From the Legalization of Politics, to the Politics of the Archive: Examining some of the Political Effects of Canada’s Constitutional Patriation on Aboriginal Peoples

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Abstract

This thesis examines some of the effects Canada’s constitutional patriation has had on Aboriginal peoples. In particular, it focuses on the way in which the politics of the archive has mediated the relationship between Aboriginal peoples and the Canadian state since 1982. To this end, while many studies of Canada’s post-1982 political constellation have noted an increasing ‘legalization’ of politics since the adoption of the Constitution Act, 1982, few have studied what legalization’s increasing reliance on archives means for mediating the resulting political relationships. By politics of the archive then, the thesis identifies the Canadian state’s attempt to structure political authority around the presence—or lack—of archival materials and documents. This ‘will to archive’ is identified as operating according to a distinct set of limitations however. Focusing on how these limitations are used, mobilized and exacerbated by the Canadian state reveals the extent to which Canada’s constitutional patriation has favoured the reinforcement of the state’s archival authority in relation to Aboriginal peoples’ claims. Through the use of Social Capital theory the latter portion of the thesis offers a critique of this tendency and ultimately concludes that a renewal of the relationship between Aboriginal peoples and the Canadian state will likely require the development of post-adversarial forms of justice, less structurally dependent on the presence of archives to determine the nature and scope of Aboriginal peoples’ rights to self-determination.
Preface

This thesis is an original and previously unpublished work, the product of its author, Patrick Desjardins.
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I would additionally like to thank the students I met as a teaching assistant.

Lastly, I would also like to thank Cassandra.
Dedication

Cette thèse est dédiée à mon père, Claude Desjardins.

Այս գործը Նվագ Ազիր և Եղյէ ին կընծայեմ; մեծ մայրը և Աղետին վերապրող.
Introduction

Of the many possible pathways into the story of Canada’s contemporary political dilemmas, this one begins at the time of Quebec’s first referendum during the spring of 1980. In the final week before Quebeckers were set to vote on the 20th of May, then Prime Minister of Canada Pierre Trudeau (in)famously announced at Paul Sauvé arena in Montreal’s historically Francophone and working class east end that:

Je sais que je peux prendre l'engagement le plus solennel qu'à la suite d'un NON, nous allons mettre en marche immédiatement le mécanisme de renouvellement de la Constitution et nous n'arrêterons pas avant que ça soit fait...nous le disons aux Québécois de voter NON, et nous vous disons à vous des autres provinces que nous n'accepterons pas ensuite que ce NON soit interprété par vous comme une indication que tout va bien puis que tout peut rester comme c'était auparavant. Nous voulons du changement, nous mettons nos sièges en jeu pour avoir du changement. Voilà donc notre attitude dans le cas du NON.¹

Trudeau would never precisely indicate what constitutional changes a ‘NO’ victory would entail. During the speech he did not disclose his ultimate preference for a Charter of Rights and Freedoms, nor did he mention his disdain for the de-centralizing politics of then Liberal Party of Quebec leader Claude Ryan.² And perhaps this is understandably so; what kind of a Prime Minister of Canada would allow himself to lose a referendum that staked the future unity of the country? Less than a week later however, at that same Paul Sauvé arena, the leader of the ‘Yes’ campaign and Parti Québécois Premier of Quebec, René Lévesque, would concede his side’s

The English translation of the full speech is located at http://www.collectionscanada.gc.ca/primeministers/h4-4083-e.html the above passage has been translated as follows:
I know that I can make a most solemn commitment that following a NO vote, we will immediately take action to renew the Constitution and we will not stop until we have done that...we are telling Quebeckers to vote NO and telling you in the other provinces that we will not agree to your interpreting a NO vote as an indication that everything is fine and can remain as it was before. We want change and we are willing to lay our seats in the House on the line to have change. This would be our attitude in the case of a NO vote.
defeat to a similar crowd declaring “Si je vous ai bien compris, vous êtes en train de dire, à la prochaine fois”. In this way, stoking the passions and aspirations of working class francophones was the terrain over which the politics of constitutional renewal were fought.

It is therefore not surprising that, in the aftermath of the NO side’s victory, Trudeau’s constitutional project adopted a language and imagery reminiscent of popular sovereignty. His promise for change was eventually emblematized in what was called the ‘people’s package’, a political project which promised to ‘patriate’ Canada’s constitution from the United Kingdom while also entrenching within it a Charter of Rights and Freedoms.3 Up to then, Canada’s principle constitutional document, the British North America Act (1867)—an imperial statute of the Westminster Parliament—required amendments to the document be enacted by that said parliament. Trudeau’s patriation project offered Canadians the appearance of a domestic constitution wrested from the clutches of the British apparently severing the country’s colonial ties with the United Kingdom.

The political reality was more complicated however; the Canada Act, 1982, like the British North America Act before it, remained an imperial statute of Westminster. With ‘patriation’ however, Trudeau achieved something beyond simply ‘bringing back the constitution’: he explicitly inaugurated Canada’s politics of the archive in front of everyone’s eyes, yet, with no one recognizing his gesture in quite such terms. At the core of Canada’s politics, a new form of constituent power was legitimized; large scale political projects could be justified according to the extent to which they promised to complete the country’s political archive by equipping it with a ‘critical’ political document it had previously lacked. In this way, the politics of the archive figures as the reliance on archival ‘facts’ in terms of the completeness

or incompleteness of the archive for the purpose of clarifying the context of judicial review. In Canada, this project ultimately legitimized a legalized form of politics.\(^4\)

This chapter of Canada’s political life had profound implications for Canada’s Aboriginal peoples. While the original context of the establishment of a politics of the archive was the containment of Quebec nationalism, the Constitution Act 1982 also promised to “recognize and affirm existing Aboriginal treaty rights”. In this respect, Canada’s adoption of the Canada Act, 1982, is paradoxical, representing a case of nationalist anti-nationalism. Here, the Federal Government wasted no opportunity to engage in its own kind of nationalist project, while denouncing the nationalist projects of the government of Quebec in addition to those of various indigenous peoples. While the story of how patriation limited Quebec’s aspirations to greater autonomy is well known in Canadian scholarship however, this thesis proposes to study how patriation—and its ensuing legalized politics of the archive—has affected the political autonomy of Canada’s Aboriginal peoples. The thesis thus attempts to show how Canada’s current constitutional form has both enabled and limited the possibilities for self-determination by indigenous peoples.

The thesis proceeds in three parts. The first analyzes the establishment and legitimation of evidential politics in Canada in terms of a legalized politics of the archive. As noted above, ‘patriation’ sought to ‘bring back’ the Canadian constitution from the United Kingdom, in effort to create a distinctively Canadian political archive. By studying a fundamental Supreme Court Case in the Canadian politics of the archive, R. V. Sioui, I outline some of the general features of this political form as it relates to the Canadian example. The Sioui case is informative in this regard as it rules on the fundamental nature of the political relationship between Canada’s three

\(^4\) Legalized politics refers to the increasing trend to have difficult political questions settled in courts by judges rather than by politicians in legislative assemblies. For a good overview of this trend in Canada see Michael Mandel The Charter of Rights and Freedoms and the Legalization of Politics in Canada (1994).
societal traditions: Anglophone, Francophone and Aboriginal. For these reasons, I argue that the 
_Siouyi_ case represents the pinnacle of the post-1982 politics of the archive in Canada.

The second part of this thesis criticizes the Canadian project of archival politics as a basis 
according to which to determine and secure political rights in Canada. By relying on the 
Bourdieuian concept of social capital, in addition to the work of Canadian sociologist John 
Porter on the concept of the _Vertical Mosaic_, I seek to show how the Canadian politics of the 
archive reproduces and maintains unequal relationships between national groups in Canada. 
Social capital theory makes it possible to show how the social and cultural power necessary to 
administer a legalized politics of the archive betrays its claim to achieve an egalitarian 
reconciliation between Aboriginal peoples and the Canadian state. Indeed, I hope to show that 
the complex networks of social power that are necessary to the administration of a legalized 
politics of the archive are an inadequate approach according to which to establish reconciliation. 
Lastly, the third part offers some summary arguments and examines the extent and possibility of 
multinational institutions in Canada.

To this extent, political theorist Gil Anidjar offers a provocative summation of what is at 
stake in the politics of the archive:

_Institutionalized by historical discourse, sealed and confirmed by jurists and by the 
law, the archive regulates disciplinary divisions and guarantees that the perfect 
murder—a crime without a trace—will never achieve the status of fact. For, had 
there been a murder ‘it would have been remembered and recorded’. And since this 
was not so, since no document is found, the historical conclusion is inevitable: there 
was no murder._

Indeed, what is thus at stake is the possibility of establishing a non-adversarial form of politico-
legal justice, for, as Anidjar highlights, the possibility of justice or injustice is determined in

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5 Gil Anidjar afterword to _The Historiographic Perversion_, by Marc Nichanian (New York: Columbia University Press, 2009), 129. Emphasis in original. Anidjar’s essay offers commentary on Nichanian book originally written in French with the title of _La perversion historiographique_ which explores the use of archival materials in legally establishing cases of genocide from a philosophical and political viewpoint.
advance by the structure of the adversarial law itself and only secondarily by the actions of the law’s subjects. In turn, the thesis draws close by examining the possibility of genuine reconciliation in Canada in the form of multinational political institutions as both a compliment and alternative to territorial federalism.

