THE ORGANIC CONSTITUTION: ABORIGINAL PEOPLES AND THE EVOLUTION OF CANADA©

BY BRIAN SLATTERY*

Despite recent advances in the law of aboriginal rights, most Canadian lawyers still tacitly view the Constitution as the outgrowth of European legal traditions, transplanted into North America. This article identifies the main features of this model of the Constitution and proposes a more appropriate model to replace it, one that recognizes the Constitution's deep roots in Canadian history and traditions, and acknowledges the distinctive contributions of Aboriginal peoples and their long-standing relations with the Crown.

Malgré les avances récentes dans la loi des droits autochtones, la plupart des avocats canadiens continuent tacitement à considérer la Constitution comme le produit des traditions légales européennes, transplantées en Amérique du Nord. Cet article identifie les caractéristiques principales de ce modèle de la Constitution, et il propose un modèle plus approprié à le remplacer, qui reconnaît les racines profondes de la Constitution dans l'histoire et les traditions canadiennes, ainsi que les contributions distincitives des peuples autochtones et de leurs relations de longue date avec la Couronne.

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I. INTRODUCTION

> What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land—our own land. ... [O]ur forefathers for generations and generations past had

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* Associate Professor, Osgoode Hall Law School, York University. The author would like to thank Vladislav Tumir for his helpful comments. An earlier version of this paper was delivered at the Conference "Lessons from Oka: Forging a Better Relationship," held at the Faculty of Law, McGill University on 13 February 1991, and was later published in the Conference proceedings: see B. Slattery, "The Path to Crisis: Origins of Conflict" in A.P. Morrison, ed., *Justice for Natives: Searching for Common Ground*(Montreal: Aboriginal Law Association of McGill University, 1994) 128.

> their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so.[1]

This statement could have been made yesterday, or a decade ago, or a century ago. In fact, it was made in 1888, by David Mackay of the Nishga Nation of British Columbia, while addressing a Royal Commission visiting the Nishga Territory.

In the same year that Mackay met the Royal Commission, the Judicial Committee of the Imperial Privy Council in London was considering arguments on the nature of indigenous land rights in Canada. At that time, the Privy Council was the final court of appeal for Canada, as well as for other British colonies. The case, *St. Catherine's Milling & Lumber Co.* v. *R.*,[2] did not directly involve native peoples. It was a dispute between Canada and Ontario over which government reaped the benefits of an Indian treaty ceding lands to the Crown. Lord Watson delivered the Privy Council's decision. He referred to the provisions of *The Royal Proclamation, 1763*,[3] an imperial instrument protecting Indian lands, and went on to say:

> The territory in dispute has been in Indian occupation from the date of the proclamation until 1873 [when it was ceded by the native inhabitants to the Crown]. ... Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then living under the sovereignty and protection of the British Crown. It was suggested in the course of the argument for the Dominion, that inasmuch as the proclamation recites that the territories thereby reserved for Indians had never "been ceded to or purchased by" the Crown, the entire property of the land remained with them. That inference is, however, at variance with the terms of the instrument, which shew that the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign.[4]

Lord Watson seemed to think that whatever land rights the Aboriginal people possessed were ascribable to the bounty of the Crown, as manifested in the *Royal Proclamation, 1763.* Even then, these rights were held at the "good will of the Sovereign." The contrast with Mackay's outlook is striking.

In recent years, the Privy Council's views on aboriginal land rights have fallen into partial disrepute, due to an important series of

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[1] Quoted in *Calder* v. *British Columbia (A.G.)*, [1973] S.C.R. 313 at 319 [hereinafter *Calder*].

[2] (1888), 14 A.C. 46 (P.C.) [hereinafter *St. Catherine's Milling*].

[3] (U.K.), reprinted in R.S.C. 1985, App. II, No. 1 [hereinafter *Royal Proclamation, 1763*]. An accurate copy of the original printed text is found in C.S. Brigham, ed., *British Royal Proclamations Relating to America* (Worcester, Mass.: American Antiquarian Society, 1911) at 212-18.

[4] *St. Catherine's Milling*, *supra* note 2 at 54.

