THE EXTINGUISHMENT OF ABORIGINAL RIGHTS AND THE JAMES BAY AGREEMENT: THE CONDITION 14 TEST

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In 1977, an Act of the Parliament of Canada approved the James Bay and Northern Québec Agreement signed by the Crown and the Cree and the Inuit of Quebec. The Act purported to extinguish the Aboriginal title and interests of "all Indians and all Inuit" in and to the territory covered by the Agreement, thus extending the extinguishment clause to the land claims of Aboriginal peoples that were not parties to the Agreement. This purported unilateral extinguishment clause was met with immediate resistance from various non-signatory Indigenous groups who claimed that they were not properly consulted and that their Aboriginal title was unjustly extinguished. This article examines the validity of this claim, particularly whether, prior to the enactment of section 35 of the Constitution Act, 1982*, there were any constitutional constraints on Parliament's ability to unilaterally extinguish the rights of Indigenous peoples. The article argues that the 1870 Order in Council admitting Rupert's Land into Canada, in particular Condition 14 of the Order, provides such constraints and thus precludes the unilateral extinguishment of the Aboriginal title of the non-signatory people. This article ultimately calls for negotiation and reconciliation among all parties involved in order to resolve the outstanding land claims and ensure the equitable recognition of Aboriginal rights.*

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Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government...[1]

I. INTRODUCTION

Nearly 45 years ago, the Parliament of Canada enacted the James Bay and Northern Quebec Native Claims Settlement Act,[2] approving and giving effect to the James Bay and Northern Québec Agreement and Complementary Agreements (the JBNQA, or the Agreement).[3] The JBNQA, the first modern treaty concluded in Canada, settled land claims by the signatory Indigenous peoples — the Cree and the Inuit in Quebec[4] — who, in exchange for the rights and benefits guaranteed by the agreement, waived their Aboriginal title and interests in and to "the entire area of land contemplated by the 1912 Québec boundaries extension acts … and by the 1898 acts" (the Agreement Territory).[5] These northern territories are vast expanses of boreal forests, taiga, and tundra, mottled with thousands of lakes and veined with mighty rivers. They have been the life-giving homeland of Indigenous peoples for millennia and constitute the bedrock of their sovereignty. Alone, these lands represent more than half of the area of Quebec.

At the time of the signing of the *JBNQA*, Indigenous peoples other than those who negotiated and signed the Agreement claimed Aboriginal rights to the Agreement Territory. The Anishnabeg, the Atikamekw Nehirowisiwok, the Innu, and the Inuit of Newfoundland's Labrador asserted that their ancestral use of part of these lands conferred on them Aboriginal title or rights.[6]

Section 2.6 of the *JBNQA*, however, stipulates that the legislation approving the agreement "shall extinguish all native claims, rights, title and interests of all Indians and all

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1 *Rupert's Land and North-Western Territory Order* (UK) 1870, condition 14, reprinted in RSC 1985, Appendix II, No 9, formerly *Order of Her Majesty in Council admitting Rupert's Land and the North-Western Territory into the Union*, dated 23 June 1870 [*1870 Order*].

2 SC 1976-77, c 32 [*Federal Act of 1977*]. See also the *Act approving the Agreement concerning James Bay and Northern Québec*, RLRQ, c C-67.

3 1998 Edition (Quebec: Publication du Québec, 11 November 1975), online: [perma.cc/7JKS-U67S] [*JBNQA*].

4 *Ibid* at vii, 1, 481–82. Another agreement was reached with the Naskapi in 1978: *The Northeastern Quebec Agreement*, 31 January 1978, online: [perma.cc/SC29-6BN5] [*NEQA*].

5 *JBNQA*, *supra* note 3, ss 1.16, 2.1.

6 A question arises as to whether Métis people are also able to claim rights in the Agreement Territory. Section 35(2) of the *Constitution Act, 1982* confirms that the Métis peoples of Canada are Aboriginal peoples of Canada for the purpose of section 35(1), which recognizes and affirms existing Aboriginal and treaty rights: *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982, c 11. So far, however, no claim for the recognition of a Métis people in Quebec has succeeded. See in particular *Corneau c. Procureure générale du Québec*, 2018 QCCA 1172.

Inuit in and to the Territory."[7] The provision contemplates more than just the "natives" specifically designated as beneficiaries under the Agreement and purports to apply to "all Indians and all Inuit."[8] The non-signatory communities were caught unaware, and, through their representatives, they implored Parliament not to enforce the undertaking of extinguishing the rights of all Indigenous peoples,[9] hoping to safeguard their own claims until they could settle them through negotiations as the Cree and the Inuit had done. Although it showed some concern for their plight, the federal government decided in the end that legal certainty for Quebec and the signatory people was the absolute priority. In the implementing statute, the *Federal Act of 1977*, Parliament gave effect to section 2.6 of the Agreement by including an extinguishment clause which states that "[a]ll native claims, rights, title and interests, whatever they may be, in and to the Territory, of all Indians and all Inuit, wherever they may be, are hereby extinguished."[10]

To this day, the non-signatory peoples have never recognized the validity of this provision. Some have sought recognition of their rights to territory covered by the Agreement during treaty negotiations.[11] Court actions have also sought the invalidation of the extinguishment clause, although none have concluded.[12] In 2014, on the fortieth anniversary of the signing of the Agreement, chiefs from the Atikamekw, Innu, and Anishnabeg nations formed a coalition to challenge the extinguishment clause contained in the *Federal Act of 1977* and to demand that their Aboriginal rights on the territory covered by the *JNBQA* be recognized. One of these chiefs summarized the longstanding grievance of these communities as follows:

> We have never ceded our Aboriginal rights or titles, or our traditional rights. We are more determined than ever to remedy the injustice committed against us and against all the nations concerned. We were excluded from negotiations, and we never consented to the extinguishment of our rights to our ancestral lands.[13]

Was Parliament able to validly suppress all third party Aboriginal claims and rights without consultation, negotiation, or compensation? According to the principle of parliamentary sovereignty, only a constitutionally entrenched provision or rule barring the

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7 *JBNQA*, *supra* note 3, s 2.6.

8 Section 1.12 of the *JBNQA*, *supra* note 3 provides that the term "Native people" designates specifically the Cree and the Inuit, whereas section 1.13 states that the term "Native person" designates a Cree or an Inuk.

9 For the testimony presented on behalf of the Atikamekw Nehirowisiwok and the Innu: House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development: Respecting Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, 30-2, No 19 (1 March 1977) at 19:10, 19:12 (Aurélien Gill) [Issue 19]. For the testimony presented on behalf of the Anishnabeg: House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development Respecting: Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, 30-2, No 20 (3 March 1977) at 20:4, 20:11 (Hector Paulsen).

10 *Federal Act of 1977*, *supra* note 2, s 3(3).

11 See especially *Agreement-in-Principle of General Nature between the First Nations of Mamuitun and Nutashkuan and the Government of Quebec and the Government of Canada*, 31 March 2004, s 3.4.2(b), online: [perma.cc/SM82-GYRE] (this provision states that the parties will settle the issue of "the status of Nitassinan covered by the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement and, where appropriate, the terms of any compensation").

12 See e.g. *Bande des atikamekw d'Opitciwan c Canada (Procureur général)*, 2010 QCCS 3899 (judgment on an application to renew a stay of proceedings); *Bandes de Betsiamites c Canada (Procureur général)*, 2007 QCCS 3028 (corrected judgment).

13 Caroline St-Pierre, "Convention de la Baie-James: une coalition pour la défense des titres ancestraux," *La Presse Canadienne* (3 February 2015), online: [perma.cc/6CQ5-BNBE] [translated by author].

federal legislative body from enacting such an extinguishment clause could stop Parliament from so doing. In 1977, however, the Canadian constitution contained no provisions generally recognizing and protecting the Aboriginal rights of the Indigenous peoples throughout Canada. This type of general protection did not come into being until the advent of section 35 of the *Constitution Act, 1982*.[14]

Therefore, the question is whether, in 1977 and thus before the constitutional reform of 1982, Parliament had the plenary authority to unilaterally extinguish rights that might be claimed by the *JBNQA* non-signatory Indigenous peoples to the portion of their traditional lands located within the boundaries of the Agreement Territory.

The Supreme Court of Canada has referred on more than one occasion to the general rule that, before the enactment of section 35 of the *Constitution Act, 1982*, no constitutional constraints existed to prevent Parliament from unilaterally extinguishing ancestral rights, so long as it expressed its intention to do so in clear and plain terms.[15]

That does not mean, however, that there was no exception under Canadian constitutional law before 1982 and that Parliament enjoyed limitless sovereignty in every case with respect to Indigenous rights. As a matter of fact, since the enactment by the British Parliament of the *Constitution Act, 1930*,[16] to confirm and give effect to agreements between Ottawa and Manitoba, Saskatchewan, and Alberta, the "Indians" in those provinces had enjoyed constitutional protections of their hunting and fishing rights on unoccupied Crown lands and any other property they were entitled to access.[17] The Supreme Court has clearly stated that this is a distinct constitutional protection and that its legal source is prior to the recognition of Aboriginal and treaty rights in the *Constitution Act, 1982*.[18]

The *Constitution Act, 1930* does not apply to the territories covered by the *JBNQA*. Nevertheless, before Parliament passed the *JBNQA* extinguishment clause, representatives of some of the non-signatory peoples argued before members of Parliament that the Aboriginal rights of their groups were protected under the imperial order that had initially attached to Canada the land that is today a part of the Agreement Territory.[19]

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14 *Supra* note 6.

15 *R v Sparrow*, [1990] 1 SCR 1075 at 1099 [*Sparrow*]; *R v Gladstone*, 1996 CanLII 160 at para 31 (SCC); *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 180 (SCC) [*Delgamuukw*]. See also *Calder v British Columbia (AG)*, 1973 CanLII 4 at 404 (SCC), Hall J, dissenting [*Calder*].

16 20 & 21 Geo V, c 26 (UK), reprinted in RSC 1985, Appendix II, No 26 [*Constitution Act, 1930*] (this statute confirms and gives effect to agreements on natural resources between the federal authorities and each of the provinces concerned).

17 Regarding the constitutional entrenchment of the rights of Indians flowing from the *Constitution Act, 1930* and related agreements, see *Frank v The Queen*, 1977 CanLII 152 at 100 (SCC); *Moosehunter v R*, 1981 CanLII 13 at 285 (SCC); *R v Horseman*, [1990] 1 SCR 901 at 931–32; *R v Badger*, 1996 CanLII 236 at paras 45, 71 (SCC) [*Badger*]; *R v Blais*, 2003 SCC 44 at paras 1, 13, 32 [*Blais*]. In *Blais*, *ibid* at para 35, the Supreme Court ruled that the Métis do not have these rights.

18 The Supreme Court wrote that, for Indigenous peoples contemplated in the *Constitution Act, 1930*, "[o]ther potential sources of aboriginal hunting rights exist outside of the para. 13 framework, such as time-honoured practices recognized by the common law and protected by s. 35 of the *Constitution Act, 1982*": *Blais*, *ibid* at para 13.

19 Issue 19, *supra* note 9 at 19:6–19:11 (contains the testimonies of the representatives of the Innu and Atikamekw Nehirowisiwok).

The objective of this article is to verify the soundness of this argument.[20] Accordingly, it will trace the legal genesis of Canada's annexation of the territory concerned and describe the conditions of the annexation that relate to Indigenous peoples (section II); measure the constitutional scope of these conditions (sections III and IV); and, finally, come to a conclusion as to the validity of the extinguishment clause to be found in the *Federal Act of 1977* (section V).

It will almost certainly be Indigenous peoples who bring this issue before the courts. In that case, the rules governing the litigation of Aboriginal rights place the burden of establishing the existence of the right on the people making the claim. If successful, they will benefit from an Aboriginal right unless it is shown that such right was validly extinguished before 1982.[21] This is the context that will trigger a debate on the validity of the extinguishment clause in the *Federal Act of 1977*. The many years since this statute came into force will not prevent a court from adjudicating the matter, since whether the Constitution can be invoked against a statute is not subject to a limitation period.[22]

II. THE CONTINENTAL DREAM OF THE DOMINION AND CONDITION 14

A. TERRITORIAL EXPANSION AND PROMISES REGARDING INDIGENOUS LAND CLAIMS

Even before some of Britain's North American colonies united into a dominion, the Canadian colonial elite had expressed their aspiration to establish a new government that would rule over a territory stretching from the Atlantic to the Pacific. During the drafting of what was to become the *British North America Act, 1867* (now the *Constitution Act, 1867*),[23] a mechanism was devised to realize that continental dream through Canada's eventual annexation of British Columbia and the vast Crown possessions separating that Pacific coast colony from Ontario. Those possessions were known at the time as Rupert's Land and the North-Western Territory, and they were administered by the Hudson's Bay Company (HBC), which held them under a charter issued by King Charles II in 1670 and a commercial concession.[24] Rupert's Land corresponded essentially to the Hudson Bay drainage basin,

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20 The specific perspective of this article should not obscure the fact that the act can be contested on other grounds. See especially Ghislain Otis, "Les droits ancestraux des peuples autochtones n'ayant pas signé la Convention de la Baie-James: La thèse de l'extinction unilatérale à l'épreuve des droits fondamentaux" (2021) 51:1 RGD 5.