In outlining the form of the politics of the archive that has taken place since 1982 in Canada, it nevertheless remains important to note what the Constitution Act, 1982, did not achieve: the termination of the imperial relationship between Canada and the United Kingdom. Indeed, it is in this light that the imperial pretensions of the politics of the archive as a political project become apparent. While Imperial statues are enacted in terms indicated by the colony, once enacted, the statutes restrict the authority of the colonial parliament. In the case of the Canada Act, 1982, the Parliament of Canada has chosen to restrict itself to the Constitution Act, 1982, which imposes both a Charter of Rights and Freedoms and a domestic constitutional amendment formula that sets clear (though difficult to attain) thresholds according to which the constitution may be changed. What is nevertheless maintained is the legal authority of Westminster over the Canadian constitution. Paradoxically then, the auto-limitation of Canada’s parliament by the Constitution Act, 1982 (and its embedded Charter of Rights and Freedoms)—often taken as the symbol of Canadian autonomy and identity—was only possible if Westminster’s Parliament were to remain super-ordinate in relation to Canada’s.

The form of the legal relationship between the Imperial Parliament at Westminster and Canada is paralleled in the relationship between Canada and its national minorities; particularly francophones and Aboriginal Canadians. In this respect, the Sioui (1990) case offers a prominent

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7 Constitutional scholar Peter Hogg notes that ‘patriation’ has not led to either constitutional autochthony or the termination of imperial authority. At best, ‘patriation’ has led to a higher degree of negative freedom in relation to the imperial parliament. See Hogg Constitutional Law of Canada 57-63.
example of the paternalistic and conservative nature of the politics of the archive confirming, on the one hand, a pattern of the Supreme Court’s overwhelming formal reliance on archival documents to determine complex cases regarding the nature of Aboriginal treaties, and, on the other, the case also reveals the extent to which the Court is often reluctant to genuinely address the implications of what is contained in the content of various archival materials.

To this extent, prior to 1982, it was considered taboo for judges to rule on the legal aspects of what were considered the negative component of Canada’s constitution, namely, conventions. In short, conventions were deemed to be political rather than legal forms of coercion. Whereas in the past judges refrained from discussing conventions, the patriation reference of 1981 was an iconoclastic one, resulting in the (in)famous ‘legal though unconstitutional in the conventional sense’ formula regarding the Federal government’s right to act unilaterally toward constitutional change.

In this way, then Chief Justice Laskin’s reasons functioned in such a way as to free politicians from another taboo: the convention requiring the unanimity of all provinces in order to amend the constitution. Without the unanimity requirement there was now greater incentive for all sides to talk and constructively engage in negotiations as the cost of failing to do so would be exclusion from the new constitutional order. This would, of course, be Quebec’s fate. While convention had previously dictated that the archive be left un-tampered under the premise of the double-compact between peoples and government—the traditional justification of Quebec’s constitutional veto—by 1982 the archive had been pried open and its contents lay bare: Quebec had no constitutional veto. Henceforth, the archive would no longer be sacred and its political use would prevail in establishing Aboriginal jurisprudence in Canada.
Chapter 1
From the Legalization of Politics to the Politics of the Archive: R v. Sioui.

This section offers a summary and overview of the Sioui decision in terms of a legalized politics of the archive. It reveals the extent to which the Supreme Court is reliant on archival materials and the disciplinary techniques (and limitations) of the human sciences to determine the nature of Aboriginal treaties in Canada. The Sioui case, in particular, is notable for the extent to which the Supreme Court relied upon and engaged in a re-construction of historical context in order to determine if a unilateral declaration signed by British General James Murray in 1760 constituted a treaty between the Crown and the Huron people of Laurette. The decision further clarified and developed the meaning of a liberal, generous and flexible approach to Aboriginal jurisprudence first elaborated by the Dickson court. Nevertheless, the Court’s development of a doctrine that is ‘liberal, generous and flexible’ is limited by the imperialistic traces which remain embedded in its humanistic methodology. In particular, the Court’s reliance on archives to determine the nature of treaties ensures that in the event no document or trace remains, the establishment of Aboriginal rights becomes compromised. This reveals a latent paternalism in relation to Aboriginal matters that implicitly favours the development of negative liberties rather than positive rights to Aboriginal self-government. By studying the Sioui decision in terms of the politics of the archive, these complications can be drawn into a sharper focus.

1.1 R. v. Sioui 1990: Summary

In R. V. Sioui the Supreme Court of Canada unanimously ruled that the Hurons of Lorette had enacted a treaty with the Crown in conformity with section 88 of the Indian act, and that this

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treaty continued to be in force after the enactment of section 35(1) of the Constitution Act, 1982. The decision confirmed that Crown legislation is enforceable only to the degree that it is in conformity with treaty obligations.

The respondents; Régent, Conrad, Georges, and Hugues Sioui argued that a treaty unilaterally signed by the British Governor of Quebec, James Murray, dated September 5, 1760, allows their nation to practice ancestral religious customs and rituals outside the boundaries of their reserve. The four respondents had previously been found guilty by Quebec’s Court of Sessions of the Peace for cutting down trees, and camping and making fires in places not designated in Parc Jacques-Cartier. The alleged infractions were deemed contrary to sections 9 and 37 of the *Regulation respecting the Parc de la Jacques-Cartier*, legislation that was adopted pursuant to Quebec’s *Parks Act (1977)*. By clarifying the limits of what constitutes a treaty for the purposes of section 35(1) of the Constitution Act, 1982, in addition to offering a way of determining the nature and content of treaty obligations under section 88 of the *Indian Act*, the Supreme Court set a major precedent in Canadian treaty jurisprudence with the Sioui case by ruling that the document presented to the Court was indeed a Treaty and that the Treaty remained legally enforceable after the enactment of the Constitution Act, 1982.

The Court determined that a treaty is characterized by the intention to create mutually binding obligations with a measure of solemnity. The capacity to enter into a treaty is not determined by historic land occupation, neither is it required that a party to the treaty be sovereign on that territory before it alienates it. Instead, what is required is the assumption by one or more of the parties that the other party has the authority to uphold and create mutually

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binding obligations on each party.\textsuperscript{10} Individual persons have the capacity to enter into a treaty on behalf of an authoritative community in so far as it can be reasonably assumed that the person can guarantee the practice of the terms stated in the treaty. On the issue of capacity, the Court cites with approval \textit{R V. Simon (1985)}: “‘Treaty’...embraces all such engagements made by persons in authority as may be brought within the term ‘the word of the white man’ the sanctity of which was...the most important means of obtaining goodwill and...On such assurance the Indians relied”.\textsuperscript{11}

Since the questions of obligation and capacity principally refer to formal criteria in determining the creation or existence of a treaty, the court also had to develop criteria according to which to determine the content of a treaty’s obligations. Writing for the Court’s unanimous decision, Justice Lamer identified two criteria according to which to determine the nature of treaty obligations: analysis of the document’s wording, and extrinsic evidence. Justice Lamer noted that though intrinsic evidence alone may be sufficient to indicate the existence of a treaty, it remains, by itself, too narrow a criteria according to which to determine the legal nature of the obligations at hand.\textsuperscript{12} As to extrinsic evidence then, Justice Lamer acknowledges at least three types: evidence indicating the parties’ intent to enter into a treaty, facts closely associated with the existence of various constituent elements of a treaty, and, lastly, “the Court was told of subsequent conduct of the parties in respect to the document”.\textsuperscript{13}

To this extent, the reasons and jurisprudence according to which extrinsic evidence were considered in the \textit{Sioui} decision count among some of the most controversial elements of Aboriginal jurisprudence in Canada. Referring to reasons from \textit{R. V. White and Bob (1965)}, the

\begin{footnotes}
\item[10] R v. Sioui, 1038g.
\item[12] R v. Sioui 1049e.
\end{footnotes}
Court confirmed that it is entitled to “take judicial notice of the facts of history whether past or contemporaneous”\(^{14}\), and is further “entitled to rely on its own historical knowledge and researches”.\(^{15}\) Because the document in question was dated from 1760, the Court had to reconstruct the historical context of that period of Canadian history.

Since the duty to prove the extinguishment of a treaty in this case is incumbent upon the appellant, the latter argued that the document should be considered a capitulation comparable in kind to that of the *Canadiens*\(^{16}\) in 1759-60 and thus not subject to the meaning of a treaty in section 88 of the *Indian Act* simply because an indigenous nation was party to the document. Justice Lamer affirmed that both France and Britain acknowledged that indigenous nations were sufficiently distinct and autonomous societal forms, constituting an independent force in the development of North-America. Justice Lamer was thus lead to conclude that the document at hand could therefore not be considered as equivalent to any agreements concluded between the British and the *Canadiens* during the same period.

According to the Court, if the relationship between the *Canadiens*, the French in North-America, and the indigenous people were equivalent, then there would have been no need to conclude a *de jure* treaty between the French and British administrations in 1763. There thus could be no way that, as the appellants argued, the Treaty of Paris extinguished the agreement between the Huron and the British of 1760, therefore remaining outside the *de jure* capacity of the British and the French and thus ensuring that legal effect of Treaty remained in place to the present time.

\(^{14}\) R v. Sioui 1050f

\(^{15}\) Ibid

\(^{16}\) At the time of the capitulation of France to Great Britain, *Canadien* identity referred to French identity in North-America much in the same way that *American* identity related to English identity in North-America; in each case the former designation referred to a distinct identity adopted by Europeans who were born in and earned their living in North-America as distinct from those Europeans born in Europe who represented the colonial administration of the metropole. See Denis Vaugeois *La fin des guerres franco-indien* (1995).
1.2 Mediated Political Refraction and Hegemonic Preservation.