Supreme Court decisions.[5] Nevertheless, some of the basic assumptions that underlie Lord Watson's remarks are still surprisingly influential. The Canadian legal system has been slow to come to terms with the perspective implicit in David Mackay's speech: we, the First Peoples of Canada, are autonomous peoples, with our own laws and lands, our own systems of government and justice. We are the original custodians of this land that we now share with you. You are the newcomers. We are not beholden to you for our basic rights and status.

One reason why the courts have had difficulty in accommodating this viewpoint is their attachment to a conception of the Constitution deeply rooted in Canada's colonial past—what may be called the Imperial Model of the Constitution. In its classic form, the Imperial Model involves a number of basic tenets, which interconnect and reinforce one another. As we will see, these tenets have never won complete acceptance in the courts and in recent times have fallen increasingly under a cloud. Nevertheless, in one form or another, the Imperial Model has had a remarkable influence on the thinking of lawyers and judges over the past century and a half. And, in the absence of anything better to replace it, it continues to provide the tacit matrix for much legal thinking about the Constitution. In this paper, I will examine the basic precepts of the Imperial Model and then propose an alternative to it, following some guideposts laid down in the recent jurisprudence of the Supreme Court.

II. THE IMPERIAL MODEL

There are six basic canons that together make up the Imperial Model. The first holds that when Europeans began settling in North America in the sixteenth and seventeenth centuries, the native inhabitants of the continent had no legal status or rights under the international law of the times. On this view, Aboriginal nations did not qualify as international entities because of such factors as their modest size, mobile lifestyle, diffuse political structures, and differing religious beliefs. Moreover, these groups did not have any international rights to

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[5] See especially *Calder*, *supra* note 1; *Guerin* v. *Canada*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*]; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025; and *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*]. However, the Privy Council's influence can still be seen, for example, in *Delgamuukw* v. *British Columbia* (1991), 79 D.L.R. (4th) 185 (B.C.S.C.) [hereinafter *Delgamuukw*]. This decision was partially reversed on appeal: see (1993), 104 D.L.R. (4th) 470 (B.C.C.A.); it is now on further appeal to the Supreme Court of Canada.

the territories they occupied, which as a matter of law were vacant and open to appropriation by others.[6]

On this view, then, the incoming French and British were able to gain sovereignty over large expanses of North America simply by "discovering" and exploring them, performing symbolic acts of appropriation, or founding small settlements along the sea coasts and riverbanks. In this relatively effortless fashion, France is thought to have gained an enormous American empire which, as depicted in standard historical atlases, stretched from the Gulf of the St. Lawrence River through the Great Lakes as far west as the Prairies and as far south as the mouth of the Mississippi River. For its part, Great Britain obtained original title to extensive regions along the Atlantic coast and around Hudson Bay and later augmented its American empire by conquest and cession from France in 1713 and 1763.[7] So, according to this approach, Canada's international title to its current territories is grounded in British title, which in turn partly derives from that of France. In no case does Canada's title stem from the original title held by indigenous peoples, for they had no international legal rights to their territories in the first place.

So, according to the Imperial Model, the *factual* process by which Aboriginal peoples joined the Canadian federation does not affect the *legal* account of how Canada came to be. Whether that process was coercive or consensual, whether it proceeded unilaterally or by agreement, whether it occured in the seventeenth century or only in the twentieth century, the genesis of Canada remains the same in the eyes of the law. The only recognized actors in the drama are European states and their colonial progeny, and so the plot centres on their comings and goings. When Aboriginal peoples appear on the stage, they are mere bitplayers and stand-ins.

This account of our legal evolution is rounded out by a complementary understanding of the Canadian Constitution. According to the second tenet of the Imperial Model, our basic constitutional framework finds its roots in British law. The Constitution consists primarily of statutes passed by the Imperial Parliament, as supplemented

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[6] For a striking expression of this viewpoint, see *R.* v. *Syliboy*, [1929] 1 D.L.R. 307 at 313 (N.S. Co. Ct.) [hereinafter *Syliboy*]. The Supreme Court of Canada expressed its disapproval of this passage in *Simon* v. *R.*, [1985] 2 S.C.R. 387 at 399.