21 The party alleging the extinguishment of Aboriginal rights bears the burden of proof: *Sparrow*, *supra* note 15 at 1099; *R v Sappier; R v Gray*, 2006 SCC 54 at para 57 [*Sappier; Gray*].

22 The Supreme Court has ruled that limitation periods do not bar declarations of unconstitutionality of a statute or of the conduct of the Crown, but it also has held that "personal" remedies for unconstitutional action can be time-barred (*Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at paras 134–35 [*Manitoba Metis*]; *Shot Both Sides v Canada*, 2024 SCC 12 at paras 60, 63). I note however that Aboriginal rights in Quebec are in all likelihood imprescriptible under the *Civil Code of Québec* (CCQ), which opens the door to petitory actions (Ghislain Otis, "Aboriginal Title Claims to Private Lands in Quebec," (2024) 57:2 UBC L Rev 513.

23 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5 [*Constitution Act, 1867*] (this Imperial statute would unite three colonies — United Canada (later Ontario and Quebec), Nova Scotia, and New Brunswick).

24 Regarding the dealings that led to the affirmation of HBC's rights in the North-Western Territory, see in particular Kent McNeil, *Native Rights and the Boundaries of Rupert's Land and the North-Western Territory* (Saskatoon: University of Saskatchewan Native Law Center, 1982) [McNeil, *Native Rights*].

which means that a large part of it is today covered by the *JBNQA*.[25] The North-Western Territory sat northwest of Rupert's Land, extending west all the way to British Columbia, northwest to Alaska, and north to the Arctic Ocean.

The procedure for annexing these territories to the Dominion of Canada is set out in section 146 of the *Constitution Act, 1867*, which reads as follows:

> It shall be lawful for the Queen, by and with the Advice of Her Majesty's Most Honourable Privy Council, on Addresses from the Houses of the Parliament of Canada, and from the Houses of the respective Legislatures of the Colonies or Provinces of Newfoundland, Prince Edward Island, and British Columbia, to admit those Colonies or Provinces, or any of them, into the Union, and on Address from the Houses of the Parliament of Canada to admit Rupert's Land and the North-western Territory, or either of them, into the Union, on such Terms and Conditions in each Case as are in the Addresses expressed and as the Queen thinks fit to approve, subject to the Provisions of this Act; and the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland.[26]

Once the *Constitution Act, 1867* came into force, the new government made the transfer of Rupert's Land and the North-Western Territory to Canada its main priority. For the Canadian authorities, worried about the dynamic of American westward and northward expansion,[27] Canadian continental continuity was a necessary condition for the Dominion's future development. Indeed, the Supreme Court of Canada has even affirmed that "expanding British North America across Rupert's Land and the North-West Territories was a major goal of Confederation."[28] The strategic importance of these territorial stakes largely explains why Canadian authorities triggered the transfer process as soon as possible, at the new federal Parliament's inaugural session. Strategy also motivated the desire to propose conditions of annexation that were likely to be approved in London, including provisions to protect the Indigenous peoples living in the territories in question.

On 16 and 17 December 1867, the Houses of Parliament adopted an address under section 146 of the *Constitution Act, 1867*, praying Her Majesty "to unite Rupert's Land and the North-Western Territory with the Dominion of Canada, and to grant to the Parliament of Canada authority to legislate for their future welfare and good government."[29] The address

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[25] It should nevertheless be pointed out that the southern boundary of Rupert's Land, notably the northern limits of Quebec, has long been a subject of debate. See in particular Henri Brun, *Le territoire du Québec*: *Six études juridiques* (Québec: Presses de l'Université Laval, 1974) at 15–20) (Brun is of the view that the southern boundary of Rupert's Land corresponded more or less to the drainage divide between Saint Lawrence and the Atlantic on one side and Ungava Bay, Hudson Strait, James Bay, and Hudson's Bay on the other). However, see also Jean-Paul Lacasse, "Les confins nordiques de la *Province de Québec*, selon l'Acte constitutionnel de 1774" (1996) 40:110 Cahiers géographie Québec 205 (in Lacasse's opinion, the southern boundary of Rupert's Land was at the Eastmain River). This debate is significant for non-signatory peoples of the *JBNQA*, because the capacity of some (namely, those whose traditional territories are south of the Eastmain River) to avail themselves of the constitutional provisions relating to Rupert's Land may depend on its outcome.

[26] *Constitution Act, 1867*, *supra* note 23, s 146.

[27] See Kent McNeil, *Native Claims in Rupert's Land and the North-Western Territory: Canada's Constitutional Obligations* (Saskatoon: University of Saskatchewan Native Law Centre, 1982) at 5 [McNeil, *Native Claims*].

[28] *Daniels v Canada (Indian Affairs and Northern Development)*, 2016 SCC 12 at para 25 [*Daniels*].

[29] *1870 Order*, *supra* note 1 at 8 (Schedule A: Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada).

contained several undertakings by Canadian authorities regarding the territories in question, including the following, which relates specifically to Indigenous land claims:

> [U]pon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines.[30]

The Imperial government granted the Dominion's request. In its response, the Colonial Secretary did not omit to say that London would deal with the file "with a just regard to the rights and interests of Her Majesty's subjects interested in those territories,"[31] and, as the transfer process would show, the rights and interests of Indigenous peoples were among those considered. Nevertheless, given the rights and powers that the 1670 *Royal Charter* had conferred on HBC in respect of Rupert's Land, it was determined that the transfer of these territories and the related government powers to Canada required the prior enactment of a statute by the Imperial Parliament.[32] This was achieved through the enactment of the *Rupert's Land Act, 1868*,[33] which explicitly authorized HBC to surrender its rights to the Crown and the Crown to accept such surrender.[34] Section 5 of the *Rupert's Land Act* also confirms Her Majesty's power to annex Rupert's Land to the Dominion of Canada by way of an order, upon the presentation of an address to this effect by the Houses of Canadian Parliament.

B. CONDITION 14 REGARDING INDIGENOUS CLAIMS IN RUPERT'S LAND

Negotiations followed between representatives of Canada and HBC on the terms of surrender of HBC's rights in Rupert's Land. HBC was particularly concerned with protecting some of its properties and ensuring that, after the surrender, it would no longer have any responsibility or duty with respect to the surrendered territory and the populations that lived there. Any responsibility or undertaking, including those toward Indigenous peoples, should thereafter revert to Canadian authorities.[35]

On 28 May 1869, immediately after the parties reached agreement, the Senate and the House of Commons ratified it in a resolution reiterating the terms and conditions of the negotiated transfer.[36] The federal Houses adopted another address to Her Majesty, praying that she admit Rupert's Land into the Dominion of Canada on the conditions set out in the resolutions of 28 May 1869 and that she admit the North-Western Territory to the said

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30 *Ibid* at 8–9.

31 McNeil, *Native Claims*, *supra* note 27 at 6, citing House of Commons, *Journals of the House of Commons of the Dominion of Canada*, 1-1, vol 1 (15 May 1868) at 368 (Duke of Buckingham and Chandos).

32 McNeil, *Native Claims*, *supra* note 27 at 6.

33 31 & 32 Vict, c 105 (UK), reprinted in RSC 1985, Appendix II, No 6 [*Rupert's Land Act*].

34 *Ibid*, s 3.

35 On the negotiations and HBC's demands, see McNeil, *Native Claims*, *supra* note 27 at 7–8.

36 *1870 Order*, *supra* note 1 at 9–10 (Schedule B: Resolutions). It is worth pointing out that section 1 of the deed of surrender states that "[t]he Canadian Government shall pay to [HBC] the sum of 300,000l. sterling when Rupert's Land is transferred to the Dominion of Canada" (*1870 Order*, *ibid* at 16 (Schedule C: Deed of Surrender)).

Dominion on the terms and conditions expressed in the earlier address of 16 and 17 December 1867.[37]

On 23 June 1870, the *1870 Order* was signed, annexing the two territories to Canada as of 15 July 1870.[38] The *1870 Order* lists and explicitly approves some of the terms and conditions of the annexation of Rupert's Land expressed in the address of 28 May 1869. The fourteenth of those conditions (Condition 14) concerns Indigenous claims. It reads:

> Any claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government in communication with the Imperial Government; and [HBC] shall be relieved of all responsibility in respect of them.[39]

Regarding the North-Western Territory, the *1870 Order* incorporates by reference the condition in the joint address of 1867, prescribing, as noted above, that Indigenous claims must be "considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."[40] Like Condition 14, this condition is among those expressed in the addresses from the federal legislative houses and was formally accepted by Her Majesty in the *1870 Order*. Consequently, these conditions "have effect [on Canadian authorities] as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland,"[41] as stated in section 146 of the *Constitution Act, 1867*.

Thus, a decisive step was taken towards realization of the Canadian continental dream. Thanks to these major political and legal manoeuvres, an enormous span of North America changed hands without any prior notice to, or consultation with, Indigenous peoples who still formed the overwhelming majority of its occupants.

C. THE TERRITORIAL EXPANSION OF QUEBEC

Shortly after the *1870 Order* came into force, the Imperial Parliament enacted the *British North America Act, 1871* (today, the *Constitution Act, 1871*).[42] This statute affirmed Parliament's power to create new provinces from the territories annexed to the Dominion the year before.[43] Section 3 also implemented a bilateral mechanism to alter the boundaries of the existing provinces, requiring both a federal law and the "consent of the Legislature of any province."[44] It thus became possible for Ottawa and a province to agree on the transfer to the

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37 *Rupert's Land Act*, *supra* note 33, s 3; *1870 Order*, *supra* note 1 at 8 (Schedule A: Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada).

38 *1870 Order*, *supra* note 1.

39 *Ibid* at 6, Condition 14.

40 *Ibid* at 9 (Schedule A: Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada).

41 *Ibid* at 1.

42 34 & 35 Vict, c 28 (UK), reprinted in RSC 1985, Schedule II, No 11 [*Constitution Act, 1871*].

43 *Ibid*, s 2.

44 *Ibid*, s 3:

> The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, *upon such terms and conditions as may be agreed to by the said Legislature*, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby" [emphasis added].

province of any territory recently acquired by Canada. In 1889, the first such agreement was made with Ontario. A few years later, the Quebec and Canadian governments agreed to set Quebec's northern boundaries, and this was done by federal and provincial statutes in 1898.[45] The territory of Quebec was then expanded in 1912 upon the enactment and coming into force of laws to this effect,[46] moving the northern borders of Quebec up to the Hudson Strait and Ungava Bay. At no time, however, were the Indigenous peoples whose land was affected by these operations consulted.

Under the *1870 Order*, the Crown negotiated 11 so-called numbered treaties in what had been Rupert's Land and the North-Western Territory.[47] Not all claims to traditional lands in Rupert's Land or the North-Western Territory were settled, however, and the lack of treaties respecting the lands newly annexed to Quebec meant that Aboriginal rights were still a live issue in the early 1970s when the Quebec government began a massive work project in what was then known as "New Quebec."[48] This is the setting in which Condition 14 again becomes relevant.

Before discussing the interpretation of Condition 14, it will be useful to define its constitutional status.

