The Tangled Web of Sovereignty and Self-Governance: Canada’s Obligation to the Cree Nation in Consideration of Quebec’s Threats to Secede

By
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PART I

1. Introduction and Overview

This article examines the relationship between traditional legal doctrine used in Canada for the protection of the First Nation Indian culture and the Canadian Constitutional Act of 1982,¹ in light of the Province of Quebec’s repeated promise to become its “own sovereign.”² Specifically, this article focuses on the legal obligations arising out of the James Bay Northern Quebec Agreement (JBNQA), a tripartite treaty under Canadian law among Canada, the Province of Quebec and the Cree Nation. The JBNQA governs the surrender of land in exchange for self-governance.³ The treaty requires the three parties to mutually consent to any modification or amendment.⁴

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¹. CAN. CONST. (CONSTITUTION ACT), § 35(1) ("The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.")


³. See James Bay and Northern Quebec Native Claims Settlement Act, S.C. 1976-77, ch. 32; see also, CAN. CONST. (CONSTITUTION ACT), § 35(3) ("For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.")

⁴. JBNQA, supra note 3, § 2.15 as cited in SOVEREIGN INJUSTICE, supra note 2, provides “[t]he agreement may be from time to time, amended or modified in the manner provided in the Agreement, or in the absence of such provision, with the consent of all the Parties.”
The definition of land surrenders and the scope of consent both play a significant role in constitutional analysis under a 1990 Canadian case, *The Queen v. Sparrow*. Furthermore, familiarity with the legal treatment of Native Americans in America is necessary to understand Canada's obligation to the Cree First Nation. A description of the history of this treatment is essential to comprehend the significance of Constitutional section 35(1).

Both Canadian and U.S. legal treatment of their native peoples are grounded in the *doctrine of discovery*. The North American interpretation of this ancient doctrine arose directly from *Johnson v. M'Intosh* in the United States in 1823. In *Johnson*, Chief Justice John Marshall held that the United States, through a treaty with the British government, had superior title to the soil occupied by native peoples because Indians were uncivilized heathens. The law of nations doctrine of discovery awarded the right to acquire territory to new discoverers as prior occupants because the Indians were savages. Courts considered Indian territory vacant in order to reach this conclusion, even though the land was occupied by the Indian peoples. While the non-Native peoples designed discovery doctrine and prior occupancy to aid transboundary exploration, the two concepts functioned as mechanisms to deprive indigenous peoples of property ownership rights.

In the United States, the discovery doctrine under *Johnson* provided natives with only a preferential beneficial occupancy of land with limited self-government as an inherent right.

Canada applied the *Johnson* discovery model to the Native Canadians, but under a different rationale. The Canadian courts did not rely on the same justifications of alleged savagery and uncivilized behavior. Instead the courts deprived Native Canadians of land and self-governance as a matter of Crown

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6. This article makes references to Indians, aboriginals, Native Americans, Native Canadians, native cultures or peoples, indigenous peoples, tribes, bands, and First Nation. Nothing pejorative in use of any of these identifications is intended.
8. *Id.* at 572-7. Prior occupancy and discovery doctrine are related — each by seeking to prevent dominance by another culture in the same territory based on the "I was here first" principle, and by that, somehow, a superior right is involved.
9. MAURICE COLLIS, CORTES AND MONTEZUMA 21-25 (1954). Discovery allowed explorers to finance journeys by promising to the sovereign a settlement in a new land, in essence a form of political collateral. To avoid conflicting disputes between different explorers over the same territory a system had to be set up to divide exploratory interests. For example, Spain and Portugal asked the Borgia Pope, Alexander VI to demarcate spheres of interest in the Atlantic, so in a Bull, *Inter Caetera*, Alexander VI declared the Portuguese to have exclusive rights to all lands they already possessed or "discovered" eastward, and to the Spanish a similar right to what lay west. If by chance the demarcation still resulted in conflict with different states, discovery gave the right to acquire to the first discoverer over subsequent arrivals. *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 573 (1823).
10. *See Mabo v. Queensland*, 66 A.L.R.J. (Australia) 408, 426 (1992). "It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty."
sovereignty. The subtle difference between the two models directly affects the significance of the Canadian Constitutional Act of 1982 and the implication of section 35(1) as it relates to Canada's obligation to the Cree Nation under the JBNQA.

In both Canada and the United States, courts used *Johnson* as a springboard for the development of preferential, yet unequal treatment of native peoples. The word “preferential” has distinct legal significance. This is because both countries have implemented domestic policy which places a premium on preservation and protection of native cultures that is clearly distinguishable from preferential treatment of other minorities. As any preferential treatment can on its face appear inconsistent with the doctrinal value of equality, its application may antagonize those who argue that all people should be treated similarly. From both the Native American and Canadian perspective, preferential treatment cultivates a status of inequality, placing native peoples in a hierarchical order that leaves them subject to a political organization which they had no voice in choosing.

Instead of relying on preferential treatment, native peoples argue for cultural preservation focusing generally on political autonomy, predicated on self-governance and land rights. These themes also rest on prior occupation. Con-

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14. In the United States, see *Morton v. Mancari*, 417 U.S. 535, 543 (1973): “One of the primary means by which self-government would be fostered . . . was to increase the participation of [T]ribal Indians . . . In order to achieve this end, it was recognized that some kind of preference . . . was necessary.” In Canada, see *Indian Act*, R.S.C. ch. 149 §18(1): Subject to the Provisions of this Act, reserves shall be held by “Her Majesty for the use and benefit of the respective bands for which they are set apart . . .” as cited in R. Bartlett, *The Indian Act of Canada*, 27 *BUFF. L.R.* 581, 600 (1978).


18. In United States, see *Cherokee Nation v. Georgia*, 30 U.S. 1, 16-7 (1831); in Canada, see *Calder v. Attorney-General of British Columbia*, 1 S.C.R. 313 (1973); see also B. Broms, *Links Between Autonomous Territory and Suzerain State*, 55 *NOR. J. INT’L L.* 12 (1986), where in the nineteenth century autonomy is a means to describe a relationship between a state and another entity that did not fulfill the requirements of a state, and is also used as a legal means to give protection to minorities within a state. See D. Sanders, *If Quebec Secedes From Canada Can the Cree Secede from Quebec?*, 29 *UNIV. BRIT. COLUM. L. REV.* 143, 152 (1995). If the Cree were to decide to strike it out on their own, at what point will the international community recognize the Cree Nation as a separate state? While the answer is not clear, a reasonable guess might start by asking whether international law will recognize Quebec as an independent state if it moves toward sovereignty.
sequentiy, native peoples argue that cultural survival depends on legal recog-
nition of the reality that they lived on a particular land first and were displaced
without their consent.\(^9\)

It is the position of the Cree Nation that cultural preservation is synony-
mous with the freedom to utilize governing rights it has gained out of the
JBNQA with Canada and Quebec, as well as inherent common law aboriginal
rights to self-government.\(^{20}\) Determining the scope of consent as a treaty right
is a major consideration in light of the Province of Quebec’s repeated warnings
to secede.\(^{21}\) It will be the conclusion of this article that the Cree Nation has an
identifiable treaty right arising under the JBNQA to be an active participant in
government discussions between Quebec and Canada regarding Quebec’s threat
of independence. This is because Quebec’s threat directly relates to the cultural
survival of the Cree Nation. The Cree Nation may soon be standing at the fork
in the road, if Quebec does in fact vote to secede.\(^{22}\)

The Cree Nation lies within Quebec’s territorial borders. It was annexed
through the 1912 Quebec Boundaries Extension Act, even though the Cree did
not participate in this land agreement between Canada and Quebec.\(^{23}\) The Cree
Nation is rich in resources. It is located in the upper one-third of the northern
region of Quebec, and is bordered by the Hudson Bay in the north and west, and
Ontario to the southwest. It has a relatively sparse non-indigenous population.\(^{24}\)
The Cree Nation, which maintains a centrally organized society of approxi-
mately 12,000 aboriginal people, has existed for thousands of years. It is di-
vided among nine regional communities, generally referred to as First Nation
Bands.\(^{25}\)

From 1912 to the early 1970’s, Quebec’s increased land mass resulting
from the 1912 Quebec Boundaries Extension Act, created intra-territorial com-
petition between Quebec and the Cree. The Cree sought to preserve First Nation

\(^9\) See, e.g., Calder, 1 S.C.R. at 317; See also Sanders, supra note 18 at 153.
\(^{20}\) See generally, SOVEREIGN INJUSTICE, supra note 2; see also Sanders, supra note 18, at 144-
5, 150.
\(^{22}\) See Sanders, supra note 18, at 144. Some scholars believe that Quebec’s secession is
unlikely because secession in federalist systems of government is not favored under international
law. But, secession in federalist systems does happen, offering opportunities for new states to be
formed. When Virginia seceded from the Union in 1861, West Virginia seceded from Virginia to
stay with the north. The recent war in what was once Yugoslavia also illustrates that the breakdown
of a federal state can reopen questions of political boundaries and self-determination. The internal
desire for Quebec’s sovereignty is based on long standing differences with Canada dating back even
before 1763 when French Quebec became part of a contiguous Canada.
\(^{23}\) See Sanders, supra note 18, at 145-46.
\(^{24}\) Id. at 144.
\(^{25}\) Id.; see also SOVEREIGN INJUSTICE, supra note 2, at 1. The cultural differences between
the people of Quebec and the Cree Nation are as pronounced as the differences between the other
inhabitants of Quebec and Canada. See Sanders, supra note 18, at 144-45. The Cree have never
assimilated into the Quebec culture to the same extent as other indigenous cultures of southern
Quebec, such as the Huron and Mohawk. For example, many Mohawk and Huron speak French,
which Quebec regards as the primary language. The Cree Nation maintains its own native language
while recognizing English as its second language. Internationally, the Cree Nation is recognized as
culturally distinct from Quebec to the extent that it enjoys a consultive roster status with the United
Nations Economic and Social Council. Id. at 151.
resources, while Quebec pursued its development policy. The ultimate question of who would control the land led to escalating disputes between the Cree and Quebec.

During this period, the Canadian federal government took a position of "alert neutrality." The federal government refrained from intervening between the disputants, despite its fiduciary relationship to native bands. The conflict between Quebec and the Cree gave rise to the JBNQA in 1975. The JBNQA is the crux of Canada's obligation to the Cree Nation, affecting the political dynamics of self-governance in regard to land occupation. While the Canadian system of federal government recognizes that Canada and the Provinces share control over the administration of native matters, the Canadian Constitution Act of 1982 mandates that federal and provincial authorities recognize and affirm existing aboriginal and treaty rights in order that native bands can maintain their culture. Despite the JBNQA, Quebec has repeatedly asserted that it will develop the Cree Nation territory at its own sovereign discretion.

In late 1995, when Quebec initiated its referendum on sovereignty, the Cree Nation initiated its own separate referendum to determine its future. The Cree asked its people whether they consented to separation from Canada if Quebec were to become independent. Over 95% of the 77% of eligible voters of the Cree First Nation participating in the referendum withheld their consent to be independent of Canada. The Cree Nation has thus clearly expressed its desire to carve out its own destiny by remaining annexed to Canada.

The Cree Nation's choice poses an obstacle to Quebec. As a result, Quebec has hardened its official position, reaffirming that Quebec is an inseparable state within long standing borders under the Quebec Boundaries Extension Act of 1912, and that the Cree Nation is part of Quebec's territory. Because of their position, the Cree are not politically autonomous. In short, Quebec claims that

27. Id. at 153-54.
28. Telephone Interview with John Henry Wapachee, Chief Returns Officer, Nemaska First Nation of James Bay Cree Nation in Nemaska (Quebec) up to May 24, 1996.
29. See supra note 13 and accompanying text.
30. CAN. CONST. (Constitution Act, 1982), § 35(1); see also Queen v. Sparrow, 1 S.C.R. 1075, 1077-78 (1990).
31. See Sanders, supra note 18, at 153-55. Prior to the JBNQA, the Cree Nation held defined territorial boundaries that were recognized by Canada. Yet the Quebec Boundaries Extension Act of 1912 transferred much of the Cree territory to the Province of Quebec, with the requirement that Quebec negotiate treaties with the Cree and Inuit Indians, while at the same time reposing fiduciary responsibility in the federal government for the Cree. Id. at 145 n.8.
32. Quebec's Bouchard Says No Snap Election, supra note 2, at A1. In late 1995 a citizen referendum in Quebec failed to approve "Quebec's sovereignty" by less than two-tenths of one percent. The defeat met with promises to try again.
33. E-mail from Glen Linder at McGill University to Professor David Caron at Boalt Hall School of Law on Oct. 17, 1995 (on file with the author).
34. Telephone Interview with John Henry Wapachee, Chief Returns Officer, Nemaska First Nation of James Bay Cree Nation in Nemaska (Quebec) up to May 24, 1996.
35. CAN. CONST. (Constitution Act, 1867), § 109 which provides that all lands belonging to the Province at the time of the Confederation continue to belong to the Province; see also SOVEREIGN INJUSTICE, supra note 2, at 58-59. Quebec has represented to Cree leaders that the Cree Nation
the Cree Nation has no right to determine its future, and that any referendum to that effect by the Cree Nation will not be recognized.\footnote{36}

Predictably, the Cree Nation asserts that it is protected by Constitution section 35(1) and the 1975 JBNQA with Canada and Quebec. The latter stipulates that any modification of the JBNQA treaty requires the "consent" of the Cree.\footnote{37} The scope of legal protection given to the treaty requirement of consent, or the treaty itself, remains to be determined. The eventual determination will have significant political consequences for all the parties affected by Quebec's possible secession.