In terms of its political content, the *Sioui* decision brings to the fore numerous longstanding political disputes in Canada. Indeed, the *Sioui* decision evidences the symptoms associated with the institution of a *refractive* community. By refractive community I am simply referring to a polity in which the constitution creates artificial antagonisms between different elements of the society. In this case, the adoption of the Constitution Act, 1982, further tangles and complicates the relationship between Canada’s founding communities, rather than clarifying them. While the adoption of the Constitution Act, 1982, has often been understood as a project aimed at establishing a greater degree of national unity, many (McRoberts 1997, Chandonnet 2013, LaForest 1992) note how the adoption of the Constitution Act, 1982, led to a greater degree of *dis*-unity. Kenneth McRoberts notes that, “not only does the Constitution Act fail to enhance the powers of the Quebec government or to reform central institutions, but under the Charter of Rights and Freedoms the powers of the Quebec government were reduced, greatly affecting important Quebec laws”.¹⁷ Thus, a distinct element of the legalization of politics in Canada is the way in which various national minorities become pitted against each other in the legal arena. Here, the self-determination of historic communities in Canada is framed as a zero-sum game where rights to self-determination for one group are enjoyed at the expense of the other. The legalization of these contradictions ensures that creative democratic and political solutions are more difficult to achieve.

Indeed, until the patriation reference of 1981, it was well established in Canadian political and legal circles that reference to *conventions* in legal proceedings was generally unacceptable. Conventions were commonly understood to be matters of political—rather than

legal—review. If the government was deemed to have acted contrary to the wishes of citizens, it was the duty of citizens to replace the government through the ballot box. The standard argument in favour of maintaining this distinction posited that because the constitution makes no reference to the major political actors of the constitution, most importantly the Prime Minister, to have judges rule on matters of convention could prove risky since *de jure* power is held by an unelected monarch.¹⁸

The legal scholar Ran Hirschl has described a process which drives the transition to the legalization of politics in terms of *hegemonic preservation*. Hirschl’s thesis is that judicial review has exploded across the globe precisely at that time when established elites were faced with a loss of power through majoritarian electoral politics. Hirschl demonstrates this phenomenon in four countries: Israel, Canada, New Zealand and South-Africa, showing how judicial review has offered traditional elites a means through which to protect their preferred policy options.¹⁹

It is precisely in this context that the *Sioui* decision takes place. On the 29th of May 1982, less than six weeks after the proclamation ceremony brought into effect the Constitution Act 1982, Régent Sioui and his family were stopped in Parc Jacques-Cartier, about an hour and a half north of Quebec City. A park agent noticed two tents in an area not designated for camping. To this extent, some commentators have noted that Francophone Quebeckers were not all that aware of what had taken place with the adoption of the Constitution Act, 1982.²⁰ Nevertheless, by the time the *Sioui* case made it to the Supreme Court in 1990, the Meech Lake debate regarding the status of Quebec as a distinct society had been well established.

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¹⁸ For a more elaborate version of this argument see Forsey (1984), *the Courts and the Conventions of the Constitution*.
Thus, it was during the heated debate surrounding the Meech lake accords that the nine judges of the Supreme Court of Canada unanimously determined the document which states the following to be a treaty:\textsuperscript{21}

\begin{quote}
THESE are to certify that the CHIEF of the HURON tribe of Indians, having come to me in the name of His BRITANNICK MAJESTY, and make Peace has been received under my Protection, with the whole Tribe; and henceforth no English Officer or party is to molest, or interrupt them in returning to their Settlement at LORETTE; and they are received upon the same terms with the Canadians, being allowed the free Exercise of their Religion, their Customs, and Liberty of trading with the English: --- recommending it to the Officers commanding the Posts, to treat the, kindly.

Given under my hand at Longueil, this 5\textsuperscript{th} day of September, 1760.

By the Genl’s Command,
JOHN COSNAN, Ja. MURRAY
Adjut. Genl.
\end{quote}

In terms of the \textit{prima facie} intrinsic evidence provided by the document, the Court focused extensively on the passage indicating that the Hurons are to be guaranteed the free exercise of religion, customs, and trade with the English.\textsuperscript{22} According to the Court; “it seems extremely strange to me that a document which is supposedly only a temporary unilateral and informal safe conduct should contain a clause guaranteeing rights of such importance”.\textsuperscript{23} Curiously however, the court accorded little consideration to the prior clause ‘received upon the same terms with the Canadians’. What is the political significance of this omission in light of the distinct society debates of Meech?

\textsuperscript{21} This is the wording of the document as it was submitted and studied by the Court. There is, however, evidence which suggests that the document submitted was not the original, found in 1996—six years after the decision—and that the original in fact has different wording. See Vaugeois, 2002; \textit{the Last Franco-Indian War}.
\textsuperscript{22} R. v. Sioui 1048g.
\textsuperscript{23} Ibid
First, it is important to note that the *Sioui* decision takes place during one of the most politically intense periods of Canada’s history and certainly its recent history. Indeed, the event which precipitated the decision took place in May of 1982, less than two months after the proclamation of the Constitution Act, 1982, into law. To this end, section 35(1) of the Act states “The existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed”. Thus, while the Murray Treaty was the document at the heart of the decision; it is the politics of the archive and the complex re-calibration of the relationship between francophones, Indigenous people and the majority Anglophone community on the one hand, and the Federal government, Quebec and indigenous people on the other that were at stake in the matter.

Of course, precipitating the Meech Lake accords had been the perception that, since 1982, Quebec had been excluded by the rest of Canada. While the quiet revolution inaugurred a period of intense social and political change in Quebec—and many laws considered vital for the survival of a modern francophone society in the North-American space were adopted—many scholars have noted that the adoption of the Constitution Act and the Charter in 1982 were an affront to these new laws. Legal scholar Michael Mandel notes that, “the objective was to overrule a popular law enacted by an elected government”. In this way then, the *Sioui* decision has to be understood within the broader landscape of *hegemonic preservation*.

Yet what is being preserved? The *Sioui* case aims at re-asserting the authority of the federal government as the entity tasked with protecting the rights of indigenous peoples. For example, that the Court reserves itself the right to make its own history disregards Aboriginal

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24 The period of the Quebec’s quiet revolution roughly corresponds to the period beginning with the election of the Lesage Liberals in 1960 to the first referendum loss of the PQ in 1980.
history in itself; its relevance to the Court is only in relation to the Court’s self-perception. In this way, one effect of Aboriginal jurisprudence has been the attempt to strengthen and distinguish the role of the Federal Government in relation to provinces. This has not necessarily favoured the protection of Aboriginal rights and interests however. Instead, it has merely asserted the constitutional position of the federal government in relation to the provinces. Indeed, many indigenous communities continue to distrust the federal government and look upon it with a skeptical eye.\footnote{26} Far from being a benevolent ‘parent’ then, the federal government can often use its negotiating position with indigenous peoples as political leverage against the provinces.\footnote{27}

Beyond the attempt to consolidate its own position in relation to the provinces, Aboriginal jurisprudence at the Supreme Court Level also serves to balance the complex relationship between Canada’s ‘founding’ societies. It must therefore not be doubted that the Sioui decision also brings into question the entirety of Quebec’s constitution. Since Quebec remains a non-treaty province (though for very different reasons than those of British Columbia) the possibility that other Murray-like treaties exist thus has the potential to severely undermine Quebec’s Civil Code.\footnote{28} In noting as much, the purpose is not to claim that the self-determination of indigenous peoples and francophones in Canada are mutually exclusive. Nevertheless, it is important to note some important historic differences between francophone communities and Anglophone communities that the Sioui decision omits, yet the \textit{Royal Commission On Aboriginal Peoples} notes:

There was one important difference between British and French practice in this context [the establishment of treaties] that would have long-term effects on the overall relationship between Aboriginal and non-Aboriginal peoples in this part of North-America. The French Colony, whose population remained small, was planted along the shores of the St. Lawrence River, in an area no longer inhabited by the

\footnote{26} Alain Cairns \textit{Citizens Plus: Aboriginal Peoples and the Canadian State} (Vancouver: UBC Press, 2002), 140.  
\footnote{27} Cairns \textit{Citizen’s Plus}, 90  
\footnote{28} Vaugeois \textit{Fin des alliances}, 69.
Iroquoian peoples of Stadacona and Hochelaga. Thus, there was no need for the French to obtain land from their Aboriginal neighbours. By contrast, from an early period the British colonists found their Aboriginal neighbours in possession of lands they wanted for themselves for purposes of expanding their settlements and economic activities.29

Recognizing that both Aboriginal and non-Aboriginal communities are intrinsically pluralistic is thus an important step forward in recognizing that a ‘one size fits all’ policy regarding Aboriginal jurisprudence undermines the plurality among both Aboriginal and non-Aboriginal Canadians.30

### 1.3 The Imposition of Juridical Forms.

Section 1.2 analysed the *Sioui* decision in terms of the specific content of a particular case of legalized politics. In this section I assess the *Sioui* decision in terms of a more general form of politics based around the presence of archival materials. The formal use of archival materials for legalized political ends is what I call here the *politics of the archive*. The politics of the archive were given explicit legal and political standing in Canada with the adoption of the Constitution Act, 1982 in terms of a politics of *patriation*. Indeed, the principle idea behind the politics of patriation was that the fundamental elements of the Canadian constitution remained in Britain, and that the elements necessary for Canadians to amend the constitution themselves should be brought home to Canada. Such insistence on constitutional completeness through an appeal to the lack of a founding archival document, though meant to secure the allegiance of all

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30 Two 2014 Supreme Court decisions rendered merely weeks apart show how such the attempt to establish a uniform and symmetrical body of specifically ‘Aboriginal’ jurisprudence can have arbitrary effects based on the contingencies of geography and history. For the difference between the situation of indigenous people in Western Canada and in eastern Canada see the *tsilhqot’in* [2014] decision for an example of the former and the *Grassy Narrows* [2014] ruling for an example of the latter.
Canadians, became the model according to which Anglophone Canada understood itself at the expense of Francophone Canada.\(^{31}\)

As a juridical form, the politics of the archive ensures that a political claim exists so long as archival data exists. Political claims made which are distinct from an archival mentality appear dubious. Though it may appear commonsensical that evidence should back up political claims to rights, as a form of jurisprudence it is not immune to manipulation or distortion. It is precisely because the archival form of jurisprudence is so demanding at the level of evidence that it becomes that much more possible for the Crown to neglect its fiduciary responsibility to indigenous peoples. In this sense, the demand for evidence creates the conditions for the possibility of its own transgression by ensuring that where evidence cannot be produced, the act under question may therefore never become justiceable.

