Socrates, Odysseus, and Federalism

Jean Leclair*

This essay briefly develops an epistemological, anthropological, normative, and legal/constitutional theory of federalism through which we could envisage anew the complexity of the relationships between Aboriginal peoples and Euro-Canadians or that of Quebeckers and Anglo-Canadians. According to this understanding, federalism is not only characterized by a recognition of the inescapable pluralism of Canadian society, but also of the close interaction between the constituent parts of that plural society — an interaction constantly torn between centrifugal and centripetal forces. Because of the bi- or multifocal perspective commanded by this understanding of federalism, none of these interlaced components may be ignored. Concepts such as sovereignty, nationalism, and rights revolve around a single centre. Federalism requires the recognition that the Self is not of one essence and that a community cannot be envisaged in ignorance of other legitimate collectivities surrounding it. In the perspective defended here, federalism is not a monoconceptual but rather a hyphenated notion forcing one to reconcile dyads such as self–other, us–them, autonomy–solidarity, power–justice, etc. Federalism also acknowledges an uncertainty in our world and in ourselves that other concepts tend to obscure. As such, federalism, at an epistemological level, requires that we be suspicious of monocular outlooks.

Cet essai présente un aperçu d'une théorie épistémologique, anthropologique, normative et juridique/constitutionnelle du fédéralisme à partir de laquelle un nouveau regard pourrait être jeté sur les rapports entre les peuples autochtones et les Euro-Canadiens ou encore, les rapports entre Québécois et Anglo-Canadiens. La conception du fédéralisme imprégnant cet essai est caractérisée par l'idée du fédéralisme, non seulement comme reconnaissance de l'indéniable pluralisme de la société canadienne, mais comme reconnaissance de l'interaction étroite existant entre les parties composant cet ensemble pluriel ; une interaction constamment tiraillée par les poussées opposées de forces centrifuges et centripètes. En raison de la perspective bi- ou multifocale commandée par le fédéralisme tel qu'entendu ici, aucune de ces composantes, parce qu'entrelacées, ne peut être ignorée. Des concepts tels que souveraineté, nationalisme, droits, ne comportent qu'un seul centre. Le fédéralisme, au contraire, exige de ceux qui veulent s'y plier, la reconnaissance que le Soi n'est pas fait d'une seule essence, qu'une communauté ne peut être imaginée sans égard aux communautés environnante. Dans la perspective défendue ici, le fédéralisme n'est pas un concept monoculaire mais bien binoculaire, puisqu'il oblige à réconcilier les dyades Soi-Autre, Nous-Eux, autonomie-solidarité, pouvoir-justice. Le fédéralisme, plus que tout autre concept, reconnaît également l'incertitude caractéristique de notre appréhension du monde et de nous-mêmes. À ce titre, il exige que, sur le plan épistémologique, soit cultivée une saine méfiance à l'égard des perspectives monoculaires.

* Jean Leclair, Professor, Faculté de droit, Université de Montréal. Trudeau Foundation Laureate 2013. The research for this paper was funded by a grant from the Social Sciences and Humanities Research Council. I would like to thank Jeremy Webber and the two anonymous reviewers for their very helpful comments. Naturally, I remain fully responsible for anything said in the following pages.

J'aime les gens qui doutent
Les gens qui trop écoutent
Leur cœur se balancer
J'aime les gens qui disent
Et qui se contredisent
Et sans se dénoncer

J'aime les gens qui tremblent
Que parfois ils ne semblent
Capables de juger
J'aime les gens qui passent
Moitié dans leurs godasses
Et moitié à côté

Anne Sylvestre
(1934-)

The following essay will eventually form part of the preliminary chapter of a book I am presently writing aimed at developing an epistemological, anthropological, normative, and legal/constitutional theory of federalism through which we could envisage anew the complexity of the relationships between Aboriginal peoples and Euro-Canadians or that of Quebeckers and Anglo-Canadians. Since a preliminary chapter is designed as an introduction to one's thesis, it is generally confined to a brief presentation of the arguments the book addresses in greater detail. So will this essay. The reader will not find here an extensive and exhaustive argumentation. I will content myself with describing some of my thesis's main underpinnings.[1]

Aboriginal scholars sometimes convey abstract ideas through the use of stories. I will thus introduce my thesis with two stories illustrative of some of

1 The federal theory summarized in the following pages has slowly grown out of my research over the last few years. In addition to the articles referred to in the footnotes of this essay, the following publications delve into one or another dimension of said theory: Jean Leclair, *Military Historiography, Warriors and Soldiers: The Normative Impact of Epistemological Choices* [forthcoming in 2013]; Jean Leclair, "'Il faut savoir se méfier des oracles.' Regards sur le droit et les autochtones" (2011) XLI:1 Recherches amérindiennes au Québec 102; Jean Leclair, "'Vive le Québec libre!' Liberté(s) et fédéralisme", online : (2010) 3 Revue québécoise de droit constitutionnel (<http://www.aqdc.org/volumes/pdf/Jean_Leclair.pdf>; Jean Leclair, "Les périls du totalisme conceptuel en droit et en sciences sociales", online : (2009) 14 :1 Lex Electronica <http://ssrn.com/abstract=1749523> and Jean Leclair "Forging a True Federal Spirit: Refuting the Myth of Quebec's 'Radical Difference'" in André Pratte, ed, *Reconquering Canada: Quebec Federalists Speak Up for Change* (Toronto: Douglas & MacIntyre, 2008) 29, online: <http://ssrn.com/abstract=1749486> [Leclair, "Radical Difference"].

the most basic ideas that, according to me, a normative theory of federalism should entail. Those stories are not the property of any particular nation or culture. There is no need to be *authentic* to commune with them. Nor are they the best stories ever told or the only stories worth hearing. However, as stories, they translate in a deeply-felt and sometimes moving fashion the human element inextricably linked to some of the fundamental ideas that political scientists and jurists study and discuss.

* * *

He was a warrior. He had fought long and hard to save his city from its enemies. However fiercely and bravely he had battled, he and his comrades had nonetheless suffered defeat. Defeat was not the only affliction with which he had to contend. To the ignominy of military disaster was to be attached the dismal spectacle of an ensuing civil war.

He was understandably traumatized by these events. And so, from the warrior he was he turned into a "word warrior."[2] *Not one knowing all the answers, but one asking questions. Not one claiming to know the Truth and desirous of imposing it on others, but one seeking it. He himself, incidentally, wrote nothing. Others recorded what he had to say.*

His was a world where gods made no pretence to epistemological authority. In other words, they claimed no ultimate authority on the nature of truth. The religion of his time knew of no official doctrines, of no canonical texts. And so, since there was no need for it, no clerical body could be found with the authority to transmit and interpret a dogma.

Still, and although he was a pious man, he strongly believed that the gods were themselves subjected to the rule of reason. To a young man claiming that "what is dear to the gods is pious, what is not is impious,"[3] *he would answer by a question: "Consider this: is the pious being loved by the gods because it is pious, or is it pious because it is being loved by the gods [?]"*[4] *Is something true because the gods consider it true, or do the gods consider something as true because it is true according to the higher law of Reason?*

2 I borrow this expression from Dale Turner, *This Is Not A Peace Pipe: Towards A Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006), although, as I hope it will become evident through the course of this essay, I do not invest it with the same meaning.

3 Plato, *Euthyphro*, translated by GMA Grube in John M Cooper, ed, *Plato: Complete Works* (Indianapolis, IN: Hackett Publishing Company, 1997), 1 at 6:7a.

4 *Ibid* at 9:910a.

His quest for understanding was existential. He needed to know, for the gods had made an extraordinary statement about him. A friend of his had asked the Delphic Pythia whether or not there existed a wiser man than he. To his utter disbelief, the priestess answered the question in the negative. And so he spent his entire life harassing people with questions about the nature of wisdom, for he knew very well that he was not the wisest man of his time. But, as it turned out, no one gave him a satisfactory answer.

