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Constitutional Realism about Constitutional Protection: Indigenous Rights under a Judicialized and a Politicized Constitution

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This article assesses the comparative effectiveness of constitutional protection of indigenous rights in Canada and New Zealand using a perspective of “constitutional realism”. The two constitutions offer a useful contrast of similar systems distinguished by distinctly contrasting directions over the past twenty-five years. The reality of Canada’s constitutional development has seen more power accrue to the judicial branch of government. The reality of New Zealand’s constitutional development has seen more power accrue to the political branches of government. The article considers the reality of the behaviour of these branches of government in each jurisdiction in relation to indigenous rights. It finds that the factual and cultural context in each of the two nations is crucial to assessing the constitutional implications of judicial versus political power. It suggests that judicial behaviour in both nations is influenced by politics and public opinion and calls for a more sophisticated unpacking of the modes of inter-branch dialogue that occurs “in the shadow of the people”.

L'article évalue l'efficacité comparative de la protection constitutionnelle des droits autochtones au Canada et en Nouvelle-Zélande d'une perspective de « réalisme constitutionnel ». Les deux constitutions présentent un contraste utile de systèmes similaires qui se distinguent clairement par les orientations opposées adoptées depuis vingt-cinq ans. Au Canada, l'évolution constitutionnelle a résulté en des pouvoirs accrus pour l'organe judiciaire du gouvernement. En Nouvelle-Zélande, l'évolution constitutionnelle a eu comme résultat des pouvoirs accrus pour les organes politiques du gouvernement. L'auteur de l'article examine les comportements de ces organes du gouvernement dans chaque pays pour ce qui est des droits des autochtones. Il conclut que le contexte factuel et culturel de chaque pays est critique pour évaluer les incidences, sur le plan constitutionnel, du pouvoir judiciaire par rapport au pouvoir politique. Il avance que dans les deux pays, le comportement de l'organe judiciaire subit l'influence de la politique et de l'opinion publique, et il plaide en faveur d'une plus grande ouverture et de la modernisation du dialogue entre les pouvoirs, dialogue qui se tient « à l'ombre des peuples ».

* New Zealand Law Foundation International Research Fellow for 2005. This article is a revised version of a lecture given in honour of Horace E. Read, a distinguished Dean of Dalhousie Law School and one of the fathers of modern legal education in Canada. The lecture was presented in March 2005 when the author was Pro Vice-Chancellor and Dean of Law, Victoria University of Wellington and Director of the New Zealand Centre for Public Law. I thank the organizers of the lecture and participants at a subsequent faculty seminar at Dalhousie, particularly Ronald Murphy, both for comments and advice and for the opportunity, and associated challenges, to revise long-held attitudes. For comments I also thank Harry Arthurs, Mark Bennett, Claire Charters, Richard Devlin, Andrew Erueti, Peter Hogg, Sandra Petersson and Ruth Wilkie. Errors remain my own.

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E nga mana, e nga iwi, e nga reo.
Tena koutou, tena koutou, tena koutou katoa.

E nga mate o tena rohe o tena rohe,
Haere, haere, haere atu ra.
Haere ki te Po nui,
Ki te Po roa,
Ki te Po pamamao,
Haere, haere, oki atu ra.

Ka hoki ki a tatou, te hunga ora,
Ngati Mi'kmaq, tena koutou.
E nga rangatira, Dean Russell, Professor Murphy, tena korua
Tena koutou, tena koutou, tena tatou katoa.¹

Introduction

The Maori language has been recognized by the New Zealand Parliament and the Judicial Committee of the Privy Council to constitute a *taonga* or treasure of the Maori.² As such, the New Zealand Crown is subject to a duty of its active protection under the *Treaty of Waitangi* of 1840:³

Foremost among those ‘principles’ [of the *Treaty of Waitangi*] are the obligations which the Crown undertook of protecting and preserving Maori property, including the Maori language as part of *taonga*, in return

1. This is a whaikorero or greeting in Maori. The English translation is:
Distinguished hosts, the different races, the various voices
Greetings, greetings, greetings to you all.
To those who have passed on in the various districts throughout the land,
Farewell, farewell, go and fare well.
Farewell to the great darkness,
Farewell to the eternal darkness,
Farewell to the distant darkness,
Farewell, farewell, and rest there.
Returning to ourselves, the living,
To the Mi'kmaq, greetings
To the chief of the Law School, Dean Russell, and Professor Murphy, greetings
Greetings, greetings, greetings to us all.
2. Section 3 of the *Maori Language Act 1987* provides that Maori is an official language of New Zealand. The Act's preamble states: “Whereas in the Treaty of Waitangi the Crown confirmed and guaranteed to the Maori people, among other things, all their taonga: And whereas the Maori language is one such taonga.” The Privy Council's recognition of the status of Maori was not explicitly based on this legislative recognition: see *New Zealand Maori Council v. Attorney-General*, [1994] 1 N.Z.L.R. 513 at 517. There is no equivalent official recognition of the status of English, the dominant language used in New Zealand.
3. The obligation on the Crown is not unqualified: *New Zealand Maori Council v. Attorney-General*, [1994] 1 N.Z.L.R. 513 at 517: “While the obligation of the Crown is constant, the protective steps which it is reasonable for the Crown to take change depending on the situation which exists at any particular time.” But “if, as is the case with the Maori language at the present time, a taonga is in a vulnerable state, this has to be taken into account by the Crown in deciding the action it should take to fulfill its obligations and may well require the Crown to take especially vigorous action for its protection.”

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for being recognised as the legitimate government of the whole nation by Maori.

The Maori language inherently contains, in its phrasing, vocabulary, and grammatical structure a set of cultural predispositions and values that reflects *te ao Maori* (the “Maori world”).⁴ It is unique in the world, as is Maori culture.

In our world of increasingly easy communication and transmission of cultural norms there is a disturbing tendency to cultural convergence. “Global” cultural icons, particularly influenced by American culture, exist virtually everywhere (think of McDonalds, Coca-Cola, the Simpsons). Global fashions, whether European or Chinese, sweep the world via the internet. Tourist industries are ironically geared towards showing off what is “different” locally, while ensuring that tourists are able to enjoy the global comforts that they expect and demand. In the long term, such a world is at risk of global cultural convergence that renders national cultures into commercial sideshows of ancient buildings, odd costumes, and quaint rituals, all devoid of connection to the reality of people’s daily lived experiences or behaviours.

It could be argued that the ultimate global standardization of behaviours, practices or social structures could pose risks to the very survival of humanity, susceptible as it would all be to attack by viruses or terrorists able to exploit a universal vulnerability. Irrespective of such apocalyptic visions, this article is based on the underlying conviction that the languages and cultures of indigenous peoples are of inherent value to the world. If such cultures do not exist in their own lands, they exist nowhere. Such a world would be the poorer for it.

In my country, New Zealand, the power politics around the indigenous Maori, and their reflection in the law, is the most complex, volatile and significant set of issues we currently face. These issues affect political debate, economic development and social cohesion and go to the core of New Zealand’s national identity. In Canada too, the position of First Nations and other indigenous peoples under the law and the constitution reflects fundamental characteristics of Canada’s national identity.

Canada and New Zealand share marked similarities in our societies, cultures and constitutional heritage. Yet the past twenty-five years have seen a divergence in our constitutional developments which creates a wonderful opportunity for comparative analysis. In particular, the comparison sheds light on the recurrent constitutional issue, standard in

4. See, generally, C. Barker and D. Galasinski, *Cultural Studies and Discourse Analysis: A Dialogue on Language and Identities* (London: Sage Publications Ltd., 2001).

both countries, about the appropriate relationship between the judicial and the political branches of government.

The essence of this article is a comparative analysis of the differences and similarities of two systems of protection of indigenous peoples' rights, as applied in Canada and New Zealand. Each system of protection is located in the way in which the constitution of each country affects and governs the nature and quality of the relationships between governments and indigenous peoples. I approach these constitutions with the conviction that they cannot be understood without an adequate appreciation of the *contexts* in which they operate in *reality*. To identify the significant constitutional dimensions I use a perspective labelled "constitutional realism," which is briefly explained in part I of this article. This perspective emphasizes the importance to a constitution of what happens in practice. Constitutional meaning comes through the iterative interaction of theoretical principles with the reality of human beliefs and behaviour.

Part II of the article outlines significant aspects of context in New Zealand and Canada that are important to this comparative exercise. In particular, it sketches the broadened representativeness of New Zealand's politicized constitution that has developed in practice over the past twenty-five years, by which power has moved from the executive to the legislative branch of government. I contrast this change with the increased judicialization of Canada's constitution over the same period, by which power has moved from the executive and legislative branches to the judiciary.

Part III offers observations about each system of protection of indigenous rights. I suggest that the judicial part of the judicialized Canadian constitution is, in reality, influenced by politics. This renders it less susceptible to suffering from the "counter-majoritarian difficulty" than may otherwise be thought while providing a relatively high level of judicial protection of indigenous rights, at least in law. In New Zealand, the increased politicization of the New Zealand constitution has increased the power of Maori to protect their own rights and interests in practice through political negotiations, but without the backstop of powerful judicial resistance to the tyranny of the majority exercised through particular legislated solutions. In concluding, I suggest that this comparative analysis highlights the importance of dialogue between different branches of government. I maintain we require further analysis of the modes, mechanisms and dynamics of dialogue between the branches of government.

I. *Constitutional realism*

A national constitution is fundamentally about the exercise of public power—who exercises it, when, and how. In understanding how a constitution works it is necessary to take seriously the reality of how power is exercised. Accordingly, in recent articles I have propounded a perspective that I call “constitutional realism”.⁵ This perspective represents an extension of the tradition of the American legal realists of the early twentieth century and applies to constitutional matters, which were only lightly treated by them, most notably by Karl Llewellyn in 1934.⁶ This “positivist” brand of realism is close to the “neo-pragmatism” of some law and literature scholarship,⁷ and some of the “post-modern” approaches to law that Richard Devlin characterises as the “new realism”.⁸

Constitutional realism, as I conceive it, is not a normative call to compromise on the appropriately high ideals of democratic constitutionalism. Nor is it a nihilistic exercise in the deconstruction of law to indeterminacy caricatured by the critics of legal realism and critical legal studies. I do not deny the power of law, including constitutional law. Rather I suggest that the reality of the behaviour and beliefs of those who operate within a constitution tell us what the content of the constitution *really is*. I call for more recognition in constitutional analysis of the integrated and iterative relationship between the way in which public power is exercised in practice and the theoretical conception of a constitution.

This perspective of constitutional realism supports a conception of a constitution that stands back from text to consider context. As Llewellyn maintained in relation to constitutions, “[a]n institution is in the first instance a set of ways of living and doing. It is not, *in first instance*, a matter of words or rules.”⁹ The key conceptual framework I promote with this perspective is that of a “complete constitution”. I reject the notion that a constitution exists only within the four corners of a document. Neither is it sufficient to identify particular statutes, common law cases and constitutional conventions, or even fundamental principles, as

5. Matthew S.R. Palmer, “What is New Zealand’s Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-holders” (2006) 17 Pub. Law Rev. 133 [Palmer, “New Zealand Constitution”] and Matthew S.R. Palmer, “Using Constitutional Realism to Identify the Complete Constitution: Lessons from an Unwritten Constitution” (forthcoming 2007) Am. J. Comp. Law. [Palmer, “The Complete Constitution”].