[7] See, for example, the maps in D.G.G. Kerr, *Historical Atlas of Canada*, 3d rev. ed. (Don Mills, Ont.: Nelson & Sons, 1975) at 22-23 and 30-31; and H.C. Darby & H. Fullard, eds., *The New Cambridge Modern History Atlas*, vol. XIV (Cambridge: Cambridge University Press, 1970) at 196-98.

by unwritten principles of British constitutional law. These statutes include the *Constitution Act, 1867*[8] and its successors, which established the basic federal structure of Canada, and, more recently, the *Constitution Act, 1982*[9] and the *Canadian Charter of Rights and Freedoms*,[10] which, although drafted in Canada, were enacted by the British Parliament at Canada's request. Since 1982, Canada has been able to amend its Constitution without having to resort to Westminster. However, according to the Imperial Model, our newfound capacity to pass amendments locally does not alter the fact that the Canadian Constitution is rooted historically in British law and still largely embodied in statutes enacted by the British Parliament.

The third tenet of the Imperial Model extends this point one stage further. It holds that all governmental authority in Canada emanates notionally from the Canadian Crown, which acts as the successor of the British Imperial Crown. This authority is exercised in the Crown's name by the federal and provincial governments and by subordinate bodies holding delegated powers. Taken together, these bodies completely exhaust the field of governmental power in Canada. So, Aboriginal peoples do not have any inherent jurisdiction over their lands or peoples. Whatever governmental authority they possess stems from the Crown by way of delegation. According to the Imperial Model, in pre-European times indigenous peoples had little that could be described as true "jurisdiction." However, even supposing that they originally held such jurisdiction, this ended when the Crown gained sovereignty over them.

Under the fourth tenet of the Imperial Model, the main body of our ordinary law also traces its origins to European sources. In Quebec, private matters are regulated by the *Code civil*,[11] which, as originally enacted in 1866, codified the laws of Lower Canada (based on the *Coutume de Paris*) on the pattern of the Napoleonic *Code civil*.[12] In the other provinces and territories, the private law is based on English common law, as imported by settlers or adopted by statute. The laws of indigenous Canadian peoples have no recognized status in Canada. Any

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[8] (U.K.), 30 & 31 Vict., c. 3 (formerly *British North America Act, 1867*), reprinted in R.S.C. 1985, App. II, No. 5 [hereinafter *Constitution Act, 1867*].

[9] Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*].

[10] Part I of the *Constitution Act, 1982*, *ibid.* [hereinafter *Charter*].

[11] *Code civil du Québec*, L.Q. 1991, c. 64.

[12] See the historical account in J.E.C. Brierley & R.A. Macdonald, eds., *Quebec Civil Law: An Introduction to Quebec Private Law* (Toronto: Emond Montgomery, 1993) at 5-32.

native custom that existed in pre-contact days was too uncertain and flexible to merit the name "law."[13] In any event, it was automatically superseded when French and English laws were introduced. As a result, aboriginal custom cannot be applied by our courts except where adopted by statute.

We now come to the fifth tenet of the Imperial Model, which deals with the question of land rights. It holds that Aboriginal peoples do not have any legal rights to their traditional lands, except where these rights have been recognized by a Crown act.[14] All land rights in Canada are deemed to stem from the Crown, either directly or indirectly. There is no such thing as "aboriginal title" in Canadian law, in the sense of land rights that spring from longtime use and occupation under customary law. If any such rights had existed prior to European contact, they came to an end when the French and British Crowns gained sovereignty and imposed their own land systems. Whatever land rights indigenous peoples possess in modern times are necessarily based on Crown acts or statutory provisions.

The sixth and final tenet of the Imperial Model holds that the historical agreements concluded by Aboriginal peoples with the French and British Crowns cannot be characterized as international treaties because, as already seen, Aboriginal peoples were never recognized as sovereign entities in international law.[15] Moreover, these agreements are not recognized in domestic Canadian law, whether as constitutional instruments or simple contracts. Whatever legal force they have stems from statutory provisions, such as section 88 of the *Indian Act*.[16]

Considered globally, the Imperial Model has three main characteristics. First, it takes an unreservedly Eurocentric view of our laws and institutions, tracing them to sources in Great Britain or France. Second, it portrays governmental authority as stemming ultimately from a single source, the Crown. Third, it subscribes to the positivist creed that law and governmental institutions are the product of legislation, grounded ultimately in the sovereign's power to command obedience. In short, the Imperial Model portrays the Constitution as (1) *alien* in origin; (2) *monistic* in structure; and (3) *positive* in nature.