His quest was not just the avocation of an idle man. He was no sophist. As we will now see, he was willing to lay down his life for the sake of his convictions. Very few sceptics would be willing to go that far.

Indeed, one sad day, Socrates, the word warrior, was accused by his fellow citizens of not believing in the gods of the State, "but in other new spiritual things."[5] *Having publicly propagated his impious ideas, he was, in consequence, also indicted for having corrupted the youth who followed in his wake.*

After their defeat at the hands of the Spartans, after the bloodshed of the civil war, the Athenians were ready to seek vengeance on Socrates. By his constant questioning he was alleged to have compromised the traditional understanding of the gods' relationship with men and thus to have jeopardized the fate of the city. Encouraging his young followers to cultivate their intellectual curiosity and their independence of thought had corrupted their minds. Was he not a close friend of the traitor Alcibiades?

At his trial, Socrates' line of defence was "provocation." He was, said he, not the least but the most pious man in Athens. By constantly seeking to determine if the god of Delphi was right, he was in fact paying him homage. In his words, "When I heard of this reply [the Pythia's] I asked myself: 'Whatever does the god mean? What is this riddle? I am very conscious that I am not wise at all; what then does he mean by saying that I am the wisest? For surely he does not lie; it is not legitimate for him to do so.'"[6] *And so he spent his entire life probing the mind of every one, being not unconscious of the enmity he provoked. He was said to be "a very odd person, always causing people to get into difficulties."*[7] *But his mission was more important than his reputation.*

5 Plato, *Apology*, translated by GMA Grube in John M Cooper, ed, *Plato: Complete Works* (Indianapolis, IN: Hackett Publishing Company, 1997), 17 at 23:24b [Plato, "*Apology*"].

6 *Ibid* at 21:21b.

7 Plato, *Theaetetus*, translated by MJ Levett in John M Cooper, ed, *Plato: Complete Works* (Indianapolis, IN: Hackett Publishing Company, 1997), 157 at 166: 149a [Plato, "*Theaetetus*"].

Eventually, he deciphered the meaning of the prophecy, which he explained in the following terms to his judges: "What is probable, gentlemen, is that in fact the god is wise and that his oracular response meant that human wisdom is worth little or nothing, and that when he says this man, Socrates, he is using my name as an example, as if he said: 'This man among you, mortals, is wisest who, like Socrates, understands that his wisdom is worthless.'"[8] *After his trial, describing himself as a "midwife" watching over "the labour of [men's] souls, not of their bodies" he would tell Theaetetus that "God compels me to attend the travail of others, but has forbidden me to procreate. So that I am not in any sense a wise man; I cannot claim as the child of my own soul any discovery worth the name of wisdom."*[9]

Socrates was thus being pious when he obeyed the god's order to live, in the philosopher's words, "the life of a philosopher, [i.e.] to examine myself and others."[10]

Then he came to the gist of his argument. He told the assembled Athenians that by condemning him they would in fact be sinning against themselves: "[F]or if you kill me, said he, you will not easily find another like me. I was attached to this city by the god — though it seems a ridiculous thing to say — as upon a great and noble horse which was somewhat sluggish because of its size and needed to be stirred up by a kind of gadfly [a stinging bee]. It is to fulfilll [sic] some such function that I believe the god has placed me in the city. I never cease to rouse each and everyone of you, to persuade and reproach you all day long and everywhere I find myself in your company."[11]

But all this eloquence, this appeal to the virtues of reflexivity, was to no avail. He was condemned. Accepting his fate, he nevertheless concluded on the following note: "Now I want to prophesy to those who convicted me… I say gentlemen, to those who voted to kill me, that vengeance will come upon you immediately after my death, a vengeance much harder to bear than that which you took in killing me. You did this in the belief that you would avoid giving an account of your life, but I maintain that quite the opposite will happen to you. There will be more people to test you, whom I now held back, but you did not notice it. They will be more difficult to deal with as they will be younger and you will resent them more. You are wrong if you believe that by killing people you will prevent anyone from

8 Plato, *Apology*, *supra* note 5 at 22: 23 a-b. He added: "So even now I continue this investigation as the god bade me — and I go around seeking about anyone, citizen or stranger, whom I think wise. Then if I do not think he is, I come to the assistance of the god and show him that he is not wise. Because of this occupation, I do not have the leisure to engage in public affairs to any extent, nor indeed to look after my own, but I live in great poverty because of my service to the god."

9 Plato, *Theaetetus*, *supra* note 7 at 167: 150 b-d.

10 Plato, *Apology*, *supra* note 5 at 27: 28e-29a.

11 *Ibid* at 28: 30e-31a.

reproaching you for not living in the right way. To escape such tests is neither possible nor good, but it is best and easiest not to discredit others but to prepare oneself to be as good as possible."[12]

* * *

My second story is much shorter. It pertains to another warrior, one who fought bravely and won, but whose journey home proved to be an ordeal or more to the point, an odyssey. His story was told and transmitted orally for centuries before being couched in writing some 2800 years ago.

* * *

He would be the last warrior to come home. Ten years it took him. Ten long years during which he had to face innumerable dangers.

Near the end of his journey, Calypso, a magnificent goddess, held him captive. She offered him her love, her beauty, and, the greatest gift of all, immortality. Despite her attempts, she was unable to make him forget his wife and home.

"'Ah great goddess,' worldly Odysseus answered, 'don't be angry with me, please. All that you say is true, how well I know. Look at my wise Penelope. She falls far short of you, your beauty, stature. She is mortal after all and you, you never age or die… Nevertheless I long — I pine, all my days — to travel home and see the dawn of my return. And if a god will wreck me yet again on the wine-dark sea, I can bear that too, with a spirit tempered to endure. Much have I suffered, laboured long and hard by now in the waves and wars. Add this to the total — bring the trial on!'"[13]

* * *

Now, what do theses stories have to do with federalism? A lot, in fact, if, as I believe, federalism can be understood, at an epistemological level,[14] as a conceptual institutionalization of reflexivity and as an intellectual posture that makes it mandatory to think problems with a critical eye toward both ourselves, as internally multifaceted beings, and towards the life of others with whom for better or for worse our lives as relational beings are irremediably enmeshed. Federalism is not only characterized by a recognition of the ines-

12 *Ibid* At 34-35: 39c-d.

13 Homer, *The Odyssey*, translated by Robert Fagles (New York: Penguin Books, 1996), at 159 (Book 5; lines 236-247).

14 The reader will have guessed that I am referring here to federalism as a conceptual tool and not to its instantiation in Canada's constitutional structure.

capable pluralism of Canadian society, but also the close interaction between the constituent parts of that plural society — an interaction constantly torn between centrifugal and centripetal forces. Because of the bi- or multifocal perspective commanded by this understanding of federalism, none of these interlaced components may be ignored. Concepts such as sovereignty, nationalism, and rights revolve around a single centre. Federalism requires the recognition that the Self is not of one essence, and that a community cannot be envisaged in ignorance of other legitimate collectivities surrounding it. In the perspective defended here, federalism is not a monoconceptual but rather a hyphenated notion forcing one to reconcile dyads such as self–other, us–them, autonomy–solidarity, power–justice, etc. Federalism is a notion premised on the belief that individuals as well as communities consist of multifarious components. Federalism also acknowledges an uncertainty in our world and in ourselves that other concepts tend to obscure. As such, federalism, at an epistemological level, requires that we be suspicious of monocular outlooks.