6. Karl N. Llewellyn, “The Constitution as an Institution” (1934) 34 Columbia L. Rev. 1. On realism generally see Laura Kalman, *Legal Realism at Yale 1927-1960* (Chapel Hill: University of North Carolina Press, 1986).

7. See Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989).

8. Richard F. Devlin, “Jurisprudence for Judges: Why Legal Theory Matters for Social Context Education” (2001) 27 Queens’ L.J. 161 at 181.

9. Llewellyn, *supra* note 6 at 17.

exhaustively defining a constitution. Rather, I suggest that the “complete constitution” includes all the structures, processes, principles and even cultural norms that significantly affect, in reality, the exercise of public power. By examining behaviour relating to the exercise of public power we can identify all those elements of the constitution that count in reality. These, after all, are the most interesting bits!

This conception of a constitution is clear in New Zealand, where it is well understood that it has no written constitution. Yet that fact seems to have led New Zealand constitutionalists, in the judiciary and the academy, largely to ignore the task of rigorously analysing the content of the New Zealand constitution. I have suggested elsewhere that applying a constitutional realist analysis can help reveal the very essence of New Zealand’s constitution as it operates in reality.¹⁰ Importantly, this perspective helps to escape from the obsession of lawyers with courts and, instead, to notice the constitutional importance of other public office-holders. In New Zealand, the decisions of the Prime Minister, the advice of the Solicitor-General, the Secretary of the Cabinet and the Clerk of the House of Representatives, for example, are of vital importance to the operation of the constitution in reality. Their behaviour and beliefs, as much as those of judges, help to define New Zealand’s complete constitution.

The implications of this perspective appear to be more startling south of the Canadian border in a United States discourse irretrievably captured by textualist analysis of a single document.¹¹ I hope that the perspective I offer resonates more easily with members of the Canadian legal academy who are, no doubt, still reared, even if derivatively, on the foundations laid by Albert Venn Dicey in his authoritative writings on the Westminster model of a constitution.

This article uses the perspective of constitutional realism to compare the reality of the operation of the Canadian and New Zealand constitutions and to examine constitutional protection of indigenous rights in each system.

II. *New Zealand’s politicized constitution and Canada’s judicialized constitution*

1. *Context: geography, demography and culture*

New Zealand and Canada are strikingly different in scale. New Zealand is composed of two main islands in the South Pacific, unimaginatively named the North Island and the South Island. It is 1500 kilometres or a three hour flight from its nearest neighbour, Australia. Its area is twice the

10. Palmer, “New Zealand Constitution” *supra* note 5.

11. See Palmer, “The Complete Constitution” *supra* note 5.

size of Nova Scotia, New Brunswick and Prince Edward Island combined. It is stretched from north to south in the Southern latitudes equivalent in the northern hemisphere to the latitudes occupied by U.S. states from South Carolina to Maine. The contrast with Canada, the second largest nation in the world and occupying half a continent, in colder climes is marked.

In 2005 there were about 4.1 million New Zealanders.¹² Of them, 635,100 or 15 percent were Maori, the indigenous Polynesian people of New Zealand. Seven percent were, ethnically, from the various neighbouring (mainly Polynesian) Pacific Islands and 9 percent were Asian. The Maori population has a much younger age profile than the general population.¹³ Due to this fact and relatively higher birth rates amongst Maori and Pasifika peoples, it is projected that, while the European population of New Zealand will grow by 5 percent between 2001 and 2021, the Maori population will grow by 29 percent and the Pasifika population by 59 percent. If immigration trends continue, the Asian population will grow by 145 percent.¹⁴ On these projections, Europeans would still be the largest ethnic group, making up 70 percent of the total population in 2021, but this would be a drop from 79 percent in 2001.

These demographic features are an important difference that permeates the comparisons between New Zealand and Canadian indigenous peoples. Of the 29.6 million Canadians recorded in the 2001 census, some 1 million or 3 percent identified themselves as North American Indian and 307,845 or 1 percent as Metis.¹⁵

Just as important is the comparison in location and circumstances of indigenous peoples. Many First Nations in Canada have their own physically separate “reservations.” Nunavut is a separate self-governing territory whose population is 85 percent Inuit. In addition to individual tribal traditions, legends and symbols, many First Nations have a separate language. In New Zealand, each Maori *iwi* (tribe) or *hapu* (sub-tribe) has a home *marae* (meeting house and small surrounding area), but there are no separate reservations. Also, with minor regional variations, there is only one Maori language. Although some areas of New Zealand (particularly the East Cape of the North Island) are predominantly Maori, most Maori are urbanised and integrated amongst the rest of the population.

12. For New Zealand population data, as at 30 June 2005, and the projections cited here see Statistics New Zealand, *Demographic Trends 2005* (Wellington: Statistics New Zealand, 2006), online: Statistics New Zealand <www.stats.govt.nz/analytical-reports/dem-trends-05/default.htm>.

13. *Ibid.* Over half of the Maori population is under 23, whereas 12% of the general population is under the same age.

14. *Ibid.*

15. Statistics Canada, *Population by selected ethnic origins* (Canada: Census, 2001), online: Statistics Canada <www40.statcan.ca/101/cst/demo26a.htm>.

Maori in New Zealand have enjoyed an assertive cultural resurgence since the 1970s. This has been accompanied by political and constitutional demands and is reflected in the legal system as outlined below. Although the comparison is inexact, something of the flavour of the Maori position in New Zealand politics would be captured by combining the moral claims of First Nations in Canada with the political assertiveness of the Quebecois.¹⁶

Despite the differences in human and physical geography, the national cultures of Canada and New Zealand are probably more similar to each other than either is to any other nation. Certainly that is how it felt to me as a New Zealander to move from living in the United States to Canada for a short period several years ago. Both New Zealand and Canada have a similar British-dominated heritage forged through the process of colonisation. Neither was inclined to revolution and both retain affection for the United Kingdom. We even share the same sovereign, currently Elizabeth II, albeit in her different capacities of Queen of New Zealand and Queen of Canada. Each country has large noisy nations as neighbours, in Australia and the United States, who have superiority complexes that we worry are justified while we take pains to distinguish ourselves from them. Both countries have national preferences for mildness, cooperation and a sense of fairplay.¹⁷

2. *Constitutional differences*

The British colonial heritage is evident in the constitutional similarities between New Zealand and Canada.¹⁸ Both are based on the Westminster model of government and observe similar unwritten constitutional conventions. The Cabinet in each nation is drawn from and responsible, collectively and individually, to Parliament. The legal system of each nation is rooted in the common law and the judiciary is independent of the executive and legislative branches of government in both theory and

16. The inexactness of this comparison is illustrated by the absence of serious demands by Maori for separate independent statehood, though on occasion demands for *rangatiratanga* (chieftainship autonomy or self-determination) come close.

17. The World Values Survey suggests New Zealand and Canadian cultural characteristics are very similar, at least on some dimensions, see Ronald Inglehart and Wayne E. Baker, "Modernization, Cultural Change, and the Persistence of Traditional Values" (2000) 65 *American Sociological Review* 19 at 31.

18. As general references regarding the Canadian and New Zealand constitutions see Peter W. Hogg, *Constitutional Law of Canada*, 4th ed. (Toronto: Carswell, 1997) and Geoffrey Palmer and Matthew Palmer, *Bridled Power: New Zealand's Constitution and Government* 4th ed. (Melbourne: Oxford University Press, 2004).

reality. For a long time Canada and New Zealand shared the same highest court, the Judicial Committee of the Privy Council, sitting in London.¹⁹

There are also differences in constitutional structure. First, and most obviously, Canada is a federal system of government in which the provinces have asserted their powers against each other and against the federal government.²⁰ In 1867 the Canadian *Constitution Act* (then known as the *British North America Act*) created the provincial system in an “act of nation building” (so described by the Canadian Supreme Court). Ten years later, in another act of nation building, New Zealand demolished its divisive provincial system by ordinary act of the New Zealand Parliament.

Whereas Canada has agonized for years about the fate of its non-elected Senate as the upper house of Parliament, New Zealand simply abolished its upper house, the Legislative Council, in 1950. This was achieved by ordinary act of Parliament, after the government took the pragmatic precaution of stacking the Council itself with members favouring self-abolition. It would clearly be presumptuous for a New Zealander to offer such a solution to Canada as a precedent.

Perhaps it is the small size of New Zealand that has encouraged such comparative off-handedness and indifference in its political culture to the niceties of constitutional reform. In 2005, the Constitutional Arrangements Committee of the New Zealand House of Representatives had the temerity to recommend to government that some generic principles should underpin discussions of constitutional change.²¹ In an unduly cautious response the Government undertook to “give further consideration” to this radical idea.²²

The most significant constitutional differences between Canada and New Zealand have developed over the past 25 years. Both have considerably ameliorated the operation of the Westminster doctrine of Parliamentary sovereignty in reality, but in markedly different ways. While the judiciary has been relatively empowered in Canada compared to both of the political

19. Canada abolished criminal appeals to the Judicial Committee of the Privy Council in 1933 and civil appeals in 1949. New Zealand’s legislation effecting abolition was not passed until 2003.

20. For a now classic study of the relative changes, in opposite directions, in the federalist natures of Canada and Australia see Leslie Zines, *Constitutional Change in the Commonwealth* (Cambridge: Cambridge University Press, 1991). This constitutional divergence regarding federalism is paralleled by the relative divergence in the power of different branches of national government in Canada and New Zealand identified in this article.

21. Constitutional Arrangements Committee, *Inquiry to Review New Zealand’s Existing Constitutional Arrangements: Report of the Constitutional Arrangements Committee*, I24A (Wellington: House of Representatives, 2005) at 5. (The author acted as Principal Adviser to the Inquiry).

22. *Government Response to Report of the Constitutional Arrangements Committee on Inquiry to review New Zealand’s existing constitutional arrangements*, J1 (Wellington: House of Representatives, 2006) at 2.

branches of government, in New Zealand the legislature has benefited, relatively, at the expense of the executive, leaving the judiciary searching for the implications of the changes.

3. *The judicialization of the Canadian constitution*

Pierre Trudeau's Canada of 1982 adopted a package of constitutional reforms that not only patriated the constitution but entrenched the *Constitution Act, 1982*, including the *Charter of Rights and Freedoms*,²³ as a form of supreme law, against which the judiciary may strike down legislation (albeit subject to a legislative override). It is interesting for the purposes of this article that part of Trudeau's determination to adopt this package of reforms probably emanated from his concern about the rights of a minority, French Canadians, under a streamlined national Westminster-style constitution.²⁴

The *Charter of Rights and Freedoms*, in particular, has been the focus of significant scholarship in the Canadian and other Commonwealth legal academies for its move in the direction of judicial supremacy in the U.S. tradition. "The major effect of the *Charter* has been an expansion of judicial review."²⁵ It provides for judicial enforcement of identified civil and political rights and freedoms that are subject, in section 1, "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." While the *Constitution Act, 1982* sanctions judicial review of legislation that is found to be inconsistent with the *Charter* it also provides in section 33 for the possibility of a legislative over-ride by Parliament or a provincial legislature in respect of certain (slightly randomly) identified rights and freedoms.