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[13] See, for example, the remarks of McEachern C.J. in *Delgamuukw*, *supra* note 5 at 447.

[14] This was the holding of the British Columbia Court of Appeal in *Calder* v. *British Columbia (A.G.)* (1970), 13 D.L.R. (3d) 64. The correctness of this holding was thrown in doubt by the Supreme Court of Canada on further appeal, *supra* note 1, and was finally laid to rest by the Supreme Court in *Guerin*, *supra* note 5.

[15] See, for example, *Syliboy*, *supra* note 6.

[16] R.S.C. 1985, c. I-5.

Two basic premises underlie and inform the Imperial Model. The first holds that the indigenous peoples of Canada originally lacked any international status, territorial title, jurisdiction, laws, or land rights. We may call this *the doctrine of a legal vacuum*, because it supposes that North America was juridically "empty" when Europeans arrived. The second principle maintains that, even if Aboriginal nations had originally possessed certain laws and rights prior to contact, they automatically lost them when European powers gained control, in the absence of explicit recognition or confirmation. This may be described as *the doctrine of radical discontinuity*, because it posits a complete legal rupture between the periods before and after the Crown's arrival.[17]

When reduced to its basic elements, the Imperial Model strikes me as wrong in principle and profoundly out of harmony with our history and traditions. Canada is not, after all, the poor, hobbled creature of eighteenth and nineteenth century British expansionist designs, as the Imperial Model seems to assume. To the contrary, Canada is an independent, multinational federation, with an autonomous Constitution rooted in several centuries of shared and divergent national experiences. The task before us is to reform our basic understanding of the Constitution so as to allow these rich bodies of experience to be tapped. We have to move from a framework grounded in imperial history to a framework more open to local history, tradition, and perspectives.

In reality, this process has been underway for more than two decades. The turning point was the split decision of the Supreme Court of Canada in the *Calder* case,[18] decided in 1973. While the judges disagreed on the result, a clear majority recognized the existence of aboriginal land rights as a matter of Canadian common law. However, the strongest impetus for change came only in 1982, when Canada formally patriated its Constitution. The new constitutional package contained several provisions dealing specifically with the rights of Aboriginal peoples. The most important of these provisions is section 35(1), which states:

> The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.[19]

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[17] For more detailed discussion of these doctrines, see B. Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: University of Saskatchewan Native Law Centre, 1983).

[18] *Supra* note 1.

[19] *Constitution Act, 1982*, *supra* note 9.

The section goes on to explain that the Aboriginal peoples of Canada include the Indian, Inuit, and Métis peoples, and that the rights in question are guaranteed equally to men and women.

Section 35 represents a basic shift in our understanding of the constitutional foundations of Canada. As the Supreme Court held in the leading case of *Sparrow*, decided in 1990:

> [T]he context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.[20]

This decision opens the window, then, to a new conception of the Constitution, one that places less emphasis on imperial claims and pronouncements. This new approach may be called the Organic Model, because it emphasizes that the Constitution is the product of slow and continuing growth, as molded in part by local Canadian influences and traditions.[21]

III. THE ORGANIC MODEL

This new Model takes issue with the six basic canons of the Imperial Model. First and most fundamentally, the Organic Model maintains that the French and British Crowns did not acquire title to North America by virtue of "discovery" and "occupation," as though the continent were a desert island. North America was not legally vacant at the time Europeans arrived. It was the domain of a large variety of independent nations and peoples, which were the custodians of the territories they controlled. In most cases, Aboriginal nations were never conquered militarily. In the early years, they frequently entered into alliances and trading partnerships with incoming European states. As Aboriginal-European contacts became more extensive and important, and as the balance of power gradually tilted to the European side, there was a slow process of accommodation whereby Aboriginal peoples were constrained to accept piecemeal the suzerainty of the Crown in return

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[20] *Supra* note 5 at 406, quoting N. Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall L.J. 95 at 100.