A true federal spirit or epistemology thus requires that we be "gadflies," "stinging bees" always on the lookout for totalizing approaches whose conceptual coherence commands that important aspects of reality be obliterated, perspectives depriving the common person of his/her agency. Christening as "federal" an epistemology that should, in fact, be universally practised might cause some eyebrows to be raised, but I nevertheless maintain that such appellation is appropriate. "Holistic" would not be so, for the latter word too often refers to epistemologies that simply emphasize the need to embrace the totality of the influences — including, for some, spiritual ones — that forge our lives, but that abstain from seriously facing up to the incontrovertible fact of the opposing pull of these various influences. These epistemologies are also oblivious to the fallibility of the knowledge — whatever such may be — upon which theories are built. A federal epistemology is one that admits and truly tackles that frustrating reality: our understanding of the world is limited and normative consequences are derived from that reality. At a deeper level such an epistemology, by revealing the frailty of our interpretations and conclusions, serves to underline the tragic character of human life in general and of politics in particular: human beings are the main characters of history, but even though they do have reasons to behave in the ways that they do, they know not which history is theirs to shape.[15] Life, history, and politics are all as aporetic as Socrates' dialogues. Liberalism, as understood by intellectuals such

15 Raymond Aron, "Science et politique chez Max Weber et aujourd'hui" (1952) in Raymond Aron, *Les sociétés modernes* (Paris: Presses universitaires de France, 2006) 179 at 195.

as Raymond Aron, Raymond Boudon or Tzvetan Todorov,[16] is precisely that intellectual posture whose fundamental premise, apart from its faith in men's capacity to reason, is the belief in the absence of any transcendental principle, be it religion, ideology, nation or state that would dictate the path of history. In other words, it is a philosophy allowing a space for tricksters such as the Raven of the Haïda myths, a creature neither human nor animal but both at the same time, displaying an "unquenchable itch to meddle and provoke things, to play tricks on the world and its creatures."[17]

At a more existential level, federalism, as envisaged here, is premised on the belief that, given the opportunity, human beings might choose, as Odysseus did, the frailty of humanity over the perfection of the gods. The son of Laertes chose the world he knew, embracing both its miseries and its splendours. He favoured his own wife over the goddess. He chose the ephemeral rather than the eternal. In my view, a normative and constitutional theory of federalism requires that we accept the world, at least in part, as it is. We must fashion concepts agreeing with reality and avoid ordering reality to fit our concepts. Paraphrasing Socrates, the virtue of federalism is that is forces us to give a true account of our lives.

To their conviction about the singularity — and, for some, the indubitability — of the knowledge upon which their theories are built — a feature of thought they share with nationalist thinkers[18] — some Aboriginal intellectuals add a strong dose of cognitive relativism. For instance, some argue that cognition itself is culturally programmed. Not only would we be blind to what is alien to our culture, but our minds would also operate as prisons, for

16 Liberalism is not an orthodoxy. Its substantive content has been, still is, and always will be a matter of debate rather than of consensus. I am well aware that some forms of liberalism are extremely dogmatic and monocular in their outlook. During the course of my book, I intend to demonstrate that some of these schools of thought are not true to the essence of liberalism. In the words of Catherine Audard: "*Le libéralisme ne peut par définition être une doctrine dogmatique*. Ce serait une contradiction dans les termes" *Qu'est-ce que le libéralisme ?: Éthique, politique, société* (Paris : Gallimard, 2009) at 734 (Audard's italics).

17 Bill Reid & Robert Bringhurst, *The Raven Steals the Light* (Vancouver: Douglas & McIntyre Ltd., 1996) at 33.

18 As for scholars from Quebec, I have described elsewhere the methodological nationalism of legal scholars Andrée Lajoie and Eugénie Brouillet and that of political scientists Guy Laforest and Patrick Fafard, and François Rocher and Catherine Côté in Leclair, "Radical Difference," supra note 1 and Jean Leclair, "Le fédéralisme comme refus des monismes nationalistes" in Dimitrios Karmis & Francois Rocher, eds, *La dynamique confiance-méfiance dans les démocraties multinationales: Le Canada sous l'angle comparatif* (Québec: Presses de l'Université Laval, 2012) [Leclair, "Refus des monismes nationalistes"], an ontological and epistemological perspective according to which the Québécois nation has but one soul and, therefore, but one way of envisaging the world. Quebeckers failing to embrace that perspective are, sad to say, still colonized or ill informed.

to escape and embrace another means of apprehending the world would be to betray our authentic selves.[19] Socrates, on the contrary, went so far as to prove that an ignorant slave boy could be taught mathematics.[20] Had Greek philosophy not possessed such openness, Horace would probably never have written his famous statement: "Captive Greece took captive her fierce conqueror, and introduced her arts into rude Latium."[21] Admittedly, non-Aboriginals have a duty to listen and to recognize that cognition is not impervious to context, especially to the manner in which knowledge is transmitted; this is a duty they dismally failed to honour until recently. Yet if aboriginal knowledge is shut tight upon itself, it stands no chance of convincing anyone outside the circle of the initiated.[22]

19 James Sa'ke'j Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1 at 6: "Tragically, some students succumb and inwardly endorse Eurocentric thought, helping to lay the foundations of the relationship of domination that will entrench their thoughts." Marie Batiste and James (Sa'ke'j) Youngblood Henderson's *Protecting Indigenous Knowledge and Heritage — A Global Challenge* (Saskatoon, SK: Purich, 2000), also provides an excellent example. In this work, "Eurocentric" cognitive theories are depicted as "unreliable… as means for arriving at truth about the natural world"; they are said to provide categories that are "arbitrary" and whose sole object is "to measure, predict or control," never, it seems, to explain and understand. In addition, "desire" is said to be the only impetus for Eurocentric thought. Consequently, "[p]eople are subject to arbitrary desires and accept certain assumptions about the natural world. Based on their desires and assumptions, they use reason to explain and structure the world around them." On the contrary, "Indigenous ways of knowing hold as the source of all teachings caring and feeling that survive the tensions of listening for the truth and that allow the truth to touch our lives. Indigenous knowledge is the way of living within contexts of flux, paradox, and tension, respecting the pull of dualism and reconciling opposing forces. In the realm of flux and paradox, "truthing" is a practice that enables a person to know the spirit in every relationship" (at 27-28, 42; see also 36-37). Truth is inaccessible by way of Eurocentric thought (at 27). One question out of many comes to mind when reading Batiste and Henderson: what allows them to speak on a realist mode of aboriginal concepts, while in the very same breath, they depict Western concepts as mere illusions? In the same vein, see Taiaiake Alfred, *Peace, Power and Righteousness:An Indigenous Manifesto* (Don Mills, ON: Oxford University Press, 1999) and, best of all, Claude Denis, *We are not you: First Nations and Canadian modernity* (Peterborough, ON: Broadview Press, 1997).

20 Plato, *Meno*, translated by GMA Grube in John M Cooper, ed, *Plato: Complete Works* (Indianapolis, IN: Hackett Publishing Company, 1997) 870 at 881-885.

21 Horace, *The Epistle to Augustus*, verses 157-158: "Graecia capta ferum uictorem cepit et artes intulit agresti Latio" in Niall Rudd, ed, *Epistles Book II and Epistle to the Pisones* (*Cambridge:* Cambridge University Press, 1989) 48; English translation by C Smart, *The Works of Horace* (London: George Bell & Sons, 1888) 284.

22 For a fascinating example of a reflexive approach to Aboriginal thought and Aboriginal law, see Val Napoleon, "Aboriginal Discourse: Gender, Identity, and Community" in Benjamin Richardson, Shin Imai & Kent McNeil, ed, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Portland: Hart Publishing, 2009) 233. As for John Borrows' *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010), an eloquent plea in favour of an integration of Indigenous legal traditions within our understanding of the Canadian Constitution, it is replete with cautionary comments about the danger of oversimplification and about the need not to dis-

From a normative standpoint, federalism is one of the few political ideas — if not the only one — whose vocation is to serve as the bedrock of a constitutional structure and of political institutions (a *federation* being the institutional materialization of federalism) that do not have monism riveted to their core. Hence, a failure to apprehend reality in a non-monistic fashion can never lead to a fruitful normative or constitutional *federal* theory. In their normative dimension, nationalistic and holistic perspectives generally end up emphasizing or legitimating the rights of only one stakeholder while at the same time having little to say about the limits of those rights. In short, to the thundering lack of self-criticism of these epistemologies must be added their inability or unwillingness to face up to the problem tied to the exercise of power upon the persons making up the collective entity. On the contrary, a normative federal theory obliges us to envisage at once the nature and the limits of our rights, an obligation that translates, for example, into the need to accompany a reflection on autonomy with one on solidarity, or rather, interdependency.