This contradiction remains present in the *Sioui* case. Here, one of the major paradoxes surrounding the case is that the respondents were in many ways required to ‘remind’ the Court of its own history; to retell the history of the Huron people to the dominant party. And while the Court affirmed its own interpretation of the historical situation in question, had the history been internalized to the degree that it was common knowledge, the requirement to re-tell the story of the Huron people’s giving up of certain rights in return for others should not have been necessary. In this way, that the court demands this kind of evidence is an attempt to re-enforce a super-ordinate position in relation to Aboriginal communities.

Yet, in a multinational country like Canada where there are at least three forms of national community which are the founding elements of the law, the situation is further complicated because the legal claims of one national community directly affect the rights of the other. An over-dependence on archival materials to support political claims can therefore only

\(^{31}\) McRoberts *Misconceiving Canada* 176-188.
serve to re-enforce the already existing relationship between the parties because the dominant archive is always the basis according to which claims are framed. In this sense, the archive may not necessarily be the most just basis according to which to administer the constitution of a multinational state in such a way as to ensure egalitarian justice between national groups.

1.4 Conclusion

This section sought to show how the politics of the archive is mobilized in Canada. Through the hegemonic preservation thesis, it sought to show that the politics of the archive in Canada was mobilized to preserve the policy options of the federal government in Canada. As a juridical form of legalized politics, the politics of the archive assumes inflated criteria according to which Aboriginal peoples must prove their claims. Even in cases where the Supreme Court appears to have ruled in favour of Aboriginal peoples, the jurisprudential logic of the decision is elaborated according to the politics of the archive thus ensuring that a high burden of proof remains in place when assessing Aboriginal claims.
Chapter 2
The Social Capital Thesis and the Critique of the Politics of the Archive

In his essay “the Forms of Capital”, sociologist Pierre Bourdieu elaborates a theory of social and cultural capital. For Bourdieu, social capital identifies the total amount of resources that one can mobilize through their group membership. Cultural capital, by contrast, refers to the set of attitudes one deploys in relation to particular economic objectives. Lastly, both forms of capital are understood as the sum total of accumulated and inherited historical relationships. In this way, Bourdieu is able to show how membership in specific social groups and access to certain educational opportunities determine the manner in which a society re-produces its fundamental institutions.

Converging on many similar themes, the Canadian sociologist John Porter identified the extent to which ethnic group membership had an effect on the distribution of social and political opportunities in Canada. Indeed, Porter notes that, “The tendency for certain kinds of occupations to be associated with particular ethnic groups in Canada are examples of how transmission of rank can take place in an open class system”. Though Porter’s work in The Vertical Mosaic is today almost fifty years old, many of the social patterns Porter identified remain prevalent in Canada today. Indeed, many contemporary scholars continue to find that a complex relationship between ethnic membership and class continues to affect the political and

33 Bourdieu “Forms of Capital”, 247
34 Bourdieu “Forms of Capital”, 246
36 While many later scholars have offered critiques of Porter’s work for being too ‘deterministic’ and lacking any insight into the role of gender and social opportunity in Canada, I see the work of Bourdieu as being quite complimentary with Porter’s, the latter’s Vertical Mosaic in many ways resembling Bourdieu’s analysis of French society in Distinction: A Social Critique of the Judgment of Taste.
social opportunities of people living in Canada today.\(^{37}\) As such, appending Bourdieu’s concept of social capital to Porter’s work on ethnic inequality in Canada can help overcome some of the latter’s blind spots (such as a lack attention paid to gender or attention to Aboriginal peoples), while offering Bourdieu’s social capital theory a well developed set of premises from which to work with in the Canadian context.

This section will proceed in the following way; in elaborating his concept of social capital, Bourdieu identifies three specific moments in its mobilization. First he elaborates *embodied* cultural capital as form of attitude or disposition. Second, he identifies *objectified* cultural capital in the form of cultural objects such as art or technology. Lastly, he identifies *institutionalized* cultural capital which guarantees the effective mobilization of political power through the networks of *social capital*.\(^{38}\) The aim of this section is to show where and how Trudeau’s patriation project, apparently oriented toward the achievement of equality in Canada, in fact re-deployed and re-asserted the old, often colonial, networks of social capital in Canada.

2.1 Social Capital and the Objectified State: Social Fact and Archive.

When cases involving Aboriginal title or treaty are at stake, indigenous peoples in Canada are required to alienate objects of their culture not explicitly intended or created for the purpose of judicial review. Often these objects are then scrutinized, not in themselves, but in order to determine their relationship to the cultural capital of the majority group. This approach is well elaborated in Patrick Macklem’s book *Indigenous Difference and the Constitution of Canada* (2001). Macklem begins this work by noting the way indigenous communities have

\(^{37}\) In Canadian political science, the work of Yasmeen Abu-Laban, for example, identifies the extent to which constitutionalism, and the attitudes one has toward constitutionalism, are often determined by ethnic group membership in Canada. See Abu Laban “Reconsidering the Constitution, Minorities and Politics in Canada” *Canadian Journal of Political Science* Vol 33, No 3 p465-497.

\(^{38}\) Bourdieu “Forms of Capital”, 247.
permanently transformed their environment: “Between Lake Huron and Georgian Bay lies Manitoulin Island, the largest freshwater island in the world. Recorded in its landscape are the spiritual histories of the Ottawa, Ojibway, and the Potawatomi peoples, who constitute the Three Fires Confederacy and who regard Manitoulin as their ancestral home”.\textsuperscript{39} Macklem then continues by claiming that, “The complexity of these social facts does not lie in their factual accuracy. Although some may take issue with their precise formulation, few deny their basic truth...Instead, their complexity lies in their constitutional significance...social facts simply describe factual differences...indigenous difference promotes equal and therefore just distributions of constitutional power”.\textsuperscript{40}

The problem with Macklem’s formulation of indigenous difference is that the entirety of indigenous rights on his view comes to rest on the possibility and existence of sufficiently alienable social facts. Macklem, furthermore, offers no explicit account of the more negative aspects associated with taking a social fact approach to indigenous rights. For example, Macklem identifies the ‘social fact’ of indigenous difference in terms of reference—pointing to the case of Manitoulin Island as an example—rather than according to any concept of the content or meaning of the social facts themselves. Thus, indigenous difference functions here only in relation to the Canadian state as the common denominator according to which to determine ‘social difference’. In this way, examples of the kind Macklem points to, conceal, rather than reveal, the more fundamental social fact that stakes the nature of the concept of the ‘social fact’ as the heart of the political conflict between indigenous peoples and the Canadian state.

\textsuperscript{39} Patrick Macklem \textit{Indigenous Difference and the Constitution of Canada} (Toronto: University of Toronto Press, 2001), 3

\textsuperscript{40} Macklem \textit{Indigenous Difference} p4-5. Emphasis my own.
For example, in the 2014 *Tsilhqot’in* decision, the logic of ‘social facts’ is mobilized by the Canadian state in order to determine the fundamental questions regarding the scope of indigenous title. As such, the logic of ‘social facts’ necessitates that indigenous peoples must show the court their presence on a territory to the square meter in order to both prove and have recognized the specific existence of title over a particular territory. The logic of the ‘social fact’ thus cuts two ways, allowing the state to recognize only the most obviously undeniable or least contentious territories as subject to indigenous title, while demanding that Aboriginal peoples go through great lengths to prove the extent of their presence over a particular territory.

This formal ambivalence of ‘social facts’ as a necessary condition of both the denial and recognition of an indigenous right thus constitutes an aspect of how the Canadian state deploys the politics of the archive as a form of cultural capital focused on the objectification of Aboriginal culture. The state, through the court system, demands that objects of culture be presented according to the logic of social facts, ensuring the maintenance of the status quo in the event that insufficiently conclusive facts are presented. This is partially the reason why cases regarding Aboriginal title in British Columbia have endured such an exasperatingly long process before reaching the *Tsilhqot’in* decision in 2014, the latter having concretely recognized the extent of the Tsilhqot’in people’s title in British Columbia. Social facts, as an ontological principle, thus create a field of representation according to which the denial and recognition of rights is already determined in advance by the principle of social facts itself.

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41 This decision, rendered in June of 2014, recognized Tsilhqot’in title on roughly 1700 square kilometers of territory in British Columbia. Nevertheless, the process necessary to recognize the title required extensively mapping the range of territoritoriality of the Tsilhqot’in people according to the logic of social facts. See *Tsilhqot’in V. British Columbia* 2014. For an example of how the logic of social fact cuts the other way, see the Supreme Court decision rendered only weeks later in July of 2014 *Grassy Narrows First Nation v. Ontario (Natural Resources)* 2014 SSC 48. This latter decision upheld the province’s authority over the land in conformity with the Crown’s fiduciary responsibility to Aboriginal peoples.
2.2 Social Capital and the Institutionalized State: the Deployment of Social Capital

The deployment of the social fact as a form of objective cultural capital would be limited in its juridical effectiveness if not for its institutionalization. Indeed, constituting the ‘social facts’ necessary to render decisions in cases involving Aboriginal rights often requires an extensive network of persons capable of transforming cultural knowledge into objects admissible as evidence in court. In this way, Bourdieu notes that the institutional recognition of objective cultural capital makes possible the comparison, exchange and substitution of various objects. The Canadian politics of the archive mobilizes an entire network of non-Aboriginal actors in the attempt to create specifically Aboriginal ‘social facts’ as an acceptable criterion around which to organize a court of adversarial justice. Indeed, the institutionalization of an archive, and the assumption that the latter amounts to a stable truth-resource make possible the conditions according to which ‘social facts’ acquire legal validity.