The *Charter* has undoubtedly had the effect of shifting the actual balance of power between the Canadian branches of government, particularly between the legislature and judiciary. The ability of the judiciary to undertake judicial review of legislation for inconsistencies with an array of rights and freedoms that can be expansively interpreted has empowered the Supreme Court of Canada. The comparison with the newly created Supreme Court of New Zealand is marked.

More subtly, it appears to this observer that the enactment of the *Constitution Act, 1982*, particularly the *Charter*, has also had a pervasive effect on the orientation of Canadian legal culture. Canada's constitution has always contained unwritten elements important to its operation in practice, such as the doctrines of collective Cabinet responsibility

23. *Canada Act 1982* (U.K.), 1982 c. 11, Sched. B.

24. Stephen Clarkson and Christina McCall, *Trudeau and Our Times, Vol I: The Magnificent Obsession* (Toronto: McClelland and Stewart, 1990).

25. Hogg, *supra* note 18 at 803.

and individual ministerial responsibility. This is consistent with long-standing Diceyan theory that constitutional law consists of both law and conventions.²⁶ Indeed, the Canadian Supreme Court's judgment in the *Patriation Reference* in 1981 is a classic judicial consideration of the status of constitutional conventions in Westminster-style systems.²⁷ The existence of the constitutive *Constitution Act, 1867*, especially sections 91 and 92, has always exerted a strong pull on the focus of lawyers and courts. However, the formal situation persists; important elements of the Canadian constitution in reality are still unwritten.²⁸

Even so, my perception is that the 1982 reforms have increased the gravitational pull of written constitutional text on the Canadian legal community. Canadian constitutional discourse now appears generally to recognise fewer, more streamlined sources of constitutional authority, not a greater number of more complicated sources. The *Charter* and the *Constitution Act, 1982*, and their interpretation by the Supreme Court of Canada, seem to attract most attention. As Harry Arthurs and Brent Arnold state, "The *Charter* has become a preoccupation of legal scholars and appellate judges" They cite 28 percent of Supreme Court of Canada cases over the 2000-2002 period as concerning the *Charter*.²⁹

The Canadian Supreme Court itself still recognises the existence of atextual constitutionalism. It still asserts the fundamentality of constitutional principles that are not derived directly from a single text, as the four principles identified in the *Quebec Secession* case in 1998 make clear.³⁰

In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.

26. A. V. Dicey, *Lectures Introductory to the Study of the Law of the Constitution*, 10th ed. (London: MacMillan & Co., 1959).

27. *Re: Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

28. Indeed, a leading authority (another New Zealander, no less) suggests that "[i]n a sense, the two 1982 statutes worsen the formal state of Canada's constitutional law, because they add two more statutes to the variety of sources which existed before." Hogg, *supra* note 18 at 7.

29. Harry Arthurs and Brent Arnold, "Does the *Charter* Matter?" (2005) 11 Rev. Const. Stud. 37 at 39.

30. *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 at para 32. For a view that this decision owes more to the Court's political strategy to a constitutional moment than established legal tradition, see Jonathon W. Penny, "Deciding in the Heat of the Constitutional Moment: Constitutional Change in the Quebec Secession Reference" (2005) 28 Dalhousie L. J. 217.

And the impressive current Canadian Chief Justice, Beverley McLachlin, made clear her widely encompassing view of a constitution in her 2005 Lord Cooke of Thorndon Annual Lecture at the Victoria University of Wellington:³¹

First, unwritten constitutional principles refer to unwritten norms that are essential to a nation's history, identity, values and legal system. Second, constitutions are best understood as providing the normative framework for governance. Seen in this functional sense, there is thus no reason to believe that they cannot embrace both written and unwritten norms. Third – and this is important because of the tone that this debate often exhibits – the idea of unwritten constitutional principles is *not* new and should not be seen as a rejection of the constitutional heritage our two countries share.

In a 2002 speech on the twentieth anniversary of the *Charter* Chief Justice McLachlin suggested that:³²

[T]he reasons Canadians have adopted the *Charter* can be fully understood only by recognizing three realities

- 1 The fact that together with the *Patriation Act*, the *Charter* reflects Canada's national coming of age;
- 2 The hands-on made in Canada process that led to the adoption of the *Charter*, and
- 3 The fact that the *Charter* expresses who we are as a people.

For sure, the *Charter* and the *Constitution Act, 1982* are constitutionally significant and, particularly, are powerful symbols of rights and freedoms in a democratic society. Opinion polls seem to suggest that the *Charter* enjoys a high level of popular support in Canada.³³ But it is possible that the *Charter* may *over-symbolize* the source of such rights and freedoms. It seems to me that the focus on the *Charter* risks crowding out, from Canadian constitutional discourse and scholarship, the more sophisticated

31. Beverley McLachlin, "Unwritten Constitutional Principles: What is Going On?" (2006) 4 N.Z. J. Pub. & Int'l L. 147 at 149. Incidentally, the "account" of this lecture given by Conservative Canadian Member of Parliament Maurice Vellacot in May 2006 bears absolutely no relation to the written text of the lecture or the lecture as I heard it delivered. He subsequently resigned as Chair of the Commons' Aboriginal Affairs Committee over the ensuing controversy.

32. Beverley McLachlin, "Canadian Rights and Freedoms: 20 Years under the Charter" (Speech: April 17, 2002) online: Supreme Court of Canada <http://www.scc-csc.gc.ca/AboutCourt/judges/speeches/charter_e.asp>.

33. Joseph F. Fletcher and Paul Howe, "Canadian Attitudes towards the Charter and the Courts in Comparative Perspective" (2000) 6(3) *Choices: Courts and Legislatures* 4 at 6. (Over 80% of Canadians had heard of the Charter in polls conducted in 1987 and 1999 and, of those, over 80% thought the Charter was a "good thing" in each poll.).

understanding of Canada's constitution that is available from Canada's rich unwritten constitutional heritage.

It would be sad indeed if Canada succumbed to mimicry of the fascinating but relatively narrow U.S. focus on *The Constitution* and its supreme interpreters in the U.S. Supreme Court.³⁴ Such a focus leads, over time, to an under-appreciation of salient atextual constitutional features, which make up what I call elsewhere the "complete" constitution of a nation state.³⁵ Unchecked, this American tendency to look first to text rather than underlying principle risks exacerbating the disjuncture that is always possible between lawyers' and courts' fine constitutional analysis and the reality of citizens' lived experiences of the exercise of power, the governing of which, after all, is the purpose of a constitution. As Arthurs and Arnold suggest:³⁶

Absent from [the 2002 Osgoode Hall Law Journal Symposium], and from virtually all *Charter* scholarship over the past twenty-odd years, has been any empirical examination of its concrete, real-life effects as experienced by its intended beneficiaries...The focus of scholarship, in other words, has been primarily on the status and well-being of *Charter* rights, not of the rights-holders themselves.

Such a tendency is not in the interests of Canada's constitutional health.

4. *The politicization of the New Zealand constitution*

New Zealand considered but rejected the Trudeau faith in judicialization of the constitution. Yet its reasons to move power away from the executive branch of government were probably even more compelling than those in Canada.

From at least 1950 to 1996 New Zealand was the most streamlined system of democratic government in the world. There was no supreme law, no federalism, no written constitution, and no upper house. There was a small House of Representatives, in which the governing party always had a majority, which was in turn dominated, in numbers and political influence, by a Cabinet that exercised control through very strict party discipline. Such a system of constitutional design relied, for representativeness, solely on the mechanism of electoral competition between two political parties.³⁷

34. Palmer, *supra* note 5.

35. *Ibid.*

36. Arthurs and Arnold, *supra* note 29 at 46.

37. Matthew S. R. Palmer, *Constitutional Design and Law: The Political Economy of Cabinet and Congressional Government* 1993 (unpublished JSD dissertation, Yale Law School, on file with the author).

During the 1980s and 1990s the New Zealand electorate became disillusioned with the bi-polar political choice it faced every three years. The Muldoon National government (1975-84), particularly in its last term of office from 1981, pursued increasingly coercive economic policies. Prime Minister and Minister of Finance Robert Muldoon exhibited an increasingly arrogant attitude and held the power to back it up.³⁸ He used it to impose a two-year nationwide freeze on all public and private sector wages and prices implemented overnight by a simple regulation. The succeeding Labour government, facing an economic crisis, reacted to over-regulation by pursuing a programme of radical economic deregulation and privatisation from 1984 to 1990. The 1990-96 National government promised a kinder gentler future but delivered expenditure cuts and deregulation of the labour market. The New Zealand electorate lost faith in the effectiveness of political competition between the two main parties, particularly in ensuring that pre-election promises were kept after an election.

In light of the Muldoon administration's demonstration of just how streamlined New Zealand government was, in the mid 1980s Deputy Prime Minister, Attorney-General and Minister of Justice Geoffrey Palmer proposed that New Zealand should follow Canada's recent lead.³⁹ In a White Paper issued in 1985, the Government advocated entrenching a Bill of Rights, together with the *Treaty of Waitangi*, both of which would have the status of supreme law along similar lines to the *Canadian Charter of Rights and Freedoms*.

The Justice and Law Reform Select Committee of the House of Representatives conducted consultations about the White Paper over two years.⁴⁰ Four hundred and thirty eight submissions were received and hearings were conducted throughout the country. A significant proportion of submissions were against the proposal. "Several distinct strains of objection emerged, but foremost among them was that a constitutional bill of rights would elevate judicial power over parliamentary power, and be anti-democratic."⁴¹ New Zealanders were, and still are, fundamentally suspicious of judges. At that time the highest court was composed of

38. See Margaret Clark ed., *Muldoon Revisited* (Auckland: Dunmore Press, 2004).

39. In the interests of disclosing my own "context" I should note that Geoffrey Palmer (now Sir Geoffrey) is my father.

40. *A Bill of Rights for New Zealand, Appendices to the Journal of the House of Representatives* A6 (Wellington: House of Representatives, 1985). See Palmer and Palmer, *supra* note 18 at 319 and Paul Rishworth, "The Birth and Rebirth of the Bill of Rights" in G. Huscroft and P. Rishworth, eds., *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (Wellington: Brookers, 1995) at 29.

41. Paul Rishworth, "The New Zealand Bill of Rights" in P. Rishworth, G. Huscroft, S. Optican and R. Mahoney, eds., *The New Zealand Bill of Rights* (Melbourne: Oxford University Press, 2003) at 7.

judges who were not even New Zealanders and who sat in London (in the Privy Council). More importantly, judges are unelected. They are part of the elite. Every one of them used to be a lawyer.

The egalitarian and apparently democratic ethic of a colonial society remains strong in New Zealand. Politicians may not be trusted, but at least they can be ejected from government every three years. In 1988 the Justice and Law Reform Committee reported its conclusion that, while misconceived, New Zealanders did not like the idea of such a supreme law.⁴² The New Zealand *Bill of Rights Act 1990*⁴³ that was eventually passed still followed the *Charter* in many respects. But, perhaps influenced by the Supreme Court of Canada's experiment with interpreting ambiguity in the Canadian *Bill of Rights Act* of 1960,⁴⁴ section 4 of the New Zealand *Bill of Rights Act* is fulsome in subjecting itself to other legislation:⁴⁵

- No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),
- (a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
 - (b) Decline to apply any provision of the enactment; by reason only that the provision is inconsistent with any provision of this Bill of Rights."