III. THE CONSTITUTIONAL STATUS OF CONDITION 14

A. ITS SUPRALEGISLATIVE VALUE

Section 146 of the *Constitution Act, 1867* confers on the *1870 Order* and the conditions it contains the same effect as a law of the Parliament of the United Kingdom. Under section 2 of the *Colonial Laws Validity Act, 1865*,[49] any Imperial law applicable in Canada and "any Order or Regulation made under Authority of such Act of Parliament, or having in the colony

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45 *Act respecting the delimitation of the north-western, northern and north-eastern boundaries of the Province of Quebec*, SQ 1898, c 6 [*1898 Act*]; *Act respecting the Northwestern, Northern and Northeastern boundaries of the Province of Quebec*, SC 1898, c 3. Whether these statutes effected the transfer of new territory to Quebec is a matter of debate, given the uncertainty surrounding the location of Quebec's northern boundary before they were enacted. Some believe that the 1898 legislation simply confirmed Quebec's northern borders (Lacasse, *supra* note 25; McNeil, *Native Rights*, *supra* note 24 at 45, n 183), while others are of the view that it broadened the territory of Quebec (Peter Radan, "'You Can't Always Get What You Want': The Territorial Scope of an Independent Quebec" (2003) 41:4 Osgoode Hall LJ 629 at 641–42).

46 *The Quebec Boundaries Extension Act, 1912*, SC 1912, c 45 [*1912 Act*]; *An Act respecting the extension of the Province of Quebec by the annexation of Ungava*, SQ 1912, c 7.

47 For the texts of the treaties in question, see Crown-Indigenous Relations and Northern Affairs Canada, "Treaty Texts: The Numbered Treaties," online: [perma.cc/Z52E-RVGB].

48 However, some Anishnabeg adhered to Treaty No. 9 concerning Ontario: Jacques Frenette, "Les lois l'extension des frontières du Québec de 1898 et de 1912, la Convention de la Baie James et du Nord québécois et la Première Nation Abitibiwinni" (2013) 43:1 Recherches amérindiennes au Québec 87 at 89.

49 28 & 29 Vict, c 63 (UK) [*Colonial Laws Validity Act, 1865*].

the force and effect of such Act" prevails over Canadian laws.[50] These terms very clearly apply to the *1870 Order* and its conditions.

Section 3 of the *Constitution Act, 1871*, referred to above, empowers Canadian authorities to alter a province's boundaries with the province's consent.[51] It does not, however, empower them to amend or repeal provisions of the *Constitution Act, 1867* or the conditions of annexation in the *1870 Order* respecting Indigenous claims.[52] In the territories covered by the *1898 Act* and the *1912 Act*, both of which concern the borders of Quebec, the province's rights over lands and resources under section 109 of the *Constitution Act, 1867* remain subject to the potential rights of the Indigenous peoples, which have been characterized as "an interest other than that of the 'province in the same'."[53] In addition, exclusive federal jurisdiction over "Indians and Lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867* is not repealed or amended by the laws concerning Quebec's borders.

In 1931, the Parliament of the United Kingdom, recognizing the independence of its dominion, enacted the *Statute of Westminster*, terminating the primacy of British laws in Canada and affirming the power of Canadian legislative authorities to repeal or amend British laws applicable in Canada.[54] However, as was requested by Canadian authorities, section 7(1) of the *Statute of Westminster* provides that "[n]othing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder."[55] Thus, the primacy of the *Constitution Act, 1867* and any orders enacted under section 146 thereof remained enforceable as against the Parliament of Canada and the provincial legislatures.[56] As a result, Parliament was prevented from repealing or amending the *1870 Order*, including the conditions the *1870 Order* sets out concerning the settlement of Indigenous claims.

Nevertheless, in 1949, Parliament obtained some room to manoeuvre to amend the *Constitution Act, 1867* through the *British North America Act, 1949*, which introduced section 91(1) into the 1867 constitutional document to empower Parliament to amend "the

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[50] The provision reads as follows:

> Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative (*ibid*, s 2).

As one author points out, although this provision was the basis for the invalidation of unconstitutional laws before the coming into force of the *Constitution Act, 1982*, the courts did not often refer to it explicitly (Brian Bird, "The Unbroken Supremacy of the Canadian Constitution" (2018) 55:3 Alta L Rev 755 at 759–61).

[51] *Constitution Act, 1871*, *supra* note 42, s 3.

[52] *1870 Order*, *supra* note 1 at 6, Condition 14.

[53] *St Catherine's Milling and Lumber Company v The Queen*, [1888] UKPC 70 at 9–11; *Dominion of Canada (AG) v Ontario (AG)*, [1896] UKPC 51 at 8, 9; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73 at para 59 [*Haida Nation*]; *Delgamuukw*, *supra* note 15 at para 175; *Constitution Act, 1867*, *supra* note 23, s 109; *1898 Act*, *supra* note 45; *1912 Act*, *supra* note 46.

[54] *Statute of Westminster, 1931*, 22 Geo V, c 4 (UK), s 3 [*Statute of Westminster*].

[55] *Ibid*, s 7(1).

[56] The scope of section 7 of the *Statute of Westminster*, *ibid*, particularly with regard to the constitutional provisions not relating to the division of powers, has been discussed. However, as Bird writes, "in the final analysis, it is widely accepted that the intent of section 7 of the *Statute of Westminster* was to preserve, through the [*Colonial Laws Validity Act, 1865*], the supremacy of the [*British North America Act, 1867*] in Canada" (Bird, *supra* note 50 at 767).

Constitution of Canada."[57] But these words were interpreted as referring only to the "'internal' federal constitution,"[58] that is, to provisions that pertain to the operation of a branch of the central government.[59] The Supreme Court has also observed that the current section 44 of the C*onstitution Act, 1982*, which allows Parliament to amend constitutional provisions "in relation to the executive government of Canada or the Senate and House of Commons," plays "the same basic function" as section 91(1), which has been repealed.[60]

The narrow amendment power conferred by section 91(1) of the *British North America Act, 1949* does not permit amendment or repeal of the *1870 Order* provisions relating to Indigenous claims. These provisions govern more than the internal operation of a central government body.[61] Rather, they concern historical claims of Indigenous peoples and the very conditions of the constitution of the territory of the modern Canadian state. Furthermore, the relevant provisions of the *1870 Order* concern collective rights which, as stated above, still limit the title of the provinces under section 109 of the *Constitution Act, 1867*.[62] The provinces' rights and prerogatives are therefore also directly at issue. Finally, the Supreme Court emphasizes the foundational aspect of Indigenous claims settlements for the Canadian State, affirming that the treaties settling such claims "serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty."[63]

Accordingly, when the federal statute purporting to unilaterally extinguish the Aboriginal rights of all Indigenous peoples in the territories covered by the *JBNQA* was enacted in 1977, compliance with Condition 14 of the *1870 Order* was a constitutional imperative. Parliament's legislative power was subject to it, despite section 2(c) of the *1912 Act* on the expansion of Quebec's boundaries, which required the province to recognize the rights of Indigenous peoples and to obtain the surrender of those rights "in the same manner, as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof."[64] This statutory provision did not actually terminate the jurisdiction or constitutional responsibility of federal authorities, as they must still intervene for any surrender of

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57 *Newfoundland Act*, SC 1949, c 81, s 1 [*British North America Act, 1949*].

58 André Tremblay, *La réforme de la constitution au Canada* (Montreal: Éditions Thémis, 1995) at 24 [translated by author]. Another author refers to the "constitutional provisions that affect the internal organization of legislative and executive powers in respect of the federal order" (Benoît Pelletier, *La modification constitutionnelle au Canada* (Scarborough, ON: Carswell, 1996) at 184 [translated by author]).

59 The Supreme Court has ruled that the term "Constitution of Canada" means "the constitution of the federal government, as distinct from the provincial governments": *Re Authority of Parliament in relation to the Upper House*, 1979 CanLII 169 at 70 (SCC).

60 *Reference re Senate Reform*, 2014 SCC 32 at para 45–46.

61 As McNeil has noted, the wording of Condition 14 of the *1870 Order* requiring that Indigenous claims be settled by the Canadian government in "communication with the Imperial Government" tends to support the argument that Indigenous claims were not historically considered purely internal federal government matters: McNeil, *Native Claims*, *supra* note 27 at 29). In *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Indian Association of Alberta and others*, [1982] 2 All ER 118 (CA Eng), the British Appellate Court ruled that the obligations and responsibilities toward Indigenous peoples historically incumbent on the Imperial Crown were today imputable exclusively to the Canadian Crown, as a result of Canadian sovereignty. Thus, the phrase "in communication with the Imperial Government" in Condition 14 of the *1870 Order* is legally obsolete today.

62 *Constitution Act, 1867*, *supra* note 23, s 109.

63 *Haida Nation*, *supra* note 53 at para 20.

64 *1912 Act*, *supra* note 46, s 2(c).

Aboriginal rights to be constitutionally effective.[65] As was declared by the Supreme Court, "the Treaty process for the surrender of the lands in Canada is federal in nature."[66] And, although the central government preserves its jurisdiction, it is also constrained by its attendant duties, including the requisite compliance with the principle of the honour of the Crown, as will be seen below. Thus, section 2(c) of the *1912 Act* may have done nothing more than delegate aspects of the negotiations to the province and compel it to cover the costs of settlement, since it explicitly states that Quebec must "bear and satisfy all charges and expenditure in connection with or arising out of such surrenders."[67] The argument that "Canada therefore transferred its own obligation under the 1870 Imperial Order in Council to Quebec" in the *1912 Act* must be qualified accordingly.[68] Similarly, the repeal of this provision by section 7 of the *Federal Act of 1977* in no way diminished the constitutional obligations of the federal Crown enshrined in the *1870 Order*.[69]

B. ITS PRIMACY CONFIRMED BY THE COURTS

The courts were quick to recognize the supralegislative nature of an order under section 146 of the *Constitution Act, 1867*. In *Jack v R*,[70] the Supreme Court stated the following in respect of the conditions in the Imperial order admitting British Columbia to the federation:

> The Terms of Union were approved by an Imperial Order in Council in conformity with s. 146 of the *British North America Act* and, in accordance with that provision, it had effect as if enacted by the Imperial Parliament. In short, it had constitutional status.[71]

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65 The *1912 Act* seems to recognize this fact, stating that "no such surrender shall be made or obtained except with the approval of the Governor in Council" (*ibid*, s 2(d)), and reaffirming federal jurisdiction over Indigenous peoples and lands reserved for their use in the territory concerned by the statute (*ibid*, s 2(e)). Henri Brun noted that the *1912 Act* is subordinate to federal constitutional jurisdiction and responsibility in respect of the extinction of Aboriginal rights (Brun, *supra* note 25 at 83–84).

66 *R v Howard*, [1994] 2 SCR 299 at 308. In *Delgamuukw*, the Supreme Court ruled that only the federal Parliament can extinguish the Aboriginal rights of Indigenous peoples (*Delgamuukw*, *supra* note 15 at para 180).

67 *1912 Act*, *supra* note 46, s 2(c).

68 Renée Dupuis, *Le statut juridique des peuples autochtones en droit canadien* (Scarborough, ON: Carswell, 1999) at 56 [translated by author].

69 *Federal Act of 1977*, *supra* note 2, s 7 (no longer in force today, reads as follows: "Paragraphs 2(*c*), (*d*) and (*e*) of *The Quebec Boundaries Extension Act, 1912* and the words 'upon the following terms and conditions and subject to the following provisions' immediately preceding those paragraphs are repealed"). See also *Federal Act of 1977*, *ibid*, s 3.

70 1979 CanLII 175 (SCC).

71 *Ibid* at 298 (Justice Dickson, although dissenting, expressed the same opinion on this specific point: "Section 146 of the *British North America Act, 1867* clearly provides that 'the Provisions of any Order in Council in that Behalf shall have effect as if they had been enacted by the Parliament of the United Kingdom for Great Britain and Ireland'. The *Terms of Union* were approved by an Imperial Order in Council thereby giving constitutional effect as if enacted by the Imperial Parliament. The *Terms* may therefore establish constitutional limitations upon the exercise of federal or provincial legislative power" at 301). See also *Canada v Kitselas First Nation*, 2014 FCA 150 at para 34.

The case law applying the conditions of the Order admitting Prince Edward Island expresses the same position.[72] The Yukon courts were therefore correct when they ruled that the conditions regarding Indigenous claims in the *1870 Order* prevailed over any federal statute.[73] Thus, in 1977, long before section 35 of the *Constitution Act, 1982*, the constitution limited Parliamentary sovereignty over Indigenous claims that specifically concerned Rupert's Land and the North-Western Territory. The *Constitution Act, 1930*, which constitutionally enshrined certain rights benefiting the Indigenous peoples in Manitoba, Saskatchewan, and Alberta, was not the only constitutional instrument at the time that applied solely to a specific part of the Canadian territory.