Section one already noted the controversial reconstruction of historical context engaged in by the Supreme Court of Canada in the Sioui case. In this case, the court’s reconstruction exclusively relied on archival materials to the extent that sovereignty converged with a certain paternalistic and patriarchichal constitution of social facts. Indeed, recall that, for Trudeau, the project of ‘bringing home the constitution’ was offered to the Canadian public as a project of patri-ation—a conception of Canada as a fatherland—linking the Canadian vision of sovereignty to a particular vision of male authority at the head of the political community. This Patriarchical function of the politics of the archive is also noted by Jacques Derrida who writes, “the meaning of ‘archive’, its only meaning, comes to it from the Greek arkheion: initially a house, a domicile, an address, the residence of the superior magistrates, the archons, those who commanded. The

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42 Bourdieu the Forms of Capital, 251.
citizens who thus held and signified political power were considered to possess the right to make or to represent the law”. According to Derrida, it is the idea of the very idea of an archive as a place or a domicile that implies the patri-archic function of an archive. He writes, “They all have to do with this topo-nomology, with this archontic dimension of domiciliation, with this archic, in truth patriarchic, function, without which no archive would ever come into play or appear as such”.

As was already noted, Trudeau’s constitutional project was framed as a ‘patriation’ of the constitution. To this end, many francophone feminists have also noted the patriarchal character of Trudeau’s national unity project. Political theorist Diane Lamoureux writes,

En fait, il semble que, pour les groupes minorisés, la Charte, plus que la Constitution, soit envisagée comme moyen de promotion collective. Cette situation présente plusieurs problèmes: d’une part, elle est susceptible d’entretenir la minorisation tout en atténuant les effets; d’autre part, elle risque de faire de ces groupes d’éternels exclus du pouvoir. La Charte a pour objet la régulation des rapports entre les citoyennes et citoyens et le pouvoir politique constitué; il s’agit donc d’un mécanisme de protection dont on ne peut ignorer la dimension paternaliste. La constitution quant à elle règle la participation au pouvoir...laquelle fournit la possibilité d’en finir avec la minorisation.

Political scientist Kenneth McRoberts similarly identifies paternalistic elements in Trudeau’s approach. McRoberts notes that Trudeau’s constitutional project, while publically aimed at maintaining national unity, increasingly led to dis-unity as it found support within a burgeoning Anglophone-Canadian nationalist sentiment rather than among a majority of Quebec’s francophones, the population it was supposed to attract. McRoberts writes, “The Trudeau vision built upon the sense of a distinctly Canadian nationality that had been emerging, thanks in part to previous federal administrations. So the national unity strategy was successful—but with the

44 Derrida Archive Fever, 3.
wrong population. As a result, it had the effect of widening the gulf between English Canadians and Quebec francophones”.\footnote{McRoberts Misconceiving Canada, 186.}

In this way then, patriation, as an attempt to institutionalize forms of cultural capital in terms of what Bourdieu identifies as, “resources linked to possession of a durable network of more or less institutionalized relationships of mutual acquaintance and recognition”\footnote{Bourdieu Forms of Capital, 251}, confirm that many of Porter’s theses about Canadian society remain accurate and relevant today. This tendency also confirms Ran Hirschl’s thesis, referred to in chapter one, of the contemporary turn toward judicial review in many countries as having been an attempt at *hegemonic preservation*.\footnote{Ran Hirschl Towards Juristocracy: The Origins and Consequences of the New Constitutionalism. (Cambridge, MA: Harvard University Press, 2008), 51.}

Indeed, Quebec has yet to positively agree to the terms of Canada’s new constitutional order. McRoberts writes, “not only did Trudeau’s vision serve to render Quebec’s continuing demands unintelligible to many English Canadians, but with its strong individualism it eliminated once and for all the English-Canadian support for the one approach to understanding Canada that they historically had shared with their francophone compatriots: the notion of a compact”.\footnote{McRoberts Misconceiving Canada, 187.} It would thus appear, as McRoberts notes, that Trudeau’s politics of the archive appealed more so to a fundamental existential anxiety in English-Canada rather than in French-Canada.

The appeal of Trudeauism in Anglophone-Canada also reveals a powerfully territorial vision of Canada as a polity of territorially based provinces equal to citizens in constitutional rights rather than as a polity shaped by broader social and cultural objectives.\footnote{See Alan Cairns Charter vs. Federalism: the Dilemmas of Constitutional Change for a sustained analysis of this dilemma.} In this way, such a territorial vision of Canada can only appeal in a fragmented way to the identity of francophones and indigenous peoples (or many Anglophone Canadians for that matter too) who see the country...
as a multinational federation. It is also according to the territorial view of Canada that many Canadians popularly perceive indigenous peoples to obtain frequent ‘victories’ in Canada’s court system. As such, the institutionalization of certain forms of cultural capital has had the effect of mobilizing popular legitimacy for the maintenance and preservation of old, colonial relationships and hierarchies. Here the Constitution and the gesture of ‘patriation’ are legitimated through a rosy picture of what Canadians aspire themselves to be—an inclusive and multicultural society—yet the political justification of such a society is still offered to Canadians in terms of a territorial conception of the country.

Because the Supreme Court of Canada evaluates both secondary social categories of the majority group (property relationships etc.), in addition to the primary existential categories of ethno-cultural/linguistic groups (language, traditions etc), this perpetuates the popular perception of an equivalence between the two categories expressed in terms of the freedom of choice to identity or linguistic rights. In turn, this popular assumption allows for the majority nationality in Canada to convert latent cultural capital into politically effective social capital. Here, critical theorist Ian Angus notes that there is no need “for regarding social identities other than ethno-cultural ones—such as national, regional, gender, or political identities—as on the same level and thus necessarily competing. Rather, the preservation and development of ethno-cultural identities might be a key mediation between national and individual identity”.

2.3 Social Capital and the Embodied State: the attitudinal disposition of Trudeau’s Patriation Project

Behind the cultural logics of social facts and the social capital mobilized by the Constitution and its ‘patriation’, is embodied a longstanding—even profoundly conservative—

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form of cultural capital, the Lockian approach to property rights and individual identity. By embodied cultural capital, Bourdieu names a fundamental mental state which “presupposes a process of embodiment, incorporation, which, insofar as it implies a labor of inculcation and assimilation, costs time... it, cannot be done at second hand (so that all the effects of delegation are ruled out).”\textsuperscript{52} A Lockian approach to individual rights and identity is that form of cultural and social capital that has been crucial to the expropriation of Aboriginal land and culture. It is also the paradigm at the heart of Patrick Macklem’s approach to indigenous difference.

In Locke’s \textit{Second Treatise of Government} is found his well known definition of property:

\begin{quote}
Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a \textit{Property} in his own \textit{Person}. This no Body has any Right to but himself. The \textit{Labour} of his Body, and the \textit{Work} of his Hands, we may say, are properly his. Whassoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his \textit{Labour} with, and joined to it something that is his own, and thereby makes it his \textit{Property}.\textsuperscript{53}
\end{quote}

The paradigmatic resemblance between Locke’s definition of property and Macklem’s concept of ‘indigenous difference’ are apparent. Macklem, from the very first pages of his book, identifies ‘indigenous difference’ as a question of labour. Here, rights are determined in terms of the transformation of the environment through prior occupancy\textsuperscript{54} rather than by a commitment to social justice in the language of a structural reform of the Canadian state: “my thesis, first and

\textsuperscript{52} Bourdieu \textit{Forms of Capital}, 248.
\textsuperscript{54} There are some debates as to the extent to which Locke fully adheres to a doctrine of prior occupancy. This is because Locke also insists that property be consistently in use so as not to spoil. The concept of prior occupancy, however, accords an absolute right to the temporally prior, whereas Locke is sometimes thought to justify the usurpation of land by a newcomer if the land is deemed to be used poorly. See Jeremy Waldron, “Indigeneity? First Peoples and Last Occupancy”, for a discussion of the relationship between Locke and theories of occupancy in relation to the question of indigenous rights. See also Barbra Arneil’s John Locke and America, chapter 6: \textit{Colonialism: John Locke’s Theory of Property}. 
foremost, is that a unique constitutional relationship exists between Aboriginal peoples and the Canadian state—a relationship that does not exist between other Canadians and Canada”.

That Macklem must justify the longstanding colonial relationship between the Canadian state and indigenous peoples as ‘unique’ is a testament to the profound impact that the Trudeau vision of Canada has had on Anglophone Canada. Framing the colonial relationship as a ‘unique’ relationship, moreover, reveals the ambivalent nature of Lockian articulations of property rights. Though there is a well established body of literature dealing with Locke’s justification of the colonial usurpation of property, a pluralisation of the concept of personhood since the 17th century has allowed for previously excluded individuals and communities a place within the Lockian constellation. What a Lockian argument for indigenous rights cannot address however, is the need for structural reform of the state itself in order to achieve a genuine and concrete equality. As such, Macklem’s argument continues to favour the abstract equality offered by legal and constitutional recognition.