Such suspicion of judges taps into a deep root in the New Zealand national psyche – one that appears (at present) to be absent in Canada. Canadian opinion polling in both 1987 and 1999 found that more than 60 percent of Canadians prefer the courts to have the final say on laws that conflict with the *Charter* whereas only around 30 percent prefer the legislature.⁴⁶ Cross-national comparison of polling data suggests that the Supreme Court of Canada enjoys comparatively high levels of popular support.⁴⁷ Even so, in 1999 Canadians were evenly split on whether the right of the Supreme

42. Final Report of the Justice and Law Reform Select Committee on a White Paper on a Bill of Rights for New Zealand (1988) *Appendices to the Journal of the House of Representatives* I.8C (Wellington: House of Representatives, 1988).

43. (N.Z.), 1990/109.

44. *R. v. Drybones*, [1970] S.C.R. 282.

45. The New Zealand judiciary has, nevertheless, found that they are able to "declare" another enactment inconsistent with the *Bill of Rights Act*, even if doing so has no "legal" effect: see *Moonen v. Film and Literature Board of Review*, [2000] 2 N.Z.L.R. 9. Note also that section 6 of the Act requires that "wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning."

46. Fletcher and Howe, *supra* note 33 at 11. In response to the question "When the legislature passes a law but the courts say it is unconstitutional on the grounds that it conflicts with the *Charter of Rights*, who should have the final say" in 1987 62% favoured the courts and 28% the legislature, while in 1999 62% favoured the courts and 30% the legislature. A majority supported the courts in every region of Canada. *Ibid.* at 12.

47. *Ibid.* at 15-16.

Court to decide “certain controversial issues should be reduced.”⁴⁸ I am not aware of comparable polling data in New Zealand. My instinct is that New Zealanders’ preferences for judges to have more power would be less than it is in Canada. Certainly the polling data on occupational reputation provides no particular cause to believe otherwise. At 6.64 on a 10-point scale in 2004, judges rank behind nurses, doctors, teachers, police, dairy farmers and sheep farmers in terms of respect.⁴⁹

It has been suggested to me that the relative level of popular comfort with judicial power in Canada compared to New Zealand may be due to Canada’s federal context.⁵⁰ Canadians have two levels of government to distrust! More seriously, Canadians have grown accustomed to the inherent by-product of federalism—courts acting as arbiters of constitutional disputes. They are used to the notion of the separation of different layers of government and different branches of government, in other words to multiple centres of power. New Zealanders are not used to courts deciding disputes about their constitution. They are used to unitary government, one house of Parliament, and (at the time of the White Paper and until the advent of elections by proportional representation in 1996) a monolithic Cabinet wielding unbridled executive and, effectively, legislative, power, controlled only by triennial elections. The last of these factors points towards the other logical place for reform of the New Zealand constitution.

In 1985 the concerns about the unbridled power of the government that led to the Bill of Rights White Paper also led to the establishment of a Royal Commission on the Electoral System. The Commission issued a comprehensive report in December 1986.⁵¹ It recommended that New Zealand reform its plurality or “first past the post” (FPP) electoral system by adopting a system of mixed member proportional (MMP) representation along the lines of the West German model. The Royal Commission’s report gathered dust in the face of two political parties unwilling to dilute their power. Yet by the early 1990s both major political parties, Labour and National, were in turn perceived by the electorate to have betrayed their popular mandate by the economic and social policies they pursued.

48. *Ibid.* at 17. 42% agreed and 43% disagreed. This result constituted somewhat less support of the Canadian Supreme Court than existed in the other jurisdictions polled.

49. UMR Research, *Mood of the Nation Report: New Zealand 2004*, online: UMR <<http://www.umar.co.nz/Reports.php>>. Judges rank seventh of 18 occupations. Lawyers (at 5.46) rank 16th and politicians were bottom (at 4.09).

50. I thank Sandra Petersson, formerly of Victoria University of Wellington and now Research Manager at the Alberta Law Reform Institute, for pointing me in this direction.

51. Report of the Royal Commission on the Electoral System, *Towards a Better Democracy* H.3 (Wellington: House of Representatives, 1986).

In 1996, after two referenda (in 1992 and 1993), the Royal Commission's proposal for electoral reform was enacted. As political science predicts, MMP elections destroyed the two-party duopoly on power. No one political party can now expect to have a majority of seats in Parliament. This has had fundamental constitutional effects in New Zealand.⁵² There must be bargaining between parliamentary parties to form a government, to formulate policy and to pass legislation. The system of government has slowed down, the executive has less power and Parliament has been revitalized. The effects of this electoral reform have changed the basic dynamics of power in New Zealand government.

Canada's enactment of the *Constitution Act, 1982* moved power from the executive and legislative branches of government—the political branches—towards the judicial branch of government. New Zealand's shift to MMP elections moved power from one of the political branches to the other—from the executive to the legislature.

The shift of power between branches of government under MMP representation can be characterized as greater “politicization” of power in New Zealand.⁵³ Under the FPP system, a single party majority government was elected to govern for three years. Political manoeuvring certainly occurred within the governing party, sometimes between loosely formed blocs within a party. But the dynamics of the exercise of power by a government sure of its parliamentary majority felt more “administrative” in its day to day policy-making than it does in the MMP environment.

Under MMP representation every policy and legislative initiative is the subject of formal negotiation between parties in the search for a majority position in the House of Representatives. Instead of the authority of a decision made within one organization (the governing party in Cabinet), government decisions are now the results of individual political transactions. These negotiations have decentralized the reality of the exercise of power by the New Zealand government. There are now more pressure points at which various groups in society can discuss and influence the exercise of government power. A greater range of political opinion is now represented in Parliament, is heard in public political debate, and can influence New Zealand government decisions.

There is, therefore, a nice constitutional parallel between the relative judicialization of Canada's constitution and the relative politicization of

52. Palmer and Palmer, *supra* note 18.

53. It could also be characterized as greater “democratization,” but, in this comparative context, I do not want to set red herrings running up Canadian rivers by implying a lack of democratic flavour to the Canadian constitution. The point here is to contrast the relative power of the judicial branch of government in Canada with the relative power of the political branches in New Zealand.

New Zealand's constitution over the same period. Both developments are examined further below, in the context of the relations between the Crown and indigenous peoples with a view to determining which model is more effective in protecting their rights.

III. *How judicialized and politicized constitutions protect Indigenous rights*

1. *Realism about protection of Indigenous rights*

What might a perspective of constitutional realism add to our understanding of how (and how well) indigenous people's constitutional rights are protected by Canada's and New Zealand's constitutions? Consider, for example, the constitutional protection of indigenous peoples' traditional use of land. A constitutional realist is not limited to analysing the words in the constitutional instruments, or even their interpretation. Rather, constitutional realism requires inquiry into how the statements and misstatements, actions and inactions, of all branches of government affect the traditional use of land by indigenous people.

A comprehensive study of the reality of constitutional protection of First Nations' traditional use of land in Canada or New Zealand would identify and analyze the significant structures, processes, principles and cultural norms that affect the reality of how the governments, in all their branches, exercise public power with respect to indigenous peoples' traditional use of land. What are the statutory rules? What do judges say they mean? How do government officials implement those rules and stated meanings? How do indigenous people experience the reality of that implementation?

To answer these questions, it would be necessary to examine how each nation's constitutional statutes touch on traditional use of land, as well as the constitutional jurisprudence of the New Zealand and Canadian Supreme Courts and the conventional principles and procedural and substantive rules that influence the behaviour of federal and provincial governments. It would be necessary to examine the common law, including that relating to aboriginal title and customary rights as developed by Canadian and New Zealand courts. It would be necessary to examine the inter-play between the common law and the legislation passed in Wellington and Ottawa and Halifax. It would also be necessary to examine how the courts, at federal and provincial levels, interpret all these legal provisions, especially those courts or other dispute resolution bodies that, in practice, decide disputes bearing on the traditional use of land.

Most importantly, it would be necessary to examine the policies and practices of the Office of Treaty Settlements, the Ministry of Justice, the Department of Conservation, the Ministry for the Environment and

Te Puni Kokiri (the Ministry of Maori Development) in New Zealand, and Canada's Department of Indian Affairs and Northern Development, and Nova Scotia's Office of Aboriginal Affairs. The attitudes of local government authorities would also be important in reality. How do they recognise, tolerate or support, indigenous peoples' traditional use of land? What are the First Nations' own beliefs and actions in fostering their traditional uses and how are they affected by government policy in reality, if at all?⁵⁴

For a constitutional rule seeking to protect the traditional use of land by indigenous people to be effective, to the mind of a constitutional realist, the rule must enhance the lived experience—the reality—of that use by specific indigenous peoples. With an understanding of that it would be possible to make an authentic assessment of the effectiveness of the constitutional protection. Conducting such an assessment in both Canada and New Zealand would truly constitute comparative constitutional analysis.

Compared to such an ambitious aspiration for comparative analysis, this article only scratches the surface of one dimension of the comparison between New Zealand's and Canada's constitutional protection of indigenous rights. It compares the effects of the tendencies of relative constitutional judicialization in Canada and politicization in New Zealand.

2. *Judicial protection of Indigenous rights in Canada*

In Canada's adoption of the *Constitution Act, 1982* the primary political dynamics concerned the powers of the provinces, especially Quebec, French and English language issues, and the passage of the *Charter of Rights and Freedoms*. The constitutional position of indigenous peoples was not directly included in the sections of the *Constitution Act, 1982* that constitute the *Charter of Rights and Freedoms*.⁵⁵ Crucially, however, section 35(1) of the *Constitution Act, 1982* provides: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." Although patriation of the constitution was

54. A realist's view of indigenous peoples' own law or "law-stuff" is a whole other subject not covered in this article. I note only the possibility that determining the impact of a western nation's constitutional system on the legal system and behaviour of an indigenous people may be a matter of significant complexity. See Karl N. Llewellyn and E. Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Norman: University of Oklahoma Press, 1941).

55. Some aboriginal peoples opposed the *Charter* for fear that it would unduly affect their own cultural practices. In response to this, section 25 of the *Charter* provides that it should not be construed as derogating from "aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada." However, this did not allay all aboriginal fears: see Bradford W. Morse, "Twenty Years of Charter Protection: The Status of Aboriginal Peoples Under the Canadian Charter of Rights and Freedoms" (2002) 21 Windsor Y.B. Access Just. 385.

(unsuccessfully) opposed in litigation by some aboriginal groups in the British courts,⁵⁶ other aboriginal groups had also lobbied for some form of constitutional protection such as section 35 for some years.⁵⁷ Twenty-five years on, this section is seen in Canadian legal circles as both a symbol and a real source of protection of aboriginal rights.