[21] For fuller treatment of various aspects of the Organic Model, see my papers: "The Independence of Canada" (1983) 5 Sup. Ct. L. Rev. 369; "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727; "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681; and "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261.

for its protection. In some instances, this arrangement was the fruit of understandings reached in treaty sessions; in others, it was the result of informal processes whereby the Crown's suzerainty was gradually extended and acquiesced in; more rarely, it was the product of war or overt coercion. The important point is that Aboriginal nations were active *participants* in the lengthy processes that eventually gave rise to the federation of Canada.

So, Canada's modern links with its territories are in part the fruit of historical relationships with Aboriginal peoples, who were the original stewards of the land, and whose long-standing presence here dwarfs the relatively brief span of European settlement. In other words, Canada's international title is grounded to some extent in the ancient occupation of indigenous nations. Canada represents, at some level, a *merging* of the sovereignties of its various component nations, with Aboriginal peoples retaining a measure of their original autonomy.

Second, under the Organic Model, our basic constitutional law is not limited to such enactments as the *Constitution Acts* of 1867 and 1982. These enactments depend for their legitimacy on a more fundamental body of law, which may be called the common law of the Constitution. This law has undergone a long period of gestation and has drawn nourishment from a variety of sources, including local practices and traditions. Among other things, the common law of the Constitution provides the framework linking Aboriginal peoples with the governmental institutions recognized in the statutory portions of the Constitution.

More specifically, the constitutional law relating to Aboriginal peoples is grounded in ancient practices generated by interaction between Aboriginal nations and British and French officials in eastern North America during the seventeenth and eighteenth centuries. By the close of the Seven Years' War, when France withdrew in favour of Great Britain, these practices had crystallized into a distinctive body of "common" or unwritten law. This body of law was neither European nor Aboriginal in origin or substance, but drew elements from both sides to produce a unique set of intersocietal rules, known in modern times as *the doctrine of aboriginal rights*. This common law was partially manifested in such instruments as the *Royal Proclamation, 1763*,[22] which reassured Aboriginal peoples of their land rights. But the *Proclamation* was not the source of the law in question; it only reflected and gave voice to a much larger body of intersocietal custom.

[22] *Supra* note 3.

The common law doctrine of aboriginal rights has many facets, which the courts are still in the process of articulating. However, its main effect, I suggest, is to recognize the internal autonomy, customary laws, and land rights of Aboriginal peoples, within a federal superstructure linking them with the broader Canadian community.

The Organic Model supports a third premise. Generally speaking, Aboriginal peoples emerged from their dealings with the Crown as partially autonomous entities living under the Crown's protection, with the right to govern their internal affairs. Over the years, this common law status was whittled away by statute, and was often ignored by governmental officials and forgotten by the general public. However, it remains the essential historical background against which the modern position of Aboriginal peoples must be understood. Under the Organic Model, it is also a central element in the panoply of aboriginal rights recognized in section 35 of the *Constitution Act, 1982*.

According to this view, the aboriginal right of self-government does not flow from the Crown and does not depend on governmental grant or recognition. It is an inherent right. However, the right of self-government is not unlimited in scope and it does not support a claim to independence. It operates under the aegis of the Canadian Constitution, and confers powers consistent with the needs and circumstances of Aboriginal peoples and their historical links with the larger community.

According to a fourth premise, our laws in private matters are not restricted to those emanating from England and France; they include aboriginal laws, as applied within native communities. These laws are not static, forever preserved in their original state like flies in amber; they are living things, which evolve over time and adapt to new needs and circumstances.

Fifth, under Canadian common law, Indian, Inuit, and Métis peoples hold aboriginal rights to their traditional lands, except where these rights have been lawfully qualified by statute or agreement. These land rights are not based on Crown grant or statutory recognition; they arise from long-standing occupation under customary law. Aboriginal title confers communal rights of use and possession and constitutes a form of collective title, which cannot be alienated by private sale but may only be surrendered or shared by way of agreement with the Crown. Aboriginal title is not confined to so-called "traditional" uses, practised at the time of European contact. It allows indigenous peoples to adapt their lands to whatever purposes serve their current needs, and permits a broad range of modern uses, including agriculture, forestry, mining, and tourism.