While Locke’s political theory does explore the legitimacy of political resistance, his argument for civil disobedience still assumes a status based right to disobey and this status based disobedience is ultimately dependent on the initial recognition of property rights in terms of a specific form of human labour. Thus, while the content of these categories have been pluralized over time, the maintenance of their general Lockian form assures that the same exclusions will be repeated—albeit according to the social content provided by contemporary circumstances. Approaching the relationship between the courts and indigenous peoples in terms of the politics of the archive allows for an identification of contemporary occasions where the regressive elements of the Lockian form of property and identity rights recognition persists. It is therefore

55 Macklem Indigenous Difference, 4. The claim, moreover, that no ‘special’ or colonial relationship exists between the Canadian state and the psyche of francophone Canada is certainly a debateable one which must be left for another occasion.
important to note that a Lockian form of identity politics ultimately presupposes the politics of
the archive, ultimately exacerbating the structural inadequacies inherent to adversarial forms of
justice. A good example of the paradoxes which result from the Lockian attitude to indigenous
difference are the differences in the outcome of two 2014 supreme Court of Canada decisions,
rendered only weeks apart. The first, mentioned earlier in this section, was the *Tsilhqot’in*
decision; the second is the *Grassy Narrows* decision.

In the *Tsilhqot’in* decision, the Court unanimously granted a declaration of Title to the
Tsilhqot’in nation in their traditional territory (located in what is roughly the Cariboo region of
British Columbia) thus overturning a British Columbia appeal court decision. Owing to the
distinct history of British Columbia in relation to other western Canadian provinces however, the
majority of the territory under British Columbian jurisdiction had never been subject to a treaty
between indigenous people and the Crown. As such, many people, both Aboriginal and non-
Aboriginal maintain that the rules of Royal Proclamation of 1763 are still in effect when
determining land usage in British Columbia. The Supreme Court affirms this view and noted that
British Columbian forestry authorizations can take place only according to the consent of the
Tsilhqot’in.\(^{56}\) While many people hailed the decision as a victory for the Tsilhqot’in and
indigenous peoples in Canada, less than three weeks later the *Grassy Narrows* decision resulted
in a frustrated response from indigenous leaders.

The Grassy Narrows first nation, are descendants of the original signatories of Treaty 3
which corresponds to an area roughly equivalent to where western Ontario meets south-eastern
Manitoba. In its reasons, the Court determined that the province of Ontario has the power to take
up lands in Treaty 3 territory—without the cooperation of the Government of Canada—as long

as the province does not break the terms of the Treaty.\textsuperscript{57} Notwithstanding the fact that the treaty was originally signed between the Ojibway and the Federal Crown, the province of Ontario has the exclusive authority to take up lands in Treaty 3 territory under those sections deemed provincial jurisdiction as set out by the Constitution Act, 1867—even if Treaty 3 territory is located within a portion of the province not originally part of Ontario in 1867.\textsuperscript{58} Since Treaty 3 does not outline a two-step process between the provincial and federal government, the cooperation of the latter is not necessary. The decision was considered a setback by indigenous leaders.\textsuperscript{59}

While these decisions may seem odd in that their outcomes appear quite different, at the core of each decision is a consistent application of the logic of the ‘social fact’. Indeed, the Royal Commission on Aboriginal People recognizes the burden placed on Aboriginal peoples by the fiduciary relationship: “the federal Crown’s fiduciary obligations are uniform throughout Canada. \textit{However, the extent and scope of these obligations vary because of the diversity of their sources}”.\textsuperscript{60} At the heart of the matter is the difference between treaty territory and non-treaty territory. The logic of the social fact applies in each case, except that in treaty territory, the social fact is treated as a positive phenomenon and, in the case of non-treaty territory, as negative one structured around a particular archival lack. In these cases the logic of the identity of non-identity prevails ensuring that the social fact remains the base currency unit according to which to evaluate Aboriginal claims. What the Grassy Narrows decision unfortunately confirms is the willingness of the Court to affirm a particular indigenous nation’s archive as the limit of that

\textsuperscript{57} Grassy Narrows First Nation v. Ontario (Natural Resources), 2014 SCC 48, paragraph 55.

\textsuperscript{58} Grassy Narrows V. Ontario, paragraph 30.


\textsuperscript{60} Royal Commission on Aboriginal Peoples \textit{Canada’s Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec Volume two, Domestic Dimensions}. (Ottawa: Research Program of the Royal Commission on Aboriginal Peoples, 1995), 70. Emphasis my own.
nation’s social and political rights. It also opens up some paradoxes regarding the relationship between equality, history, and the law as a basis for determining the differences in rights between Aboriginal peoples.

A further aspect of the Court’s use of the logic of the social fact is how the latter are strategically deployed in order to ‘to uphold the constitution’. In cases of indigenous jurisprudence these strategies are often noticeable in terms of the relational symmetry according to which the Court positions itself vis-a-vis indigenous peoples. The question of Aboriginal Title is exemplary in this regard. To this extent the *Delgamuukw* (1997) decision remains the standard-bearer in terms of determining the kinds of rights implied by Aboriginal title. In the reasons for that decision, Chief Justice Lamer writes:

> Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves Aboriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need to be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies.\(^6^1\)

Since the basis of Aboriginal law in Canada is recognized to have originated in the *Royal Proclamation of 1763*\(^6^2\) the symmetry at the heart of questions of Title results from the principles embedded in the latter document and the complexity which results from the ‘fact’ that, in the *Proclamation*, the Crown effectively claimed for itself Title over what is now the territory of the province of Quebec.

To this end, the passage\(^6^3\) often identified as acknowledging the recognition of Aboriginal title states that while all land and territories not included within the limits of the

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\(^6^1\) Isaac *Aboriginal Law*, 3
\(^6^2\) Isaac *Aboriginal Law*, 4
\(^6^3\) For convenience this is the passage in question:
we do further declare it to be our Royal will and pleasure, for the present as aforesaid, to reserve under our sovereignty, protection and dominion, for the use of the said Indians, all the land and territories not included within the limits of our said three new governments, or within the territory granted to the Hudson’s Bay Company...And we do further strictly enjoin and require all persons whatsoever, who have either willfully or
‘three new governments’ are reserved under the sovereignty of the Crown for the use of indigenous peoples, inside the boundaries of the newly delineated territories the Crown reserved for itself the right to “summon and call general assemblies”. In this way then, the Proclamation opposed the colonial government’s right to summon political assemblies against an Aboriginal right to the use of land. In as much as the *Tsilhqot’in* decision declared the presence of Aboriginal title, it thus simultaneously continued to affirm the Canadian state’s political right to appropriation within the limits of the constitution. As such, the ‘unique’ relationship between the Canadian state and indigenous peoples continues to bear many of its past colonial traces. Moreover, the claims to Aboriginal title are structured in such a way by the Royal Proclamation to ensure that it is the political institutions of the colonial governments which determine the nature of Aboriginal land use; an antagonism built in to the Proclamation itself. Thus, the Court and the Canadian public, through its unflinching belief in the ‘social fact’ as a basis for determining indigenous rights, appears to have adopted a Lockian attitude as a form of embodied cultural capital, the institutional framework of which was further strengthened by Trudeau’s patriation project.

### 2.4 Conclusion: Against the Chauvinism of the Social Fact

Indigenous political theorist Glen Coulthard notes how the current of political theory styled ‘deliberative democratic theory’ often misconstrues what is at stake in identity politics, “at issue is the structure of domination and inequality that anchors the Canadian state’s relationship with indigenous communities, not the production and maintenance of non-negotiable identity

* inadvertently seated themselves upon any lands within the countries described, or upon any lands which, not having been ceded to or purchased by us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such settlements.

* Houston *Documents*, 68.
There nevertheless remains among Canadians a popular perception that indigenous peoples are granted special privileges in relation to non-indigenous Canadians. To this end, this chapter sought to show, how, even in cases where indigenous peoples are apparently granted ‘special rights’ such as Title by the Supreme Court, the foundation according to which rights can continue to be withheld is maintained. The chapter relied on Pierre Bourdieu’s theory of social capital in order to show how cultural capital, activated through the politics of the archive, directed toward the creation of objectified cultural capital in the form of ‘social facts’, is mobilized through Canada’s process of judicial review. To this extent, the politics of the archive function as both a floor and ceiling according to which the political claims of Aboriginal people are mediated by the Canadian state and the chapter has further sought to clarify and critique this phenomenon as a contingent and arbitrary feature of Canadian politics.

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Chapter 3: Closing Arguments

This thesis has assessed the politics of judicial review in Canada according to the concept of the politics of the archive. Its general tendency has been to offer a critical analysis of the impact of the politics of the archive on the relationship between the Canadian state and Aboriginal peoples. In this concluding chapter, however, I offer an account of the formal limits to justice embodied in the politics of the archive. As such, I aim to clarify and summarize the normative reasons that have informed the preceding analysis. To this end, the section argues that there are apriori tendencies embedded in the structure of adversarial justice that make the achievement of equality of opportunity unlikely in contexts where multiple national communities share a single state. In the final section of the chapter, the extent to which the adoption of a genuinely multinational state in Canada can alleviate some of these difficulties is examined.

3.1.1 First Argument: *the formal outcome of legalized politics is determined in advance by the structure of the archive.*

When claims are made seeking redress for grave and immense injustices, the Western tradition of adversarial justice places the burden of proof on the claimant. By convention, the claimant must establish the nature of the claim at hand through a series of argumentative tests. To this end, many deliberative democrats have been keen to note the apparent success such an approach to conflict resolution can have. Theorists like Monique Deveaux and John Dryzek maintain that deliberative approaches can resolve disputes about contested cultural practices, to the point of even claiming that deliberative approaches can resolve mutually contradictory claims.66 Despite the confidence with which such claims are made, the examples that are often

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66 See both, Monique Deveaux “A Deliberative Approach to Conflicts of Culture” *Political Theory* Vol 31 No 6, 780-800, 2003 AND John Dryzek “Deliberative Democracy in Divided Societies” *Political Theory* Vol 33 No 2,
deployed by such theorists—while certainly examples of contentious practices—are never of quite the most difficult variety. In this respect, the legal criteria of genocide presents an interesting opportunity to test the potential success of deliberation where only “the toughest issues concerning mutually contradictory assertions of identity” are at stake.