The location of section 35 in the *Constitution Act, 1982* but outside the *Charter* may mean that it lacks some of the symbolic power of the *Charter*. However its practical effects are more powerful because it is not subject to some of the qualifications on the *Charter*.⁵⁸ Unlike the *Charter*, section 35 is not qualified by section 1's balancing of rights against "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Unlike the *Charter*, section 35 cannot be overridden by legislatures under section 33. While section 35's protection is not limited only to government action by section 32, the Supreme Court has found that the duties it imposes do not arise in relation to third parties.⁵⁹ However, like the *Charter*, section 35 is supreme law by virtue of section 52 of the *Constitution Act, 1982*, which provides that "any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." The courts, and ultimately the Supreme Court of Canada, therefore have the power to interpret the meaning of section 35 and to strike down legislation that is inconsistent with it. This is judicial power indeed. The Supreme Court's adoption of a limitation to section 35 that is similar to section 1 illustrates the need of guidelines for the exercise of that power.⁶⁰

Section 35 was not the primary focus of the national constitutional debate that led to the 1982 Act. It was the result of consultation and agreement. But in the context of the wider constitutional compact involving patriation of the constitution, the Quebec question and the *Charter*, section 35 has the aspect of a side deal in the national debate. Its strategic importance to the passage of the *Constitution Act, 1982* appears to have been primarily in facilitating support of another section of the

56. *Manuel v. Attorney-General*, [1983] Ch 77 at 95 (CA). See P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status and Self-Determination* (Oxford: Oxford University Press, 2004) at 385.

57. Philip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005) at 425-426.

58. Hogg, *supra* note 18 at 695.

59. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 53. ("The honour of the Crown cannot be delegated.")

60. In *R. v. Sparrow*, [1990] S.C.R. 1075 at 1113 the Supreme Court found that any law with the effect of impairing an existing aboriginal right would be subject to judicial review on the basis of whether the impairment was justified by virtue of pursuing a compelling and substantial objective consistent with the special relationship of trust between the Crown and aboriginal peoples.

community, the First Nations, for the wider constitutional change.⁶¹ From a southern hemisphere perspective it seems likely that this context of a wider package of constitutional reforms was crucial to ensuring section 35 passed. Would Canada have adopted section 35 if it had been the only constitutional proposal debated throughout the nation? I suspect not.

The existence of section 35 has seen the “judicialization” of protection of indigenous rights in Canada, in the same way as the *Charter* has judicialized other significant aspects of Canada’s constitution. A series of significant Canadian Supreme Court cases have demonstrated that this judicialization has had real effects on law and behaviour. Certainly, to this observer, the quality of the relationships between the Canadian Crown and indigenous peoples has improved since 1982. But the effectiveness of such Supreme Court decisions appears to lie primarily in the incentives they have laid down for executive governments and the reactions of a succession of governments over time. To this realist, the dynamics of the Canadian Supreme Court’s approach to indigenous rights since 1982 are similar in quality to the dynamics in the 1970s.

In 1969 the Trudeau administration’s truly “White” Paper on Indian Policy proposed the integration of Indians with Canadian society and the removal of special legal implications of “aboriginal” status. Minister Chretien signalled a retreat from this position in 1971 in the face of aboriginal outrage. The Supreme Court’s contribution to the situation came in 1973 in its historic *Calder* case.⁶² In this case and in *Guerin*,⁶³ the Court seized on common law doctrines of aboriginal title and fiduciary obligation as tools to impel the federal and provincial governments to consult and negotiate with First Nations. At a basic level of judicial motivation it seems to me that the Court was concerned at what it perceived to be cases of injustice facing specific groups of indigenous peoples and sought to prod government to engage seriously with the issues. It was successful. “*Calder* was the catalyst for the formulation of a new policy.”⁶⁴

The impact of section 35 appears in subsequent cases. In *Van der Peet*, Chief Justice Lamer found that the section provides the constitutional “framework” for reconciling the prior existence of aboriginal peoples with the sovereignty of the Crown.⁶⁵ In *Sparrow* the Canadian Supreme Court used section 35 to reinforce and enlarge upon the fiduciary obligations

61. Clarkson and McCall, *supra* note 24.

62. *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

63. *Guerin v. The Queen*, [1984] S.C.R. 335 (although decided after the *Constitution Act*, 1982 the court’s judgment in this case did not depend on section 35.)

64. Peter H. Russell, “High Courts and the Rights of Aboriginal Peoples: The Limits of Judicial Independence” (1998) 61 Sask. L. Rev. 247 at 260.

65. *R. v. Van der Peet*, [1996] 2 S.C.R. 507.

suggested in *Guerin* and clarified the process and requirements of extinguishment of aboriginal title left hanging in *Calder*.⁶⁶ In *Delgamuukw*, Chief Justice Lamer clarified what the constitutional weight of section 35 should be used for, in backing up the Court's earlier common law based decisions.⁶⁷

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, ... that we will achieve ... "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.

In these post-section 35 cases, as with the pre-section 35 cases, the Court's primary role appears to have been to push executive government to take the interests of indigenous peoples' seriously. As the cases demonstrate, these prods often manifest as procedural requirements upon the Crown in engaging with indigenous peoples and thus they reflect the importance of process for the health of these relationships. In terms of the procedural pressure put upon the Crown, section 35 has made the Court's tools more powerful. A convenient way to appreciate this development is to view section 35 as adding to the Court's available institutional "capital", related to its legitimacy, which it can decide to maintain or expend in the pursuit of its normative understanding of Canada's commitment to the protection of indigenous rights.⁶⁸

In addition to giving the Supreme Court power to affect the procedural dynamics of Crown-First Nations relationships, section 35 has a more substantive effect. While section 35 is in force, it gives the Supreme Court power to rule against legislative attempts to abolish indigenous rights. The power of Parliament is limited substantively, at least in the short or even medium term. As argued further below, though, there are ultimate limits to the Court's powers in the long term, viewed through a realist lens, that exist in the susceptibility of the Court's own institutional power to public opinion, and in the ultimate (though difficult) possibility of amendment to section 35.

The *Constitution Act, 1982* has also had a significant effect through processes of political consultation. Section 35.1 of the *Constitution Act, 1982* requires that a constitutional conference be held, including participation of aboriginal representatives, before there can be amendment to the protections of aboriginal peoples in the *Act*. Sections 37 and 37.1

66. *Supra* note 60.

67. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186.

68. On the notion of an exhaustible supply of institutional capital available to a court, see Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (Chicago: University of Chicago Press, 1980).

required the holding of constitutional conferences on matters directly affecting the aboriginal peoples of Canada. The Canadian custom of negotiations with First Nations was bolstered by the section 37 conferences and confirmed by the precedent of full inclusion of four national aboriginal organizations as a third order of government, along with 11 first ministers and two territorial leaders, in the discussions leading to the failed *Charlottetown Accord* in 1992.⁶⁹

The *Charlottetown Accord* provided for recognition of aboriginal peoples' "inherent right of self-government within Canada." While the *Accord* was defeated in the 1992 national referendum, the inherent right of self-government has continued to be recognized, as in the federal government's policy statement in 1995. More than half of the First Nations and Inuit communities in Canada have since entered negotiations with the federal government over the details of self-government.⁷⁰

Yet the Canadian Supreme Court appears to have been less enamoured of Canadian governments' acceptance of the inherent right of self-government that emerged from the political discussions. It has drawn back from directly endorsing self-government as being required by section 35 apart from governmental agreement.⁷¹ Perhaps this is related to the fact that the policy on the inherent right of self-government is paradigmatically a political approach to indigenous issues. It constitutes a general solution of the definition of jurisdiction to exercise political power and its allocation between different political entities. Such a solution does not lie within the comfort zone of courts concerned with the context of individual cases of controversy.

As the above, sweepingly general account suggests, there is value in applying a healthy dose of traditional realism to the effect of the presence of supreme law in Canada. The courts alone have not transformed the indigenous policies of governments. Neither have they acted as an inevitable consequence of conventional legal doctrine. Rather, they have used the tools available to them to bolster their "bargaining" strength with the political branches of government in the interests of what they perceive, on the basis of considered and informed reflection, to be justice. In doing this, Canadian judges must surely respond to political factors within their context of decision-making as, I am sure, do New Zealand judges. These inputs are most likely to affect judicial decision-making

69. Hogg, *supra* note 18 at 703.

70. McHugh, *supra* note 56 at 473.

71. E.g. *R. v. Pamajewon*, [1996] 2 S.C.R. 821 at para. 24 ("assuming without deciding that section 35(1) includes self-government claims . . .").

in the highest courts on issues grounded in the widest policy latitude, of which indigenous rights are one set.

Kent McNeil makes this point powerfully in the context of Canadian (and Australian) indigenous rights.⁷² He notes the stinging dissent of Justice McLachlin (as she then was) from the majority decision by Chief Justice Lamer in *Van der Peet* as “indeterminate and ultimately more political than legal.”⁷³ McLachlin J.’s point goes to the substantive, as well as the procedural, nature of the Supreme Court’s protection, in reality, of indigenous rights. From her perspective, the majority in *Van der Peet* went further than defining the justifiable limits on the exercise of an aboriginal right and threatened to “diminish the *substance* of the right that s.35(1) of the *Constitution Act, 1982* guarantees to the aboriginal people. This no court can do.”⁷⁴

Kent McNeil concludes as follows:⁷⁵

The lesson to be learned from the decisions examined in this article can, I think, be summed up like this: regardless of the strengths of legal arguments in favour of Indigenous peoples, there are limits to how far the courts in Australia and Canada are willing to go to correct the injustices caused by colonialism and dispossession. Despite what judges may say about maintaining legal principle, at the end of the day what really seems to determine the outcome in these kinds of cases is the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure. I think this is a reality that Indigenous peoples need to take into account when deciding whether courts are the best places to obtain redress for historical wrongs and recognition of present-day rights. It may be advantageous to formulate strategic approaches that avoid surrendering too much power to the judicial branch of the Australian and Canadian state.

The continued authority of any court’s decisions ultimately rests on the social and constitutional norms of legitimacy applied to the court by the public and by informed legal and political opinion. Such norms evolve and are iteratively confirmed or challenged. In marginal cases, individual decisions at variance with contemporary social and political, ultimately constitutional, mores can eat away at or maintain the Court’s institutional capital. From my observations, Supreme Court judges in Canada, as in most other jurisdictions, are *and should be* conscious of that. At the margins,

72. Kent McNeil, “The Vulnerability of Indigenous Land Rights in Australia and Canada” (2004) 42 Osgoode Hall L. J. 271. For an earlier comparative treatment taking a similar perspective of judicial inclinations see Russell, *supra* note 64.

73. *Supra* note 65 at para. 302.

74. *Ibid.* para. 315.

75. McNeil, *supra* note 72 at 300-301 (footnote omitted).

and in the long term, Supreme Court judges must deliberately adjust the results of their decisions, if not their reasoning, according to their inchoate normative perceptions of the values of their national jurisdiction.

As James Kelly and Michael Murphy argue persuasively in relation to aboriginal rights issues and Quebec, the Supreme Court of Canada assumes a “meta-political” role in the management of Canada’s constitutional architecture.⁷⁶ Court decisions facilitate dialogue between courts and legislatures and between First Nations and governments. In doing so, the Court must act carefully, balancing the risks of getting too far ahead of public opinion and of failing to protect what it identifies as the values underlying Canada’s constitutional fabric.