Finally, the Organic Model holds that early treaties concluded between Aboriginal nations and European powers were often international in nature, in the sense that they were concluded between independent, self-governing political entities, each with their own territories. However, as the balance of power gradually shifted, treaties increasingly reflected the predominance of the European partner and embodied the latter's claims of suzerainty. These later treaties operated increasingly at the domestic level, contributing to the formation of the Canadian Constitution and the common law doctrine of aboriginal rights. However, it would be wrong to think that the international and domestic spheres can be neatly severed. Under the Organic Model, an historic international treaty between Aboriginal and European entities might today carry certain domestic effects, and a domestic treaty might have modern international consequences. What is clear, for our purposes, is that aboriginal treaties not only contributed in a general way to the evolution of the Constitution, but also supplied part of its federal structure. This situation, sometimes described as "treaty federalism," has now been formally recognized and consolidated in section 35 of the *Constitution Act, 1982.*

The Organic Model, then, has three main features, which contrast with those of the Imperial Model. First, the Organic Model holds that the Constitution is rooted ultimately in Canadian soil rather than in Europe, while acknowledging the important influences of Great Britain and France. Second, the Model subscribes to a pluralist conception of the sources of law and authority, viewing the Crown as the constitutional trustee of coordinate spheres of jurisdiction rather than their exclusive source. Third, the Model rejects the positivist view that our most fundamental laws are embodied in legislation and are grounded ultimately on the sovereign's power to command obedience; rather, it portrays the law as immanent in our collective practices and traditions, which, in turn, reflect more basic values and principles. In summary, the Organic Model views the Constitution as (1) *indigenous* to Canada, rather than an alien import; (2) *complex* in structure, rather than monistic; and (3) fundamentally *customary* in nature, rather than composed simply of positive law.

Two basic principles lie at the foundations of the Organic Model. The first rejects the view that North America was a legal vacuum at the time of European contact. It holds that America was the domain of a variety of aboriginal polities, possessing international status, territorial title, jurisdiction, laws, and land rights, with the capacity to enter into international treaties and other relations. This view forms the core of what we have called *the doctrine of aboriginal rights* The second

principle denies that aboriginal laws, jurisdiction, and land rights were automatically terminated when European powers gained sovereignty. It maintains that these rights presumptively remained in force under the new regime, as necessarily modified by the advent of the Crown. We may call this the *doctrine of continuity*.[23]

Thus, the Organic Model encourages us to broaden our conception of the sources of Canadian law and to recognize the diverse roles that Indian, Inuit, and Métis peoples have played in the formation of this country and its Constitution. It suggests that Aboriginal peoples should be viewed as active participants in generating the basic norms that govern us—not as people on the fringes, helpless victims, or recipients of constitutional handouts from the government or the courts, but as contributors to the evolution of our Constitution and most fundamental laws. In short, aboriginal conceptions of law and rights really count—not as curiosities of another time and place or as the denizens of exotic legal pigeonholes, but as a fundamental part of our living legal traditions.

More generally, the Organic Model opens up the Constitution to a variety of perspectives that have long been excluded or assigned to the periphery of our collective life. The Model represents a further stage in the long process of decolonization that Canada has undergone since 1867. If we have been slow to free ourselves from the trammels of imperial rule, preferring to accomplish by gradual processes of evolution what others have effected abruptly by force of arms, we have been even slower to embark on the task of internal decolonization. It is only a Canadian, perhaps, who would prefer the silent shifting of constitutional paradigms in the night to the tumultuous drama of a Boston Tea Party or a Bastille. Nevertheless, as an astute observer of the Commonwealth once said: "There is much to be said for stealth and subtlety as methods of revolution, if revolution there must be."[24]

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[23] See Slattery, *supra* note 17.

[24] R.T.E. Latham, *The Law and the Commonwealth* (London: Oxford University Press, 1949) at 534.