Sovereignty, nationalism, cultural authenticity, and rights, as "all or nothing" concepts, are unable to explain the complexity of the relationships between Aboriginal peoples and Euro-Canadians or that between Quebeckers and Anglo-Canadians. All these concepts call for reality to be cast into one single mould.

Instead of emphasizing the particular nature of the *relationships* between individuals, between groups, and between individuals and groups, these concepts seek to identify a quintessential substance: the existence of a "State" where sovereignty is concerned; of a *volkgeist* or "spirit of the people" where nationalism is appealed to; a cultural essence where authenticity is invoked; and, finally, the definition of what distinguishes so radically a person or a group that it deserves to be elevated to the level of a "right."

Holistic and nationalistic perspectives tend to depict the nurturing of many allegiances as a symptom of — in a declining spectre of politeness — misinformation, "fatigue," cowardice, neurosis, or false consciousness. However, if envisaged from the federal perspective here defined, duality and even ambivalence is no pathology, nor is the fact that some individuals might sometimes feel a stronger attachment to one particular political community or social group without wishing to sunder completely their ties with another.

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card human agency. Furthermore, his willingness to compare, not only reinforces his arguments but also enables the building of epistemological bridges between Aboriginals and non-Aboriginals.

Federalism, as defined here, is not simply a means of acknowledging the existence of the many social groups to which the citizen's multiple attachments are engrafted. It also aims at *structuring* relationships so that these groups and their members can peacefully coexist. Such peaceful coexistence is made possible because, unlike the concepts of sovereignty, nation, cultural authenticity, and rights, federalism makes compromise, concessions, and even renunciation plausible, possible, and honourable. What makes federalism a moral enterprise is the kind of interaction and participation it makes possible for both individuals and the communities they constitute. Such interaction and participation are premised on freedom and individual agency, albeit a freedom and individual agency exercised in a historically contingent context.

If, as I believe, our commitments are more complex than generally described, and if there is no unique lode-star (the nation, the "authentic" culture, etc.) guiding our every action in every circumstance, then federalism appears in tune with the reality of our daily lives. Furthermore, if our commitments and beliefs are indeed partly shaped by the contextual setting in which we are situated, federalism, once institutionalized, can help instil a pattern of living that makes collective egoism hard to promote. There is a certain dispositional character about federalism in that it encourages the seeking of the midpoint between two extremes.

The striving for a midpoint inevitably evokes the necessity of setting limits. In fact, as the concept of "federal constitutionalism" I developed elsewhere demonstrates, my thesis envisages federalism as a facet of constitutionalism and the rule of law, as one of the means of preventing abuses of power.[23] Indeed, at the very heart of federalism, and as opposed to other monocular concepts, we find the idea of limits: "Federalism … not only allows several peoples and publics to combine self-rule and shared rule but to do so within the context of limited rule. Limited rule is a concomitant of federalism because sharing on a federalistic basis necessarily involves limits — to preserve liberty writ large for all and the specific liberties of the constituents."[24] Thus, not content with presenting an epistemological and normative theory of federalism, the question of its legal and constitutional configuration will also have to be addressed since "[t]he successful application of federal principles and mecha-

23 See Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31 The Queen's Law Journal 521; online: <http://ssrn.com/abstract=1678795> [Leclair, 'Federal Constitutionalism"].

24 Daniel J Elazar, *Exploring Federalism* (Tuscaloosa and London: University of Alabama Press, 1987) at 233 [Elazar].

nisms must involve their constitutionalization in ways that are appropriate for maintaining limited rule as determined by the constituting elements."[25]

Furthermore, federalism is equally as concerned as constitutionalism with striking a balance between power and justice. Sovereignty, nationalism and culture — when the latter is understood as a coalescing ingredient — are primarily concerned with power and the means of generating and mobilizing collective power rather than with the pursuit of justice. The most rudimentary notion of federalism is always committed to a certain understanding of justice premised on the idea that a distribution of power is both indispensible and beneficial: "One of the primary attributes of federalism is that it cannot, by its very nature, abandon the concern for either power or justice but must consider both in relationship to each other, thus forcing people to consider the hard realities of political life while at the same time maintaining their aspirations for the best polity."[26]

In my view, however, federal constitutionalism evokes more than the need for the constitutional enshrinement of the federal principle or the abstract idea of the necessity of limits. It calls for a contextualized approach recognizing the inescapable historicity of political regimes and constitutional orders. All political regimes are typified by some specific fundamental bonds — or relationships — uniting citizens to one another and legitimating state structures and institutions. In addition, all constitutional orders provide a particular accommodation of morality and politics, a particular distribution of "fundamental baseline entitlements among legal actors."[27] As a distributive enterprise, constitutional law in general — and federal constitutionalism in particular — requires an analysis of both the historical and contemporary contexts of the society within which abstract principles operate. As such, federal constitutionalism denies, for instance, that sections 91 to 95 of the *Constitution Act, 1867,* which allocate mutually exclusive legislative powers to the central and provincial governments, exhaust the scope of the federal principle. Rather than being built upon a formal conception of our Constitution, federal constitutionalism is based on an "organic" understanding — organic in the sense of a living constitutional experience.[28] In other words, to grapple with the present and to imagine the future, any political regime and any constitutional

25 *Ibid*. For the sake of brevity, these legal and constitutional facets will not be examined in the present essay.

26 *Ibid at* 84.

27 Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) at 21.

28 Not one however, as I will argue, that would be irrational and deterministic.

order must draw on more than the formal rules of constitutional law. It must also appeal to the particular patterns of relationships that developed over time between individuals and the community(ies) they constitute. In the case of Aboriginals and non-Aboriginals in Canada, since the beginning of the 19th century, such patterns of relationships have always displayed a huge imbalance of power in favour of the state.[29]

Furthermore, federalism and constitutionalism, understood as normative concepts, must eventually espouse a particular institutional form if they are to become tangible tools of governance. In other words, the spirit of federalism must ultimately be embodied in a federation. The same goes for constitutionalism whose institutional configuration will vary from one state to another. Not only have the above-mentioned particular patterns of relationships determined the specificity of Canada's political institutions since 1760, but, reciprocally, those institutions have forged our understanding of federalism itself: "As tangible institutional fact, [federation] cannot be reduced to the mere end product of federalism. We do not move in simple straight-line from federalism to federation. Federation itself is governed by purpose …; its acts upon federalism, helping to shape and reshape both its expression and its goals. The relationship between federalism and federation is therefore symbiotic; each impinges upon the other in an unending fashion."[30]

It is my belief that a constitutional and federal theory fit for Canadians must take proper account of the continuity specific to our constitutional tradition, one in which, for one, constitutions have never acquired the status of unalterable sacred icons. On the contrary, formal written documents have never been understood as the whole of Canada's Constitution. Conventions, practices, and the common law have mediated, not without setbacks, the demands of the Good (politics) and of the Right (morality), as understood over time. This constitutional tradition, at least until the late 1980s, had never conceived the writing of constitutions as an exercise in perfection and exhaustiveness but rather as the art of the reasonable. In this context, the tacit was not compelled to completely bow to the explicit.[31] Canada, therefore, has always envisaged

29 See Jean Leclair, "Le fédéralisme: un terreau fertile pour gérer un monde incertain" *in* Ghislain Otis & Martin Papillon eds, *Fédéralisme et gouvernance autochtone/Federalism and Aboriginal Governance* (Quebec: Les Presses de l'Université Laval, 2013) 21.

