Foreword

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A Reconciliation without Recollection? highlights the challenges underlying the Crown's position relative to Indigenous peoples in Canada. This book explains how Canadian law's contingencies masquerade as necessities when dealing with Indigenous peoples. In examining these problems, Professor Nichols helps us see how untested assumptions within Canada's legal system obscure choices that diminish the potential for creating healthier relationships across the land. Mischaracterizing choice as necessity diminishes the freedom of both Indigenous peoples and the Crown and simultaneously undermines the legitimacy of Canada's legal system.

The leading Aboriginal rights case in Canada, *R. v. Sparrow*, held that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown." The *Sparrow* case attempted to manufacture certainty when there was doubt: Indigenous peoples have questioned the Crown's assertions "from the outset." Crown land claims are unproven. As Professor Nichols demonstrates throughout this text, the Crown claims land through assertion in ways that the Courts do not sufficiently question and have not adequately justified. In fact, the Crown's claims are inferior when measured by the same test the courts apply to Indigenous peoples, as set out in the 2014 *Tsilhqot'in* Aboriginal title action. These deficiencies include the fact that: (1) the Crown did not legally occupy land in North America prior to their assertions of British sovereignty; (2) there have been notable breaks in the physical continuity of the Crown's occupation in places across the country since sovereignty's assertion; and (3) the exclusivity of the Crown's occupancy from the assertion of sovereignty until today is undermined by continued Indigenous governance and possession of Crown-claimed lands.

Despite these problems, the courts identify reconciliation as the purpose of Aboriginal and treaty rights in the jurisprudence. These high-sounding words do not match the lower status generally accorded to Indigenous peoples in their relationship with the Crown. In addressing this disjuncture, Professor Nichols

asks us to consider whether reconciliation is possible when the law assumes that the Crown can unilaterally determine the position of Indigenous peoples within Canada's constitutional order. As his analysis unfolds, he helps us see that reconciliation with colonialism is not a goal that Indigenous peoples can support or approve.

Professor Nichols helps us see that there can be no reconciliation when we fail to recollect the colonial foundation of the existing s. 35 framework. He shows us that the law's abstraction in favour of the Crown causes Canadians to lose track of the *contingency* of that bias and thereby threatens our ability to choose other, less-oppressive alternatives. When courts or legislatures act on assumptions that the Crown is necessarily vested with power-over Indigenous peoples, reconciliation becomes an impossibility.

In making his case, Professor Nichols reminds us that the work of reconciliation cannot be done within the confines of any one tradition. This book reminds us of the importance of detailed doctrinal, philosophical, historical, and policy-oriented research when examining Aboriginal and treaty rights in Canada. He has done a superb job of highlighting challenges ahead in working towards reconciliation from these varied viewpoints. The work of reconciliation requires that we see our hidden biases, and *A Reconciliation without Recollection?* is among the best tools we have for opening our eyes to the choices that lie before us.

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