Moreover, the *1870 Order*, although renamed the *Rupert's Land and North-Western Territory Order*, is still part of the "Constitution of Canada" under subparagraph 52(2)(b) of the *Constitution Act, 1982*.[74] The Canadian Parliament and the federal Crown are therefore bound to comply with Condition 14 to this day.

To gauge the extent to which Condition 14 restricts the power of Parliament and the federal government, however, we must first identify the principles that govern its interpretation and application.

IV. CONDITION 14 ENGAGES THE HONOUR OF THE CROWN

A. THE DYNAMIC INTERPRETATION OF THE *1870 ORDER*

The question as to whether the Aboriginal rights of non-signatories of the *JBNQA* exist and persist in what was formerly Rupert's Land is an issue that remains live to this day. The answer given depends on the applicable rules of law as they are understood and interpreted at the time the issue needs to be resolved by the courts. For example, in *Manitoba Metis*, to determine whether the federal Crown's conduct in the years immediately following the creation of the province of Manitoba in 1870 complied with its constitutional obligations towards the Métis, the Supreme Court did not try to understand the import of the *Manitoba Act, 1870* by relying on the interpretation the courts would have given it at the time of the

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[72] *Friends of the Island Inc v Canada (Minister of Public Works) (TD)*, [1993] 2 FC 229:

> The Terms of Union upon which the various provinces entered Canada are part of the Constitution and create constitutional obligations. This is now expressly recognized in the *Constitution Act, 1982*…, see subsection 52(1), paragraph 52(2)(*b*) and Item 6 of the Schedule to that Act. Prince Edward Island joined confederation pursuant to a United Kingdom Order in Council setting out terms and conditions (the Terms of Union). That Order in Council was given the status of a United Kingdom statute by section 146 of the then *British North America Act, 1867* … (now the *Constitution Act, 1982*). Thus, prior to 1982, amendment would have had to have been accomplished by a statute of the United Kingdom. (at 270 [citations omitted])

[73] In *Ross River Dena Council v Canada (Attorney General)*, 2017 YKSC 58 [*Ross River* YKSC] (the Court of first instance stated that, "pursuant to s. 146 of the [*British North America Act, 1867*], the provisions of the *1870 Order*, which of course included the relevant provision, 'shall have effect' as if they had been enacted by the British Parliament; and ... pursuant to s. 2 of the *Colonial Laws Validity Act*, *1865* and s. 7(1) of the *Statute of Westminster*, and subsequently pursuant to s. 52(1) of the *Constitution Act, 1982*, the relevant provision acquired constitutional force" at para 51). The Court of Appeal of Yukon affirmed this position (*Ross River Dena Council v Canada (Attorney General)*, 2019 YKCA 3 at para 99 [*Ross River* YKCA]).

[74] *Constitution Act, 1982*, *supra* note 14, s 52(2)(b).

relevant events.[75] Instead, it reviewed at length the contemporary case law interpreting and applying constitutional statutes relating to Indigenous peoples.

The Supreme Court also does not hesitate to analyze the conduct and obligations of Her Majesty during eighteenth-century treaty negotiations in light of principles that were fully developed later, such as the honour of the Crown,[76] which the Supreme Court first referred to in an Indigenous context in the late nineteenth century.[77] There are, in fact, multiple examples of government actions affecting Indigenous peoples that were later assessed according to rules that had not been developed at the time of the facts of the case.[78] In this way, the case law supports the statement that "whether an Aboriginal or treaty right could have been directly enforced in the courts in 1850 or 1870 or 1920 is of interest, but does not determine whether it will be enforced now."[79]

Regarding the interpretation of the *1870 Order* more specifically, the Court of Appeal of Yukon found that the *1870 Order* is legally binding today, even though it would not have been considered such when it came into force.[80] The Court interpreted and applied the conditions respecting Indigenous claims in the *1870 Order* in light of principles that emerged in recent case law, including case law dealing with section 35 of the *Constitution Act, 1982*. According to the Court:

> It was not a legal error for the judge to consider s. 35 jurisprudence as an interpretive aid in relation to the Transfer Provision. Both s. 35 and the 1870 Order are part of the same statutory scheme, the Constitution of Canada, and both address the same subject matter, the constitutional rights of Indigenous peoples. The principles of statutory interpretation presume harmony, coherence and consistency between statutes within the same statutory scheme and dealing with the same subject matter.[81]

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75 *Manitoba Metis*, *supra* note 22; *Manitoba Act (1870)*, SC 1870, c 3, s 31, reprinted in RSC 1985, Appendix II, No 8.

76 See e.g. *R v Marshall*, 1999 CanLII 665 at paras 4, 49–52 (SCC) [*Marshall*] (the Supreme Court required that a treaty from 1760 be interpreted in light of the duty to act honourably in the treaty negotiations, which the Supreme Court found was incumbent on the Crown at the time). In *Marshall*, *ibid* at para 4, the Supreme Court justified its reading of the Treaty by stating that "nothing less would uphold the honour and integrity of the Crown in its dealings with the Mi'kmaq people to secure their peace and friendship."

77 As the Supreme Court noted in *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 51 [*Mikisew* 2005], the principle of the honour of the Crown was recognized as a principle of Aboriginal law in *Ontario v Dominion of Canada Re Indian Claims*, 1895 CanLII 112 at 511–12 (SCC). See also *Marshall*, *supra* note 76 at para 50.

78 Hamar Foster invokes the example of *Guerin v R*, 1984 CanLII 25 (SCC) [*Guerin*] and the Supreme Court's novel application of the Crown's fiduciary duty. As Foster writes: "Thus, a duty that was breached in 1957, and for which no judicial remedy existed at that time, was judicially remediable in 1984" (Hamar Foster, "Another Good Thing: *Ross River Dena Council v Canada* in the Yukon Court of Appeal: Or: Indigenous Title, 'Presentism' in Law and History, and a Judge Begbie Puzzle Revisited" (2017) 50:2 UBC L Rev 293 at 316).

79 Foster, *ibid* at 317. Foster's legal "presentism" is not dissimilar to the declaratory approach based on Blackstone's aphorism whereby, in the common law, "judges do not create law but merely discover it" (*Canada (Attorney General) v Hislop*, 2007 SCC 10 at para 84).

80 *Ross River* YKCA, *supra* note 73 at paras 51–61. See also *Ross River Dena Council v Canada (Attorney General)*, 2013 YKCA 6 at paras 39, 42–43. Authors have debated whether the provisions of the *1870 Order* respecting Indigenous peoples were seen to be legally enforceable when it came into force (Kent McNeil, "Indigenous Rights Litigation, Legal History, and the Role of Experts" (2014) 77:2 Sask L Rev 173 at 185–200; PG McHugh, "Time Whereof: Memory, History and Law in the Jurisprudence of Aboriginal Rights" (2014) 77:2 Sask L Rev 137 at 162–63, 168–69).

81 *Ross River* YKCA, *supra* note 73 at para 99 [citations omitted].

Therefore, the constitutional validity of the clause found in the *Federal Act of 1977*, which seeks to unilaterally extinguish the Aboriginal rights of the Indigenous non-signatories of the *JBNQA*, must be assessed in light of the constantly evolving case law and its dynamic interpretation of the constitutional instruments concerning Indigenous peoples.

B. THE SYMMETRICAL INTERPRETATION OF THE *1870 ORDER*'S PROVISIONS REGARDING INDIGENOUS PEOPLES: THE CROWN'S DUTY OF HONOURABLE DEALING

A constitutional provision is construed on the basis of "the meaning of its words, considered in context and with a view to the purpose they were intended to serve."[82] The Supreme Court has noted that, in constitutional matters, "the purposive inquiry must begin by examining the text."[83] A simple reading of the terms of the *1870 Order* immediately reveals that the provisions relating to Indigenous claims differ depending on whether they concern the North-Western Territory or Rupert's Land. It will be recalled that Condition 14, which applies to Rupert's Land and thus to the Agreement Territory under the *JBNQA*, states that "[a]ny claims of Indians to compensation for lands required for purposes of settlement shall be disposed of by the Canadian Government."[84] As noted above, the condition regarding the North-Western Territory, set out in the 1867 address and accepted by the British authorities, states that "the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."[85] Condition 14 does not explicitly require that the claims be "considered and settled." It also does not expressly state that the conduct of the Crown is subject to the "equitable principles" that have historically guided it. In fact, it sets out no norms at all to constrain the Canadian government when dealing with potential claims to territories located within the boundaries of Rupert's Land.[86]

A strict and literal reading of Condition 14 could therefore support the argument that the Crown enjoys boundless discretion in setting the terms by which it will deal with an Indigenous land claim, subject only to the explicit requirement that any potential compensation must be paid from the Canadian government treasury. As for the compensation itself, nowhere does Condition 14 state that it must be just, sufficient, or prompt. Interpreted literally, Condition 14 makes no promises about the process or substance of an Indigenous claim settlement.[87] Because the explicit promise of an equitable settlement of Indigenous claims in the North-Western Territory is not repeated in respect of Rupert's Land, *a contrario* reasoning could support the conclusion that the intention was to treat Indigenous peoples in

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82 *Blais*, *supra* note 17 at para 16.

83 *Quebec (Attorney General) v 9147-0732 Québec inc*, 2020 SCC 32 at para 12. For an example of an analysis of a constitutional text, see *Blais*, *supra* note 17 at paras 8–11.

84 *1870 Order*, *supra* note 1 at 6, Condition 14.

85 *Ibid* at 8–9 (Schedule A: Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada).

86 It is in fact an obligation, as the English version clearly reveals by stating that claims "*shall* be disposed of": *1870 Order*, *supra* note 1 at 6, Condition 14 [emphasis added].

87 The English and French versions are equally vague or neutral. The unofficial French version merely states: "Toute indemnité à payer aux Indiens pour les terres destinées à la colonisation sera réglée par le Gouvernement Canadien" (*ibid*).

the latter territory differently. On the other hand, as statutory interpretation scholars have observed:

> Since it is only a guide to the legislature's intent, *a contrario* reasoning should certainly be set aside if other indications reveal that its consequences go against the statute's purpose, are manifestly absurd, or lead to *incoherence and injustice that could not represent the will of the legislature*.[88]

An *a contrario* reading of Condition 14 would be based not on what it says but on what it does not say or, in other words, on the silence of the text vis-à-vis the express equity imperative found in the condition respecting the North-Western Territory. The interpretive problem is therefore the meaning to be assigned to this omission. In this case, a purposive analysis cannot be clearly guided by the specific wording of the constitutional provision, because Condition 14 does not explicitly derogate from equitable principles. Indeed, the reference to compensation for Indigenous peoples in exchange for opening the territory to colonization even appears to indicate a recognition of prior occupation of the territory by Indigenous societies and a consideration of their legitimate interests. This reference therefore does not impose an inference that it was intended that justice or fairness could be denied in the way a settlement is reached or in the very substance of the settlement.

Accordingly, the interpretation must consider the silence of Condition 14 in light of its specific purpose as apparent from the context of its drafting. Did British and Canadian authorities intend, on the same day and through the same constitutional instrument, to establish two fundamentally different schemes for Indigenous peoples according to whether they were traditional occupants of either Rupert's Land or the North-Western Territory? Did they want some Indigenous people to be entitled to just and equitable settlements of their land claims but the others to depend on the utterly discretionary judgment and goodwill of the government for the protection of their interests?

Nothing in the historical or philosophical context of the enactment of the *1870 Order* justifies concluding that the lack of explicit reference to equitable principles in Condition 14 was intended to deny Indigenous peoples any and all protection from inequitable treatment by the Crown in respect of their claims in Rupert's Land. The historical record shows no clear indication that the drafters of the *1870 Order* had specific strategic, economic, or other reasons to believe that Indigenous peoples of Rupert's Land should be subject to a regime providing them with only limited protection in their land claims. Nor do any historical elements indicate that the government authorities intended, for clearly stated or identifiable reasons, to grant preferential treatment to Indigenous groups in the North-Western Territory through the principles governing the settlement of their land claims. As explained above, Condition 14 arose in a legal context that made the surrender of HBC's rights and responsibilities a prerequisite to London's transfer of the territory to the Dominion of Canada — hence the existence of Condition 14 as a provision that is formally distinct from the condition respecting the Indigenous peoples of the North-Western Territory. There is nothing to suggest that the wording of this condition expresses a deliberate and coherent policy

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[88] Pierre-André Côté, Stéphane Beaulac & Mathieu Devinat, *The Interpretation of Legislation in Canada*, 4th ed, translated and revised by Steven Sacks (Toronto: Thomson Reuters, 2011) at 361–62 [emphasis added].

making a prejudicial distinction between the Indigenous peoples in Rupert's Land and those in the North-Western Territory.