30 Michael Burgess, *Comparative Federalism: Theory and Practice* (New York: Routledge, 2006) at 2.

31 "The tacit recognition of [Quebec's] specificity, in fact, has been the consistent theory of Canadian constitutional arrangements since the *Quebec Act, 1774:* accommodate Quebec's particularity as far as possible by provisions which, on their face, apply indiscriminately, but which, in their conception and their expected execution, are designed with Quebec in mind. For the art of Canadian constitutionalism has been to find the formulae and the practices by which these two basic federative

its constitutional order as an unfinished business. True, unsuccessful attempts at making our Constitution more explicit were made in both 1987 (*Meech Lake Accord*) and in 1992 (*Charlottetown Accord*). Such attempts could indeed be interpreted as a caesura between an organic and a more voluntarist understanding of the Constitution.[32] Furthermore, one could even claim that Part V of the *Constitution Act of 1982* shackled Canada with a constitutional straightjacket. However, in spite of all that, the Supreme Court of Canada took up again the threads of a more organic understanding of our fundamental document when it underlined in 1998 that "the Constitution is more than a written text. It embraces the entire global system of rules and principles which govern the exercise of constitutional authority. A superficial reading of selected provisions of the written constitutional enactment, without more, may be misleading. It is necessary to make a more profound investigation of the underlying principles that animate the whole of our Constitution."[33]

Another feature of Canada's constitutional tradition is that, reluctantly or willingly, tacitly or explicitly, the presence of a French-speaking majority on the territory of what would become the Province of Quebec in 1867 has always been recognized as a "fundamental characteristic of Canada."[34] That such majority succeeded in being heard does not stem from any British natural disposition for magnanimity. On the contrary, it certainly originates from the resilience and the courage of some members of the francophone community. However, in their plight, they were able to adroitly mobilize the slowly expanding liberal matrix of British imperial law introduced by the conqueror. Initially, the "old subjects," the British, were the sole beneficiaries of the limited political liberties guaranteed by imperial constitutional law. However, over the long run, the "new subjects," the French Canadians, successfully resorted to the very same principles — some of these quite unknown under French rule — to bolster their political demands for greater autonomy and their claim for recognition as constituent actors.[35] Formal constitutional documents would eventually come to mirror the federal spirit that the relations between French and English Canadians had bred. When envisaged over the long term, it

themes — distinctiveness (compact) and equality (statute, and latterly states-rights) — can be reconciled": Roderick A Macdonald, "Meech Lake to the Contrary Notwithstanding: Part II" (1991) 29 Osgoode Hall LJ 483 at 523-524 [Macdonald].

32 On the organic/voluntarist distinction, see Hugo Cyr, *Canadian Federalism and Treaty Powers: Organic Constitutionalism at Work* (Bruxelles: P.I.E. Peter Lang, 2009).

33 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at 148, 161 DLR (4th) 385.

34 Macdonald, *supra* note 31 at 542.

35 Michel Morin, "The Discovery and Assimilation of British Constitutional Law Principles in Quebec, 1764-1774" *Dalhousie Law Journal* [forthcoming in 2014].

seems that Canada's federal tradition was born out of the acknowledgement — however resentful by some — that no one political actor would, could, or should reap full victory. It has slowly grown to reflect what a majority of its citizens have come to recognize (some quite reluctantly), i.e. the need, if not the wisdom, to seek the midpoint between two extremes and thus to resist the temptation of pledging one's allegiance to a single government. Formal constitutional rules did not produce this federal ethos; rather, the latter begat them. At the same time, formal rules could not sustain such an ethos if it came to disappear.

Some might deplore that this ethos was not the sole product of polite political deliberation among friends. There was deliberation, indeed, but there was also acrimony and, sometimes, bloodshed. However, like democracy and tolerance, federalism is not simply an ethereal ahistorical concept; it has and it is a history in itself, something to accomplish rather than already accomplished. As I previously stated, it is a lived experience having mixed over time both appeals to justice and appeals to force. As such, it can fail. Tolerance, for instance, was not brought about by the sudden hatching of a general consensus on the need to listen and to love one another, but rather by the horrors of the religious wars of the 17th century, the Thirty Years' War taking pride of place as "certainly one to the cruelest [sic] episodes in the history of warfare."[36] A closer look at history then demonstrates that good sentiments have sometimes fathered bad politics — as the "peace for our time" episode demonstrates, and that mean if not downright evil, sentiments have also, given time, forced mankind to wiser politics.[37]

Federalism therefore might not have sprung from the goodness of men's hearts nor from a social contract duly approved and dated. Just the same, it does not follow that our ongoing cycles of conflicts and co-operation did not espouse a federal pattern and that the latter, once given an institutional form, was not itself reinforced by that very institutionalisation. Even in the absence of a formal contract between partners to a federation, "the spirit of federalism that pervades ongoing federal systems tends to infuse a sense of contractual obligation into the participating parties."[38] My claim is that federalism has also succeeded in structuring our individual and collective lives in a manner

36 John Merriman, *A History of Modern Europe: From the Renaissance to the Age of Napoleon*, 3d ed vol 1 (New York: WW Norton & Company Inc., 2009) at 155.

37 For instance, Michael Howard has concluded that "war and welfare went hand in hand": *The Lessons of History* (Oxford: Oxford University Press, 1991) at 156 cited in Tony Judt, *Postwar: A History of Europe Since 1945* (New York: Penguin, 2005) at 73.

38 Elazar, *supra* note 24 at 185.

that has promoted with some success — since the Canadian federation has not yet disintegrated — a *modus vivendi* grounded upon a more reflexive attitude toward monistic political discourses.

Another of my contentions is that special attention should be given as to how federal constitutionalism, as opposed to aboriginal *rights* or the *right* to self-determination, could provide a normative justification for the insertion of Aboriginal peoples within the Canadian constitutional framework. The specificity of their situation, I argue, lies not so much in their cultural difference as in the particular nature of the *political relationships* they developed first with France and Great Britain and then with Canada. Whether before or after the advent of the Indian Acts in the middle of the 19th century, Aboriginal peoples were never considered, when public policies concerning them were elaborated, as simple individual subjects or citizens. Treaties were signed with bands and tribes. Individuals do not sign treaties; only political communities do.[39] Furthermore, even though colonial administrators certainly hoped that, under the Indian Acts regime, Indians could be "emancipated" through a process of "civilization," to borrow the vocabulary of the time, yet, this legislation never apprehended them in their sole individual capacity. The "band," defined as a "body of Indians," remains to this day the main political unit of

39 It is worth noting that some of the most important "Indian treaties" were signed between 1871 and 1923, that is, well after the first Indian Acts were adopted in the 1850s. Speaking of treaties, I underline that, in the course of my book, I will examine in detail the "treaty federalism" doctrine. In many ways, this approach can be reconciled with the federal constitutionalism I advocate. However, in some of its most radical forms, "treaty federalism" does not meet with my understanding of federalism. What follows is a summary of what I consider to be some of the shortcomings of the "treaty federalism" doctrine (see Leclair, "Federal Constitutionalism," *supra* note 23). The "treaty federalism" doctrine is based on the idea that all issues between Aboriginals and non-Aboriginals should be settled through treaties, a premise that is more confederal than federal. Such a doctrine thus oftentimes proposes a system characterized by the fragility of the links uniting the parts to the whole. In fact, in its more radical form, "treaty federalism" prohibits any direct and individual participation by Aboriginal community members in the Canadian political and governmental institutions. All contacts with the Canadian State are to be made by the community's representatives: see for instance, James [Sakej] Youngblood Henderson, "Empowering Treaty Federalism" (1994) 58 *Sask L Rev* 241. This perspective presupposes that Aboriginals all wish to sunder their immediate, as opposed to mediate, cultural and political ties with non-Aboriginals. Furthermore, treaty federalism fails to be truly federal in character because it essentially focuses on the autonomy guaranteed by federalism, leaving aside any consideration of the federal solidarity required to maintain the viability of the system. The two-row wampum of the Haudenosaunee Confederacy is often invoked to justify this thesis of separateness. Finally, the "treaty federalism" doctrine fails to recognize that many aboriginal communities will never be in possession of the political leverage necessary to force non-native governments to sit at the negotiation table. The legal dice are currently loaded against Aboriginal peoples. Not until Canadian constitutional common law acknowledges them as constituent peoples, that is, as essential actors within the Canadian federal State, will the task of negotiating treaties prove possible for many aboriginal communities.

the Aboriginal universe. The present version of the *Indian Act* continues to prescribe the subordination of the band members' lives, not only to the will of the Minister, but also to that of the band council, the designated mediator of the will of all.