This article will suggest that the Cree Nation has a protected treaty right which can be used to carve out its own political identity and autonomy. Furthermore, this article argues that Canada has a legal obligation to support the Cree's autonomous choice. Canada can begin to fulfill its obligation by including the Cree in negotiations regarding Quebec's future. This act would give meaning to consent under the JBNQA and Constitutional section 35(1).\footnote{38}

Prior occupancy under the discovery doctrine plays a role in the analysis because it affects the scope of the term "consent" in the treaty in any dispute between the parties. It is the contention of this article that an argument based on prior occupancy under Johnson should not be the underlying consideration in determining Canada's obligation to the Cree. Nor should the Cree rely solely on prior occupancy in claiming to have a constitutional right to treaty protection. Rather, this article contends that there is another more powerful norm behind the traditional prior occupation argument.\footnote{39} This norm is known as first sovereignty. This article will discuss at length the value of the first sovereignty doctrine and how it relates to fiduciary responsibility and equality within the

\footnote{36} Sanders, supra note 18, at 153, where Lucien Bouchard, leader of the Bloc Quebecois argues that "[n]ative people do not have the right to self-determination. It does not belong to them. We have been very clear on that, on legal grounds."

\footnote{37} See JBNQA, supra note 3, § 2.15. The Cree maintain that Canada has a fiduciary responsibility to intervene on behalf of the Cree Nation for any act that affects aboriginal or treaty rights. Sanders, supra note 18, at 156.

\footnote{38} See, e.g., Queen v. Sparrow, 1 S.C.R. 1075, 1012 (1990). "While it is impossible to give an easy definition of . . . rights, it is possible, and indeed crucial, to be sensitive to . . . the rights at stake."

\footnote{39} See, e.g., Worcester, 31 U.S. (6 Pete) at 559. "The Indians have always been considered as distinct, independent political communities, retaining their original natural rights . . . ."; see also Cherokee Nation v. Georgia, 30 U.S. 1, 16 (1831). "The acts of our government plainly recognize the Cherokee Nation as a state, and the courts are bound by those acts."
governance of unique people.\textsuperscript{40} This article challenges the traditional arguments for sovereignty grounded in discovery and prior occupation.\textsuperscript{41}

This article will demonstrate that prior occupancy and discovery doctrine, through \textit{Johnson}, confused property law concepts with sovereignty, creating a legal fiction. This legal fiction resulted in territorial gains to dominant systems of government.\textsuperscript{42} This article contends that \textit{prior occupancy} conceals a stronger argument based on traditional equality emanating from sovereignty.\textsuperscript{43} First sovereignty, and how it relates constitutional protection and the JBNQA regarding self-governance, is examined herein.

As part of the examination of first sovereignty, Part II will discuss the law of nations as applied in the Marshall trilogy and demonstrate how the Court’s legal analysis confused the meaning of discovery and sovereignty with property law concepts. Part II will also examine how the transmutation of sovereignty and property law took effect in Canada with regards to native relationships. In particular, the significance of Canadian Supreme Court cases \textit{Calder v. Attorney-General of British Columbia}, and \textit{Sparrow v. The Queen}, with repeated reliance on \textit{Johnson v. M’Intosh} in the United States, will be analyzed in the context of section 35(1) of the Constitution Act of 1982.

Part III will demonstrate how prior occupancy has been altered and how it is used as a tool for preferential treatment that both discriminates and encourages dependency in governmental relationships. The end result is ultimately to deprive native peoples of the ability to protect their culture. Part III will argue that first sovereignty is a better argument for a claim for native choice as it does not rest on the reliance upon dominant governmental structures.

Part IV will look specifically at the James Bay Northern Quebec Agreement (JBNQA) and how the treaty’s interpretation of consent provides constitutional protection for the Cree Nation. This protection afforded the Cree guarantees that it can participate in any negotiations between Canada and Quebec. The guarantee derives from section 35(1) of the Constitution Act of 1982,

\textsuperscript{40} Telephone Interview with John Henry Wapachee, Chief Returns Officer, Nemaska First Nation of James Bay Cree Nation in Nemaska (Quebec) up to May 24, 1996. “First sovereignty” is a phrase used to describe rights that are documented in a treaty that inherently acknowledge that Native Canadians existed in certain territory first with their own governance of their own people. Peter Macklem uses the phrase “prior sovereignty” to describe the common law aboriginal rights that correlate to first sovereignty, of which rights arise from the mere existence of the Band itself — but do not grow out of the treaty itself. P. Macklem, \textit{Distributing Sovereignty: Indian Nations and Equality of Peoples}, 45 STAN. L. REV. 1311, 1335 (1993).

\textsuperscript{41} \textit{Johnson}, 21 U.S. (8 Wheat.) at 570. “According to every theory of property, the Indians had no individual rights to land; nor had they any collectively, or in their national capacity; for the lands occupied by each tribe were not used by them in such a manner as to prevent their being appropriated by a people of cultivators . . . . [t]he right derived from discovery and conquest.”

\textsuperscript{42} \textit{Id.} at 573. “The principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made.” \textit{But cf.} at next line “[D]iscovery the sole right of acquiring the soil from the natives.” \textit{Id.} (emphasis added). \textit{See also Mabo}, 66 A.L.R.J. (Australia) at 409.

and from application of the *Sparrow* and *Guerin* decisions which affect native survival and other fiduciary duties requiring consultation of the Band. 44

Part V will conclude that section 35(1) of the Constitution Act of 1982 elevates the requirement of consent as a treaty right into an obligation by the federal government to include the Cree Nation in negotiations with Quebec. 45 This position is predicated, however, on adopting a first sovereignty argument. Finally, this article will conclude that Canada does not give up any of its sovereignty by allowing Cree Nation participation under a forward looking view of sovereignty as a *bargained for, valued good* arising from the "free consent of men." 46

**PART II**

1. *The Law of Nations, Sovereignty and The American Cherokee Cases*

Under international law, respect for territorial sovereignty remains the hallmark of a nation's independence and authority. 47 But the relationship between sovereignty and law is indivisible. This is because sovereignty emerged from international law just as international law has played a role in defining the substantive limitations of sovereignty. 48

Hugo Grotius, an early influence on international law defined sovereignty as a state of a "body of free men consensually united for common enjoyment and advantages" that provided power to enact and execute its own laws. 49 Because a state derives its power from the "free consent of men," it was Grotius' view that likewise, the law of nations was driven by the mutual consent of territories governed by rational men, the manifestation of which could give rise to equal or unequal obligations. 50 Grotius did not express the idea that an unequal status in a relationship amounted to the absence of sovereignty. 51

Vattel, another international scholar, postulated that the primary requirement for sovereignty was that an area have boundaries and the ability to govern itself by its own laws and authority. 52 Even a territory in an "unequal alliance"

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44. See, e.g., Queen v. Sparrow, 1 S.C.R. at 1119.
45. *CAN. CONST. (Constitution Act), § 35(1).*
47. *HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 14-6 (rev. 1996).*
48. See M. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 4-7, 10 (2nd ed. 1993). The attributes of sovereignty range from the internal character of a territory to possess exclusive ability to enact its own laws, to the external attribute of a state having the power to relate with whom it chooses, as well as maintaining and securing its own territorial borders.
50. *Id.* at 61-3. According to Grotius, one attribute of sovereignty is that a state must not be under the control of another power; therefore a state subjugated to another state is not a sovereign. While the meaning of subjugation is not defined by Grotius, it appears that unless there is a complete surrender and transfer of one's internal and external characteristics, sovereignty still exists, even if a relationship between two powers is unequal.
51. *Id.* at 62, where Grotius tells us that "confederated states" still retain their individual sovereignty to make and execute laws. Grotius at 110-4 says that disturbing a man in actual possession of territory is "repugnant to the general feelings of mankind."
retained its sovereignty as long as it continued to govern itself.\textsuperscript{53} Under Vattel's view, a treaty would not restrict sovereignty, unless a weaker party affirmatively refrained from action that could not be allowed without the stronger party's consent.\textsuperscript{54} The Thirty Years' War strongly influenced both Grotius and Vattel. This war brought about a push to delineate borders for different groups of people who had distinct cultural fears and territorial interests.\textsuperscript{55}

Today, legal scholars define sovereignty to be irretrievably interwoven in the definition of a State that includes the internal, external and territorial attributes of both Grotius and Vattel, in essence giving the state the authority to act in its own best interest.\textsuperscript{56} But in none of the above definitions is sovereignty equated with property ownership. This discussion of sovereignty is significant to the Cree Nation, as will be discussed in Part III. The Canadian courts have never asserted that the Cree lacked political structure or self-governance prior to European occupation. Therefore, the modern definition of sovereignty may open the door to a strategic legal argument for the Cree to assert their right to consent.

As exploration gave rise to international commerce, sovereignty was served by another concept, that of the \textit{doctrine of discovery}.\textsuperscript{57} Discovery provided the necessary rhetoric for a nation to stake out own boundaries in unoccupied areas to resolve competing claims over territory.\textsuperscript{58} Under the law of nations, discovery doctrine provided that the discoverer of unoccupied vacant land held territorial sovereignty over the land as against subsequent arrivals.\textsuperscript{59} Discovery gave the first discoverer, as a prior occupant, the right to acquire territory as property, but it did not convey property or confer the presumption of ownership nor possession.\textsuperscript{60} Therefore, discovery doctrine acted as a template to obtain recognition of territorial sovereignty and receive equal respect from States in order to protect one's right to the territory. But the discovery of new lands did not always match the conceptual framework.

The Americas provide an apt example, because much of these territories were inhabited by native peoples. In order to make the doctrine of discovery fit the situation presented, a fiction developed in the law of nations that treated

\begin{itemize}
\item \textsuperscript{53} \textit{Id.} For Vattel, the basic principle of natural law was that men inherit a perfect independence and liberty which cannot be taken without their consent, and that man has an obligation to assist others as long as it does not harm themselves. \textit{Id.} at 51, 58.
\item \textsuperscript{54} \textit{Id.} at 58, 69.
\item \textsuperscript{55} See \textit{Janis}, supra note 48, at 152-5.
\item \textsuperscript{56} See \textit{Hannum}, supra note 47, at 15, citing 1933 Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 1. A definable territory of a permanent population under the effective control of a government that is recognized because of its ability to enter in relations with others. Yet the definition still rests on the territorial aspect of sovereignty which provides the base from which governments make rules and relate to others.
\item \textsuperscript{57} \textit{Mabo}, 66 A.L.R.J. at 418.
\item \textsuperscript{58} \textit{Id.;} see also \textit{Collis}, supra note 9, at 21-5.
\item \textsuperscript{59} \textit{Mabo}, 66 A.L.R.J. at 408-9, 418, in which the Supreme Court of Australia declared the doctrine of discovery an intolerable fiction under \textit{Johnson v. M'Intosh}, and one that cannot be applied in contemporary analysis.
\item \textsuperscript{60} \textit{Id.} at 418. If land was previously occupied, discovery provided that territorial sovereignty could only be obtained by conquest and surrender.
\end{itemize}
native inhabitants as sub-human. Through such treatment, the discoverers were entitled to view the lands as "vacant" (terra nullius). The rationale driving this assumption was that natives were governed by custom, rather than the rules of law, and therefore lacked organization to put land to proprietary use.

On the North American continent, discovery received a twist of American legal ingenuity in Johnson v. M'Intosh. In that case, Chief Justice Marshall applied the doctrine of discovery to justify the acquisition of territorial sovereignty based on native "savagery." Importantly, however, he also muddied the distinction between the international law definition of sovereignty and common law property concepts of ownership that gave "acquisition of title" to the discoverer. It is such failure to distinguish domestic property concepts from international law and sovereignty that underscores the confusion of the original meaning of discovery and rights to territorial acquisition associated with sovereignty today. Because of the view adopted, Johnson led to greater inequality in treatment regarding native people's ability to govern themselves; a collective identity cannot govern without a territorial base.

Writing for the majority, Chief Justice Marshall held that the federal government obtained exclusive title because the British Crown was the first to occupy on the North American continent.

According to every theory of property, the Indians have no individual rights to land; nor had they collectively, or in their national capacity . . . all the proprietary rights of civilized nations on this continent are founded on this principle . . .

61. Id. at 411.
62. Johnson, 21 U.S. (8 Wheat.) at 577; see also Francisco de Vitoria, De Indis et de Jure Belli Reflectiones V-1, pt. 5, 55, 130, 137-39 (Ny’s ed.). One of the first written documentation of discovery doctrine as it applied to Indians was contained in Spanish theologian and jurist de Vitoria’s, De Indis et de Jure Belli Reflectiones, where discovery allowed coming onto unoccupied lands as natives were considered heathens. But Vitoria also argued that natives were not to be deprived of their lands, even though they were outside the faith. While Spanish law prohibited the taking of natives land, it was still done in defiance of the law. Law of the Indies (Recopilacion de Leyes de los Indias), Bk. IV, tit. 12, law 9, as cited in F. Cohen, Spanish Origins of Indian Rights, 31 GEO. L.J. 12-3 n.33 (1942).
63. Johnson, 21 U.S. at 590. "But the tribes of Indians inhabiting this continent were fierce savages, whose occupations was war . . . to govern them as a distinct people, was impossible . . ." Johnson involved a land title dispute that arose when the appellant claimed title to land that had been devised from his father. The father had purchased the land from the Piankeshaw Indian tribe in Virginia. The federal government claimed title because of a grant by the same tribe after the original conveyance to appellant’s father. Id. at 549, 558, 563. The Piankeshaw tribe was not a party to the action and as such there was no mechanism to directly challenge the assumptions and cultural stereotypes. However Johnson has come to mean what it says, namely that natives are incapable of owning land because they are savages. At the same time, Johnson guaranteed autonomy, and combined with the cultural stereotype, set the stage for an unequal, yet protective guardianship between the federal government and Indian nations.
64. Id. at 567. "Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives . . ." The obvious assumption was that native people were too uncivilized to obtain benefits of international law.
66. Johnson, 21 U.S. at 570.
On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves as much of it as they could respectively acquire.  