The legal definition of genocide currently set forth in UN Convention on the Prevention and Punishment of the Crime of Genocide is as follows:

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

What is particular about the concept of genocide is the burden of proof necessary to bring about its conviction. From a maximalist jurisprudential perspective, the occurrence of a genocide certainly cannot be proven according to any concept of ‘social fact’ because, for the perpetrator to have effectively conducted a ‘successful’ genocide, any potentially remaining ‘social facts’ that could be attributed to the existence of the now eradicated group would have had to have been eliminated, thus making any affected knowledge regarding the event impossible. This is sometimes referred to as the corporate conception of genocide because what is at stake is the deliberate elimination and destruction of the cultural products of an entire people. As such, the legal definition of genocide already makes impossible the redress for, or punishment of, the crime of genocide, by ensuring that any punishable act of genocide must always be a failed genocide and thus always an attempted genocide.

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218-242, 2005. John Dryzek claims that “deliberative democracy can process the toughest issues concerning mutually contradictory assertions of identity”

67 See Dryzek.
Since a punishable genocide in this case can only be an attempted genocide, the attempt to seek redress for genocide already undermines its own possibility because if the redress is sought by survivors of the event, then their very survival counts as evidence of the incompleteness of the act by the alleged perpetrator. Survivors of such a traumatic event must thus re-count their narrative as a social fact, thus linking the logic of the social fact in a parallel way to the logic of the perpetrator. From the maximalist perspective, the question posed by the form of legalized politics becomes, if as the defendant claims a genocide was committed; “how then can the defendant possibly prove its own death”? Since the concept of a survivor is the very antithesis to the total destruction of a group, it becomes effectively impossible for a survivor to prove the total destruction of her people. On the one hand, if genocide occurred, there could be no survivors, and if there are survivors, there could only have been an attempted genocide. In turn, the demand to validate a claim to attempted genocide by offering proof places the aggressor in a superior position because it is the victim that must prove he was victimized.

This short discussion in terms of some of the dilemmas of legalized politics in terms of genocide is meant to show how the formal outcome of legalized politics is already determined in advance by the ontological constitution of ‘social facts’. Because the form of legalized politics necessarily prevents any kind of genuine equality between contending parties, legalized politics ensures that the most contentious cases and arguments create conditions according to which an irresolvable remainder is built in to the very process of Western forms of adversarial political communication. In cases of irresolvable antagonism then, legalized politics alone cannot ensure the establishment of a common ground according to which to resolve such conflicts.68

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68 For a work that treats this problem in far greater depth, see Jean-François Lyotard’s *The Differend: Phrases in Dispute*. Lyotard’s work is structured around the concept of the ‘differend’ a concept which he uses to identify “a conflict between two parties, that cannot be equitably resolved for lack of a rule of judgement applicable to both arguments”.
To this extent, deliberative democrats like John Dryzek, who forewarn against a rising tide of “murderous identity politics”, are mistaken in what is deemed to be the cause of such intense identity politics. As this thesis has sought to show, even in a supposedly peaceful society such as Canada, the strategies adopted by those who practice identity politics are often constructed in relation to specific structural deadlocks that result from the institutional design of legalized politics. One would therefore be tempted to conclude that were legalized politics to be practiced in a more egalitarian fashion, both in theory and practice, the intensity and ‘essentialism’ of identity politics would likely be less pronounced and thus less murderous.

3.1.2 Second Argument: because the vast majority of archival documents preserve examples of unequal relationships between peoples, their deployment as a political/legal strategy according to which to achieve genuine equality is limited.

Under a form of legalized politics, the possibility of political equality must rely on a series of documents which codified instances of unequal relations of power between peoples. To the extent that such documents constitute the foundation and limit to claims of political equality, their use in reversing colonial relations are equally limited. The Canadian context offers the Royal Proclamation of 1763 as a canonical document in this regard. Not only does the document establish a formal relationship between the Canadian state and Indigenous peoples that continues to exist to this day, it also positions the latter entities in relation to francophone Quebec as well. For such reasons, the Royal Commission on Aboriginal Peoples has recommended that a new Proclamation be issued in order to signal a new beginning between Aboriginal peoples and the Canadian state.

Even in cases of apparent Court victories by indigenous peoples—assumptions often incorrectly perpetuated by major Canadian media networks—the latent colonial relationship is

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69 Dryzek “Deliberative Democracy in Divided societies”
70 Royal Commission on Aboriginal Peoples Vol. 5 Renewal: a Twenty Year Commitment, 5.
concealed. Cases like *R. V. Sparrow* (1990), which ruled on the nature of the fishing rights of members of the Musqueam nation, though often thought to be an important example of Aboriginal ‘victory’ in Court, are found to have many veiled problems when subject to closer scrutiny. Michael Mandel notes that in *Sparrow*, “the Court could afford to be generous on the existence of the right because it was going to keep the nature of the right firmly under control by subjecting it to ‘reasonable limits’.”

To this extent, resistance to an arbitrary appeal to ‘reasonable limits’ can necessitate strategic use of the *reductio ad absurdum* form of argument. Since the Court appeals to the legitimacy of a *reasonable* limit, if a limit can be shown to be more than *un*-reasonable—even absurd—the particular limit in question has the potential of being lifted. The *reductio* derives its effectiveness by simultaneously affirming the power of the sovereign while also noting the impossibility of the sovereign to be limited by a higher authority in a certain domain. The argument is presented in such a way to suggest that if the sovereign were to accept a particular argument as reasonable, an absurd consequence would follow such as a limitation of the sovereign’s sovereignty. Section 2 noted that, since the Royal Proclamation of 1763 opposes the rights of governments to Indigenous peoples, the Court is often careful to ensure that it treats Title cases in such a way as to not limit the rights of governments in relation to indigenous peoples. In Canadian Aboriginal jurisprudence, this form of discourse and relationship is the ideal that judges seek to establish, as it reinforces the authority of the Crown in situations of conflict. The risk of argument is thus disproportionally greater on the original claimants who are often Aboriginal peoples. Aboriginal jurisprudence thus offers the Canadian state opportunities to adjust its concept of sovereignty as it sees fit. Mandel thus notes that it is, “more realistic to

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71 Mandel *the Legalization of Politics in Canada*, 364.
view the Charter [and by extension the Constitution Act, 1982] as having operated to manage Aboriginal claims than as having operated to promote them”.

3.1.3 Third Argument: The concept of a ‘social fact’ is a dishonest criterion according to which to mediate public expectations regarding the rule of law.

For these above reasons then, it is clear the fundamental political problem at the heart of every case of legalized politics is to determine the nature of specific social facts. Yet, the problem with presupposing the ‘social fact’ as the basic currency according to which to premise a legalized politics of the archive is that the concept is already framed from the perspective of its possible transgression. It was already Plato who noted in the Republic that to know the form of the just one must also know the form of the unjust. Partisans of a legalized politics of the archive favour this arrangement precisely because transgression of the law implies knowledge of the form of justice. To this extent, as was explored in section 3.1.1, there are some situations in which the structure of the law, in combination with the theory of social facticity, effectively makes impossible the determination of culpability, unleashing a social frustration which results in the establishment of identity politics.

The development of identity politics, however, does not worry partisans of legalized politics because the identities that are mobilized are created in relation to the frustration that results from the practice of legalized politics. Thus, legal form can still be used to maintain and manage various political identities as long as, in the identity political context, a negative reading of the concept of the social fact is maintained. What remains dishonest about the concept of the social fact as the basis for a legalized politics of the archives is that what fundamentally governs the structure of the law are the limits regarding the genesis of legal-philosophical-political concepts and not just the explicitly enumerated sections of constitutional law.

72 Mandel The Legalization of Politics in Canada, 368
It is for these reasons that a legalized politics of the archive can only be sustained by an unequal distribution of social capital. Regarding this unequal distribution of social capital through educational opportunities, John Porter writes; “Low I.Q. scores and poor school achievement can be associated with lower social class position...those with high I.Q.’s on the average came from more expensive houses, were from smaller families, and had fathers with high incomes...social class is a complex interweaving of the social and the psychological...”

Likewise, Pierre Bourdieu notes that, “the educational system tends increasingly to dispossess the domestic group of the monopoly of the transmission of power and privileges—and among other things, of the choice of legitimate heirs from among children of different sex and birth rank”.

In this regard, an honest appeal to social facts must not simply point to the apparent existence of a factual consequence, it should also show how the structure and genesis of a series of concepts make possible the apprehension of particular phenomena as a social fact capable of bearing legal and political implications. What is important is thus making explicit the genesis, structure and malleability of legal concepts. A dishonest form of legalized politics avoids any such criterion.

### 3.2 Canada and the Multinational State.

The previous three subsections explored some arguments generally critical of a legalized politics of the archive in both theory and practice. This section identifies some of theoretical obstacles which prevent the conceptualization of Canada as a multinational state at the institutional level.