As for the general purpose of the *1870 Order*, as we have seen, it is inextricably linked to the Canadian confederation project that was achieved by including what the Supreme Court has called "the western territories" within the Dominion.[89] The Supreme Court has noted that, in these territories, "[a] good relationship with all Aboriginal groups was required to realize the goal of building 'the railway and other measures which the federal government would have to take'."[90] Refusing in advance to provide equitable treatment to the Indigenous peoples of Rupert's Land on their land claims would hardly have favoured the establishment of a peaceful relationship between the Indigenous peoples and the Canadian government as the latter pursued its westward expansion policy. This is why treaties that settled Indigenous land claims in Rupert's Land were negotiated in the years after the *1870 Order* came into force, when the territory was needed for colonization.

The immediate background to the drafting of Condition 14 provides clues to what its wording means. Indeed, the condition is a verbatim reproduction of Canada's agreement with HBC, which demanded that it be irrevocably released from responsibility to equitably resolve Indigenous claims.[91] The terms used were not aimed at limiting the scope of the Canadian government's obligations toward Indigenous peoples, but rather sought to identify who was responsible for fulfilling the Canadian authorities' solemn undertaking in the 1867 address to the Indigenous peoples in both territories.[92] Furthermore, correspondence between Canadian and British authorities of the time seems to show that the obligation Condition 14 imposes on Canadian authorities to act in concert with the Imperial authorities is an expression of London's desire to promote equitable treatment of Indigenous land claims in Rupert's Land.[93]

The historical background also includes the address presented jointly on 31 May 1869 by the Houses of Canadian Parliament praying Her Majesty to unite Rupert's Land with Canada on the terms and conditions expressed in the appended resolutions.[94] One of these resolutions solemnly recognizes that, "upon the transference of the territories in question to the Canadian Government, it will be the duty of the Government to make adequate provision for the protection of the Indian tribes whose interests and well-being are involved in the transfer."[95] To conclude that Condition 14 allows the Crown full discretion to settle Indigenous claims as it sees fit would be to ignore this explicit recognition.[96] Although the Imperial Crown did not clearly state that Canada's undertaking was a precondition to the transfer of territory, the undertaking is part of the historical setting of the *1870 Order* and illuminates the policy underlying it.

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89 *Manitoba Metis*, *supra* note 22 at para 1.

90 *Daniels*, *supra* note 28 at para 25.

91 Condition 14 repeats section 8 of the agreement of 22 March 1869 between HBC and the Canadian negotiators: *1870 Order*, *supra* note 1 at 11–12 (Schedule B: Resolutions).

92 *Ibid* at 8 (Schedule A: Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada).

93 McNeil, *Native Claims*, *supra* note 27 at 22–24.

94 *1870 Order*, *supra* note 1 at 14–16 (Schedule B: Resolutions).

95 *Ibid* at 13 (Schedule B: Resolutions). For a discussion of this resolution, see Peter A Cumming & Neil H Mickenberg, eds, *Native Rights in Canada*, 2nd ed (Toronto: Indian-Eskimo Association of Canada, 1972) at 148–49. See also McNeil, *Native Claims*, *supra* note 27 at 25–26.

96 McNeil, *Native Claims*, *supra* note 27 at 10–12.

The case law also sheds light on the basic norms that inform the interpretation of Condition 14. The *1870 Order* makes the settlement of Indigenous claims part of the Crown's process of asserting and consolidating its sovereignty in the face of American territorial expansionism. The honour of the Crown is engaged by this operation, compelling it to undertake and diligently conduct negotiations with the aim of achieving equitable settlement of land claims by Indigenous peoples.

The duty of honourable dealing was born of the Crown's unilateral assertion of sovereignty over Indigenous peoples and their lands.[97] According to the Supreme Court, "[i]n Aboriginal law, the honour of the Crown goes back to the *Royal Proclamation* of 1763, which made reference to 'the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection'."[98] Therefore, when the Crown asserts, consolidates, or exercises its sovereignty, and then finds itself facing a claim by an Indigenous people based on their ancestral occupation of the land, it cannot claim to have absolute discretion to deal with this claim as it wishes. It also does not have the absolute freedom to impose the terms of a settlement. The raison d'être of the Indigenous land claims process is the reconciliation of Aboriginal rights with the sovereignty of the Crown.[99] According to the Supreme Court, the honour of the Crown "has been found to be engaged in situations involving reconciliation of Aboriginal rights with Crown sovereignty."[100]

Condition 14 of the *1870 Order* refers to the conduct of the Crown in response to Indigenous claims to territory in Rupert's Land. Thus, "from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably."[101] Moreover, Condition 14 is part of the fundamental law of the country, which confirms the importance of an honourable settlement of Indigenous claims.[102] And finally, the beneficiaries of Condition 14 are explicitly and exclusively Indigenous peoples; accordingly, there can be no doubt that Condition 14 is based on the "special relationship" between these peoples and the Crown.[103]

When asked to interpret the conditions in the *1870 Order* relating to Indigenous land claims, the Yukon courts rightly decided that they impose a constitutional obligation on the Crown to undertake negotiations to reconcile the rights of Indigenous peoples with the

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97 *Haida Nation*, *supra* note 53 at paras 32, 59; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74 at para 24 [*Taku River*]. For an analysis of the origin, evolution, and different applications of the principle of the honour of the Crown, see especially Peter W Hogg & Laura Dougan, "The Honour of the Crown: Reshaping Canada's Constitutional Law" (2016) 72 SCLR (2d) 291; Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433.

98 *Manitoba Metis*, *supra* note 22 at para 66. See also *Beckman v Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 42 [*Beckman*]; *Mikisew* 2005, *supra* note 77 at para 51; *Mikisew Cree First Nation v Canada (Governor General in Council)*, 2018 SCC 40 at paras 21, 59 [*Mikisew* 2018].

99 As the Supreme Court states: "Historically, treaties were the means by which the Crown sought to reconcile the Aboriginal inhabitants of what is now Canada to the assertion of European sovereignty over the territories traditionally occupied by First Nations" (*Beckman*, *supra* note 98 at para 8). Slattery writes that the principle of the honour of the Crown predates the *Royal Proclamation of 1763* (Slattery, *supra* note 97 at 443–45), an opinion that aligns with the Supreme Court's reliance on this principle to characterize the Crown's duties during negotiations of the peace and friendship treaties in 1760 (*Marshall*, *supra* note 76 at paras 43–44, 49–52).

100 *Manitoba Metis*, *supra* note 22 at para 68.

101 *Haida Nation*, *supra* note 53 at para 17.

102 *Manitoba Metis*, *supra* note 22 at para 70.

103 *Ibid* at para 72.

Crown's assertion of sovereignty in a treaty.[104] This obligation consists of undertaking and diligently pursuing good faith negotiations to resolve land claims honourably.[105] It does not strictly require that the parties reach an agreement, however.[106] The case law has assigned the same scope to provisions of the *1870 Order* governing Indigenous claims in both territories.[107]

It can therefore be affirmed that, like the provision relating to the North-Western Territory, the purpose of Condition 14 is not to confer absolute discretion on the Crown over how it treats Indigenous land claims. On the contrary, it aims to give substance to an undertaking to settle Indigenous claims equitably and honourably.

It now remains to be seen whether the unilateral extinguishment of the rights of non-signatories in the *Federal Act of 1977* allows the Crown to honourably discharge its constitutional obligations.

V. UNILATERAL EXTINGUISHMENT AND THE CONDITION 14 TEST

A. PARLIAMENT AND THE PROVISIONS OF THE *1870 ORDER* CONCERNING INDIGENOUS PEOPLES

It cannot be overlooked that the *1870 Order* does not explicitly rule out the unilateral extinguishment of Aboriginal rights in the territories transferred to Canada. Because Condition 14 refers solely to the Canadian "government" and not to Parliament, can it not be validly argued that the invocation of the government's obligations must always be subject to the principle of Parliamentary sovereignty? Can it not also be said that, given the clear intention to extinguish Aboriginal rights in the *Federal Act of 1977*, the Canadian government is indeed bound to act honourably, but only within the limits of the statute? In other words, the Crown must square its duty to settle Indigenous claims equitably and honourably with the prior and legally indisputable fact of the suppression of all Indigenous rights relating to the lands and resources in the territory mentioned in the *Federal Act of 1977*.

It could also be argued that deference is owed to Parliament, especially since the extinguishment clause is the result of a delicate weighing of the interests of Quebec and the

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[104] In *Ross River* YKSC, *supra* note 73 at para 167, Gower J wrote:

> [T]he ordinary meaning of the relevant provision, particularly keeping in mind the purpose and scheme of the legislation in which it is found, is capable of creating a constitutional obligation that Canada enter into treaty negotiations with any Indian tribes in Rupert's Land and the North-Western Territory which had claims for compensation for lands required for the purposes of settlement.

The Court continued: "[I]t is appropriate to interpret it today as a promise in a constitutional context which engages the honour of the Crown and seeks to reconcile the land rights of pre-existing Aboriginal societies with the assertion of Crown sovereignty" (*ibid* at para 175). This position was affirmed by the Court of Appeal of Yukon (*Ross River* YKCA, *supra* note 73 at paras 51–61).

[105] For a consideration of the basis and scope of the Crown's duty to negotiate: Felix Hoehn, "The Duty to Negotiate and the Ethos of Reconciliation" (2020) 83:1 Sask L Rev 1 at 3.

[106] *Ross River Dena Council v Canada (Attorney General)*, 2017 YKSC 59 at para 355.

[107] Accordingly, it has been determined that, since Condition 14 does not require the settlement of Indigenous claims *before* the Crown authorizes the use of lands by third parties, the same applies to the condition of equitable settlement applicable to the North-Western Territory (which included the Yukon): see especially *Ross River* YKCA, *supra* note 73 at paras 59–61.

signatory peoples of the *JBNQA* against those of non-signatory peoples. This provision was one of the key stakes in the difficult negotiations leading up to the first modern treaty in Canadian history. The decision to include a provision extinguishing the rights of non-signatories in section 3(3) of the *Federal Act of 1977* in fact sprang from negotiations among Quebec, the Cree, and the Inuit.[108] Ottawa was aware, however, that Indigenous peoples other than the Cree and the Inuit traditionally used the Agreement Territory.[109] Federal negotiators sought a solution that would take the interests of non-signatories into account.[110] Their efforts led to the inclusion of section 2.14 of the Agreement, pursuant to which "Québec undertakes to negotiate with other Indians or Inuit who are not entitled to participate in the compensation and benefits of the present Agreement, in respect to any claims which such Indians or Inuit may have with respect to the Territory."[111] It should be noted, however, that the undertaking in section 2.14 of the *JBNQA* is not repeated in the *Federal Act of 1977* and therefore does not provide a legislative counterweight to unilateral extinguishment.[112]

Nevertheless, the argument in favour of Parliamentary sovereignty and acknowledgment of the difficult political choices before Parliament runs up against the fact that the obligations the *1870 Order* imposes on the Canadian government towards Indigenous peoples are constitutionally entrenched. Parliament therefore cannot remove these obligations, void them of their contents, or modify their scope. In other words, the unilateral extinguishment of the rights of non-signatories of the *JBNQA* is valid only if it is consistent with the Crown's constitutional duty to equitably and honourably negotiate and settle land claims by Indigenous peoples as contemplated in the *1870 Order*. Ultimately, the position that the Crown's obligation is subordinate to the extinguishment clause is not legally tenable.

Nevertheless, is it not true that the specific terms of Condition 14 do nothing more than refer to agreements on compensation to Indigenous peoples in exchange for land sought for settlement or for the use of third parties? Can the wording not be seen as a kind of constitutional codification of the common law presumption that expropriation entails the right to compensation for the expropriated, in this case to the benefit of the Indigenous peoples concerned?[113] Put differently, Condition 14 demands fair compensation but does not prohibit expropriation.

It could then be argued that the unilateral and prior extinguishment of the rights of an Indigenous people does not prevent the parties from engaging in honourable negotiations after the fact to seek agreement on just compensation, and that such compensation might even take the form of a grant to the Indigenous party of rights to land and resources. Is this approach to compensation not prescribed by section 2.14 of the Agreement, which, moreover,

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[108] Quebec, the Cree, and the Inuit had already reached an agreement in principle that was presented to the federal representatives: House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development: Respecting Bill C-9, James Bay and Northern Quebec Native Claims Settlement Act*, 30-2, No 23 (10 March 1977) at 23:10, 23:22 (PM Ollivier).