Consider the hypothetical position of a Canadian supreme court today that does not operate with a supreme charter or constitution. Would its decisions on indigenous rights since 1982 have been any different? One might think that such a court would make stronger decisions. It might consider it has the freedom to make strong statements of principle while leaving the resolution of a difficult issue to Parliament. Inconvenient consequences of such principles would not be attributable to the court. Or one might think that such a court would make weaker decisions. It might seek to anticipate and thereby blunt political reaction to its judgments, especially reactions that would have the power to override its judgments. However, in believing there is some chance of either, or even both tendencies occurring, one implicitly acknowledges that the Supreme Court of Canada acts with an eye to political factors and public opinion in its judicial decision-making.⁷⁷

For completeness, I note that I consider the same is true in New Zealand and in every other supreme court that is otherwise lauded for its judicial independence. As Justice Kirby of Australia observed:⁷⁸

No judge of integrity can believe that he or she is a free agent, entitled to state the law according to a personal agenda. Yet it is equally wrong to disguise the policy choices that judges must make in performing their functions or to pretend that the pursuit of justice is irrelevant or that words alone, found in past “doctrine”, solve all legal problems.

76. James B. Kelly and Michael Murphy, “Shaping the Constitutional Dialogue on Federalism: Canada’s Supreme Court as Meta-Political Actor” (2005) 35 *Publius* 217.

77. This is consistent with Jonathon Penny’s application of Bruce Ackerman’s theory of constitutional moments to the Canadian Supreme Court’s decision in the *Quebec Secession Reference*, *supra* note 30 at 247-254.

78. Hon. Justice Michael Kirby, “Judicial Activism: Authority, Principle and Policy in the Judicial Method,” *The Hamlyn Lectures, Fifty-Fifth Series*, 20 November, 2003 (London: Sweet & Maxwell, 2004).

If understood in this way, through the prism of realism, Canada's judicialized constitution, including its constitutional protection of indigenous peoples, is less immune from public pressure than legal circles might wish to think. To be sure, that pressure is quite different from the short-term pressure on politicians measured by opinion polls. It is a longer term, less choate judicial perception of the normative values of their nation's jurisdiction and of how "history" will judge decisions.

The good news for those desiring to protect indigenous rights in Canada is that judicial power is less likely to yield to short term political pressure than is legislative or executive power. The warning is that it may yield to sustained political and normative pressure over the medium or long term, and that matters in relationships between the Crown and indigenous peoples. Ironically, such susceptibility of judicial power also makes a judicialized system of constitutional protection less objectionable to those zealous defenders of democracy that seek to elevate the constitutional position of the elected representatives of the people.

3. *Realism about political protection of Indigenous rights in New Zealand*

The signing of the *Treaty of Waitangi* between the British Crown and Maori chiefs in 1840 is taken as marking the founding of New Zealand. Unlike many British treaties with First Nations in Canada, the *Treaty of Waitangi* was not concerned with a transfer of land, extinguishment of aboriginal title or the creation of reserved areas. Although it did affirm the Crown's exclusive pre-emptive right of purchase of Maori land, it was a general treaty of cession and protection. The problem is that there was, and is, disagreement over what was ceded and protected.⁷⁹

The *Treaty of Waitangi* is short—being composed of three articles – and appears in two versions—one in English and the other in Maori. The original was written in English and translated into Maori with the help of missionaries before being presented to a gathering of chiefs of tribes at Waitangi in early February 1840. Copies were subsequently hawked around the rest of the country. Some 500 Maori chiefs eventually signed the *Treaty*. Most chiefs signed the Maori version, which had important differences in the key terms.

In the English version of Article the First, Maori cede to the Crown "absolutely and without reservation all the rights and powers of Sovereignty." Yet in the Maori version they cede "kawanatanga"—a transliteration of "governorship" that may have resonated with the Maori understanding

79. The seminal work is Claudia Orange, *The Treaty of Waitangi* (Wellington: Bridget Williams Books Ltd, 1987).

of the biblical relationship between Governor Pontius Pilate within the Roman Empire or as associated with the remote Governor of New South Wales.⁸⁰ In the English version of Article the Second, the Crown “confirms and guarantees” to Maori the “full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession.” Yet in the Maori version, Maori are guaranteed their “te tino rangatiratanga” or chieftainship (rangatira being chiefs). This notion may have been closer to the English conception of sovereignty than was kawanatanga. It was “rangatiratanga” that was used to denote the “independence” of New Zealand in the 1835 Declaration of Independence, eventually signed by some 50 Maori chiefs and acknowledged by the Crown.⁸¹ The least problematic is article the Third, where the Crown guarantees Maori all the rights and privileges of British citizens.

The standard legal doctrine of *contra proferentum* suggests that the Maori version should be given more weight, in legal interpretation, than the English version. Even so, however, the balance between the articles of the Treaty in both versions is general and vague. In working out what the *Treaty of Waitangi* means in a particular context, modern *Treaty* jurisprudence in New Zealand is threaded through with the notion of balance. In particular, in most issues that call for the application of the *Treaty*, there is a need to balance article one’s cession of “sovereignty” or “kawanatanga” with article two’s guarantee of “full, exclusive and undisturbed possession” or “te tino rangatiratanga”. In 1988 the Waitangi Tribunal said:⁸²

[A] careful balancing of interests . . . is required. It was inherent in the Treaty’s terms that Maori customary values would be properly respected, but it was also an objective of the Treaty to secure a British settlement and a place where two people could fully belong. To achieve that end the needs of both cultures must be provided for and, where necessary, reconciled.

My favourite quotation reflecting this balance is from one of the Tribunal’s first reports, the 1983 Motonui-Waitara report (Wai 6):⁸³

The Treaty represents the gift [by Maori] of the right to make laws in return for the promise to do so so as to acknowledge and protect the interest of the indigenous inhabitants. . . . That then was the exchange of gifts that the Treaty represented. The gift of the right to make laws, and

80. *Ibid.* at 41.

81. *Ibid.* at 21-22.

82. Waitangi Tribunal, “Report on the Manganui Sewerage Claim” 1988 Wai 17 at 60.

83. The Waitangi Tribunal, “Motonui Waitara Report” 1983 Wai 6.

the promise to do so so as to accord the Maori interest an appropriate priority.

This commentary emphasises that the essence of the meaning of the *Treaty* lies in figuring out how to balance general governance and Maori interests, not in abstract statements. Disconcertingly, especially for lawyers used to seeking solutions to particular problems, the literal text of the *Treaty* does not provide “answers” to specific issues that arise. It does not reflect a standard contractual commercial interaction where each party sought to spell out specific things they wanted. How could it, when the nature of the deal was so long term, and each party expected and intended to endure for the rest of foreseeable time? Rather, the nature of the deal was inherently relational, like many Canadian treaties.⁸⁴

From a legal perspective, the *Treaty of Waitangi* is also unsatisfying as a complete and unambiguous source of British sovereignty. A few years after the *Treaty* was signed Attorney-General William Swainson considered that British sovereignty was based “partly upon discovery, partly upon cession, partly upon assertion and partly upon occupation.”⁸⁵ But from a symbolic and moral perspective the *Treaty* has power.⁸⁶ It symbolized and still symbolizes a mutual agreement between two peoples that gave the Crown legitimacy to exercise a governance role in New Zealand and accorded some level of protection to Maori. Despite the uncertainty and argument over its terms the *Treaty* remains a potent symbol of nation-building. As the then President of the New Zealand Court of Appeal, later Lord Cooke of Thorndon, stated extra-judicially in 1996: “[i]t is simply the most important document in New Zealand’s history.”⁸⁷ Its historical existence as an explicit agreement gives added moral legitimacy to Maori claims.

The *Treaty of Waitangi* does not, of itself, confer legal rights in New Zealand. Its legal status remains that of a treaty unincorporated into domestic law. It is not part of any higher law in New Zealand and it is not even part of ordinary domestic law except to the extent that it is referred to in individual statutes. Yet domestic law was the vehicle of response to increasingly assertive Maori political demands for land rights in the 1970s. The *Treaty of Waitangi Act 1975* created the Waitangi Tribunal as a semi-judicial forum for the investigation of allegations by Maori of

84. Ken S. Coates and P.G. McHugh, *Living Relationships Kokiri Ngatahi: The Treaty of Waitangi in the New Millennium* (Wellington: Victoria University Press, 1998).

85. U.K., H.C., “Parliamentary Papers Relating to New Zealand,” Vol. 2 1844 at 560 quoted in Evelyn Stokes, *Wiremu Tamihana: Rangatira* (Wellington: Huia Publishers, 2002) at 114.

86. John Borrows, “Ground Rules: Indigenous Treaties in Canada and New Zealand” (2006) 22 N.Z.U.L.Rev. 188.

87. Sir Robin Cooke, “Introduction” (1990) N.Z.U.L. Rev. 1.

contemporary breaches of the *Treaty*. It had recommendatory power only. In 1985 its jurisdiction was extended retrospectively to 1840. In 1988, as a result of Maori litigation and court ordered negotiation, the Tribunal acquired a limited statutory mandate to make binding orders on the Crown in relation to specified forms of redress.⁸⁸ Impelled partly by this binding mandate, which constituted a significant fiscal risk, from the early 1990s there have been significant settlements between the Crown and Maori iwi of historical grievances over fisheries, land confiscations and fraudulent land transactions.⁸⁹

There are, of course, some “backdoor” means by which courts can find ways of giving legal bite to the *Treaty*. For example, the *Treaty* can be treated as a relevant consideration in the judicial review of administrative action, with or without statutory references to it.⁹⁰ And it can be used as a touchstone in the judicial task of statutory interpretation.⁹¹ But otherwise, in the ordinary courts, as determined by the Privy Council in *Te Heu Heu Tukino*, the *Treaty* has no independent legal effect in and of itself.⁹²

Parliament has made up for this by referring repeatedly, particularly in the 1980s and 1990s, to the *Treaty* in specific statutes. This legislative hook has usually been a generic reference to the principles of the *Treaty*, though there are signs more recently of Parliament’s willingness to explore its specific implications in legislation.⁹³ The generic references in particular have faced the New Zealand courts with the challenge and opportunity of considering the meaning of the *Treaty of Waitangi* in various specific contexts and have thereby generated significant, though sometimes tentative, jurisprudence.

So the legal status of the *Treaty of Waitangi* in New Zealand is that it is “half in and half out of the law.”⁹⁴ Whether it has legal effect depends primarily on the politics in Parliament at the time each new statute is passed and whether it is politically desirable to refer to the *Treaty* or not. The resulting constitutional status of the *Treaty* in New Zealand is truly “politicized”, along with the rest of the New Zealand constitution, in distinction to the “judicialized” nature of constitutional protection of First Nations rights in Canada.

88. *Treaty of Waitangi (State Enterprises) Act 1988* (N.Z.), 1988/105.

89. See, e.g. Douglas Graham, *Trick or Treaty?* (Wellington: Institute of Policy Studies, 1997) and Matthew S.R. Palmer, “International Law/Intercultural Relations” (2000) 1 *Chicago J. Int’l L.* 159.

90. *Attorney-General v. New Zealand Maori Council*, [1991] 2 N.Z.L.R. 129; *Ngai Tahu Maori Trust Board v. Director-General of Conservation*, [1995] 3 N.Z.L.R. 553; *Barton-Prescott v. Director-General of Social Welfare*, [1997] 3 N.Z.L.R. 179.