This principle was that discovery gave title to the government . . . [which] gave to the nation making the discovery the sole right of acquiring the soil from the natives.

Citing the law of nations, Marshall simply deprived Native Americans of the essential elements of sovereignty under any modern definition yet the "original inhabitants" were still recognized as unique and [A]dmitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

So, in North American law, Johnson has come to mean that not only territory, but land title, is acquired by discovery, although the original occupants retain a preferential right to occupy the land. By asserting that international law supported discovery as the basis of land title, and associating property concepts with territorial sovereignty, Marshall tailored the law of nations to fit the domestic circumstances he sought to address, namely, the numerous conflicts between Indians and the emerging society over territory. This does not change the fact that in doing so, Marshall misapplied the law. As a result, Johnson has left native peoples both in the United States of America and Canada without the power to alienate land, and in Canada, without the inherent ability to govern themselves. This misapplication of the law at the same time set the stage for the unequal and preferential status of beneficial occupancy that remains in both States today.

Marshall’s comments characterizing the Indians as “fierce savages” championed cultural inequality. His characterization resulted in institutional guardianship in the form of reservations, allegedly in order to protect Indian uniqueness and their ability to exercise their rights as independent nations.

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67.  Id. at 572.
68.  Id. at 573.
69.  Id. at 567, n. c citing Marten’s Law of Nations, 67, 69.
71.  Johnson, 21 U.S. at 574.
73.  One clue to the selective conversion of domestic property law into the law of nations is found in the lack of acknowledgment by Marshall that "possession," another common law property concept as an indicia of ownership to the natives, was never separately discussed. e.g., Calder, 1 S.C.R. at 368; "Posession is of itself at common law proof of ownership." Had Marshall done so, the discoverer's claims to title of property would have substantially diminished because possession gives superior rights over users, as only against true owners.
74.  See, e.g., Morton, 417 U.S. at 535; see also Calder, 1 S.C.R. at 313.
75.  Johnson, 21 U.S. at 569. "They are of that class who are said by jurists not to be citizens, but perpetual inhabitants with diminutive rights."
Johnson, in fact, called attention to Native Americans’ rights while also emphasizing their dependency.  

Because Canada has adopted Johnson, the preferential and unequal status created by its rationale will work its way into the discussion of Canada’s obligation to the Cree Nation in light of Quebec’s pronouncements. The maintenance of their status will also be driven by inappropriate reliance on property law. Whether a legal argument is framed in prior occupancy or first sovereignty, however, helps define the obligation.

Eight years after Johnson, in Cherokee Nation v. The State of Georgia, the U.S. Supreme Court denied original jurisdiction to the Cherokee Nation as a foreign state because it considered the Cherokee Nation to be within U.S. territory. Therefore the Cherokee could not invoke original jurisdiction of the Supreme Court to challenge Georgia’s efforts to annex Cherokee territory.

Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cessions to our government; it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Marshall noted that the Cherokee had power to place themselves under the protection of a more powerful government in language that is reminiscent of Grotius and Vattel. On one hand, while the Cherokee possess the ability to govern themselves, they remain dependent nations, but not necessarily subjugated to the point where they have lost all self-destiny. In essence, Indians will be treated as the dominant culture is treated, or dissimilarly, as the dominant society elects. The significance of this statement becomes more apparent one year later in Worcester v. Georgia, where the Supreme Court recognized inherent self-government of the Cherokee. The United States took no action, however, to enforce the Supreme Court judgment.

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77. Cherokee Nation v. Georgia, 30 U.S. 1, 20 (1831). Some of those laws included extinguishing title to land guaranteed by the federal government; subjecting Cherokee people to Georgia laws and repealing Cherokee laws; exercising control over Cherokee industry, and making it a criminal offense for a non-Cherokee to live in Cherokee territory, even with permission from the Cherokee Nation. The laws also provided that an Indian within the Cherokee Nation would not be a competent witness in any court in the state of Georgia where a white person is a party. See also Burke, supra note 72, at 512. The prohibitions were enacted only after gold was discovered in Cherokee Nation territory. Id.
78. Cherokee Nation, 30 U.S. at 17.
80. Cherokee Nation, 30 U.S. at 1. “The Cherokee are a state. They have been uniformly treated as a state since settlement of our country.”
81. Worcester, 31 U.S. at 555. Only one day after Marshall issued his opinion in Cherokee Nation, the state of Georgia arrested two missionaries for violating Georgia’s prohibition of living on the Cherokee reservation without a “passport”. Because one of the missionaries worked for the
The U.S. Supreme Court held in *Worcester* that Georgia could not make laws that interfered with treaty obligations between the United States and the Cherokee Nation because the United States was required to protect Cherokee Nation cultural identity and survival.

This treaty, thus explicitly recognizing the national character of the Cherokees, and their right to self-government; thus guarantying their lands; assuming the duty of protection, and of course pledging the faith of the United States for that protection; has been frequently renewed and is now in full force.  

While Indians are under the protection of the United States, "and no other power," the treaty did not imply "destruction of the protected." Georgia had no right to ignore Indian title nor interfere with internal Indian affairs, as the Indian Nations [had] always been considered as distinct, independent political communities, retaining their natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from the intercourse with any European potentate than the first discoverer of the coast of the particular region claimed . . . the words "treaty" and "nation" are words of our own language, selected in our own diplomatic and legislative proceedings, by ourselves, having such a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied all in the same sense.

Marshall's opinion in *Worcester* presents a clear departure from *Johnson* to the extent that it admits that Indian tribes did possess the ability to exercise political governance as recognized nations (but not foreign states). *Worcester* does not reject discovery doctrine. Nor does it correct the misapplication of discovery with acquisition and title. Nevertheless, the decision preserves the possibility of challenging the assumption on which the discovery doctrine rested, i.e., that land inhabited by indigenous cultures was presumed vacant because native peoples lacked political organization. Despite *Worcester* and the influence of American law, Canada stubbornly clings to discovery under *Johnson*.

Nevertheless, the Marshall trilogy represents a political and legal identity for Native Americans in which self-government presupposes a land base. In addition, the power of inherent self-governance cannot be disentangled from the obligation of the federal government to provide Native Americans with a land base to protect their existence as a distinct people. But, it also means that Native Americans remain elevated to some form of preferential treatment through a guaranteed land base or self-governance, all originally predicated on discovery and prior occupation. Yet any preference remains an unconscious perversion of

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82. *Id.* at 556.
83. *Id.* at 552-4.
84. *Id.* at 559-60.
85. *Id.*
86. See *Calder*, 1 S.C.R. at 383-84 (dissent).
equality through a trusteeship type of relationship because a trusteeship, like a guardianship, presumes one party is dependent and inherently unequal.\textsuperscript{87}

And at the same time, internal sovereign recognition has met with great resistance by the politically dominant society which insists that Indians be subject to the same principles of equality as other minorities.\textsuperscript{88} While limited self-governance for Native Americans remains tenuously intact,\textsuperscript{89} in Canada, self-governance as an inherent right has never legally existed.\textsuperscript{90}

2. Canada and First Nation Relationship: Delegated Government

Unlike America, Canada has not legally recognized inherent self-governance of its native (First Nation) peoples.\textsuperscript{91} Rather, self-governance in Canada is contingent, delegated by the Canadian Constitution and provincial lawmaking.\textsuperscript{92} Canada, with its pervasive influence of British law, assumes sovereign authority filters down from the Crown to the citizenry.\textsuperscript{93} At the same time, the Cree argument for inherent self-governance is predicated on the fact that self-governance is neither delegated nor confederated. The Cree assert that inherent self-government arises out of the very existence of the Band itself, based on a long-standing internal structure of political organization. The internal structure is tacitly recognized by "consent" within the JBNQA.\textsuperscript{94}

\textsuperscript{87} While Chief Justice Marshall never used the word "trusteeship" in Johnson, Cherokee Nation or Worcester for the protection of tribes, it appears from numerous references in Johnson, 21 U.S. at 543, 574, 584, 587. Marshall appeared to borrow the 16th century Spanish concepts in regards to equality and protection of Indian lands, including "guardianship." See F. Cohen, \textit{Original Indian Title}, 32 MINN. L. REV. 28, 41-5 (1947). In any land grants or disputes involving Indians, the King’s attorneys were required to appear on behalf of Indians, and if the Crown was a party to the dispute a special master was to represent the Indians. Cohen suggests that Marshall’s treatment of the Indians was influenced by Spanish theologian and jurist Francisco de Vitoria who argued that “men inhere rights as men, not by reason of their race, creed or color, but by reason of their humanity.” This doctrine of Vitoria was provided with papal support in 1537 by the Bull \textit{Sublimis Deus}, in which Pope Paul III declared that “the said Indians and all other people... are by no means to be deprived of their liberty or possession of their property, even though they be outside the faith...”


\textsuperscript{89} Mancari, 417 U.S. at 545.

\textsuperscript{90} See, \textit{e.g.}, Queen v. Syliboy, 1 D.L.R. 307, 313 (1929).


\textsuperscript{92} Under the \textit{CAN. CONST.} (Constitution Act, 1867), all jurisdiction in Canada is divided between the federal and provincial governments. \textit{CAN. CONST.} (Constitution Act, 1867), §§91-92 amended 1982. Nothing is said in the Constitution or federal lawmaking regarding the recognition of aboriginal lawmaking.

\textsuperscript{93} B. Slattery, \textit{First Nations and the Constitution}, 71 CAN. BAR REV. 261, 264 (1992); see also Syliboy, 1 D.L.R. at 313. “But the Indians were never regarded as an independent power.”

\textsuperscript{94} Slattery, \textit{supra} note 93, at 262. “In pre-European times, the indigenous peoples of Canada were sovereign and independent nations controlling their own territories and ruling themselves under their own laws.” \textit{See SOVEREIGN INJUSTICE, supra} note 2, at 65. In \textit{The Queen v. Sioui}, 1 S.C.R. 1025, 1053 (1990) Lamer, J. stated: “The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated into treaties of alliance or neutrality. This clearly indicates that the Indian nations were regarded in their relations with European nations which occupied North America as independent nations.”
For over a hundred and fifty years, Canadian law followed Johnson, and viewed discovery as giving title to the Crown by the nature of the Crown's authority (internal sovereignty), but not territorial sovereignty, the alleged prong for the reasoning in Johnson.95 Canadian legislative law has never expressed that native peoples were uncivilized, nor has common law ever held that the doctrine of discovery extinguishes ultimate title because of lack of native political structure.96 This suggests that native Canadian governance existed even before British sovereignty, and thus differs from the Johnson doctrine.97 Canadian cases reflect that, because the Crown claimed it was the ultimate authority, the Crown held exclusive title under the Johnson discovery doctrine as a matter of law.98

Non-recognition of inherent self-governance began with the de facto trusteeship of The Royal Proclamation of 1763. This Proclamation provided that all territory lying between the present territory of Ontario and Saskatchewan was not subject to sale to any private person by the Indians, and that only the Crown could purchase any land reserved to it "under [its] Sovereignty, Protection, and Dominion, for the use of the said Indians . . ."99 Similar to their counterparts in America, Native Canadians were deprived of independent ownership rights. Unlike the American approach, however, there was no recognition of inherent self-government to protect culture.100

The Royal Proclamation of 1763 does not contain an explicit renunciation of self-government by native peoples in the Canadian territory.101 The Royal Proclamation of 1763, however, does provide a description of the relationship between the Crown and Native Canadians based on the common law of discovery. It is also consistent with Johnson in providing that a change in sovereignty does not affect the presumptive status of possession and occupancy.102 The Royal Proclamation of 1763 also guarantees that native land can only be acquired by treaty contract.103

95. See St. Catherine's Milling and Lumber v. The Queen, XIII S.C. 577, 649 (1887); see also R. BARTLETT, INDIAN RESERVES AND ABORIGINAL LANDS IN CANADA 7-18 (1990).
96. See Calder, 1 S.C.R. at 383, where Hall J. adopted the view of Chief Justice Marshall in Worcester: "America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws."
97. Calder, 1 S.C.R. at 346-50; see also Slattery, supra note 93, at 264.
98. Calder, 1 S.C.R. at 314, 320, 324.
100. Id. The Royal Proclamation serves as the first attempt to centralize preferential treatment and institutional dependency for the native culture. However, the precise geographical application of The Royal Proclamation is unclear because it was written at a time when there was concern about the expansion of proprietary interests south and west of the Proclamation line, which meant south of Ontario and southern Quebec, which did not include the northern reaches to the Cree Nation until the Boundaries Extension Act of 1912. The purpose of the Royal Proclamation was to interpose the Crown between Indians and individual purchasers because "great Frauds and Abuses have been committed to purchasing Land of the Indians, to the great Prejudice of our interest and great dissatisfaction of the Indians . . . ".
101. Id.
102. See Johnson, 21 U.S. at 572.
103. See Boldt, supra note 99, at 358.
When Canada federalized in 1867, the Constitution created jurisdiction "over Indians, and the lands reserved for Indians," and enacted legislation for the native population in the form of the Indian Act. The Indian Act legalized institutional guardianship by pushing for assimilation of native Canadians, under the rationale of equality among all citizens. The Indian Act thus affirmed that under joint provincial and federal administration, aboriginals had no legal rights of self-government, though they retained special rights pertaining to protected territorial lands. Some commentators have described the Indian Act as heavy-handed.

The Indian Act gave broad discretion to the federal governments to manage surrendered land by creating municipal "Indian Bands." Each Band had an average size of 500 members, each with contingent governments exercising limited powers, and subject to the Minister's power to "disapprove bylaws." By limiting the size of the Bands, the effect was to break down the native community structure, and dilute their cohesive political power and control.