Hence, Aboriginal peoples have always been perceived as forming political communities and not simply as aggregations of individuals; second-rate communities starting in the middle of the 19th century, but political nevertheless. "Political community" is understood here as a collectivity capable, within a specific territory, to ensure respect for the rights it recognizes to its members, the latter, in return, being willing to fulfil the duties imposed upon them. The fact that the power exercised was no longer inherent but delegated changes nothing to the matter. The Government's hope was that the band council could exercise sufficient authority to ensure the implementation of its will upon the members of the band. The Canadian State, then and now, has itself therefore contributed to maintain Aboriginal peoples, as collectivities, on the margin of the Euro-Canadian universe. Non-Aboriginals have willingly erected barriers, both cultural and territorial, between themselves and aboriginal political communities. The State's casting aside of whole societies combined with resistance from Aboriginals to the policy of assimilation induced behaviours, expectations, and relations which cannot be brutally dissevered without any damage. Our political concepts and the institutions called upon to incarnate them transform reality and we cannot remain oblivious to the concrete consequences of their implementation and operations. This historical pattern of State marginalization conjugated to the persistent resistance of the Aboriginal peoples themselves explains why we must still reckon today, within the Canadian political universe, with aboriginal political communities. These arguments, among others, lead me the defend the idea that Aboriginal peoples should not simply be envisaged as cultural minorities or as first occupants but rather as constituent actors in the advent of a federal State whose construction was and is still an on-going process.[40]

The advantage of highlighting relationships over aboriginal cultural difference is that the former has normative significance for both Aboriginal *and* non-Aboriginals. What is of importance politically then is not so much the elusive quest for some quintessential authenticity (however important that might be), but rather the undeniable failure of a colonial enterprise aimed at negating and crushing the Aboriginals' individual agency (as manifested

40 For a similar approach, see John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 157-158.

in their private lives and as members of political communities) and the fact that this pulverizing policy was enshrined in laws and institutions that still perpetuate colonialism.

Envisaging a normative position that emphasises the particular nature of our relationships with one another also enables us to avoid the trap of cultural essentialism. Indeed, as will be argued, behind the abstraction of the expression "Aboriginal peoples" — or Quebeckers — palpitate the hearts of real human beings whose lives, willingly and sometimes most unwillingly, have been entwined with that of non-Aboriginals or non-Quebeckers.[41] Denying that would also be tantamount to closing our eyes to an undeniable reality.

By the same token, recognizing the importance of relationships, and more specifically of power relations, implies the recognition of their importance not only *between* political communities, but also *within* them. A federal constitutionalism theory resting on the need to honour each individual's agency cannot close its eyes to the manner in which such a need is addressed within the federated entities whose recognition is precisely aimed at expressing and institutionalizing the citizens' divided loyalties. Any attempt at sealing off — as opposed to regulating — the porous internal frontiers without which a state could not be said to be federal would be tantamount to an infringement of an individual's right to such divided loyalty.

In conclusion, I wish to come back once again to Socrates' *Apology* because it also illustrates one of my theory's fundamental underpinnings: the importance of cultivating one's independence of mind. When majorities, or to be more precise, individuals speaking in the name of such majorities, command one to conform or to speak the language of a specific *doxa*, one can fortify oneself by echoing the words of the philosopher: "I [do not] regret the nature of my defense. I would much rather die after this kind of defense than live after making the other kind."[42] Federalism allows someone to legitimately and willingly belong to two or more communities without partaking to any monistic discourses that would force him to choose one community over the other(s), and thus to lose himself in the process. In other words, it enables a person to fully participate in a political regime that legitimates the rejection of all nationalist or cultural authenticity discourses dwarfing the luxuriant complexion of her personal identity.[43]

41 Rather than non-Quebeckers, I should more appropriately say non-Francophone Quebeckers.

42 Plato, *Apology*, *supra* note 5 at 34: 38e.

43 Leclair, "Refus des monismes nationalistes," *supra* note 18 at 209; online: <http://ssrn.com/abstract=1927356>.

Building Indigenous Governance from Native Title: Moving away from 'Fitting in' to Creating a Decolonized space

*Lisa Strelein and Tran Tran**

The business of decolonization involves engaging with former colonial laws, policies, and practices in order to create a "space" for Indigenous peoples to express their unique identities, cultures, and ways of knowing. In postcolonial contexts, transitional justice measures have been used as a mechanism to enable the decolonization of legal spaces. However, decolonization does not always guarantee a postcolonial state. As a transitional justice mechanism, native title in Australia has evolved via the common law to recognize the relationships that Indigenous peoples have with their land and waters. However, native title has been accused of limiting the ability of native title holders to engage effectively in governance structures. Drawing on parallels in the Canadian context, we consider both the limitations of native title law as a tool for decolonization and the constraints imposed by Australia's federal constitutional structure. The paper then outlines the legal regime established under native title and discusses how it operates outside the realm of "government." We then consider the way in which native title holders engage with Indigenous and non-Indigenous governance within this "private sector" before discussing whether native title has been able to provide a decolonized space within Australia's governance system.

La décolonisation exige de se lancer dans les lois, les politiques et les pratiques coloniales d'autrefois afin de créer un « espace » où les peuples autochtones puissent exprimer leurs identités, leurs cultures et leurs façons de savoir uniques. Dans les contextes postcoloniaux, des mesures juridiques de transition ont servi de mécanisme de décolonisation des espaces juridiques. Cependant, la décolonisation ne garantit pas toujours un État postcolonial. En tant que mécanisme juridique de transition, les titres autochtones en Australie ont évolué au moyen de la common law pour reconnaître les rapports des peuples autochtones avec leurs terres et leurs eaux. Toutefois, on a accusé les titres autochtones de limiter la capacité des détenteurs de titres autochtones de s'engager efficacement dans les structures de gouvernance. Les auteurs s'appuient sur des parallèles avec le contexte canadien pour examiner les limites du droit des titres autochtones comme outil de décolonisation et les contraintes imposées par la structure constitutionnelle fédérale de l'Australie. Ils exposent ensuite les grandes lignes du régime légal mis en place sous les titres autochtones en examinant comment ils fonctionnent en dehors du domaine du « gouvernement ». Puis les auteurs discutent de la participation des détenteurs de titres autochtones à la gouvernance autochtone et non autochtone à l'intérieur de ce « secteur privé » avant d'examiner la question à savoir si les titres autochtones ont pu assurer un espace décolonisé à l'intérieur du système de gouvernance de l'Australie.

* Australian Institute of Aboriginal and Torres Strait Islander Studies.