91. *Huakina Development Trust v. Waikato Valley Authority*, [1987] 2 N.Z.L.R. 188.

92. *Hoani Te Heu Heu Tukino v. Aotea District Maori Land Board*, [1941] A.C. 308.

93. Matthew S. R. Palmer, “The Treaty of Waitangi in Legislation” [2001] N.Z.L.J. 207.

94. Palmer and Palmer, *supra* note 18 ch. 17.

It might be thought that the monolithic nature of New Zealand government, controlled by the Pakeha majority, would have had the minority indigenous Maori cheering on the 1985 proposal to judicialize the *Treaty of Waitangi*. But this was not the case. At the level of principle, there was a significant Maori view that putting the *Treaty of Waitangi* itself into any law passed by Parliament would *diminish* its status. The *Treaty* would be transformed from a powerful normative symbol with moral legitimacy into a mere legal instrument. And legal instruments, even those with the status of supreme law, can be amended. Indeed, the one element of the *Treaty of Waitangi* that was incorporated generally in legislation was the Crown's right of pre-emption – and that was abolished by subsequent legislative amendment.⁹⁵ If the *Treaty* is outside the law its moral and normative power can continue untouched, as a reference point for political agitation. Inside the law, it becomes an instrument of the legal system and a plaything for lawyers and judges.

At a pragmatic level, the context of the mid-1980s was important. The proposal to entrench the *Treaty* in supreme law was raised in Labour Party policy before the 1984 election and formally proposed by the Labour Government's White Paper in 1985. The select committee received and heard public submissions primarily during 1985-86. It issued an interim report in 1986 on the public submissions and a final report on the substance of the proposal in 1988. Maori reaction was suspicious and sceptical both at a national hui in September 1984 and in submissions to the select committee in 1986.⁹⁶

At that time, New Zealand court decisions could fairly be perceived as ignoring the *Treaty of Waitangi*. The courts were not a useful avenue for pursuing Maori claims. The seminal *Lands* case which dramatically challenged that view was brought and judgment issued in 1987,⁹⁷ based on a reference to the *Treaty of Waitangi* in the *State-Owned Enterprises Act 1986*. By contrast, political action had long been part of Maori strategy and by 1986 that was showing signs of bearing significant new fruit, especially through the 1985 amendment which conferred retrospective

95. *Land Claims Ordinance 1841* and s.73 of the *New Zealand Constitution Act 1852*. The colonial New Zealand Parliament passed a Native Territorial Rights Bill in 1859, abolishing pre-emption. In an interesting early example of the political power of the *Treaty of Waitangi* to affect law, it was "disallowed" by the UK government as an infringement of the *Treaty*. Pre-emption was eventually abolished by the *Native Land Act 1862*, the preamble to which stated that act's intention to "give better effect" to the *Treaty of Waitangi*. See M.P.K. Sorrenson, "A History of Maori Representation in Parliament" Annex B to the Report of the Royal Commission on the Electoral System, *Towards a Better Democracy* H.3 (Wellington: House of Representatives, 1986) at B-14 and B-17.

96. Geoffrey Palmer, *New Zealand's Constitution in Crisis: Reforming our Political System* (Dunedin: John McIndoe, 1992) at 78.

97. *New Zealand Maori Council v. Attorney-General*, [1987] 1 N.Z.L.R. 641.

jurisdiction on the Waitangi Tribunal to hear allegations of breaches of the *Treaty*. So it is understandable that it would not have been clear to Maori in 1986 that it was more in their interests to trust supreme power to a group of old white male middle class judges, ultimately sitting in London, than to trust their own leverage in Wellington as a recently successful assertive political group.

Ironically, in the mid 1980s and 1990s the effect of Maori political power was given a huge assist by successful recourse to the courts in the *Lands* case and some similar subsequent cases. It is not clear that if Maori were presented with the same proposal in the White Paper in 2006 that they would reject it. But neither would such a proposal be likely to be put. Context, and therefore timing, is everything.

Maori reliance on political representation as a strategy to influence government is long established. Since 1867 a set number of four electoral seats (compared to some 72 to 95 general seats) have been reserved for Maori. These seats were originally created as a temporary measure, pending individuation of Maori land tenure qualifying Maori for the general franchise, and as a quid pro quo for increased parliamentary representation for the South Island goldfields. They were also “a useful way of rewarding Maori loyalists and placating Maori rebels, while also assuring critics in Britain that the colonists would look after Maori interests.”⁹⁸ The Maori MPs occasionally proved influential, such as enabling the formation and occasioning the fall of the Stafford government in 1872. A number of talented Maori MPs and Cabinet Ministers demonstrated the value of the Maori seats to both Maori and pakeha electors in the late nineteenth and early twentieth centuries. But their influence on policies of most direct concern to them was limited by the numerical power of the majority Europeans. In 1936, the influential religious and political Ratana movement concluded an alliance with the Labour Party that dominated the dynamics of Maori political representation for the next sixty years. In the two-party system these seats became sinecures for Maori Labour MPs who rarely impressed with their competence or influence.

With the introduction of the MMP electoral system in 1996 the Maori seats were retained but their number was made to vary with the number of Maori electing to be on the Maori roll.⁹⁹ Furthermore, under MMP representation, every voter has two votes – one for a representative in the electorate in which they are enrolled, and one “party vote” for the party

98. Sorrenson, *supra* note 95 at B-20.

99. Maori electors are able to exercise an “option” every five years as to whether they will be on the Maori or the general electoral roll. The boundaries of Maori and general seats are then set to ensure the population size of all seats are equal (within a 5% tolerance).

which they favour to form the government. The party vote determines the overall proportions of political party representation in Parliament.¹⁰⁰ At 15% of the population Maori therefore represent a sizable portion of the electorate and their party votes have a direct influence on who is able to form a government.

The new political power of Maori under the MMP electoral system has been manifested directly in electoral results. In the last, 99 member, FPP Parliament of 1993-96 there were 7 Maori MPs. At the MMP elections in 1996, 1999, 2002 and 2005 16, 16, 19, and 21 Maori have been elected respectively. The New Zealand First Party led by a populist and charismatic Maori, swept the Labour Party from the five Maori seats. NZ First's Maori seat MPs, who characterised themselves as "the tight five", in rugby parlance, adopted a sunglasses enhanced swagger that was new to New Zealand politics. The New Zealand First Party held the balance of power. After holding an eight week auction between the two major political parties, the New Zealand First Party formed a coalition government with the National Party, with two Maori MPs in Cabinet in the posts of Deputy Prime Minister and Treasurer, and Minister of Maori Affairs. Among other things, the influence of NZ First Maori MPs stopped in its tracks a Government Bill abolishing the right of appeal to the Privy Council in London. When the leader of the New Zealand First Party split with the National Party in 1998, the National Party remained in power as a minority government due to its maintenance of relationships with most of the NZ First Maori MPs (three out of five of whom left the New Zealand First Party and became independent).

In 1999 and 2002 Maori voters returned to the Labour Party, which was duly elected to government, albeit in coalition with other parties. After that it became less clear to Maori that the Labour Party was delivering, in rhetoric or reality, for Maori. In 2003 a major political controversy erupted over the existence of customary rights of Maori to the foreshore and seabed. This split the Maori caucus of the governing Labour Party, one member of which left the party to form the new Maori Party. In 2005 the Maori Party won four of the (now) seven Maori seats. Maori voters also made significant use of their strategic opportunity for vote splitting.¹⁰¹ While the Labour Party was again able to form a government, the Maori Party's anti-Labour stance influenced its choice of coalition partners.

100. Though if a political party obtains more electoral seats than it is entitled to under the party vote, it retains the extra seats as what is known as an "overhang".

101. In the Maori seats, 54% of the party list votes went to Labour and only 27% to the Maori Party whereas Maori Party candidates in those seats won 47% of the constituency votes and Labour 42%. By such "vote splitting" between party and constituency votes Maori voters were able to increase their influence on the composition of Parliament under the MMP system.

In 2006, in the quinquennial Maori Electoral Option exercise, Maori were able to choose whether to be on the Maori or general electoral roll. For the first time, a political party in parliament, the Maori Party, campaigned unambiguously for more Maori to join the Maori roll. There has been a net increase of more than 14,000 voters on the Maori roll, but analysis of census data is required before it is clear whether this will further increase the number of Maori seats. Irrespective of the proportion of Maori voters on the Maori roll, however, Maori political influence seems set to increase in New Zealand over the medium term, given the demographic trends outlined above.

4. *Assessing judicial versus political protection: the importance of context*

The state of the relationships between the Crown, Maori and other New Zealanders is undoubtedly a most important part of the constitutional health of New Zealand. So, how should New Zealand government exercise power in relation to Maori? The issues are inherently and intensely political. The demographics and political power of Maori suggest to many New Zealanders that the position of Maori is strong enough that national conversations about these issues should be held in the political arena – between people who understand policy and politics, principle and pragmatism—not judges.

Judges can act on instinct and can justify decisions with logical reasoning, but, as a generalization, they are neither trained in nor instinctively attuned to the art of policy-making or political compromise. In New Zealand the judiciary was relatively late in recognizing the legal implications of the *Treaty of Waitangi*. The seminal *Treaty* cases of the Court of Appeal led by Sir Robin Cooke (now Lord Cooke) in the 1980s were startling at the time in New Zealand but remain relatively orthodox by Canadian standards. Like the Canadian cases, their primary practical import was to impel executive governments to negotiate with Maori. Also like the Canadian cases, initially startling breakthroughs were followed by a more conservative judicial backwash.¹⁰²

The results of political negotiations did lead to significant reforms. For example, the acquisition of compulsory powers of resumption of land by the Waitangi Tribunal in the *Treaty of Waitangi (State Enterprises) Act 1988*¹⁰³ was the result of court-mandated negotiation between the Crown and the New Zealand Maori Council. That in turn created the fiscal risk of

102. For a nice comparative analysis of the dynamics of judicial approaches to aboriginal rights in Canada, New Zealand, the U.S. and Australia see P. G. McHugh, “New Dawn to Cold Light: Courts and Common Law Aboriginal Rights” [2005] N.Z.L.Rev. 485.

103. *Supra* note 88.

outstanding historical *Treaty* grievances that proved crucial in convincing the government in the 1990s to conclude significant settlements of grievances.

Unlike Canada, the New Zealand judiciary's power to impel government action is taken to derive solely from legislation passed by Parliament and to the extent that legislation gives legal effect to the *Treaty of Waitangi*. Without such a democratic link the New Zealand Court of Appeal would have risked significant over-expenditure of its institutional capital in its 1980s decisions. The judiciary's very *lack* of power could be seen as enabling it to give clearer voice to the implications it found in Parliament's statements.

In contrast, the foreshore and seabed controversy of 2003 saw a sharp political and legislative reaction to perceived Court of Appeal law-making in reversing a 1960s precedent in the common law of aboriginal title. The incident shows that, in New Zealand, politics determine the extent of protection of indigenous rights, but it is not clear that such protection is inferior to Canada's judicialized system in practical reality.

Again, remember the importance of context. Maori are 15% of the New Zealand population and growing. They are educated, urbanised and integrated with the rest of the community while maintaining and enhancing an assertive and distinct cultural identity. In Canada, in the negotiations leading to the *Constitution Act, 1982*, if First Nations had been in this position and had had the option of enacting section 35 or proportional representation on a federal and provincial level, which would have better protected their interests?