In 1888, the Canadian courts gave full support to the Parliament's power to assume responsibility for the care of natives. The courts also had jurisdiction to delineate the scope of the aboriginal property rights. From that period until the mid-1970's, as a matter of public policy, Canada refused to recognize native title or self-government derived from historic occupation and possession of lands prior to British and Canadian rule.

In 1973, the Canadian Supreme Court decided Calder v. Attorney-General of British Columbia. This decision stirred the conflict for competing lands, by recognizing that the only way for natives to surrender sovereignty was by treaty contract. In Calder, the Nishga Tribal Council sued the province of British

104. An Act Providing For the Organization of the Department of the Secretary of State of Canada for the Management of the Indians and Ordinance Lands, S.C. 1868, ch. 42, § 88 (1876) (Can.) [hereinafter Indian Act]. Under the Indian Act, the Department of Indian Affairs can exercise complete control and authority over Indian reserves providing services that are generally administered by the Provinces including health care, welfare, education, law enforcement, housing, employment and agriculture. In essence, § 88 of the Indian Act inherently obliterates any form of native self-government; see also CAN. CONST. (Constitution Act, 1867), § 91(24), which also provided that Parliament could make laws to govern Canada, which did not come under the powers of the provincial legislatures, i.e., could enter into treaties with respect to native land.

105. The Statement of the Government of Canada on Indian Policy (1969) as cited in Queen v. Sparrow, 1 S.C.R. at 1103, contained the assertion that "aboriginal claims to land... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian Community." (emphasis added).

106. See, e.g., R. Bartlett, The Indian Act of Canada, 27 Buff. L. Rev. 581, 603 (1978). "The provisions of the Indian Act clearly indicate the managerial prerogative of the Minister of Indian Affairs over reserves and band resources. The denial of self-government inflicted by such provisions is compounded by the denial of legal remedy." (emphasis author's).

107. Id.

108. Id.


111. Calder, 1 S.C.R. at 316, 345 (dissent).
Columbia to obtain a declaratory judgment that British Columbia never extinguished native title lawfully by treaty. The Nishga sought this remedy in response to land grants made by British Columbia for mining, petroleum, and forestry development in land which the Nishga claimed had been used since "time immemorial."112 Their prior occupation claim raised by the Nishga argued that territory designated by the British Columbian Governor from 1858-63 to exercise "absolute territorial sovereignty" over lands Indians possessed and occupied, violated the Royal Proclamation of 1763.113 The Nishga lost at trial and appealed, claiming extinguishment of title was not part of the law of Canada or British Columbia.114

On appeal, the question of fact regarding Nishga prior occupation existed. Nevertheless, the Canadian Supreme Court held, in an equally divided opinion, that the Nishga did not fall under the protection of the Royal Proclamation of 1763, since British Columbia was not part of the geographic delineation of the Royal Proclamation Act of 1763.115 Upholding the lower court's verdict, three justices of the Supreme Court wrote that because British Columbia was settled before the Royal Proclamation of 1763, and the British Crown had later alienated Nishga property in 1870 for the protection of natives, the assertion of prior occupation did not follow, as it was "inconsistent with native title."116 Therefore, native title was extinguished by the discovery doctrine under Johnson.117

The dissenting opinions of three justices argued that common law jurisprudence affirmed recognition of aboriginal rights to land. They asserted that it was only until absolute title was conclusively surrendered that aboriginal rights were extinguished, as native title was presumed.118 The dissent predicated its reasoning on the observation that history had demonstrated that the doctrine of discovery followed in Johnson was wrong.119

In summary, although the Nishga lost, half the Court supported their claim to retain ownership of their traditional territory as a matter of sovereignty.120 It is also clear that the Canadian Supreme Court in Calder did not rule that native title had been absolutely extinguished in the absence of a clear treaty.121 Nor

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112. Id. at 317; cf. Worcester, 31 U.C. at 559.
113. Calder, 1 S.C.R. at 314, 333.
114. Id. at 318-9.
115. Id. at 328-9.
116. Id. at 344.
117. Id. at 325.
118. Id. at 352-3.
119. Id. at 346. "The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of the present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and the culture of our original people was rudimentary and incomplete and when they thought to be wholly without cohesion, laws of culture, in effect a sub-human species." This pronouncement is critical to understanding that legal treatment given by the Marshall court in Johnson was neither factually nor legally based, and would not be tolerated in Canada to perpetuate a fiction regarding the implications to common law aboriginal rights. See, e.g., Mabo, 66 A.L.R.J. at 409.
120. Calder, 1 S.C.R. at 317.
121. Id. at 335.
did the Court say anything in *Calder* about native self-governance as a common law aboriginal right.

Two months after *Calder*, the provincial Supreme Court of the Northwest Territories ruled that the Dene Indians had established a prima facie case for aboriginal rights founded on prior occupation, based on evidence of the existence of an organized societal structure.\(^{122}\) This first legal recognition of self-government by a provincial high court had immediate and substantial impact in other provinces, including Quebec.\(^{123}\) Viewed in conjunction with the equally divided opinion in *Calder*, it appears that the federal and provincial governments were re-thinking the scope of the doctrinal application of *Johnson* within Canada.\(^ {124}\)

As the doctrinal application of *Johnson* evolved, the Cree conflict with Canada and Quebec continued. In the early 1970's, without Cree consent, Quebec and several large, hydro-industrial corporations undertook construction of a $6 billion hydro-electric project in northern Quebec on commonly recognized Cree land. This action commenced in joint cooperation with Canada.\(^ {125}\) The construction would potentially create an estimated 100,000 jobs to supply additional energy to Quebec, and for export to the northeastern United States,\(^ {126}\) yet there was no indication that Cree land possession, nor occupation, had ever been extinguished.\(^ {127}\) Quebec's territorial expansion to include the Cree Nation had not occurred until 1912 with the Quebec Boundaries Extension Act.\(^ {128}\) Therefore, even under the Royal Proclamation of 1763, title was not clearly extinguished.\(^ {129}\)

The Cree sought an injunction against the governments of Canada and Quebec, anticipating destruction of their occupied lands due to inevitable flooding from the hydro-electric project. The injunction argued that the development constituted a breach of trust.\(^ {130}\) Quebec argued throughout the hearing that the Cree had no native rights, even though there was no positive surrender of land.\(^ {131}\) Under the *Calder* plurality, extinguishment was not required, since there was no common right recognition of First Nation land. Nevertheless, the question of right to self-governance associated with the land remained uncertain, given both *Calder*'s strong dissent, and the judicial recognition of Dene self-government. As a result, the Superior Court decided to order a halt to the James Bay hydro-electric project on the basis of unextinguished aboriginal title.\(^ {132}\)

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122. In re Paulette and Register of Titles (No. 2) 42 D.L.R. (3d) 8, 39, 40 (1974).
124. Id.
126. Id. at 148.
127. Id. at 146.
128. Id. at 145.
129. Id.
130. Id. at 149.
131. Id. at 148.
In light of *Dene* and *Calder*, the Cree, Canada, and Quebec entered into the JBNQA to extinguish native title in exchange for more self-governance control in areas occupied by the Cree Nation. The federal government of Canada acknowledged it had breached its fiduciary obligations to the Cree Nation. Ultimately, the government reached a settlement with the Cree, including greater rights for self-governance.

Nine years after the JBNQA treaty, the Canadian Constitution Act of 1982 (Act of 1982) was enacted. The Act of 1982 provided that "existing aboriginal and treaty rights [are to be] recognized and affirmed." Under Canadian law, a land settlement agreement is considered a treaty, and therefore is subject to the protection of section 35(1) of the Act of 1982. While it is clear that section 35(1) of the Act of 1982 represents a struggle in the political forum for constitutional recognition of native Canadian rights, under an analysis of *Guerin v. The Queen*, decided two years after the constitutional enactment, legal protection of section 35(1) guarantees exists. *Guerin* imposed a legal fiduciary responsibility on Canada to protect the aboriginal culture from federal or provincial legislative and administrative behavior that would interfere with native common law rights. When a fiduciary responsibility is legal, it can be enforced in Court as a private right of action by an aggrieved party, rather than subjected to the political sphere for resolution.

In *Guerin*, the Musqueam Band surrendered reserve land to the Crown, which in turn leased the land to a golf club. The Crown's agent failed to inform the Band that it had leased the land in its unimproved condition, which brought less money than the Crown could have made for the Indians in its actual improved condition. The Band had not agreed to these terms when it consented to cede the lands for lease. When the Band sued Canada, the government claimed it was immune from suit and damages since the surrender and lease constituted a "political trust," and therefore was not subject to legal action.
The Supreme Court of Canada did not accept the Crown’s argument, holding that the federal government owed a legal fiduciary responsibility, as well as a political trust because of the unique (sui generis) historical relationship between the natives and the Crown. That is, Canada has a legally enforceable, non-adversarial fiduciary duty to aboriginal peoples. The duty thus characterized is to be interpreted in contemporary recognition and affirm the rights defined within the historic relationship under section 35(1).

The definition of native rights and legal responsibility in Guerin was further refined in 1990. In Sparrow v. The Queen, the Supreme Court of Canada held that “activities connected to cultural and physical survival constitute native rights” to be recognized and affirmed if they existed prior to 1982, even if conferred by treaty and not extinguished by plain (explicit) intent by the sovereign. Sparrow implemented a two-part test, requiring any government act to be subject to a strict standard of justification, and that even if justified, it must still be construed in broad and favorable terms to the considerations of First Nation people.

In Sparrow the appellant, a member of the Musqueam Band, was criminally charged with violating the Fisheries Act by using a drift net longer than one allowed under that Act. The defendant-appellant fished in traditional waters within the territory of British Columbia. Though exclusive title was ceded to the Crown, the Musqueam Band retained the right to use the waters for traditional practices.

The Fisheries Act was enacted prior to section 35(1) of the Constitution Act of 1982. The defendant admitted that he violated the Act, but claimed a privilege under Section 35(1) of the Constitution Act of 1982. The federal government claimed that while the defendant once had a historical right to fish for his community livelihood in the traditional manner, the Fisheries Act extinguished that right.

In rejecting the government’s argument, the High Court held that government regulations or actions cannot be determinative of the content and scope of existing aboriginal rights under the Act of 1982. The Court decided that section 35(1) is to be construed broadly and flexibly in favor of native peoples, unless the Constitution Act of 1982 clearly and explicitly extinguishes a right. Even if
the Act is determined to extinguish a right, it may only do so after considering First Nation interests.\textsuperscript{150}

To the \textit{Sparrow} court, even if a right is controlled in great detail, it does not mean the right is extinguished.\textsuperscript{151} \textit{Sparrow} then implicitly rejects the \textit{Calder} plurality holding that common law discovery extinguished native rights. Therefore, \textit{Calder} should no longer be interpreted as holding that the common law does not recognize native rights. \textit{Sparrow} elevates aboriginal and treaty rights to special constitutional protection and scrutiny. Additionally, \textit{Sparrow} serves as an important step beyond the fiction of discovery, since the Court recognized that sovereignty may no longer be within the exclusive control of the dominant political cultures. \textit{Sparrow} does indicate that native Canadians did in fact retain some political control and territory before Europeans arrived and is consistent with the dissent in \textit{Calder}.\textsuperscript{152} Even while aboriginal rights had been historically ignored, the time for legal recognition of evolving traditional practices therefore comes toward the native population “based on respect for their right to occupy their traditional lands.”\textsuperscript{153} Thus, the intent of section 35(1) of the Constitution Act is to restrain exercise of the Crown’s sovereign power by liberally construing the fiduciary responsibility to preserve First Nation traditional practices.\textsuperscript{154} “Our history has shown, unfortunately all too well, that Canada’s aboriginal peoples are justified in worrying about government objectives which may be superficially neutral, but do constitute de facto threats to the existence of aboriginal rights and interests.”\textsuperscript{155}

It is clear from \textit{Sparrow}’s interpretation of section 35(1), that any action, whether legislative or executive, even if taken for independent and neutral reasons, that interferes with native aboriginal rights implicated by common law or treaty, can only be justified if the government shows that it has given priority to section 35(1) in balancing those native interests.\textsuperscript{156} Considering this interpretation along with the fiduciary responsibility described in \textit{Guerin}, it follows that the elevated scrutiny of the \textit{Sparrow} standard requires the consultation of the natives\textsuperscript{157} in affairs that affect recognition of their rights. The final determina-

\begin{footnotesize}
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\item \textsuperscript{150} \textit{Id.} at 1109.
\item \textsuperscript{151} \textit{Id.} at 1109-10.
\item \textsuperscript{152} \textit{Id.} at 1109. Because the Musqueam historically fished for cultural and physical survival, the scope of that right had to be exercised in a contemporary manner with Constitutional priority given to natives under 35(1). “Historical policy on part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but it is also incapable of, in itself, delineating that right . . . the government can regulate the exercise of the right, but such regulation must be in keeping with s. 35(1).” \textit{Id.} at 1101.
\item \textsuperscript{153} \textit{Id.} at 1091-93, 1103.
\item \textsuperscript{154} \textit{Id.} at 1103-09.
\item \textsuperscript{155} \textit{Id.} at 1110.
\item \textsuperscript{156} \textit{Id.} at 1118. Though \textit{Sparrow} indicates that native rights are not absolute, any governmental action will be subject a strict standard of justification to secure native rights and prevent unwarranted intrusion of guarantees created by common law or treaty. \textit{Id.} at 1111, 1112. “[I]t is possible, and, indeed crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.”
\item \textsuperscript{157} \textit{Id.} at 1080, 1119.
\end{enumerate}
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tion of the balance should be weighted toward native priority. But, as in Guerin, because the Band must be consulted, the substantive form of the hierarchical and unequal relationship between Native Bands and the governments seemingly continues. Nevertheless, the dominant political society’s leverage has been limited.