Introduction

As colonized peoples, Aboriginal and Torres Strait Islander peoples have been historically excluded from the constitutional makeup of the Australian state. The forced settlement of Australia disregarded Indigenous peoples' land and laws and established a series of colonies under British rule through the late 1700s and early 1800s. Through the formation of the Australian commonwealth in 1901, Indigenous peoples were again excluded from the self-governing communities that came together to form the federation. Indeed, the federal compact between the colonies that became Australia's written Constitution refers to Indigenous peoples only by way of exclusion.[1] The newly formed states sought to retain jurisdiction over the Indigenous peoples' lands and, to some extent, their labour, which are both essential to economic development.[2] Australia struggles with its identity as a colonizing force; the colonial relationship is ongoing and must be constantly renegotiated.[3] As Anne Curthoys has noted, Australia is at once both colonial and postcolonial, both colonizing and decolonizing.[4]

The Australian Constitution was designed as a political compact between colonial administrations to herald the emergence of an independent nation-state. It was not a declaration of the relationship between the state and its citizens, though it fills the role of the founding moment in nation-building terms. As a result, however, the Constitution has no explicit rights provisions, leaving the protection of citizens to the Parliament and the common law.[5]

1 For example, section 51(26) originally gave the Commonwealth the power to make laws for "the people of any race except the aboriginal race." Similarly section 127 excluded Aboriginal people from the "reckoning" of the population. These references were removed from the Constitution in a 1967 Referendum. Section 25 however remains unchanged. This provision allows states to exclude certain races from voting. Similarly, section 51(26) now allows the Commonwealth to legislate for Indigenous peoples (as "people of any race") but there is no restriction as to require such legislation to be beneficial.

2 Aus, Commonwealth, *Official Report of the National Australasian Convention Debates, Melbourne, 1898,* vol 4 (Sydney: Legal Books, 1986) 228.

3 See Mick Dodson & Lisa Strelein, "Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State" (2001) 24 UNSWLJ 826.

4 Ann Curthoys, "An Uneasy Conversation: the Multicultural and the Indigenous" in John Docker & Gerhard Fischer, eds, *Race, Colour and Identity in Australia and New Zealand* (Sydney: UNSW Press, 2000) at 21-36. See also Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999) at 3.

5 The Australian Constitution is understood to contain three express guarantees or freedoms: the guarantee of just terms compensation for the acquisition of property (section 51(31)) (although not for Indigenous peoples, to which we will return later in this paper); the separation of religion and the state (section 116); and the freedom to move across state borders without discrimination (section 117). The only express right is the right to a trial by jury (section 80). The Constitution has also been interpreted as containing implied freedoms in relation to democratic representation, including the

The recognition of Indigenous peoples' rights and interests in relation to land through the Australian common law in *Mabo* 1992[6] and the subsequent processes established under the *Native Title Act 1993* (Cth) (NTA) have been a key strategy to restore a measure of land justice and to counter the laws and institutions formerly used to dispossess Australia's Indigenous peoples. Since colonization, Indigenous political gains in Australia have been based upon the language of equality and social justice rather than political self-determination and self-government or any Indigenous rights discourse.[7] The common law employs the legal device of "native title" to provide legal recognition and protection under Australian law to Indigenous rights and interests in territories held under Indigenous systems of law and custom. However, the promise that native title held 20 years ago, both as a mechanism for achieving a decolonization of Australian land law and as a potential basis for the recognition of Indigenous peoples as self-governing peoples has been thwarted by overly "legal" processes. Instead the result is a measure of frustration and dissatisfaction with the slow progress and minimal gains being achieved through native title. Twenty years later, the Australian polity is once again considering whether a change to our Federal Constitution could help heal the scars of colonization. The passing of the *Aboriginal and Torres Strait Islander Peoples Recognition Act* (Cth) in February 2013 marks the start of a two-year dialogue on Constitutional reform.

We cannot meaningfully debate formal recognition in the federal Constitution without considering the broader context of Australia's federal constitutionalism. This paper considers the role of native title as a transitional justice measure and its effectiveness in creating a decolonized space for Australia's Indigenous peoples. First, we consider the role of the law as a tool for decolonization and the limitations imposed by Australia's federal constitutional structure. The paper then outlines the legal regime established under native title legislation as outside the realm of "government" and the formation of native title corporations as a "private sector." We then consider the way in

freedom of political communication (*Australian Capital Television v Commonwealth*, [1992] HCA 45, 177 CLR 106). See generally George Williams, "Race and the Australian Constitution: From Federation to Reconciliation" (2000) 38 Osgoode Hall LJ 643.

6 *Mabo v Queensland [No 2]*, [1992] HCA 23, 175 CLR 1 [*Mabo*]. Eddie Mabo, James Rice, and David Passi brought an action against the State of Queensland in the High Court claiming customary title to the Murray Islands in the Torres Strait based on Meriam law. The case recognized that the Meriam Le (people) were entitled to possess, occupy, use, and enjoy the Murray Islands under their own system of law and governance and that rights and interests flowing from those laws are recognized and protected under Australian law.

7 On the impact of the absence of rights discourse, see Larissa Behrendt, *Achieving Social Justice* (Sydney: Federation Press, 2003).

which native title holders engage with Indigenous and non-Indigenous governance within this "private sector" before discussing whether native title has been able to provide a decolonized space within Australia's governance system.

Decolonization and transitional justice

As we settle in to the third International Decade for the Eradication of Colonialism and, in 2010, the 50th anniversary of the adoption of the United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples,[8] attention to the decolonization of Indigenous peoples remains disconnected from meaningful change in domestic contexts.[9] While there is significant literature on the nature of settler colonialism and its resistance to change, Indigenous peoples have been less engaged with the theories, methodologies, and political movements of decolonization.[10] Instead, the focus has been on the development of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), which was finally accepted by the United Nations General Assembly in 2007 after more than a decade in development.[11] The UNDRIP articulates in detail the application of human rights principles in the context of Indigenous peoples. The Declaration encompasses, among others, rights over lands and resources, language and cultural rights, and education and citizenship rights. The most significant element of the Declaration

8 *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), UNGAOR, 15th Sess, (1960). The Declaration has the status of *jus cogens*, that is, an imperative principle of international law that is binding on the United Nations and its members as an authoritative interpretation of the United Nations Charter and normative principle of international law.

9 While there is nothing in the Declaration to prevent its application to the situation of Indigenous peoples, from the beginning the Declaration has been limited in practice by the "salt water thesis" that it should only be applied to circumstances in which the colonial power is separated from the colonized people by ocean. The "Belgium thesis" refuted this concept by arguing that the Declaration should apply to Indigenous peoples within sovereign states. See Michla Pomerance, *Self-Determination in Law and Practice* (The Hague: Martinus Nijhoff Publishers, 1982) for a classic account of the historical limitations of the Declaration. In this context, Huygens makes the distinction between decolonization through economic and military control and decolonization through institutions: Ingrid Huygens, "Developing a Decolonization Practice for Settler Colonizers: A Case Study from Aotearoa, New Zealand" (2011) 1:2 Settler Colonial Studies 53.

10 Anthony Moran, "As Australia Decolonizes: Indigenizing Settler Nationalism and the Challenges of Settler/Indigenous Relations" (2002) 26:6 Ethnic and Racial Studies 1013; Lorenzo Veracini, "Settler Colonialism and Decolonization" (2007) 6:2 Borderlands e-journal, online: <http://www.borderlands.net.au/vol6no2_2007/veracini_settler.htm>.

11 Australia's Indigenous organizations were heavily involved in the drafting of the Declaration. However, Australia was one of four countries to vote against the adoption of the Declaration, along with Canada, the United States, and New Zealand. Australia later expressed its support for the UNDRIP in 2009.

is the right of all Indigenous peoples to self-determination, and by virtue of that right, the right to freely determine their political status.[12]

Decolonization and self-determination in the Indigenous context is complex, considering the influences and confluences of interactions between the colonizing and Indigenous cultures over centuries.[13] The role the UNDRIP in unmasking and demystifying the fear of separatism in debates about self-determination should allow us to reintegrate our thinking about colonized peoples' varied experiences. In order to decolonize a space within settler societies in which Indigenous peoples can freely express their political, cultural, and social identity, we require a mutual and collaborative dialogue. Decolonization for Indigenous peoples is not simply a matter of finding space to be Indigenous or to be different, for these too are colonized roles. Instead, we must find a space for Indigenous peoples simply to be — to be Arrernte, to be Noongar, to be Meriam or Badulgal, to be Karajarri, Yawuru, Yalanji, or any of the hundreds of groups who make up the first peoples of the continent.