[109] *Ibid* at 23:15, 23:16, 23:19 (JT Fournier). See also *ibid* at 23:20 (Hon Warren Allmand).

[110] Federal civil servants explained that section 2.14 was added to the *JBNQA* after federal negotiators intervened: *ibid* at 23:15, 23:16, 23:19 (JT Fournier).

[111] *JBNQA*, *supra* note 3, s 2.14.

[112] *Ibid* (section 2.14 expressly provides that "[t]his paragraph shall not be enacted into law").

[113] See especially *AG v De Keyser's Royal Hotel, Ltd*, [1920] AC 508 (HL Eng); *Burmah Oil Co Ltd v Lord Advocate* (1964), [1965] AC 75 (HL (Scot)); *Manitoba Fisheries Ltd v The Queen*, 1978 CanLII 22 at 109–10 (SCC); *Authorson v Canada (Attorney General)*, 2003 SCC 39 at paras 14, 54.

does not affect the obligations of the federal Crown?[114] The *Federal Act of 1977* also authorized the Governor in Council to approve and declare valid any agreement between the governments and non-signatories concerning rights that the latter "may have had in and to the Territory prior to the coming into force of this Act."[115] This approach, based on a literal reading of Condition 14, is problematic because the Canadian government's constitutional obligation to settle Indigenous claims honourably and equitably may not be limited to providing compensation for lost Aboriginal rights.

These considerations underscore the fact that the core constitutional issue is whether it is in fact possible for the Canadian government to comply with its constitutional duty to negotiate an honourable settlement of the claims of non-signatory Indigenous peoples if negotiations have a purely *a posteriori* compensatory purpose because the historic rights of those peoples have already been utterly and unilaterally suppressed by the legislature.

We must now understand what an honourable and equitable settlement of land claims by non-signatories of the *JBNQA* means in practice.

B. THE CONDITIONS OF AN HONOURABLE SETTLEMENT OF INDIGENOUS CLAIMS IN UNCEDED TERRITORIES

Unilateral extinguishment without any substantial attempt first to negotiate a settlement appears at odds with the principles of equity as generally understood by the Canadian government itself at the time of the *1870 Order*. While it is true that the Crown did not systematically negotiate treaties to settle Indigenous land claims in the Atlantic region, southern Quebec, and British Columbia, federal policy was different with respect to the territories covered by the *1870 Order*, which the Supreme Court has described as the "vast territories to the west" and as those "stretching from modern Manitoba to British Columbia."[116] As the Supreme Court noted, at the time of the *1870 Order* and in the years immediately following, "[t]he government policy regarding the First Nations was to enter into treaties with the various bands, whereby they agreed to settlement of their lands in exchange for reservations of land and other promises."[117] The position of the federal authorities was communicated clearly and repeatedly to the Quebec government during discussions on the enactment of the territorial expansion acts of 1912.[118] The federal policy is codified in those statutes, which explicitly affirm Quebec's obligation to obtain the surrender of Aboriginal rights on lands required for settlement or for use by third parties, without supplanting the federal Crown's responsibility.

In the decades that followed the enactment of the *1870 Order*, although the federal government did not always conclude treaties on the northern territories before authorizing extraction and settlement activities there, it also did not resort to full and prior unilateral extinguishment of Aboriginal rights. Moreover, commentary and case law have interpreted

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[114] The third paragraph of section 2.14 in fact states that "[n]othing in this paragraph shall affect the obligations, if any, that Canada may have with respect to claims of such Native persons with respect to the Territory": *JBNQA*, *supra* note 3.

[115] *Federal Act of 1977*, *supra* note 2, s 4(1)(b).

[116] *Manitoba Metis*, *supra* note 22 at para 1.

[117] *Ibid* at para 3.

[118] See especially Frenette, *supra* note 48 at 94–99 (discussing the federal orders of 17 January 1910 and 2 May 1910).

Condition 14's "sister clause" in the *1870 Order* — the one applying to the North-Western Territory — as referring to the mechanism for the negotiated surrender of Aboriginal rights provided in the *Royal Proclamation of 1763*.[119] It is assumed that the same is true regarding Rupert's Land, which is contemplated by Condition 14.[120] This position appears all the more valid as the *Royal Proclamation of 1763* is considered the foundational constitutional expression of the Crown's duty to deal honourably when negotiating Indigenous claims to unceded territory. Prior and unilateral extinguishment neutralizes the very principle in the *Royal Proclamation of 1763* that sets up a negotiation process to seek consensual and bilateral agreement, or in other words, the "purchase" of lands by the Crown from an Indigenous people willing to cede their rights.[121]

It nonetheless appears important to take a further step in our consideration of the compatibility of prior unilateral extinguishment with the Canadian government's constitutional obligation to treat and settle Indigenous land claims honourably in what was formerly Rupert's Land. The honour of the Crown must be weighed not in the abstract, but on the basis of the circumstances as a whole.[122] It is therefore crucial to thoroughly consider whether the Crown can still acquit itself of its constitutional obligations when the Aboriginal rights of the Indigenous peoples it is transacting with have been completely suppressed.

The scope of the Crown's duty to deal honourably must be defined not narrowly and formalistically, but broadly and purposively, or in other words, according to its objective, which is the just reconciliation of pre-existing Indigenous interests with the Crown's assertion of sovereignty.[123] The Supreme Court has in fact stated that the "process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples"[124] and that "[r]econciliation requires the Crown and Aboriginal people to 'work together to reconcile

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[119] George R, Proclamation, 7 October 1763 (3 Geo III), reprinted in RSC 1985, App II, No 1 [*Royal Proclamation of 1763*]. McNeil argues that the reference to equitable principles incorporates the surrender of rights scheme in the *Royal Proclamation of 1763*. He writes that this condition of the *1870 Order* "would cause the procedure outlined in the *Royal Proclamation* for the surrender of Indian lands to apply to the North-Western Territory" (McNeil, *Native Claims*, *supra* note 27 at 20–21). See also Jamie Bliss, "No Treaty Signed, No Battle Fought: The Foundations of Aboriginal Title in the Yukon" (1997) 3:1 Appeal 53 at 55. In *Ross River* YKSC, *supra* note 73 at para 166, after a review of the abundant case law, Justice Gower wrote, "I conclude that the 'equitable principles' referred to in the relevant provision ought to be interpreted *today* as those principles emanating from the Royal Proclamation which specifically contemplated a duty to treat" [emphasis in original]. On appeal, the Court confirmed this conclusion, noting that none of the parties had in fact contested it (*Ross River* YKCA, *supra* note 73 at paras 40, 86).

[120] *Ross River* YKSC, *ibid* at para 167.

[121] The relevant passage of the *Royal Proclamation of 1763* reads as follows: "if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie" (*Royal Proclamation of 1763*, *supra* note 119 at 6).

[122] *Haida Nation*, *supra* note 53 at para 18. See also *Taku River*, *supra* note 97 at para 25; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council*, 2010 SCC 43 at paras 36–37 [*Rio Tinto*]; *Beckman*, *supra* note 98 at para 43; *Manitoba Metis Federation*, *supra* note 22 at para 74; *Mikisew* 2018, *supra* note 98 at paras 24, 60.

[123] *Taku River*, *supra* note 97 at para 24. In *Manitoba Metis*, the Supreme Court wrote that the jurisprudence "illustrates that an honourable interpretation of an obligation cannot be a legalistic one that divorces the words from their purpose," and thus, it continues, "the honour of the Crown demands that constitutional obligations to Aboriginal peoples be given a broad, purposive interpretation" (*Manitoba Metis*, *supra* note 22 at para 77).

[124] *Haida Nation*, *supra* note 53 at para 32.

their interests'."[125] Thus, enforcing the Crown's duty of honourable dealing is the prescribed method in Canadian law to deal with the tension between asserted Crown sovereignty on the one hand and pre-existing rights claimed by an Indigenous people on the other.[126] The cardinal objective of a just settlement of an Indigenous claim to unceded land must be sought through honourable negotiations because "[t]he honour of the Crown is always at stake in its dealings with Aboriginal peoples."[127]

Historically, the preferred instrument for reconciliation has been a treaty. The Supreme Court has readily stated that "the Crown has an 'obligation to achieve the just settlement of Aboriginal claims through the treaty process,'"[128] and that "[w]here treaties remain to be concluded, the honour of the Crown requires negotiations leading to a just settlement of Aboriginal claims."[129] Accordingly, for the extinguishment clause to be valid, it must be possible for the Crown to negotiate an Indigenous land claim under Condition 14 and to achieve an effective and equitable reconciliation of the interests at issue. The Crown's duty to negotiate has no other objective, and Parliament cannot deprive the Crown of its capacity to realize this objective through negotiations.

It is useful to further define the issues at stake in the settlement of claims to unceded lands. In this specific context, an Indigenous land claim is based on the Aboriginal rights doctrine, which reflects the fact that in Canada "Aboriginal peoples were here when Europeans came, and were never conquered."[130] Aboriginal rights, the strongest expression in Canadian law of precolonial Indigenous legitimacy, are pre-existing rights and an *ab initio* limitation on Crown title.[131] The Crown therefore cannot use the land or resources in a way that cannot be reconciled with its duty of honourable dealing, so long as the pre-existing Aboriginal rights endure. An Aboriginal right to land and resources, whether exclusive land title or a right to

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125 *R v Desautel*, 2021 SCC 17 at para 88 [*Desautel*].

126 In this regard, the Supreme Court has stated that "[t]he ultimate purpose of the honour of the Crown is the reconciliation of pre-existing Aboriginal societies with the assertion of Crown sovereignty": *Manitoba Metis*, *supra* note 22 at para 66.

127 *Haida Nation*, *supra* note 53 at para 16. See also *Badger*, *supra* note 17 at para 41. In *Taku River*, the Supreme Court noted that, "[i]n all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question" (*Taku River*, *supra* note 97 at para 24).

128 *Desautel*, *supra* note 125 at para 89.

129 *Haida Nation*, *supra* note 53 at para 20. See also *Rio Tinto*, *supra* note 122 at para 32.

130 *Haida Nation*, *ibid* at para 25.

131 Aboriginal rights are in fact deemed to flow from a legal situation predating the assertion of sovereignty: see especially *Guerin*, *supra* note 78 at 379; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at paras 10, 69 [*Tsilhqot'in*]; *Newfoundland and Labrador (Attorney General) v Uashaunnuat (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 at para 35. Authors have rightly pointed out that, since they are a State doctrine, Aboriginal rights "logically may arise only upon the assertion of Canadian sovereignty" (Jean Leclair & Michel Morin, "Fascicule 15: Peuples autochtones et droit constitutionnel" in Stéphane Beaulac & Jean-François Gaudreault-Desbiens, eds, *JurisClasseur Québec – Droit constitutionnel* (Montreal: LexisNexis Canada, 2024) 15-1 at 15-65 [translated by author]).

use and harvest, gives the group that holds it the authority to govern the use that may be made of the land and resources concerned.[132]

The stakes of reconciliation are therefore momentous for both the Crown and Indigenous peoples. For the Crown, reconciliation not only serves to legitimize its sovereignty, but also secures the Crown's ability, subject to the terms of the treaty, to manage the land and its resources and to plan and implement development by granting rights to third parties. Indigenous consent to use the territory provides legal certainty and, in the best-case scenario, achieves the "reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship."[133]

For an Indigenous people, the justiciability of their Aboriginal rights is a bar to the Crown's claim of being the sole owner and master of the territory. Aboriginal rights compel the Crown to negotiate a mutually acceptable solution to the challenges posed by sustainable coexistence. The Crown's duty to deal honourably allows Indigenous groups to seek agreements that recognize, determine, and define their rights to their traditional lands.[134] Therefore, in unceded lands, Aboriginal rights are the foundation for the reconciliation of rights, jurisdictions, and legitimacies.