As section 35(1) of the 1982 Constitution Act suggests, Canada has strengthened its commitment to preferential treatment based on indigenous difference, elevating and affirming “existing aboriginal and treaty rights” through legislative and judicial processes. At the same time, Sparrow seems to suggest maintaining a system that recognizes traditional differences as a justification for preferential treatment to protect native culture. Such a system would rely on Guerin’s fiduciary responsibility doctrine, implying that Canadian governments must take care of native Canadians.

Since Calder, the Canadian Government has moved toward being more supportive of native autonomy by allowing natives to have more say in their political organization and cultural livelihood. The government has also placed limitations on the scope of Native Canadian voice, based on the Johnson assumption that prior occupation justifies preferential treatment. And while Sparrow surely limits the application of Johnson and discovery, Johnson has still not been wholly discarded, remaining a repository of questionable legal

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158. See generally St. Catherines Milling and Lumber Co. v. The Queen, XIII S.C. 577 (1887). It was not until 65 years after Johnson that the Privy Council recognized that Indian territory and the nature of Indian rights derived from The Royal Proclamation Act of 1763, and were a question of fact. In that time substantial documentation had been developed regarding native culture governance, once thought to have been non-existent because they were regarded as a subhuman species without cohesion, culture or laws. See Calder, 1 S.C.R. at 346. Cf. Id. at 328 (dissent), where British law recognized that Indians were “organized in societies occupying areas as their forefathers had done for years.”

159. Guerin v. The Queen, 2 S.C.R. 335, 389 (1984); see also Queen v. Sparrow, 1 S.C.R. at 1119.

160. For example, Canada has encouraged self-government settlement claims in response to allegations of systematic discrimination unrelated to land dispute matters. Craig Turner, For Canada’s Jailed Indians, Justice is Going Traditional, S.F. CHRON., May 14, 1996, at A10. Those agreements contain reservation clauses as to the scope of self-government and limit taxing power, subject matter jurisdiction in regard to family law matters, criminal prosecutions, and limit decision making in forms of punishment among its people. See, e.g., T. Issac, The Nunavut Agreement-in-Principle and Section 35 of the Constitution Act, 1982, 21 MAN. L.J. 390 (1992). Some of the agreements provide for jurisdictional cooperation as to which jurisdiction will have authority when there is a conflict between the governments. But see, Hogg & Turpel, supra note 88, at 204. For example, clause 13.5 of the Yukon First Nation Self-Government Agreement provides that laws of general application will apply to the First Nation, citizens and First Nation Land. If there is an inconsistency between the law of the First Nation and the Province, the law of the First Nation will be superior. However, the Yukon First Nation Self-Government Agreement says nothing regarding inconsistencies between the First Nation and the federal government. But all limit native Canadians because these agreements are not viewed as involving a dispute with land that does not constitute a treaty under Canadian law. “The present policy of the Government of Canada is to deny treaty status to self-government agreements.” “[A] self-government agreement that was part of a “land claims settlement” is protected under section 35(1) of the CAN. CONST. (CONSTITUTION ACT, 1982). This would mean any attempt by the Parliament, legislature or province to alter the terms of the self-government agreement would be struck down by the courts.” Simon v. The Queen, 2 S.C.R. 387, 398 (1985).
thinking to be revisited and applied at the whim of the politically dominant cultures until complete rejection of discovery and its link to prior occupation.

Nonetheless, *Sparrow* still alters the equation. While the JBNQA treaty grants the right of consent, the scope of that right may turn on *Sparrow*'s broad interpretation rule.¹⁶¹ In *Sparrow*, while the defendant was fishing illegally for a commercial purpose in traditional waters, it did not destroy the act's status as an aboriginal right. It was the fact that natives fished for cultural survival in traditional, yet surrendered waters that was being protected, not the traditional form it took, that in turn gave meaning to the present existence of the right.¹⁶² In essence, because of *Sparrow*, the historical scope of what was important as a traditional practice becomes important to protect and preserve native culture in order to define the right contemporaneously.¹⁶³ The significance of this distinction indicates that something more powerful than Band land claim issues is at stake.

For example, the power of governance through consent as a treaty right on the JBNQA agreement implicates control in protecting cultural survival.¹⁶⁴ In other words, it is difficult to separate the right from attachment to the land as *Sparrow* suggests, though it is the right being protected, and not necessarily the land. The requirement of "consent" evidences the essential right of power to self-govern. But how far does the right extend, and what are the limitations to consent within the context of self-governance? The significance of prior occupation and first sovereignty discussed in the next section play a role in determining the scope of "consent" within the JBNQA.

Neither Canadian nor Native sovereignty was directly challenged in *Sparrow*, thereby remaining unchallenged by section 35(1) of the Constitution Act. As a result, the scope of consent to any modification of an "existing treaty right" within the analysis of section 35(1) must be litigated as it relates to competing

¹⁶¹ Even if a right cannot be enforced under a treaty, the right to occupy and possess the land under *Johnson* still exists under the fiduciary obligation that arises from the *CAN. CONST. (CONSTITUTION ACT, 1867)*, §§ 91-92, and not just *Guerin*. *See Queen v. Sparrow*, 1 S.C.R. at 1086. Additionally, under *Sparrow* it appears consent or consultation could be interpreted as an element of an aboriginal common law self-governance right, and thus receive Constitutional protection, if there is some connection between the terms and the land it is exercised upon. After all, no Canadian Supreme Court opinion says that self-government is not a native right, and Dene even suggests otherwise. This writer would argue "consent" required by JBNQA section 2.15, or "consultation" required by *Guerin* and *Sparrow* are integral elements of self-government because each is essential to order one's affairs through reason. Therefore, the term of "consent" is not only a treaty right, but like "consultation," is evidence of the existence of an aboriginal right of self-governance, for without political structure, representation and organization one would not have the ability to consent, consult or bargain. This is relevant because, if the scope of JBNQA term of consent doesn't include exercising self-government, an alternative aboriginal rights argument could be made under *Sparrow*.

¹⁶² *Sparrow*, 1 S.C.R. at 1096. Perhaps traditional practice, as tribal organization, constitutes an aboriginal right of self-government that is as valuable as the land itself because the practices provide a mechanism to obtain, possess and occupy land and collective identity through political structure. After all, the right to possess and occupy the land will continue regardless of any agreement or treaty as a fiduciary responsibility of Canada under the *CAN. CONST. ACT (CONSTITUTION ACT, 1867)*.

¹⁶³ *Queen v. Sparrow*, 1 S.C.R. at 1091. "Further, an existing right cannot be read so as to incorporate the the specific manner in which it was regulated before 1982."

¹⁶⁴ *Id*. at 1094, 1100, where the court suggests rights extend to social and cultural activities.
jurisdictional and territorial claims among Canada, the Province of Quebec and the Cree Nation, if Quebec takes more definite steps toward sovereignty. However, the challenge may not arise from a territorial dispute, but instead from the right to choose the form of "self-governance" for the territory and its people. This right is implicated by the requirement of "consent" to any modification of the JBNQA that could result from Quebec's threats. The treaty requirement for "consent" constitutionally protects Cree involvement under section 35(1) of the Constitution Act.165 Interestingly, the court in Sparrow briefly mentions the JBNQA as an example of a treaty to be protected by section 35(1) of the Constitution Act.166 Therefore, there is no reason to suspect that the treaty would be analyzed any differently than an aboriginal right under Sparrow, given that both treaties and aboriginal rights fall within the same clause of section 35(1).167

As a result, defining and understanding the implication of prior occupation becomes crucial to determining the scope of the treaty right. Such definition of the doctrine is also important in deciding whether the Cree should be allowed to participate in discussions with Canada and Quebec. Finally, understanding the role the doctrine of prior occupation plays links the treaty right of consent to the ability of self-governance that is implicated by the treaty term.

Before examining the relationship of Constitution Act section 35(1) to the JBNQA treaty analysis, a discussion of why prior occupation masks a more powerful argument is necessary to substantiate a claim for Cree Nation involvement in the discussions with Canada and Quebec.

PART III

Prior Occupation Doctrine and its Relationship to Equality

As Johnson and Calder indicate, the call by native peoples for self-govern-ment is linked to a claim of a land base which rests on the argument that prior to European discovery, native peoples occupied sections of the North American continent.168

As Worcester, Calder and Sparrow suggest, those occupied lands were originally inhabited by cultures with existing internal political mechanisms.169 The growing body of law of preferentially distinct treatment to protect native cultures, whether based on inherent or delegated authority, still prevents Natives from either holding title or exercising self-governance.170

165. Id. at 1093.
166. Id. at 1103-4.
167. Though the JBNQA as a written treaty wouldn't necessarily seem to fall directly under a common law aboriginal rights analysis within section 35(1); it doesn't preclude an aboriginal rights analysis that could be implicated if the written treaty term of "consent" in the JBNQA is interpreted to be an integral element of self-governance or other common law aboriginal right.
168. Johnson, 21 U.S. at 563; Calder, 1 S.C.R. at 401 (dissent).
169. Calder, 1 S.C.R. at 346 (dissent); Queen v. Sparrow, 1 S.C.R. at 1099, 1100 (1990); see also Worcester, 31 U.S. at 540.
170. In each instance of preference, the dominant government attempts to meet obligations through judicial and legislative protection by different forms of land protection and limited self-government.
At the same time, preferential acts for Indians appear as elevated favoritism which contravenes presumptive principles of equal treatment grounded in the political cultures of North America. Native people see the push toward "equality" by the dominant cultures as a disguised means of assimilation and dissolution of culture. Native people resist in order to preserve culture and protect the traditional ways of their collective identity, framed in terms of separate footing based on prior occupancy. In other words, why should native cultures give up the preferential status that seemingly gives them a foot up on other minorities, even while it leaves them exposed to pressure from the dominant political cultures?

On the other hand, opposition to differential preferential treatment based on prior occupancy is predicated on the principle of equality, which asks: Why should native people receive preferential treatment because they lived in a particular area first? What is the relevance of prior occupation to bestowing preferential treatment?

Felix Cohen, the late American Indian scholar, suggested that preferential legal treatment for Natives is based on political arrangement, and is not similar to the traditional treatment given to other discriminated classes associated with equal protection as race, gender, alienage, or ethnicity. However, this response does not address the concerns of critics of indigenous preferential treatment. Critics assert that prior occupation is merely a descriptive difference that creates a political classification based on considerations irrelevant to equal treatment. Why should the first people who lived in North America have greater political or preferential protection than those who arrived generations later? Isn’t drawing a distinction on prior occupation an arbitrary classification that has no relationship to political rights and responsibilities in the context of a society built upon equality? These questions deserve attention, and it is here where the argument predicated on prior occupancy alone begins to break down. Additionally, it serves as a starting point to understand that something more powerful rests behind prior occupation.

Behind Johnson, Worcester, Calder, Guerin and Sparrow, the repeated associations with prior occupation mask other native grievances made in conjunction with prior occupation: first, indigenous people did not voluntarily consent to a cultural or political structure imposed by an encroaching dominant society, and second, natives were so egregiously treated through "discovery" by colonization, that preferential treatment is a political attempt to right the wrong through

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172. See, e.g., Queen v. Sparrow, 1 S.C.R. at 1100; see, e.g., Morton, 417 U.S. at 535.
173. See, e.g., KENNETH KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 211 (1989). "People who are disfavored by the society's present norms will seek to exchange them for new norms that will rank them higher."
175. Viera, supra note 16, at 1578.
176. See, e.g., ANTONY FLEw, EQUALITY IN LIBERTY AND JUSTICe 142-43 (1989). "The great principle of equality before the law ... means ... the law ought to take into account only whatever differences that are properly relevant."
legal means. Assuming the factual accuracy of these arguments, the logic of each in the context of prior occupation provides justification for preferential treatment, rather than an explanation of why it exists.

Peter Macklem, a Native Canadian scholar, raises the argument that while Native American and First Nation Canadians did not consent to the political structure imposed upon them, they seemingly behaved identically to the immigrants who were subject to the laws and political structure of the emerging dominant society. Some proponents of native self-governance counter that many immigrants voluntarily came to the North American continent thereby waiving any objection to the form of governance and consenting to the political structure operating on the continent. While this may be true in some cases, it fails to consider the Africans forced to come to North America to serve as slaves.

Racist comments and rhetoric ("If you don't like it, why don't you get on the boat and go back home?") suggest that the attitudes used to justify depriving indigenous cultures of traditional territories and self-governance are to an extent racially motivated. Regardless, African Americans are not provided with a protected land base nor given the right to govern themselves on this continent even though they never consented to a ready made legal and political status. So why should native peoples? One can make a very solid argument that prior occupancy, when used as a justification to base preferential treatment for self-governance or beneficial use of land is logically underinclusive when it is juxtaposed with the consideration of others' non-Native, non-consensual experience.