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73 Porter *The Vertical Mosaic*, 196-7
74 Bourdieu *The Forms of Capital*, 255
To this end, the work of Kenneth McRoberts suggests that institutional multinationalism has not been achieved in Canada. According to McRoberts, what prevents the multination state from gaining greater currency in Canada is the concept of symmetry.\textsuperscript{75} It was noted above that in cases of Aboriginal title, the Court tends to frame its reasons out of a defensive concern for symmetry. A symmetrical concept of constitutional law assumes a formal distinction between boundaries, such that one party on either side of the boundary cannot be granted more rights without making the other party worse off. Thus, referring again to the Royal Proclamation of 1763 as an example, granting indigenous peoples legislative assemblies would diminish the Crown’s paternalistic duty to protect “the several nations or tribes of Indians” who live under the sovereignty of the Crown.\textsuperscript{76}

In this way then, the symmetry aspired to by the Court is not one between people’s but between internal and external boundaries of the state. Francophone constitutional scholar Henri Brun, notes “Par rapport à l’État, le droit est externe ou interne. Le droit externe est appelé droit international; ses normes prévalent par-delà des collectivités et territoires étatiques. Le droit interne est le droit applicable à la collectivité et au territoire d’un État donné”.\textsuperscript{77} To this enumeration, one could add a further distinction relating to the sui generis status of many Aboriginal communities in Canada, that of the internal-external.

The internal-external designation is an accurate representation of what’s at stake in the ‘sui generis’ status of Aboriginal law for a number of reasons. On the one hand, indigenous peoples have only been granted limited recognition on an international basis. While many states recognize indigenous people, they are not accorded the same privileges as states within the

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\textsuperscript{75} Kenneth McRoberts “Canada and the Multinational State” Canadian Journal of Political Science Vol 34 No. 4, 2001, 712.

\textsuperscript{76} Houston Canadian Constitution, 70

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international system. From the international perspective then, they remain *internal* to a particular state. On the other hand, within a particular state their status is also distinct from other citizens by virtue of the *Indigeneity* of Aboriginal peoples. In this sense then, Aboriginal peoples remain external to other members of the polity.

Since the Canadian state is absolutely focused on maintaining this formal, *internal-external* boundary between itself and Aboriginal peoples, the former cannot properly be said to be *multinational* at an institutional level. While undeniably multinational in terms of its sociological composition, this concrete diversity is given little expression in Canada’s institutions. Even Canada’s bilingualism policy only partially reflects the concrete diversity of Canada in that linguistic rights are primarily framed as individual rights to a service in a particular language rather than as a collective right to self-determination.

A multinational state in the Canadian context would thus be less focused on maintaining formal boundaries and become more oriented to allowing and encouraging fuller expressions of the varied and diverse experiential content of Canada’s numerous national communities, and not just maintaining each community’s formal, historically constituted, relationship to the state. Moreover, the institutions necessary for such a state to be successful in the Canadian context would likely require the addition of a court system and process distinct from the Supreme Court. This is because having the Supreme Court adjudicate cases of Aboriginal law alongside the many other cases it sees incorrectly suggests that all these cases are somehow equivalent, which is not accurate in the case of Aboriginal peoples. Thus, a kind of post-adversarial form of adjudication in the case of Aboriginal peoples may be necessary in order to establish genuinely multinational state institutions with the potential to achieve greater solidarity between Canada’s various communities.
3.2.1 Excursus on ‘social fact’ and oral testimony: The case of Aboriginal Oral History since Delgamuukw (1997)

In 1997, the Supreme Court admitted Aboriginal oral testimony as a legitimate form of evidence in Aboriginal jurisprudence. Many commentators subsequently cited this development approvingly. While the legitimation of oral testimony is no doubt an advance, in important respects however, the acceptance of oral testimony by the Supreme Court remains the logical fulfilment of the politics of the archive rather than providing an alternative.

From a structural perspective, oral testimony continues to place Aboriginal peoples in a compromised situation in relation to the Canadian state. By offering oral testimony, Aboriginal people must resort to a mode of communication capable of heading the injunction of the Canadian state to ‘prove the facts’. Since the base unit of exchange in these proceedings remains the social fact, the admittance of oral testimony as accepted by the Supreme Court of Canada thus continues to affirm the politics of the archive. Indeed, in its reasons, the Court affirmed the following in relation to Aboriginal jurisprudence: “the ultimate purpose of the fact finding process at trial [is]—the determination of the historical truth”.78 As such, oral testimony is offered to the Court as a way to fulfill the logic of the social fact, rather than a compromise aimed at alleviating the limits inherent in the western form of adversarial justice.

Here, the oral testimony offered to the court by Aboriginal peoples must be of a kind that is comprehensible to the Supreme Court and therefore in conformity with its traditions of oral history and not those of Aboriginal peoples. Thus, while the court continues to develop and cultivate its own standing according to its own preferred terms and methodologies, the development of Aboriginal oral testimony is not allowed the same opportunity to proceed for its own sake but must do so for the uses and purposes of a western court organized around the

78 Delgamuukw v. BC, 1068 paragraph 86.
principle of adversarial justice. The cultural development and preservation of Aboriginal peoples through the refinement of their people’s specific oral traditions is therefore not the primary concern of the Court and therefore reveals the Court’s unwillingness to function as a properly multinational institution.

Non-indigenous scholars such as the anthropologist Bruce Miller have also questioned the role of the Court in leading the debate on the admissibility of Aboriginal Oral history, “However the question of the significance and feasibility of incorporating oral narratives into Western systems of knowledge and authority is understood, the adversarial legal process is clearly not the best venue to work this question out...it is failing...[and] the legal system has rejected informed and thoughtful versions of how to understand oral narratives...in favour of a less informed but simpler version presented by the Crown”.

Likewise, historian Arthur Ray notes that:

The adversarial nature of the process greatly enhances the challenge they [Aboriginal peoples] face. Although expert witnesses are there to assist the court, their evidence and testimony is challenged directly by opposing counsel through cross examination...From the beginning the adversarial nature of the process frequently has had a divisive impact on the community of experts who have taken part. A key reason is that opposing lawyers often explore the limits of the theoretical differences that exist among experts. Consequently, expert witnesses are often pushed or pulled towards the boundaries of currently acceptable historical interpretation.

It is possible that this relationship between Aboriginal oral history and the will to archive of the Supreme Court of Canada may change in the future. At present however, the admissibility of oral traditions in cases of Aboriginal jurisprudence seem to offer only a small concession on the path to the establishment of a multinational state. Moreover, the implications of admitting

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oral testimony of the kind advocated by indigenous peoples into the western legal tradition have yet to be fully enumerated.⁸¹

⁸¹ There are numerous works examining the use of Aboriginal oral testimony in cases of Aboriginal jurisprudence, yet, given the limits of this thesis, only a cursory overview of this work is possible. Nevertheless, those interested in critical perspectives on the matter should further consult the work of Val Napoleon “Delgamuukw: A Legal Straightjacket for Oral Histories?” in the Canadian Journal of Law and Society. For a more optimistic perspective, the work of indigenous legal scholar John Borrows, in particular his books Canada’s Indigenous Constitution and Drawing out Law, develop a potential way in which aboriginal legal traditions can be reconciled with euro-Canadian legal traditions.
Conclusion

Guilty as charged: Accepting the Fact of a Legalized Politics of the Archive.

This thesis has sought to show how the context of the Canada-Quebec conflicts from the 1960’s through to the 1980’s, having finally precipitated patriation, paved the way for Canada’s current structure of Aboriginal jurisprudence as a politics of the archive. To understand the full extent of what’s at stake in Canadian Aboriginal jurisprudence therefore requires a degree of familiarity with this other conflict as well. In this way, the politics of the archive necessarily implicates the politics of national self-determination for all three of these socio-political traditions within Canada; casting aside the issue of the nature of the relationship between these three communities fated to live together risks further exacerbating the problem. The failure to adequately accommodate the demands of Aboriginal peoples through patriation should thus not be seen as a reflection of the impotency of Aboriginal peoples, rather, this lacunae should be seen for what it really is: the failure of Canadians as a democratic people.

To this end, chapter one explored some of the features of Canada’s transition from the legalization of politics to the politics of the archive. It sought to expose the complex relationship between sovereignty and the archival historiography of the human sciences at the heart of the Canadian state. Chapter two offered a critique of this process through the social capital theory of Pierre Bourdieu and sought to show how the egalitarian claims made by partisans of legalized politics are belied by the hierarchical networks of social power necessary to administer a politics of the archive in the form of a legalized politics. Chapter three further clarified the general form of the politics of the archive by disengaging somewhat from the Canadian context in order to

show the limits of the specifically jurisprudential logic at work in administering the politics of the archive.

Nonetheless, hasn’t the author of this thesis—itself slated to become part of an archive—not engaged in the very same practice he condemns? In regards to this accusation, the author must stand guilty as charged. Yet, if the current state of affairs makes the politics of the archive truly unavoidable, then one should at least be permitted to insist upon having an open, honest and public discourse regarding the less appealing aspects of legalized politics. This thesis has sought to disclose, as much as possible, both the logic and sites according to which legalized politics has operated in Canada, while also outlining some of the political challenges posed by such a form of politics and the disproportionate burden it places on Aboriginal peoples.

It is therefore necessary to note that if the Canadian state is serious about establishing a renewed relationship of trust with Aboriginal peoples, a new form of post-adversarial justice less dependent on archival politics must be explored. In this regard it is Frantz Fanon who summarizes and clarifies—more poignantly than I could hope to—what is at stake in looking beyond a legalized politics of the archive:

It would be of enormous interest to discover a black literature or architecture from the 3rd century B.C, we would be overjoyed to learn of the existence of a correspondence between some black philosopher and Plato, but we can absolutely not see how this fact would change the lives of 8 year old kids working the cane fields of Martinique or Guadeloupe. I find myself in the world and I recognize I have one right alone: of demanding human behavior from the other.83

83 Frantz Fanon *Black Skin, White Masks* (New York: Grove Press, 2008), 205.
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