Equitable reconciliation is an obligation that has both a procedural and a substantive dimension, and it applies throughout the entire pre-contractual phase, that is, until an agreement settling the Indigenous claim is reached. The pre-contractual phase can be very lengthy, due in particular to the complexity and significance of the stakes. Until a settlement is reached, the duty of honourable reconciliation compels the Crown to consult the Indigenous people concerned when it considers decisions and actions that could have a prejudicial effect on any Aboriginal rights claimed. The Crown must also, when appropriate, take steps to accommodate Aboriginal rights — that is, to eliminate or minimize the prejudicial effects of planned governmental action on those rights.[135]

Such obligations stem from the fact that, when a claim is made to unceded territory, the duty to act and deal honourably serves to *preserve and protect* the Aboriginal rights pending final settlement.[136] The Supreme Court has said that unilaterally exploiting claimed lands

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[132] The Supreme Court has recognized that because the Indigenous group itself holds an Aboriginal right, it is empowered to set the terms by which its members may exercise that right. Indeed, "treaty rights do not belong to the individual, but are exercised by authority of the local community to which the [individual] belongs": *R v Marshall*, 1999 CanLII 666 at para 17 (SCC)). Similarly, because of its collective nature, an Aboriginal right "is not one to be exercised by any member of the aboriginal community independently of the aboriginal society it is meant to preserve" (*Sappier; Gray*, *supra* note 21 at para 26). See also *Delgamuukw*, *supra* note 15 at para 115; *Reference re An Act respecting First Nations, Inuit and Métis children, youth and families*, 2024 SCC 5 at para 112.

[133] *Beckman*, *supra* note 98 at para 10.

[134] In *Haida Nation*, *supra* note 53 at para 25, the Supreme Court declared that "[t]he honour of the Crown requires that these rights be determined, recognized and respected." See also *Desautel*, *supra* note 125 at para 30.

[135] See especially *Desautel*, *ibid* at para 30; *Taku River*, *supra* note 97 at para 25; *Rio Tinto*, *supra* note 122 at para 32; *Ktunaxa Nation v British Columbia (Forests, Lands and Natural Resource Operations)*, 2017 SCC 54 at para 79 [*Ktunaxa*].

[136] The Supreme Court emphasizes that the objective of the duty to consult and accommodate is to "protect Aboriginal rights and to preserve the future use of the resources claimed by Aboriginal peoples while balancing countervailing Crown interests": *Rio Tinto*, *supra* note 122 at para 50.

before reaching a settlement can mean depriving the Indigenous claimant of their resources, and "[t]hat is not honourable."[137]

If the Crown does not sufficiently consult the people concerned or put appropriate mitigation measures in place, the courts may intervene to ensure compliance with the principle of precautionary reconciliation. Similarly, if the Crown fails to pursue settlement diligently or in good faith, the courts may be called in as reinforcement.[138] When, despite their diligence and good faith, the parties' efforts to negotiate a reconciliation of their interests are for naught, the Indigenous people may bring the matter before a court for a ruling on the merits of their claim. As the Court of Appeal of Yukon explained:

> If, after nearly 30 years of good faith negotiations, no settlement is reached, the rights at issue in the negotiations are not extinguished and breaches of the rights are not ameliorated, mitigated or somehow remedied. Rather, the result of unsuccessful negotiations, no matter how honourably conducted, is that the rights at issue remain justiciable in the same way they were before negotiations were undertaken—in court, if necessary.[139]

The history of the *JBNQA* negotiations reveals the extent to which the justiciability of Aboriginal rights is an essential condition for reconciliation when negotiations concern unceded territory. Were it not for judgments from the Superior Court of Quebec and the Supreme Court of Canada establishing a real possibility of judicial recognition of Cree and Inuit Aboriginal rights to the lands targeted by Quebec's hydroelectric projects, the province would have unilaterally moved forward without making the slightest effort to reconcile government prerogatives with Indigenous interests in the territory.[140] The justiciability of Aboriginal rights ultimately guided the parties toward reconciliation — albeit imperfect and controversial — of their respective claims.

If an Indigenous group is able to prove the Aboriginal rights it claims before a court, the honour of the Crown prohibits the government from limiting the exercise of those rights, save in pursuit of a sufficiently important government objective, by proportionate means, and after proper consultation with the Indigenous group.[141] Dialogue and negotiations, if appropriate, are therefore still possible, with the help of the courts. Thus, in claims for unceded territories pursuant to Condition 14 of the *1870 Order*, the justiciability of the Aboriginal rights that the Indigenous party claims is an essential element of reconciliation.

C. UNILATERAL EXTINGUISHMENT IS INCONSISTENT WITH THE *1870 ORDER*

While the honour of the Crown requires that interests be reconciled equitably, not all failures or breaches on the part of the government constitute a breach of the Crown's honour.

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137 *Haida Nation*, *supra* note 53 at para 27.

138 Indeed, according to the Court of Appeal of Yukon: "A remedy for a failure to engage in constitutionally required good faith negotiations is to order that such good faith negotiations commence" (*Ross River* YKCA, *supra* note 73 at para 133). On the role of the courts in the implementation of the duty to negotiate in good faith, see Robert E Hawkins, "A Duty to Discuss: The Supreme Court's Role as Facilitator of Last Resort" (2014) 64 SCLR (2d) 397 at 411–15; Hoehn, *supra* note 104 at 37–41.

139 *Ross River* YKCA, *supra* note 73 at para 132.

140 *Le Chef Max "One-Onti" Gros-Louis et autres c La Société de développement de la Baie-James et autres* (1973), [1974] RP 38 (Sup Ct); *Calder*, *supra* note 15.

141 *Tsilhqot'in*, *supra* note 131 at para 87.

The measure in question must be one that "substantially frustrates the purposes of a solemn promise."[142]

When determining the constitutional validity of the provision in the *Federal Act of 1977* purporting to unilaterally extinguish the rights of non-signatories to the *JBNQA*, it must be considered whether prior unilateral extinguishment substantially frustrates the Crown's capacity in the pre-contractual phase to honourably reconcile its interests with those of the Indigenous people concerned. The reconciliation of those interests is the *sine qua non* of any honourable settlement.

It must also be determined to what extent the substantive goal of a treaty, namely the honourable reconciliation of Crown and Indigenous interests, remains within the parties' reach. To put it another way, does it remain substantially possible to equitably reconcile the respective claims of the Crown and an Indigenous people as Condition 14 of the *1870 Order* requires, when the Aboriginal rights of the Indigenous people were unilaterally suppressed before discussions even began?

It should immediately be pointed out that the conclusion of *NEQA* in January 1978, not long after the extinguishment clause came into force on 14 July 1977, is not a precedent establishing the compliance of such an agreement with the constitutional requirements of the *1870 Order* when unilateral extinguishment has taken place. We must remember that, like the Cree and the Inuit, the Naskapi had already accepted in principle that they would surrender their rights during negotiations, which were drawing to a close when the extinguishing act was sanctioned.[143] In addition, section 2.1 of *NEQA* expressly provides that the Naskapi surrender and abandon their Aboriginal rights in return for the rights and benefits set out in the agreement.[144] In short, *NEQA* complies with the requirement of extinguishment by prior negotiated treaty. It cannot be cited as proof that the unilateral extinguishment of Aboriginal rights is consistent with the constitutional requirement of the equitable and honourable settlement of Indigenous claims.

Indeed, prior and unilateral extinguishment of Aboriginal rights runs contrary to the very raison d'être of pre-contractual reconciliation, namely, the preservation of the claimed Aboriginal rights, which constitutes an integral element of the duty to negotiate honourably. It eliminates the very purpose of the Crown's obligation to deal honourably with claims before settlement by consulting the Indigenous party if government action risks infringing the Aboriginal rights claimed. Once a statute unilaterally extinguishes those rights and the only issue that remains to be negotiated is compensation — thus, merely the acceptance of responsibility for the consequences of the extinguishment — an Indigenous people can no longer prove that a government measure risks infringing their unceded Aboriginal rights and seek precautionary measures to protect those rights. And the Crown, for its part, is relieved

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142 *Manitoba Metis*, *supra* note 22 at paras 82, 107.

143 For the testimony of federal representatives during the parliamentary proceedings: House of Commons, *Minutes of Proceedings and Evidence of the Standing Committee on Indian Affairs and Northern Development: Respecting Bill C-9, James Bay and Northern Quebec Claims Settlement Act*, 30-2, No 21 (8 March 1977). On 8 March 1977, during the examination of Bill C-9, Minister Allmand confirmed that, at the time, "negotiations with the Naskapi [were] very advanced, and that they [felt] they [would] have an agreement very soon" (*ibid* at 21:8 (Hon Warren Allmand)).

144 *NEQA*, *supra* note 4, s 2.1.

of its duty. Thus, unilateral extinguishment is in direct contradiction to the principle of pre-contractual precaution, which is the very foundation of honourable reconciliation.

During negotiations on terms and conditions of compensation, the Crown enjoys the legal certainty it acquired through the prior extinguishment of rights. The Crown is free to assign the territory for public purposes or to grant rights to third parties.[145] The Indigenous peoples' position is therefore doubly precarious: they cannot turn to the courts to vindicate their "existing" Aboriginal rights pursuant to section 35 of the *Constitution Act, 1982*, and they run the risk of leaving empty-handed, without any rights to their traditional lands and without any compensation in the event of an impasse in diligent and good faith negotiations. Their fate is even more calamitous than that of Indigenous peoples who successfully prove their Aboriginal rights yet "find their land and resources changed and denuded," a situation regarding which the Supreme Court has declared, "[t]his is not reconciliation," and "[n]or is it honourable."[146] The situation of non-signatories appears all the more desolate compared to that of signatories of an agreement, who, in exchange for ceding their rights, receive the full range of rights and benefits the agreement provides, including a land regime guaranteeing their exclusive or priority harvesting rights in vast territories. As the Supreme Court has remarked, "[i]t seems harsh to put aboriginal people in a worse legal position where land has been taken without their formal cession than where they have agreed to terms of cession."[147]

Reconciliation is inherently bilateral. It involves an offer and a counter-offer — we might almost say a gift and a counter-gift — that opens the door to compromise leading to potential reconciliation.[148] The key to reconciliation based on a claim for pre-existing Aboriginal rights is the capacity of the Indigenous people to negotiate their consent, to obtain a benefit in exchange for a concession, and to weigh benefits and concessions against each other to crystallize or suspend consent, in particular when consent relates to the abandonment or use of their as yet unextinguished Aboriginal rights.

In other words, the *transactional principle* is part and parcel of reconciliation as a contractual and constitutional objective. In treaty negotiations, an Indigenous people agrees to allow development on their territory, possibly to the detriment of their Aboriginal rights, "in exchange" for benefits under a treaty. Such an exchange, which is at the very heart of the operation, becomes impossible if unilateral extinguishment has already taken place. In such a case, the Indigenous party has nothing left to exchange, no concessions to demand, and no compromises to seek or make between the diminishment or loss of Aboriginal rights and the state's quest for legal certainty.

The capacity to exchange and transact through the use of their Aboriginal rights claim has always been a valuable tool for Indigenous peoples in their negotiations with the Crown, despite the historical structural inequities between the actors. Even in the nineteenth century, experienced Indigenous negotiators obtained significant benefits, such as mechanisms for compensation based on the degree of profitability of harvesting activities on their territory in

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[145] The exercise of these powers must be subject to the treaty rights of the signatory people.

[146] *Haida Nation*, *supra* note 53 at para 33.

[147] *Marshall*, *supra* note 76 at para 21.

[148] Regarding the importance of gifts and counter-gifts in establishing and maintaining just social, economic, and political relationships in Indigenous cultures: Denys Delâge & Jean-Philippe Warren, *Le piège de la liberté*: *Les peuples autochtones dans l'engrenage des régimes coloniaux* (Montreal: Boréal, 2017) at 21–34.

exchange for their consent to the use of the territory by the government or settlers.[149] When a law unilaterally extinguishes Aboriginal rights before any dialogue takes place, Indigenous consent is no longer to be negotiated, and the essential process of exchange with a view to reconciliation can no longer be an object of negotiations; it has been autocratically excluded from the potential choices of the negotiators.

In such a situation, the Crown already holds all the rights as a result of unilateral extinguishment. Proportionate or innovative approaches that seek to minimize an agreement's effect on Aboriginal rights are no longer achievable. The only thing that remains to be settled is a demand for compensation for what is already irremediably lost. An act of Parliament has nipped reconciliation in the bud because an Indigenous people is coerced into resigning themselves to the loss of their Aboriginal rights as a precondition for negotiations.