In the past these were the lines along which I argued in favour of the New Zealand's politicized constitution. I made this argument on the basis of my perception of the executive branch of government, of varying political identity, which has consistently stated that it seeks to honour the *Treaty of Waitangi* in good faith and to pursue healthy relationships between the Crown, Maori and other New Zealanders. I made this argument on the basis of a Waitangi Tribunal that harnessed its credibility to exert persuasive power in authoritatively ruling on alleged breaches of the *Treaty* as well as on perceiving Maori and liberal pakeha political interests were powerful enough to defeat hostile redneck attitudes. I also made it because of my belief in a national culture of commitment to cooperation and fairplay.

Hence I am personally discomfited by the change in context which has challenged my understanding of the realities that underlie the New Zealand constitution. Under the FPP electoral system, the broad churches of the two main parties each encompassed but hid a wide range of opinions. Under MMP representation, this range of opinions is more transparent and

the whole spectrum of views is more explicitly and stridently expressed in public and reflected in politics. Transparency in public dialogue cuts two ways.

In 2003 New Zealand political dialogue about the *Treaty of Waitangi* and race issues turned nasty. The trigger was a Court of Appeal decision, overruling previous case law, to allow Maori to pursue claims to aboriginal title to the foreshore and the seabed.¹⁰⁴ The Court did not find that such claims were necessarily valid, just that they could be pursued in the Maori Land Court. I have suggested elsewhere that politicians and the public were surprised by the decision in two ways: that there might be some question about ownership of the foreshore and seabed; and that there was a source of enforceable legal rights existing in the common law, outside the rubric of the *Treaty of Waitangi*.¹⁰⁵

It can be argued that the Court of Appeal was naïve in its expectations about the implications of its decision in terms of the likely parliamentary politics. I think it was. But equally the Crown was naïve in judicial politics in putting a question to a superior court to which it expected the answer to be a denial of access to a court. In the political and legislative reaction that ensued, some political parties exploited and fanned the politics of fear and prejudice while the government passed legislation, with opposition support, to invalidate such Maori claims.

Healthy relationships require healthy dialogue: honesty, trust, respect, good faith, careful sensitivity, a willingness to apologize when offence is given, and a willingness, eventually, to accept an apology and to move on to a new depth of understanding. That is not what I saw in New Zealand's debate about the foreshore and seabed. It was vituperative and destructive and elements of it were racist. It shook my faith in the ability of New Zealand politics to deal, maturely, calmly and reasonably, with issues of high public policy and national identity.

Yet, in the past year, I have come to think that perhaps even the nature of the foreshore and seabed politics can be seen as constructive in the long term. It can be argued that the public and political reaction was exacerbated by surprise and that the initial political panic set off a chain reaction which was bound to end in tears. It is true that Maori political muscle did succeed in watering down the proposed legislative override to provide a code for determining the implications of aboriginal title claims to the foreshore and seabed. Further, intensive new negotiations between the Crown and Maori

104. *Ngati Apa v. Attorney-General*, [2003] 3 N.Z.L.R. 643.

105. Matthew S. R. Palmer, "Resolving the Foreshore and Seabed Dispute" in Raymond Miller and Michael Mintrom, eds., *Political Leadership in New Zealand* (Auckland: Auckland University Press, 2006) at 197.

have started in an effort to define the Maori interest in particular areas of the foreshore and seabed. The Maori political reaction at the 2005 election might yet prove powerful enough to repeal aspects of the regime. There is also an argument that this outburst is a final cathartic fling by an older reactionary generation, for over the coming years the browning of the New Zealand population will create more mutual cultural understanding, with the numerical strength for its enforcement politically.

While transparency of a wide spectrum of political views can be uncomfortable, the accompanying political responsibility for action may contain its own answers to that discomfort. The views that were expressed in the New Zealand foreshore and seabed debate were genuinely held. If they had not been able to be publicly expressed their subterranean existence could be expected to affect the politics of Maori issues in other ways. Few New Zealanders enjoyed the debate or the nature of it, but it was a debate that had to take place.¹⁰⁶ There appears to me now to exist a greater political interest in seeking constructive solutions to *Treaty* issues. Perhaps the reaction to the reaction will itself provide the political incentive to reframe the political and legal framework of *Treaty* issues. Ultimately, public opinion formed by genuine public debate must underlie any system for the protection of indigenous rights. For these reasons, I am not yet completely ready to accept judicialization of the constitutional protection of Maori rights in New Zealand along Canadian lines.

Conclusion

My instinct is that a full constitutional realism analysis of the protection of indigenous rights in Canada and in New Zealand would find, in general, that the differences between Canada's judicialized system and New Zealand's politicized system are more apparent than real. There are, no doubt, differences but, over the medium to long term, I expect that the similarities of cultural temperament and of constitutional heritage and structure along with the relatively even balance between judicial protection of First Nations under section 35 of the *Canadian Charter of Rights and Freedoms* and the higher population and political salience of Maori under proportional representation in New Zealand would obscure those differences. At the least, I am sure this would be the case relative to the constitutional relationships that governments in the rest of the world have with their indigenous peoples.

106. This is one of the few points of agreement between this article and Jeremy Waldron, "The Half-Life of Treaties: Waitangi, *Rebus Sic Stantibus*" (2006) 11 Otago L. Rev. 161, though I do take it to be the main point of Jeremy's article.

If my instinct is right, wider questions are raised about the importance of our conventional western obsession with constitutional structure. Just how important, in constitutional reality, is the presence or absence of supreme law and the consequent dynamics of dialogue between judiciary and legislature? New Zealand born Peter Hogg and Canadian Allison Thornton (née Bushell) have advanced, and defended, the notion that in passing legislation and striking it down on the grounds of inconsistency with the *Charter*, the Canadian legislatures and judiciary are engaged in a form of dialogue.¹⁰⁷ This idea develops the notions of Alexander Bickel and others in the United States who have sought to explain away the “counter-majoritarian difficulty” of an even stronger, and self-asserted, judicial power over legislation.¹⁰⁸

I have advanced above a “constitutional realist” view that suggests that public opinion (or, at least, judges’ perceptions of it) play a role in judicial decision-making that is important over the medium to long term. Politicians’ perceptions of public opinion clearly underlie decision-making of the executive and legislative branches of government over any term. Both judiciary and legislature pay attention to public opinion in shaping their respective decisions, and their approaches to inter-branch disputes, over fundamental constitutional concepts. In the long term, public opinion is the ultimate arbiter of these disputes.

In 1979 Mnookin and Kornhauser suggested that the role of law is to form a backdrop of ultimate authority in influencing the settlement of disputes at the time of divorce.¹⁰⁹ Disputants “bargain in the shadow of the law.” I suggest in relation to differences of view on constitutional matters between the legislature and judiciary that these branches of government are *bargaining in the shadow of the people*. Each branch forms its own view of who “the people” are and what the people want. These views are systematically different—being influenced by different time horizons (short term versus long term) and consequently different emphases. A longer term judicial horizon presumably has more room to encompass a Rawlsian like valuation of tolerance of difference and protection of minority rights in the longer term interests of building a community, especially where that minority is core to the historic identity of the nation. A shorter-term political horizon will presumably respond more directly to instinctive knee-jerk reactions but will then have clear responsibility for

107. Peter W. Hogg and Allison A. Bushell, “The Charter Dialogue between Courts and Legislatures” (1997) 35 Osgoode Hall L.J. 75.

108. Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* 2nd ed. (New Haven: Yale University Press, 1962).

109. Robert H. Mnookin and Lewis Kornhauser, “Bargaining in the Shadow of the Law: The Case of Divorce” (1979) 88 Yale L.J. 950.

dealing with the implications of acting on those instincts. In each case, each branch of government is implicitly searching for a solution that is consistent with its view of what “the people” want.

Hogg and Bushell’s analysis suggests that in Canada disagreements between branches are resolved in only a few iterations. When the Supreme Court finds legislation to be inconsistent with the *Charter* or the constitution, amending legislation (or, rarely, a legislative override) is almost always passed to achieve the policy objective in a *Charter* consistent way. New Zealand doesn’t have a supreme law against which the courts can enter such a dialogue with as powerful a voice, but judicial reinterpretations of ordinary statutes or the common law can occasionally have similar effects—as in the *Lands* case and the *Ngati Apa* decision that gave rise to the *Foreshore and Seabed Act 2004*. The inter-branch dynamics are similar.

The differences between Canada’s judicialized and New Zealand’s politicized constitutions inform us about the attitudes of “the people” to the different views that the branches of government hold of the views of “the people” in relation to indigenous rights. From what I can tell, there is now little dispute over the legitimacy of the Canadian Supreme Court’s ability to override Parliament’s legislation on the basis of its view of the *Charter* or *Constitution Act, 1982*. This might suggest that Canadians, collectively and inchoately, are relatively comfortable with a relatively powerful voice being accorded to a long term view of the rights of First Nations, based on reason and principle and worked out through inter-branch dialogue.

In New Zealand clearly there is still popular unhappiness about the prospect of judges challenging Parliament’s supremacy. This unhappiness may be less than it was twenty years ago, but it is there nonetheless. This might suggest that New Zealanders are relatively comfortable with a relatively powerful voice being accorded to a short term view of the rights of Maori, based on emotion and pragmatism and worked out through political dialogue. Maori themselves have a long tradition of engaging with political processes. But over the last twenty years some judicial decisions and some political decisions may have given Maori cause to wish that the judicial voice be heard more loudly in its dialogue with the political branches.

In both countries, dialogue is important to, and inherent in, the constitutional protection of indigenous rights. The existence of ongoing relationships with government and non-indigenous peoples are at the heart of indigenous peoples’ positions in post-colonial societies. Communication and dialogue is the key to ensuring that these relationships, and the constitutional dynamics based on them, are healthy. Genuine disagreement

and discussion of differences is part of that process, which may be more transparent in a politicized than a judicialized constitution. The normative constitutional challenge is to tune the mechanisms and modes of the dialogue to enhance those relationships, because their health largely rests on the processes and structures that facilitate dialogue and enable understanding, honesty, respect, trust and good faith to be communicated and demonstrated.

Surely the same is true of constitutional dialogue between the separate branches of government. But have we properly examined the mechanisms and modes through which judiciary and legislature converse? Is it adequate to suggest that that conversation should only involve the unilateral processes involved with the production of legislation on the one hand and the production of judgments on the other? Perhaps each branch of government, or academics on their behalf, should consider whether there are better ways of each understanding the independent role of the other.

This article has suggested that inter-branch dialogue involves “bargaining in the shadow of the people.” The political system underpinning the legislature has a highly developed set of mechanisms by which politicians assess the views of the people. What are the equivalent mechanisms in the judiciary? Should they be explicated? Or would such explication create a transparency that would diminish popular trust in judicial institutions?

A constitution is about a nation’s aspirations regarding who exercises power, when and how. In reflecting the nation’s cultural characteristics, including those about how we communicate with each other, a constitution concerns both national identity and how we want to be in an increasingly less diverse world. The way in which the Canadian and New Zealand constitutions protect indigenous rights is key to our constitutional identities.

No reira, tena koutou, tena koutou, tena koutou katoa.