Proponents of natives' self-governance also point to the horrendous treatment resulting from the wrongful application of discovery doctrine. Examples of this include checkerboard jurisdictions and government mandated sub-units of discrete size and undesirable location which tear a culture from its roots. Proponents of prior occupancy based preferential treatment believe the solution

177. Macklem, supra note 174, at 1330.
178. Id.
179. Id.
180. Viera, supra note 16, at 1581; see also T. Cramer, Superlawyers and Sami in Sweden, 55 Nor. J. Int'l L. 59 (1986); see also Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 569-70 (1823). "The statutes of Virginia, and of all other colonies, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection of the government."
181. See, e.g., Macklem, supra note 174, at 1332-33. Moreover, even considering those who did voluntarily undertake to make a new life on the North American continent, why should they be precluded from re-shaping the political landscape of a new home as a matter of their self-determination? Why should living somewhere first be a factor if it frustrates or counters the political will of the majority, which is a primary prong of democratic government?
182. See, e.g., Washington v. Confederated Bands and Tribes of the Yakima Indian Nation, 439 U.S. 463 (1979). Checkerboard jurisdiction occurs where, for example, a reservation provided to natives, under the authority of the natives, is re-configured to allow external governments to also exercise jurisdiction in select areas that contrasts sharply to the meaning of autonomy and self-governmental structure. Another example of checkerboard jurisdiction occurred under the Canadian Indian Act where the dominant governments broke up band communities to restricted sub-unit sizes of no more than 500 people per unit.
to right the past and present wrongs is to claim a land base as a homeland, and self-govern.\(^{183}\)

The justification of preferential political status based on the fact of horrendous treatment doesn't make sense, however, considering Asian Americans and Canadians were systematically deprived of real property during World War II even though they were "equal" citizens.\(^{184}\) Like the African Americans and Canadians, the Asian American and Canadians were not compensated with self-governance or a land base. Some suggest that paying reasonable compensation to native peoples for the taken lands would provide an expedient, politically correct solution. Predictably, native people argue that compensation fails to remedy the land and autonomy they are deprived of that is essential to their collective cultural survival — namely their own society — their own institutions — their own traditions, a status they consider valuable.\(^{185}\)

There is no question that the Indians' lack of consent to a dominant political culture is an important element to aid the justification of preferential treatment, especially as an ingredient of how prior occupation historically placed these cultures on unequal footing. Additionally, little debate remains concerning the egregious treatment of the Indians and the fact that they were pushed off their land despite prior occupancy. This lack of debate is evidenced in their lack of legal leverage to protect their occupancy and possession.\(^{186}\) But prior occupation as the sole justification for why there should be guaranteed institutional self-governance or a land base does not squarely address the equality issue. Again, the arguments appear to be underinclusive and, at the same time, preferential to a certain group of people simply because they are Indian.

Prior occupation, as a property based use concept of property law, with its preference for alienability of ownership, restricts natives to use and enjoyment as mere occupants.\(^{187}\) The common law real property structure generally presumes the owner has superior title to the occupant.\(^{188}\) By inherent legal nature the relationship is unequal because the owner can continue the relationship at his goodwill making the occupant dependent on that goodwill.\(^{189}\)

\(^{183}\) Id.

\(^{184}\) Macklem, supra note 174, at 1333.

\(^{185}\) Interview with Alberto Saldomando, Legal Director, International Indian Treaty Council, in San Francisco on September 12, 1996. "Native groups do not want to be part of the dominant culture — we have our own practices — our own institutions — and only want those respected."

\(^{186}\) See also ROBERT UTLEY & WILCOM WASHBURN, INDIAN WARS 139, 140-41 (1985) in which authors trace the conditions during the Trail of Tears when Native Americans were forced to migrate against their will from Georgia into Oklahoma and beyond after Georgia refused to enforce the Supreme Courts ruling in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). In fact, President Jackson withdrew U.S. military support and protection in the Cherokee Nation area and failed to send U.S. Marshals to enforce the Supreme Court's order thereby allowing Georgia to do what it wanted to force the Cherokee to assimilate by imposing the laws of one jurisdiction. Georgia's President Jackson is said to have remarked upon Chief Justice Marshall's opinion in Worcester "John Marshall has made his decision, now let him enforce it."

\(^{187}\) See THOMAS BERGIN & PAUL HASKELL, Preface to Estates in Land and Future Interests 5-7 (12th ed. 1966).

\(^{188}\) Id.

\(^{189}\) Id.
In fact, it can be said that prior occupation as a basis for preferential treatment or call for self-governance or land falls into the trap of justifying a hierarchical and unequal arrangement in the distribution of political order which is what native peoples in both Canada and the United States claim they are actually fighting against. As Johnson illustrates, property law in the guise of sovereignty under the discovery doctrine framed the reference for all the legal and political treatment that followed. Marshall, mistaking that “title” vested in the discoverer of unoccupied lands based on inferior status, not only transmuted domestic common law property principles but also its ownership hierarchy.

Premised on the assumption that exclusive land title vests in the government who thereby enjoys a superior right to arrange enjoyment and use of the property, the principles of prior occupation will arguably always be inferior to title ownership and will act to reproduce reliance of the occupant in any number of forms whether it be by limited self-governance, restrictive land possession and occupation, or entitlement compensation which does not address what was actually lost.

Johnson postulated that the land was vacant because natives were uncivilized and therefore did not deserve legal benefits beyond subordinated possession and occupation. While Worcester retreated from this extreme posture, it continued the inequality by arguing for limited self-governance protection of reservation land provided by treaties with the United States because Native Americans were dependent. Anthropological history shows that both Native Canadians and Americans were not as politically unsophisticated as Johnson suggests.

In America a constant shifting of rationale makes Indians more equal through forced assimilation and ultimately deprives them of ownership based on inability while, at the same time, protecting and guaranteeing them as dependent occupants. There is also a shift to recognize self-governance based on ability and cultural autonomy as an inherent right while still being careful not to allow too much government because they are protected until they become more equal.

191. See Johnson, 21 U.S. at 567. “Discovery is the foundation of title, in European nations, and this overlooks all proprietary rights in the natives.” See also Foster, supra note 190, at 345. “Anyone can have title to land, but there can only be one sovereign.” Cf. Grotius, supra note 43, at 103. “For jurisdiction and property are distinct from each other in their effects.”
192. See Johnson, 21 U.S. at 569, 574, 577.
194. Cherokee Nation v. Georgia, 30 U.S. 1 (1831) illustrates this clearly. Burke, supra note 72, at 503. Through that independent self-administration of land, the Cherokee effectively resisted for some time the efforts of Georgia’s interest to push the Cherokee off their lands. See also Utley & Washburn, supra note 186, at 139 where the Cherokee had developed industries in their territory including “ten sawmills, more than sixty smithies, eight cotton-weaving machines, eighteen schools, miles of public roads, sturdy houses, and their own newspaper, the Phoenix, which was published in both English and Cherokee.” It was that organizational resistance that motivated Georgia to enact laws to annex Cherokee territory and assimilate the Cherokee to obtain control over the Cherokee land after gold was discovered. Burke, supra, at 503.
In Canada, there is a shift from recognizing some traditional territorial sovereignty, to taking land in absolute title based on Johnson, without the rationale of inability or uncivilized status. Unlike the United States, there is a flat out denial of inherent self-governance that presumes a legal inability to govern based on Crown sovereignty and the special relationship, intimating native inferiority. While the special relationship presumes a preference for protection in order to save native culture, protection is maintained mostly by limited self-governance agreements which cannot be enforced under treaty law because they are not tied to land surrenders. Moreover, they are unenforceable as a matter of international law, because they are not accompanied by implementing legislation. At any point in time, Indians are preferentially pulled in two different directions and are expected to be like and unlike the rest of society.

Preferential treatment based on prior occupancy, which has only occupancy or use benefits to native peoples, has then become a disguise for inequality by giving similar treatment to dissimilar people, but not dissimilar treatment for all individuals based on relevant characteristics of equality. In Canada, Calder gave support to this inequality by indicating there were no aboriginal rights other than "occupation" because title was assumed to be in the Crown as a matter of law. While Guerin recognized that the government had a legal fiduciary relationship to the natives, it was structured by the historical rhetoric of dependent occupancy on the Canadian government. Sparrow, while recognizing that First Nations had a history of traditional organization and political structure, nevertheless assumed that title remains in the Crown because of the special relationship growing out of the fiduciary relationship of Guerin's paternal assumption.

The Crown, by holding ultimate title through Johnson with the misapplication of both property and sovereignty, placed native people at the goodwill discretion of the "new owner" government. Additionally, because neither Guerin nor Sparrow directly challenged the assumption of ultimate Crown title, the consequence of built-in institutional distribution of legislative authority between the federal government and the Provinces remains.

After Sparrow, however, the extent of dominant government power is also less certain. Sparrow, by recognizing traditional internal organization in order to coordinate cultural livelihood and identity which steps beyond mere occupancy, opens the paternal order to challenge and chips away at the rationale underlying the assumption of prior occupation. Recognizing this force implicates something more powerful behind prior occupation as it relates to the distribution of authority between Ottawa and the provinces, and has tremendous implications to the JBNQA because the amount of judicially sanctioned participation in governance through "consent" is determinate of the Cree Nation's par-

197. Calder, 1 S.C.R. at 320.
198. Id. at 321, 328.
This requirement for consent strongly implies political organization and governance.

Prior occupancy operates to lock native cultures into dependence on government while, at the same time, they are conceptually recognized as a distinct people without an equally distinct voice. Falling back on any legal or political argument based on prior occupancy to have a voice predicated on "consent" plays into the hierarchical governmental powers distributive scheme. Relying on prior occupancy admits that the relationship is unequal. Because of that inequality, some have bargaining power while others do not. If the reasoning is tied to a prior occupation analysis, it is likely that the Cree will have to accept what is decided without them, outside the terms of the JBNQA agreement, by the other parties without their "consent." The reason is that the hierarchical relationship predicated on prior occupancy preserves the relationship of dependency of goodwill and discretion in the hands of the Canadian trustee landlord governments. From a First Nation point of view, mandatory acceptance without consent would be a very insecure position, since it not only deprives Native Canadians of land they arguably occupied first, but it also deprives them of a governance mechanism to protect their culture and identity, leaving them vulnerable to the will of the dominant governance systems as merely a beneficial tenant.

Prior occupancy, then, gives permission to distinguish peoples that are different but not equal with different treatment because prior occupancy, arising from Johnson, distorts the real claim of cultural survival and autonomy necessary for collective identity. By falling into the trap of relying on prior occupancy, native people run the risk of losing the power to determine their institutions and identities by admitting inequality and perpetuating the foundational myth: Different, but probably less competent, and therefore less equal.

It appears then, that a more powerful doctrine lies behind the lack of governance associated with prior occupation and preferential treatment. That doctrine is the norm of first sovereignty.

If the Cree Nation claims a right to land or self-governance based on a treaty or aboriginal right falling from prior occupancy, their claim is not that they were merely in Canada first occupying the land. Rather, they are asserting that they were the first occupants with their own sovereignty: that they possessed a territory; had fundamental institutions of governance; and were comprised of a people with a collective cultural identity. Their cultural identity is evidenced by the manner in which they used land and administered their daily activities even before the Europeans arrived. The claim really is one of first sovereignty, not prior occupancy. Chief Justice Marshall in Worcester, nine

201. JBNQA, supra note 3, § 2.15.
203. See Macklem, supra note 174, at 1350.
204. Johnson, 21 U.S. at 569. "The statutes of Virginia, and of all other colonies, and of the United States, treat them as an inferior race of people, without the privileges of citizens, and under the perpetual protection and pupilage of the government."
years after Johnson, made clear intimations to a more powerful norm existing alongside prior occupancy.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions of their own, and governing themselves by their own laws.\footnote{205}

This description resonates with the modern definition given to sovereignty within the international legal definition of state without using that label.\footnote{206} Because sovereignty inextricably involves internal and external authority as well as territory, the surrendering of exclusive possession does not mean that occupiers and possessors give up all rights, including their rights to the land they occupy or possess.\footnote{207} Both Grotius and Vattel were clear in the limitations under international law regarding acquisition of territory.\footnote{208}

Johnson’s rhetoric, in essence, has fooled those deprived of land into basing their claims on prior occupancy in order to prevent other governments from taking any more land or governance. It fails though to challenge the basic assumptions underlying the doctrine of discovery, to re-acquire lands, or to impose a demand for more equal participation in the governance mechanisms. The diminished strength of native culture is directly related to reduction of land and loss of political power.\footnote{209} The claim that natives neither managed nor owned land because they were uncivilized is a sophisticated rationalization used to deprive them of an integral part of their culture and identity merely because of cultural differences, despite having first occupied, possessed, and controlled the territory.\footnote{210}

The Cree Nation claims it never ceded exclusive possession by treaty because it was conquered.\footnote{211} The Cree claim they entered into the JBNQA treaty relationship to exchange and delineate territory for protection and self-governance along certain consensual borders. They did not agree to give up the culture, identity, and political ways tied to the land. Under the law of nations, a

\footnote{205} Worcester, 31 U.S. at 542.

\footnote{206} See Hannum, supra note 47, citing 1933 Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, art. 1. Cf. Cherokee Nation v. Georgia, 30 U.S. 1 (1831); “The Cherokee are a state.” While prior occupation could be described as one avenue to obtain territorial sovereignty only if land is vacant, it is not property ownership, and certainly is not by itself self-governance or territorial sovereignty. Mabo, 66 A.L.R.J. at 409, 415, 418. Under the doctrine of discovery, sovereignty may be obtained either by first occupation with governance; by conquest, or by either, accompanied by a formal surrender of exclusive possession resulting from a just war.

\footnote{207} Vattel, supra note 52, at 53.

\footnote{208} See Grotius, supra note 43, at 60-1. The state has three main powers; to make its own laws, execute them and appoint magistrates; \textit{Id.} at 108-111 where uninterrupted possession lands cannot create express title . . . each state’s laws apply within its own borders . . . and as between two sovereign nations, boundaries are settled by treaty. But, the fact that one also occupies a certain area first does not mean a different sovereignty cannot be exercised over the land by conquest. Nevertheless, under the law of nations, at least until Johnson, it also does not mean that people in “rightful possession or occupation” give up any rights to title because territory has been surrendered in the absence of conquest.


\footnote{210} Sovereign Injustice, supra note 2, at 1, 264-6.

\footnote{211} \textit{Id.}
territory or state can be protected by another without giving up sovereignty. Even assuming the Cree were in Canada first with their own territory, customs, and societal organization, it remains unclear whether first sovereignty is a stronger argument than prior occupancy for treaty enforcement for the protection of self-governance or land.