Ultimately, an attempt to forge relations between the Crown and an Indigenous people on the ruins of the latter's prior dispossession betrays the ethos of reconciliation and co-operation undergirding the Canadian law governing the negotiation of Indigenous claims to unceded lands. Therefore, the unilateral legislative extinguishment of the Aboriginal rights of peoples who did not sign the *JBNQA* more than substantially hampers the Crown's capacity to comply with Condition 14, particularly in the pre-contractual phase. In the circumstances, reconciliation consistent with the honour of the Crown cannot be achieved, even if the *1870 Order* does not require that an agreement be reached before the Crown grants rights to third parties.[150]

It is enlightening to compare the effect of the extinguishment clause in the *Federal Act of 1977* on the Crown's duty to settle Indigenous claims honourably under the *1870 Order* with the effect of the *Yukon Act*,[151] which was challenged in the Supreme Court of Yukon case of *Ross River* on the grounds that it violated this duty. The Court of Appeal of Yukon upheld the trial decision that ruled that the federal statute in no way diminished the protection of Indigenous claims flowing from the *1870 Order* because the statute's purpose was merely to delegate the power to make laws for the Yukon to local territorial institutions, with those laws remaining subject to the terms of the *1870 Order*.[152] Indeed, in that case, federal counsel strongly emphasized that the purpose of the *Yukon Act* was not to extinguish Aboriginal rights.[153] There is little doubt that, had the Court interpreted the *Yukon Act* as expressing a clear and plain intention to unilaterally extinguish all rights of Indigenous peoples in the Yukon in unceded lands, it would have found that the statute was inconsistent with the constitutional obligations imposed on the federal Crown by the *1870 Order*.

Finally, what can be made of the potential contention that Parliament's violation of the provisions of the *1870 Order* can be justified because of the important governmental objective it seeks to achieve — that is, facilitating the conclusion of the first modern treaty — and because some accommodation is provided through Quebec's treaty undertaking to

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149 See e.g. *Restoule v Canada (Attorney General)*, 2021 ONCA 779, rev'd in part 2024 SCC 27.

150 *Ross River* YKCA, *supra* note 73 at para 100.

151 SC 2002, c 7.

152 *Ross River* YKCA, *supra* note 73 at para 101. The *Yukon Act* contains a provision prohibiting derogations from Aboriginal rights (*Yukon Act*, *ibid*, s 3).

153 *Ross River* YKSC, *supra* note 73 at para 225 (Justice Gower observed, "Canada submits that the purpose of the *Yukon Act* was not to extinguish [the First Nation's] rights, but rather to transfer certain governance responsibilities to the local government in the Yukon").

negotiate compensation with non-signatories? This argument, inspired by the Supreme Court's decision in *Sparrow*, would be doomed. The Supreme Court has held that the justification of infringement on constitutionally protected Indigenous interests must fulfill "the concept of holding the Crown to a high standard of honourable dealing with respect to the aboriginal peoples of Canada."[154]

It has been established that the prior unilateral extinguishment of Aboriginal rights in a manner that precludes the honourable negotiation and settlement of Indigenous claims contravenes both the procedural and substantive requirements of the honour of the Crown. Moreover, such extinguishment is disproportionate because, as the Crown's consistent later practice has made clear, it is reasonably possible to enter into a modern treaty without completely thwarting an honourable negotiation and settlement of the Aboriginal right claims of non-party peoples on the treaty territory.[155] Prioritizing legal certainty for the Crown and the signatory peoples above all else, at the cost of the complete and unilateral suppression of the Aboriginal rights of non-signatories, is not a balanced approach, especially when it is recalled that the dreaded legal insecurity is in no way the fault of the Indigenous peoples who suffer the consequences of the extinguishment. If we place the operational convenience the government obtains by unilaterally extinguishing the Aboriginal rights on one side of the scales of justice, and the dispossession of Indigenous peoples deprived without their consent of their longstanding claims that underpin their historical identity and legitimacy on the other, the balance will tip toward the latter.

VI. CONCLUSION

The extinguishment clause found in the *Federal Act of 1977* is not consistent with the Canadian constitution. As a result, a court seized of this issue should declare the law inoperative to the extent of its inconsistency. The court should recognize that it cannot be applied to third parties claiming Aboriginal rights on territory that was formerly within Rupert's Land.[156] Its constitutional invalidity does not flow from Parliament's failure to consult and accommodate non-signatories during the legislative process, but rather from its attempt to counter or neutralize the Crown's constitutional duty and capacity to comply with the terms of Condition 14 of the *1870 Order*.[157]

The Aboriginal rights claims of the Innu, the Anishinaabeg, and the Atikamekw Nehirowisiwok with respect to the Agreement Territory therefore remain invocable and justiciable. The federal Crown's constitutional obligation, based on the *1870 Order* to undertake and pursue negotiations in a manner consistent with its duty of honourable dealing with a view to equitably settling the claims of these peoples, remains fully operative.

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154 *Sparrow*, *supra* note 15 at 1110.

155 See the discussion below of the saving clauses for the rights of third party peoples in modern treaties subsequent to the *JBNQA*.

156 The same is true regarding section 2.6 of the *JBNQA*, which should be declared inoperative in respect of non-signatories.

157 A majority of the Supreme Court has found that, during the parliamentary legislative process, the duty to act honourably does not give rise to a right to contest the legislative action based on an allegation that the legislators failed to consult potentially affected Indigenous peoples: *Mikisew* 2018, *supra* note 98 at para 52.

Accordingly, until the land claims of non-signatories to territory in what was formerly known as Rupert's Land are settled, the Crown must meet its pre-contractual precautionary obligations, which require it to prevent or minimize the prejudicial effect of any project or governmental action on the capacity of Indigenous peoples to enjoy their asserted Aboriginal rights.[158] Any Aboriginal right proved by an Indigenous group will be recognized as an "existing" right within the meaning of section 35 of the *Constitution Act, 1982*, such that it may not be unjustifiably infringed by the Crown. Settlement negotiations must be conducted diligently and in good faith, although the courts cannot sanction the failure to arrive at an agreement.

A question will arise concerning the way in which the Aboriginal rights of non-signatories will relate to those granted in the former Rupert's Land to the Cree and the Inuit under the *JBNQA* and the Naskapi under *NEQA*.[159] If the unilateral extinguishment process had been constitutionally legitimate, it would have peremptorily settled the issue by performing a "great purge" of the rights of non-signatories, leaving only the treaty rights of the signatories.

This unique, even radical, approach was subsequently abandoned. All other modern treaties contain provisions expressly protecting the rights of Indigenous third parties in the treaty territory.[160] In other words, the signatories' rights conferred or affirmed by these treaties do not supplant or diminish Aboriginal rights claims by a people that is not party to any of the said treaties. This practice enshrines the elementary principle of the relative effect of contracts and treaties, which aligns perfectly with the honour of the Crown and which the Supreme Court has applied in Indigenous contexts.[161]

Accordingly, the Aboriginal rights of third parties must be taken into account when applying the *JBNQA* and *NEQA*. Indeed, this is expressly contemplated in several treaties that require the parties to renegotiate and modify any treaty clause that a final court decision

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158 These obligations are incumbent on either the federal or provincial Crown, depending on whether the project falls under federal or provincial jurisdiction.

159 The courts will read down section 3(3) of the *Federal Act of 1977* (*supra* note 2), which is still fully operative in respect of the signatory peoples, who therefore enjoy the rights and benefits set out in the *JBNQA*. Indeed, under section 3(2) of the *Federal Act of 1977*, the beneficiaries of the *JBNQA* enjoy the rights and benefits set out therein "[u]pon the extinguishment of the native claims, rights, title and interests referred to in subsection (3)" (*Federal Act of 1977*, *supra* note 2, s 3(2)). The courts strive to preserve the constitutional elements of a statute to ensure that citizens benefit from valid measures "where it can be fairly assumed that 'the legislature would have passed the constitutionally sound part of the scheme without the unsound part' and where it is possible to precisely define the unconstitutional aspect of the law" (*Ontario (Attorney General) v G*, 2020 SCC 38 at para 114). The unconstitutional aspect of section 3(3) is very specific, and Parliament cannot be assumed to have preferred that the entire subsection be struck down — thus doing away with all the rights and benefits flowing from the *JBNQA* — over renouncing the unilateral extinction of the rights of the non-signatories. If interpreted as applying to the signatories of the *JBNQA* only, section 3(3) is still able to fulfil its essential purpose, which is to give effect to the agreement between the Crown and the signatory people, which today enjoys constitutional protection under section 35(1) of the *Constitution Act, 1982*, *supra* note 14.

160 This practice might be explained by the coming into force of the *Constitution Act, 1982*, which confers constitutional protection on Aboriginal rights existing at the time.

161 In *R v Sioui*, [1990] 1 SCR 1025 at 1063, the Supreme Court declared that a treaty to which an Indigenous people is not a party cannot extinguish that people's rights under another treaty. The Cree in Quebec rely precisely on the relativity of treaties to claim Aboriginal title and rights on part of northern Ontario that is otherwise included within the territory of Treaty No 9 between the Crown and the Anishnabeg. They rightly invoke the continuity of the Aboriginal rights of treaty non-signatories in lands contemplated by the treaty (*Crees (Eeyou Istchee) et al v Canada (Attorney General) et al*, 2017 ONSC 3729).

has declared inoperative because it infringes an Aboriginal right held in the territory by a people that is not a party to the treaty.[162]

Renegotiations aim to compensate Indigenous parties to the treaty when they are affected by the enforceable rights of non-signatory Indigenous peoples, and to find replacements for provisions declared inoperative. This type of solution could be applied if a provision of the *JBNQA* or *NEQA* is found to violate the Aboriginal rights of a non-signatory people.

It is possible, however, for the limitation of an Aboriginal right of a third party Indigenous people to be justified in a specific situation under the *Sparrow* test. We must not rule out the hypothesis that a measure giving effect to a right provided in the *JBNQA* or *NEQA* can limit the exercise of an established Aboriginal right of a non-signatory people. However, it will be up to interested parties to justify such infringement, and doing so will require consultation and accommodation of the people whose right is at issue.[163]

Legitimate and lasting reconciliation of the interests and rights of the different Indigenous peoples on these territories will be achieved through negotiations among all the parties concerned. The Indigenous peoples should settle overlapping claims themselves, using mediation mechanisms where necessary.[164] Such a negotiated reconciliation appears markedly more honourable than the solution implemented by Parliament in 1977, which involves the sacrifice of the Aboriginal rights of non-signatory people on the altar of legal certainty for the Crown and the signatory people.

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[162] *Nisga'a Final Agreement*, 27 April 1999, C-2, ss 33–35, online: [perma.cc/HQ6C-WJ23]; *Yale First Nation Final Agreement*, 5 February 2010, ss 2.12.1–2.12.3, online: [perma.cc/XG2L-REK9]; *Land Claims Agreement Between the Inuit of Labrador and Her Majesty the Queen in Right of Newfoundland and Labrador and Her Majesty the Queen in Right of Canada*, 22 January 2005, Part 2.10, online: [perma.cc/48HP-DGDJ]; *Maa-nulth First Nations Final Agreement*, 9 April 2009, ss 1.12.1–1.12.5, online: [perma.cc/79RH-UEFN]; *Tsawwassen First Nation Final Agreement*, 6 December 2007, C-2, ss 47–49, online: [perma.cc/G5SN-RRDF]; *Tla'amin Final Agreement*, 5 April 2016, C-2, ss 52–55, online: [perma.cc/Y7BG-ZK4V]; *Agreement Between the Crees of Eeyou Istchee and Her Majesty the Queen in Right of Canada Concerning the Eeyou Marine Region*, 7 July 2010, ss 29.2–29.3, online: [perma.cc/S4TK-X4XQ]; *Land Claims and Self-Government Agreement among the Tłı̨chǫ and the Government of the Northwest Territories and the Government of Canada*, 25 August 2003, ss 2.7.1–2.7.4, online: [perma.cc/L7NP-YH8W].

[163] See especially *Tsilhqot'in*, *supra* note 131 at paras 88, 125.

[164] There are successful precedents: see e.g. Ministerial Special Representative on Renewing the Comprehensive Land Claims Policy, *A New Direction: Advancing Aboriginal and Treaty Rights*, by Douglas R Eyford (Ottawa: Aboriginal Affairs and Northern Development, 2015) at 67–68. It should be noted that an Innu community that did not sign the *JBNQA*, the Pekuakamiulnuatsh Nation, has already entered into a bilateral agreement with the Cree of Eeyou Istchee to partially settle the issue of territorial overlap (Pekuakamiulnuatsh Takuhikan, "Mamu Uitsheutun/Maamuu Wiicheutuwin: Une entente de Nation à Nation Cris – Pekuakamiulnuatsh," (21 June 2018), online: [perma.cc/MZ7N-QSQJ]).