It is difficult initially to see the distinction between prior occupancy and first sovereignty. Conceptually, however, first sovereignty, with its accompanying correlates of territory, governance, and identity, intimates a closer relationship between what was actually lost through Johnson and its progeny, and what is at stake in the real world in order to maintain collective identity and cultural survival as a distinct people. A claim of prior occupancy is contextually relativistic and attenuated in the sense that it involves a relationship between two unequal parties that, by its descriptive nature describes the use of property and really doesn’t directly link or associate collective identity or political organization associated with the internal and external aspects of sovereignty.

A claim based on first sovereignty, in contrast, gets the attention and respect of those with similar interests at stake, whether it be sovereignty, territory, or a tradition of self-governance and internal law-making or custom. Said another way, because all sovereigns want respect for their authority and give respect in kind as a basis in law for equality of relationships under international law, a claim based on first sovereignty forces the world community to confront and re-examine what it has denied the same respect for others, and to re-examine what it really means to be equal when undertaking the protection of another. As Grotius postulated, the equality of nations originates from a “perfect body of free men, united together in order to enjoy common rights and advantages.” Therefore, there is no reason to think a legal argument predicated on first sovereignty would not be tenable based on both principles of equality and public international law.

The argument for the importance of claiming first sovereignty is also implicated in the international plane and not restricted solely to the municipal realm, where the parties live in Canada under the umbrella of one federalist and territorial sovereign. The importance of understanding that a distinction exists between prior occupancy and first sovereignty becomes apparent when one recognizes that treaties, in the context of land agreements, provide an important link between Sparrow and the recognition that governance arises out of the JBNQA obligation under section 35(1) to help control Cree destiny. While Canadian treaty law requires an implementation act through its domestic law to

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212. See Vattel, supra note 52, at 58. Moreover, treaties reflect the shift in international law from conquest to consensual agreements that are the basis of international governance and equality today. See, e.g., Janis, supra note 48, at 9.


214. Id. at 25.

215. Simon v. The Queen, 2 S.C.R. 387, 398 (1985); see also CAN. CONST. (Constitution Act, 1982), § 35(3): “For greater certainty, in subsection (1) treaty rights includes rights that now exist by way of land claims agreements or may be so acquired.”

216. See Sanders, supra note 18, at 143-4.
give international legal effect to treaties, the requirement for implementation assumes the federation is in place.

Quebec's sovereignty movement would seemingly remove the implementation requirement, because the Cree Nation is within its borders, much the same way that Quebec is geographically attached and within Canada's borders. If Quebec can secede from Canada, why cannot the Cree nation determine its own future?217

A treaty has both domestic and international legal implications because, as Marshall intimates in Johnson and Worcester, a treaty itself is born to reach beyond the territorial borders where sovereign interests conflict.218 Given the scope of the constitutional protection that Sparrow provides under section 35(1), and the recognition by Simon that treaties with Indians can be recognized as "international like" even without implementing legislation,219 the JBNQA treaty must be considered at both the municipal and international levels in any process involving Quebec's attempts at sovereignty.220

PART IV

The James Bay and Northern Quebec Agreement and the Relationship to Treaty Application and Canada's Fiduciary Obligation to Intervene

Part II, section III of this article outlined that Canadian legislative law never expressed that natives were uncivilized, nor that case law ever held that the doctrine of discovery extinguished ultimate title based on lack of native political structure when prior occupation was the basis of discovery application.221 The same cannot be said, however, of the separate judicial treatment given to treaties with respect to Canada's native people.222

Under sections 18(1) and 88 of the Indian Act and section 35(3) of the Constitution Act of 1982, agreements containing solemn promises are recognized as treaties between the federal and provincial governments with the native

218. Johnson, 21 U.S. at 568; see Worcester, 31 U.S. at 552-53. Moreover, a treaty serves to suggest conflicting international concerns because there is no reason to believe that a government would enter into a treaty with its own people.
220. As Part IV intimates, the treaty obligation of Canada to the Cree Nation may stretch out into the international realm by the mere fact that it is a treaty, the terms of which cannot be waived without agreement of all other parties to the JBNQA regardless of dominant government preferences. JBNQA, supra note 3, § 2.15. See, e.g., The Case in the Western Sahara, 1975 I.C.J. 12, 31, 55 advisory opinion, citing Judge Dillard's dissent. "It is for the people to determine the territory, not the territory to determine the destiny of the people."; but cf. JBNQA, supra note 3, § 2(e), as cited in Sovereign Injustice, supra note 2, at 261 n.923 which provides "that the trusteeship of the Indians in said territory and the management of any lands now or hereafter reserved for their use shall remain in the Government of Canada subject to the control of Parliament."
221. See generally, St. Catherines Milling and Lumber v. The Queen, XIII S.C. 577 (1887).
Canadians. Early treaty interpretation regarding native people reflected an ethnocentric attitude reminiscent of Johnson — treaties were little more than political arrangements where native people were regarded as inferior because they did not have the power to enter into treaties and, therefore, could not enforce the terms of a treaty. Judicial attitude regarding treaty interpretation has shifted. Treaties are now interpreted as contractual arrangements between the Crown and natives. This has important implications as to how land surrenders are interpreted in the context of prior occupation and first sovereignty as it relates to consent. Since the 1980’s, however, treaty law with Canada’s native peoples has undergone several significant changes.

In Simon v. The Queen, the Canadian high court held that a treaty should be interpreted as reasonably understood by natives, and not through the eyes of the Province. In The Queen v. Sioui, the Canadian high court held that a treaty regarding the use of land for hunting and fishing was to be interpreted in a broad and liberal scope giving meaning to native understanding at the time of signing of the treaty. Both of these holdings rest on the interpretation of Provincial laws to give effect to section 88 of the Indian Act which creates a paramount interpretation for Indians in treaty disputes with Provinces. Because Parliament and the federal executive government still retain jurisdiction over “Indians and Lands Reserved for the Indians” under section 91(24) of the Constitution Act of 1867, federal legislation and executive acts of the Crown prevail over treaties.

But section 91(24) was also enacted before the Constitution Act of 1982 section 35(1), which should provide “existing aboriginal and treaty rights” with
recognition and affirmation. The Court, as Sparrow indicates, is to apply a broad scope rule in determining the existence of rights of First Nation people and any infringement of rights under section 35(1) is to be interpreted subject to a strict legitimate purpose test after giving priority consideration to native interests that have not been "clearly and plainly" extinguished. Given the constitutional protection under 35(1) of treaty rights, the legal effect of the JBNQA treaty language through interpretation as it relates to the term of consent and the scope becomes important.

Two JBNQA clauses are crucial. Section 2.1 of the JBNQA provides that "[i]n consideration of the rights and benefits herein set forth in favor of the James Bay Cree and the Inuit of Quebec, the James Bay Cree and the Inuit hereby cede, release, surrender and convey all their Native claims, rights, titles and interests, whatever they may be, in and to land in the Territory and in Quebec, and Quebec and Canada accept such surrender.

Section 2.15 of the JBNQA provides that "[t]he agreement may be from time to time, amended or modified in the manner provided in the Agreement, or in the absence of such provision, with the consent of all the Parties."

Because the Agreement contains no provision addressing the situation where a party seeks its sovereign independence, as Quebec, then the requirement of consent of all the Parties under section 2.15 of the JBNQA becomes significant. It brings into focus the different interests and obligations of the parties.

When Quebec attempted to develop Cree Nation territory in the mid-1970s, the federal government's official position during Quebec's development was to stand by in "alert neutrality," indicating Canada was not prepared to live up to its fiduciary responsibilities under the Constitution Act of 1867 to protect and preserve the Cree Nation.

Only after Calder's powerful dissent and Dene did the federal government intervene, resulting in the JBNQA settlement. The primary concession to the
Cree was the promise of self-governance upon the lands they possessed and occupied, plus the guaranteed say requiring unanimous "consent" to any modification or amendment to the JBNQA.236

Despite Sparrow, Canada seems to have returned to its alert neutrality posture of the 1960-70s which preceded the original conflict arising from Quebec’s ambitious hydro-electric projects that gave rise to the JBNQA.237 While Quebec claims the Cree Nation land and makes its threats of sovereignty clear, Canada has issued no official comment about the Cree Nation referendum to remain annexed to Canada.238 At the same time, Canada has made it clear it does not want Quebec to secede.239

Canada’s silence regarding the Cree Nation should be troubling. Canada, it could be argued, does not want to provoke a confrontation with Quebec over Cree territory that may create greater public support in Quebec for secession. It could also be inferred from the silence that the Cree Nation has a political significance to Canada and Quebec as a numerator in the equation to prevent Quebec from becoming independent. While not being able to enter the minds regarding the relationship between Ottawa and Quebec, the political reality is that there will likely be negotiations between Ottawa and Quebec in order to make some political arrangement to prevent Quebec from becoming its own sovereign. This most likely would require some ordering of affairs by the dominant governments involving the Cree Nation because one of Quebec’s grievances to Canada is that it should manage the natural resources within its own territory.240 Simply, Quebec considers Cree territory its territory; Cree resources, its resources.241 The Cree Nation is naturally concerned that Canada will do nothing to act on the Cree Nation’s behalf, or will become an active participant in failing to obtain Cree “consent” under section 2.15 for any political arrangements with Quebec that may involve the Cree Nation.242 Any informal agreement between Ottawa

Quebec because of Canada’s non-intervention policy. Id. at 255. This may overstate the case, but evidence of this conclusion may be supported by noting that the Cree were given regional governmental authority in populated areas which appear to be limited to approximately 2% of the inhabited territory. Id. at 264. Cree Nation development input was limited to advisory bodies; and under section 8.13 of the JBNQA, environmental assessment of development projects would not include the assessment of the social impact of development on Cree Nation citizens. Id. at 268.

236. See JBNQA, supra note 3, § 2.15. Also significant is that when the JBNQA treaty was approved by the Parliament, section 2(e) of the Boundaries Extension Act, requiring Canada to maintain the fiduciary responsibility toward its native peoples, was repealed in compliance with the JBNQA in order to implement the treaty. But nothing is said to remove the fiduciary obligation from The Royal Proclamation, though it may not be considered a legal instrument, as it appears to be a statement of policy.

237. Telephone Interview with John Henry Wapachee, Chief Returns Officer, Nemaska First Nation of James Bay Cree Nation in Nemaska (Quebec) up to May 24, 1996.

238. Id; see also Sanders, supra note 18, at 152.


240. Sanders, supra note 18, at 147, 152.

241. Id.

242. See also JBNQA, supra note 3, § 2(e) that provides “that the trusteeship of the Indians in the said territory and the management of any lands now or hereafter reserved for their use shall remain in the Government of Canada subject to the control of the Parliament,” (emphasis added) cited in SOVEREIGN INJUSTICE, supra note 2, at 261.
and Quebec may further erode guaranteed Cree Nation self-governance and land control.

Canada could argue that it has no section 35(1) obligation to include the Cree Nation in any negotiations or discussions with Quebec. Canada would argue that the JBNQA section 2.15 requires consent, which presupposes the possibility of modification or amendment. However, section 2.15 fails to mention negotiations or conversations among treaty parties outside the terms of the JBNQA. Canada could further argue that even if Canada and Quebec do engage in consultations or negotiations regarding the Cree Nation, Sparrow only requires consultation if native rights to occupation and possession are affected. Any discussion about control of governance or territory that does not directly affect the Cree Nation under section 2.1 is irrelevant because the Cree Nation has surrendered and conveyed all title rights to its territory in exchange for other benefits, such as the right to consent to amendments or modifications. The inclusion in negotiations was not an expressed benefit of the JBNQA contract.

The Cree Nation, on the other hand, could argue that it is an equal party to the treaty, therefore the meaning of "consent" under a "generous," "liberal" and purposive meaning under Sparrow can only make sense if the Cree are allowed to participate in consultations or negotiations in order to determine if there is in fact a modification of the JBNQA that may affect their rights under the treaty. The Cree would argue that the requirement for "consent," under section 2.15, as a treaty right requires consultation necessary for Cree cultural survival under Guerin and Sparrow which also implicates a right to decision-making or self-governance.

Under Sparrow, Guerin, and section 35(1), the Cree Nation appears to be entitled to legal protection as against Canada (and Quebec) for breach of consent as a treaty right deriving from a treaty term. The question of the scope of that consent as a legal obligation remains.

Guerin and Sparrow represent an ambitious combination of the aboriginal rights area within the constitutional sphere to include the interests of natives through "consultation" in any action by the government that affects common law aboriginal and treaty rights. The fact in Sparrow that the defendant was fishing for a commercial purpose did not destroy the status of an aboriginal right,
through Native Canadians had historically only fished for community survival and barter. It was the fact that natives fished for cultural survival that was being protected, regardless of the present form. While the Court did not say that the same analysis would apply to treaty rights, it called for a "generous," "liberal" and "purposeful interpretation" of section 35(1), making specific references to treaty jurisprudence with Native Canadians in order to determine when a right was extinguished. By inference, a treaty not only creates the rights, it reflects the value of the goods that are important to both parties in consensually entering into the agreement, as well as recognizing the contemporaneous values given to the terms. To the Cree, the valued good was internal sovereignty as indicated by the right to consent to any modification. The dominant government does not recognize self-governance as an inherent right and, therefore, argue it cannot be made the basis of a land surrender claim even if it is guaranteed by a treaty.

The penultimate issue as to whether the Cree Nation should be allowed to take part in any negotiations or consultation with Canada and Quebec thus turns not only on the scope of consent, but also on one’s view of land surrenders and governance in the context of sovereignty and equality. If a court subscribes to the traditional prior occupation argument under the discovery doctrine which vests title in the Crown, it would seem logical that the scope of consent would be interpreted in a manner that is consistent with the meaning attributable to the native interest in land at the time the JBNQA was entered. That is, only if some act by the government actually affects possession or occupancy, and not govern-
ance or other collateral terms of the land settlement agreement, would the court interpret “consent” as requiring Canada to intervene or involve the Cree Nation in discussions. In Canada there is not yet a common law right of self-governance associated with use and enjoyment of land, as the United States recognized in Worcester. Thus, in Canada, any impact not associated with strict land occupancy would not be relevant. Their law would therefore not require Canadian intervention or protection of the Cree Nation through their inclusion of the Cree in discussions, since there is no apparent right to internal sovereignty.

On the other hand, if one were to look at the meaning of consent and land surrenders from a first sovereignty point of view, then instead of viewing the surrender of land as a complete relinquishment of title under section 2.1, any discussion regarding Cree territory would, by implication, associate the aspiration of native survival as it is intimately tied to the ability to self-govern as

must turn to the contemporaneous form the right takes, not just an over the shoulder historical approach to determine the extent of the form as the right originally existed. Id. at 1091-93.

247. Sparrow, 1 S.C.R. at 1078. "They are rights held by the collective and are in keeping with the culture and existence of that group."

248. Id. at 1099-1100.

249. Id. at 1103-04, 1106.

250. Id. at 1090, 1100. "While no commercial fishing existed prior to the arrival of European settlers ... the Musqueam practice of bartering in early society may be revived as a modern right to fish for commercial purposes."


252. See Calder, 1 S.C.R. at 383; but see, Queen v. Sparrow, 1 S.C.R. at 1094.
The surrender of land by the Cree would be viewed through the eyes of the Cree as granting consent to the dominant system to take title to the land, based on the contractual condition that natives retain the right to use, possess and govern themselves, which the JBNQA treaty explicitly provides. This would be consistent with Simon and Sioui, and the law of nations, which provide that one nation can place itself under the protection of another, without surrendering internal sovereignty. It is also consistent with the liberal and broad view of rights under Sparrow.

Under a first sovereignty view, the fact that the Cree Nation exchanged the surrender for the right to “consent” to any alteration or modification implicitly means that the Cree Nation values something more than just land, or is fearful of losing more than just the use and occupation of land. They are in fact putting a price on the value of maintaining internal sovereignty as a valued good, by bargaining the surrender of land for “consent” which provides an inherent right to prevent the loss of their cultural and political identification that is inseparable from the use and possession of the land itself. Sparrow stands behind this proposition. Because the requirement for consent, as an attribute of cultural organization, is intimately connected with preservation under Sparrow through consultation required by Guerin, consent then should be interpreted in a “generous”, “liberal” and “purposive” sense to give meaning to the scope of the existing right to consent - the right to participate in decisions requiring reason to put one’s affairs in order.

The broad interpretation rule of Sparrow to determine the existence of the particular right to attain the objectives of section 35(1) and “protect” and “maintain culture” would require Canada to “consult” in order to give “consent” “purposive meaning.” Therefore, consent as a constitutional treaty right is inherently integral to self-governance which requires all available information on which to make a reasoned decision in order to maintain the collective identification and culture as the Cree Nation. Consequently, Canada would be obligated not to take any steps that would impair that cultural livelihood or an existing right unless it could show substantial justification for doing so. This also means not excluding the Cree Nation in any discussions with Quebec in

255. See generally Simon, 2 S.C.R. at 1025 (1990); “Subject to the terms of ANY treaty . . . .”; see Sioui, 1 S.C.R. at 1038. The question of capacity must be seen from the point of view of the Indians at that time, and the Court must ask whether it was reasonable for them to have assumed that the other party that they were dealing with had authority to enter into a valid treaty with them.
256. JBNQA, supra note 3, § 2.15.
257. See Vattel, supra note 52, at 58.
258. See, e.g., Worcester, 31 U.S. at 552-54.
259. Queen v. Sparrow, 1 S.C.R. at 1078. “Courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of the ‘sui generis’ nature of aboriginal rights. While it is impossible to give an easy definition of fishing rights, it is crucial to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake.”
260. Id. at 1080, 1105, 1110, 1119.
261. Id. at 1110.
order to protect cultural preservation. Those discussions would include, under a first sovereignty analysis, almost any subject that directly affects the culture or collective identity of the Cree Nation. It would not be limited only to the effect on land that would fall under a prior occupancy analysis. As *Sparrow* tells us, a section 35(1) interpretation of an existing right is to be made with the goal of providing an avenue for Native Canadians to exercise control over their own destiny.\(^{262}\)

Under first sovereignty, consent as a treaty right is a necessary ingredient to consultation under *Sparrow* and *Guerin* to make reasoned choices “essential for cultural and physical survival” and, therefore, is pulled up into the sphere of cultural rights protection as a necessary political tool to maintain the collective identity of the Cree Nation; much the same way commercial fishing was contemporaneously seen as necessary to the Musqueam in *Sparrow*, though it was once based on a lifestyle to fish for barter and community survival.\(^{263}\) Without consultation to meet the requirement under *Sparrow* to protect and preserve native culture, section 35(1) becomes empty and the treaty right of consent worthless.\(^{264}\)

While *Sparrow* still assumes Canada enjoys sovereign authority over the native population, section 35(1) displaces an absolute interpretation that allows Canada to behave in a way that affects native life without first consulting with natives.\(^{265}\)

**PART V**

**CONCLUSION**

While no case authority directly suggests a first sovereignty point of view is justiciable, it is interesting to note that another federalist commonwealth court has openly repudiated and rejected the prior occupation/discovery doctrine.\(^{266}\) In Australia, the court in *Mabo* recognized that any reliance on discovery was driven by fiction, since it fails to properly characterize people’s ability to own and manage land not in European possession.\(^{267}\) Like the Torres Island aborigines in *Mabo*, under a first sovereignty claim, the Cree Nation would be recog-

\(^{262}\) *Id.* at 1076-7.

\(^{263}\) *Id.*

\(^{264}\) *Cf.* *Guerin v. The Queen*, 2 S.C.R. at 354. Lack of consultation “makes a mockery of the Band’s participation.”

\(^{265}\) *Queen v. Sparrow*, 1 S.C.R. at 1109. Under the JBNQA, consent would be an essential element of consultation and decisionmaking because it is linked to cultural survival. *Id.* at 1080, 1119. Though Canada could argue that national security or act of state may be involved to justify excluding the Cree from talks with Quebec, the fact remains that it has not done so. Even if Canada makes this argument, in light of *Sparrow*, Canada must still justify any action that affects any rights under both treaty and aboriginal law rights.

\(^{266}\) *See Mabo*, 66 A.L.R.J. at 409.

\(^{267}\) *Id.* See e.g., *Calder*, 1 S.C.R. at 318-19, 330,(citing WILSON DUFF, THE INDIAN HISTORY OF BRITISH COLUMBIA ch. 8 (1964)). This suggests the assumptions, justifications and presumptions surrounding discovery doctrine as a means to acquire title and territory are not supported by fact under a contemporaneous understanding of anthropology and the law.
nized as existing first, with their own institutions and discrete territory, for thousands of years before the arrival of "discoverers."  

It is clear that section 35(1), as a constitutional mechanism, was meant to lift native rights in the political hierarchy through the judicial process. Those protected native rights include treaty right promises, as in the JBNQA. While it does not raise protection of Native Canadians to the level of perfect equality, it is a substantial step towards closing the gap between the protector and protected, and in doing so allows the native culture to come out from under the umbrella of dependence, in order to have more political choice in its future. This is consistent with the law of nations. But section 35(1) can only do so if it is interpreted consistent with protecting rights created in a treaty.

Therefore, consent as a treaty right, with an eye toward first sovereignty, should be interpreted in a way that requires Canada to show it has sufficient justification not to include the Cree Nation in talks with Quebec. Moreover, while the subject remains unsettled, the determination of self-governance as an aboriginal right also remains open. However, it makes little sense to create a Constitutional mechanism such as section 35(1), which is designed to promote the political involvement of people to organize for their cultural survival, unless either consent or consultation is interpreted to be an element of a common law aboriginal right of self-governance. If interpreted as such, section 35(1) would require mutual discussion in political decision-making that affects the Cree Nation as a separate right outside the JBNQA treaty right of consent.

Despite the evolution of more favorable treatment towards some Native Canadian autonomy in the last twenty-five years or so, dominant society laws still remain resistant to the native peoples’ desire to determine their own future. Some resistance is understandable. With pockets of various native communities scattered throughout the North American continent, the more developed these communities become, the greater the appearance of the opportunity of fragmentation of a federation, thereby challenging the conceptual framework of the meaning of state and territory. At the same time, much of the rhetoric on historical models of sovereignty and state to protect one's borders is based on fear and assumptions of fragmentation, and may be outdated in the world of consensual agreements. After all, has the justifiable concept of state as a method to

269. Sparrow, 1 S.C.R. at 1093, 1104. "[T]he Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but is also incapable of, in itself, delineating that right." Id. at 1101, suggesting that it is the court that is the ultimate arbiter of what constitutes an aboriginal right.
270. See, e.g., Grotius, supra note 43, at 25-9; Vattel, supra note 52, at 58.
271. See, e.g., Henry Burmester, National Sovereignty, Independence and the Impact of Treaties and International Standards, 17 Sydney L. Rev. 127, 132 (1995) (citing L. Wildhaber, Sovereignty and International Law, in R. Macdonald & D. Johnston, The Structure and Process of International Law, 438 (1983). "Classical international law was more or less an inter-state law of peaceful co-existence, dealing with a few topics, which ranged from war and neutrality to the conquest and cession of territory, from external trade to diplomatic law. Modern international law, by contrast, endeavours to be a law of economic, social, cultural, technical and civilizing cooperation... aimed at problems of development, human rights... ."
prevent fragmentation in a territory prevented the breakup of Yugoslavia or the former Soviet Union and present day Russia?

The Cree Nation is not asking to manage the domestic or foreign relations of Canada, but only to take part in discussions that can affect its internal sovereignty, arguably guaranteed by the treaty term of consent. Nor is the Cree Nation asking to be absolutely independent and separate from Canada.272 There is also no indication that Canada would lose any of its sovereignty by allowing the Cree Nation to participate in discussions with Canada. A state is entitled, after all, to place restraints on its actions, and transfer some of its powers by treaties, without sacrificing its sovereignty.273

An example of this state prerogative can be found in the dynamics of the European Economic Union (EEU). The EEU has centralizing features in economic decision-making and jurisprudence. Yet signatory states do not sacrifice sovereign authority and cease to operate as independent entities because they agree to specialized governance. Arguably, the shared decision-making among Canada, Quebec and the Cree Nation required through “consent” leaves intact the same respect for a nation’s ability to protect itself. It is interesting to postulate that the EEU is an example of consensual-based sovereignty looking toward the 21st century, trying to break down economic and governance borders without giving up internal sovereignty.274 It does not look back to a 500 year old war that deeply influenced Grotius and Vattel, and ultimately shaped the modern approach to sovereignty and the definition of state, along with its correlates of discovery and prior occupation.275

Likewise, when Canada agreed to the requirement of obtaining “consent” to any modification to the JBNQA, it did not give up its powers or sovereignty to the Cree Nation. Under section 35(1), when a treaty is involved, the strict requirement of consent under the JBNQA is mitigated by an inherent limitation with a proper showing of justification for taking an action regardless of section 35(1).276 But, as this article suggests, any justification for an act or legislation that contravenes the meaning of the treaty language should not rest on inferiority rooted in Johnson, the discovery doctrine, or prior occupation. Section 35(1) clearly checks the Johnson approach in Canada by elevating the importance of protecting the involvement of Native Canadians into the political process. Sec-

272. See SOVEREIGN INJUSTICE, supra note 2, at 60. As Cree Grand Chief Matthew Coon Come remarked at the Canadian Club in Toronto in January of 1995 (while explaining to an audience the implication of the relationship between Canada and the Cree Nation if Quebec seceded), “It should be clear to everyone by now that we are not separatists. You have never heard about a Cree independence movement because there is no Cree independence movement. We most certainly have our grievances against the Government of Canada. Our relationship is in need of profound reform. But we are not separatists.”

273. See VATTEL, supra note 52, at 58. Still, while Canada continues to possess the authority to engage in acts and make laws that can regulate relations with the natives, it must have sufficient justification for doing so. Queen v. Sparrow, 1 S.C.R. at 1109.

274. See Burmester, supra note 271, at 127-32.

275. See GROTIUS, supra note 43, at 2, 3.

276. See Sparrow, 1 S.C.R. at 1109-10. A right is not absolute, but to the extent it is inconsistent with government interest it must be interpreted in favor of natives unless demonstrated by justification otherwise.
tion 35(1) thereby serves as a mechanism to move away from a preferential form of dependence that acts to discriminate both for and against Native Canadians. Consideration can only be given to section 35(1) if the parties all step back from the fiction of prior occupation justified under the discovery doctrine, and the confusion it has caused in creating a preferential system of treatment with its accompanying disability of overarching inequality. To paraphrase one scholar, to motivate governance or legal change is a bit like steering an oil supertanker on a new course . . . it takes many efforts to turn the wheel, and it takes many miles before the ship reacts after you turn the wheel . . . and so you better hope the course is correct. This article suggests that a first sovereignty course may be ready for charting, without nearly as much hazard. Arguably, the words of "consent" should be considered by the courts and the political processes to give full meaning to section 35(1). This in turn would preserve, protect and respect Canada's obligations to the Cree Nation under the JBNQA as a truly equal party under the agreement, so that the Cree can better control their future.

277. Prof. David Caron, from student class notes in Public International Law, University of California at Berkeley, Boalt Hall (Fall, 1995).