Decolonization in settler societies has been linked to the institutions and structures of society. Just as the foundation of colonization in Australia was the displacement of Indigenous peoples from their land, so too the placement or displacement of Indigenous peoples in societal discourses remains a central concern. When survival depends on resisting assimilation,[14] focus understandably falls to structures of legal recognition and articulation of Indigenous rights but must also consider the need to engineer governance structures that recognize and reflect the unique identities and priorities of Indigenous peoples.[15] Just as colonization refers to the process of appropriation or the establishment of control through force and administration,[16] decolonization demands reforms in policy and institutional settings to restore

12 The right of all peoples to self-determination is the first article in both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic Social and Cultural Rights*. The right to self-determination is also stated within the original *United Nations Declaration on the Granting of Independence to Colonial Countries and Peoples*.

13 Shepard argues that settler colonialism and decolonization are intimately linked: see Todd Shepard, *The Invention of Decolonization: The Algerian war and the remaking of France* (Ithaca, NY: Cornell University Press, 2006).

14 Wolfe, *supra* note 4 at 3.

15 There are layers of colonization and this debate is not limited to relationships between Indigenous peoples and "white settlers," although this paper is limited to the role of Indigenous peoples within decolonized spaces. For the broader context of colonization see generally: Nan Seuffert, "Civilisation, Settlers and Wanderers: Law, Politics and Mobility in Nineteenth Century New Zealand and Australia" (2011) 15 Law Text Culture 10.

16 Linda Tuhiwai Smith, *Decolonising Methodologies: Research and Indigenous Peoples* (London and New York: Zed Books, 1999).

political and cultural institutions and relations to traditional lands.[17] As such, we need a broader understanding of decolonization as referring not only to institutional structures and bureaucracy but also to cultural, linguistic, and psychological decolonization and the laws, policies, and processes that enable these other forms of decolonization to operate.

One of the strategies of decolonization is the use of "transitional justice," which describes the process by which the colonizing order makes available legal institutions and mechanisms to provide recognition of Indigenous people. Joe Williams, a Maori judge of the Supreme Court of New Zealand, described native title as a transitional justice mechanism. In the Indigenous context, Williams defined transitional justice more specifically to refer to a process by which "the new order agree[s] either to uphold pre-existing rights … or to make good on those that were unfairly taken away."[18] Williams argues that postcolonial independent Australia has "reached a point in their development where they can address questions of transitional justice without fearing that to do so would undermine the legitimacy of the existing legal order."[19] However, transitional justice is premised on the existing order staying intact. The benefit of transitional justice to the colonizer is that it receives moral legitimacy it might otherwise lack. Discrimination and debasement of Indigenous peoples is integral to Australia's nation-building process. The idea that we need to unmake our institutions in order to regain our moral legitimacy challenges the Australian sense of national identity. Moral legitimacy from Indigenous peoples is difficult to achieve. As settler exodus is unlikely as a possible decolonization strategy,[20] the Australian context requires a renegotiation of the colonial relationships of power and dispossession and the emergence of new forms of government and engagement.

17 According to Maori academic Linda Tuhiwai Smith, the practice of decolonization involves the transfer of the instruments of formal governance to the Indigenous people of a colony: *Ibid.* Roy also notes that "debates at the heart of contemporary postcolonial legal theory focus on the role of the law as an integral component of the colonial, imperial and now post colonial projects": Alpana Roy, "Postcolonial theory and law: a critical introduction" (2008) Adel LR 315 at 324.

18 Joe Williams, "Confessions of a native judge: Reflections on the role of transitional justice in the transformation of indigeneity" in *Land, Rights, Laws: Issues of Native Title*, 3:14 (Canberra: Australian Institute of Aboriginal and Torres Strait islander Studies, 2008) at 3, online: <http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2008/ntc08papers/WilliamsJ.pdf>.

19 *Ibid* at 4.

20 Franz Fanon, *Wretched of the Earth* (Harmondsworth, UK: Penguin Books, 1967) at 35.

The limits of the available mechanisms

Indigenous peoples in Australia have sought to renegotiate their legal status, the return of their territories, and political autonomy through a variety of mechanisms. The recognition of native title in 1992 was not the first time the Court process had been employed to seek return of lands. In 1971 the Yolgnu people of Arnhem Land in the Northern Territory attempted to prevent bauxite mining approved by the government without the consent of the traditional landowners, but the case was unsuccessful.[21] Nevertheless, the decision led the Commonwealth Government at the time to instigate an inquiry, which recommended the introduction of legislation to recognize and protect Indigenous peoples' rights to their lands.[22] However, Australia's federal constitutional framework leaves the administration of lands, including Indigenous peoples' lands, within the jurisdiction of the states. At the time of the inquiry, the Federal Government was powerless to introduce legislation nationally (an issue we will explore further in the following section) and instead introduced the *Land Rights (Northern Territory) Act 1976* (Cth) in relation to the federally administered territory.[23] Many states followed suit, introducing statutory land rights regimes that provided for the return of certain lands, but excluded many other areas from being transferred. Western Australia was notable in its refusal to introduce any form of land rights, which thwarted further attempts to introduce a national land rights scheme.[24]

Throughout the 1970s a series of policies emerged under the penumbra of self-determination, including: regional and national democratically elected representative structures and national self-administration through the Aboriginal and Torres Strait Islander Commission; local self-government structures under state legislation; and community-controlled services and corporations. These structures were established as both a means of attracting funding and services but also as an expression of de facto governance. Established predominantly in a policy period of self-determination, the emergence of the

21 *Milirrpum v Nabalco*, (1971), 17 FLR 141.

22 Austl, Commonwealth, Aboriginal Land Rights Commission, *Second Report* (Canberra: Government Press, 1974) (also known as the "Woodward Inquiry").

23 Tim Rowse, "How we got a native title act" (1993) 65:4 The Australian Quarterly 110.

24 The most common form of land tenures include alienable freehold granted under the *Aboriginal Land Rights Act 1983* (NSW) in New South Wales; inalienable freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) in the Northern Territory; trust land under the *Community Services (Aborigines) Act 1984* (Qld); and freehold under the *Aboriginal Land Act 1991* (Qld) in Queensland, with equivalents for the Torres Strait Islands. There are also specific pieces of legislation created for reserve or trust areas throughout Australia.

Indigenous corporate sector reflects a "liminal arm of government."[25] These organizations have contributed to the formation of the Indigenous organizational sector, to which we will return later in the article.[26] Through the 1990s, many of these institutions were destroyed or reformed in favour of mainstream institutions and services, which were based on the assumption that removing responsibility and autonomy from Indigenous community organizations would better address Indigenous disadvantage.[27] More recently, the Australian Federal Government has supported the establishment of an advocacy body in the form of the Congress of Australia's First Peoples which seeks to reconcile extant forms of governance into a collaborative structure. The fractured political dimensions of community development that now confront Indigenous peoples have resulted from the lack of formal mechanisms for the inclusion of Indigenous governance in regional governmental arrangements.

Colonization and decolonization are also inherently personal experiences; as Veracini claims, settlers carry colonialism "in their bones."[28] Many decolonization movements around the world have utilized transitional justice measures that are directed to the personal. For example, in the Australian context reconciliation and truth-telling work alongside land rights and autonomy claims. The Reconciliation movement began in earnest in 1991 with the establishment of the Council for Aboriginal Reconciliation, later replaced by Reconciliation Australia.[29] The stories of those Aboriginal and Torres Strait Islander peoples removed from their families under racist policies of "protection" were presented as part of a commission of inquiry,[30] eventually resulting in an apology from the Australian Government. The symbolic importance of reconciliation and an apology have not detracted from the calls for more substantive redress, mirrored in debates about what constitutional recogni-

25 Patrick Sullivan notes, however, that there are considerable issues of coherence within the sector: Patrick Sullivan, *The Aboriginal community sector and the effective delivery of services: Acknowledging the role of Indigenous sector organisations* (Desert Knowledge CRC Working Paper 73) (Alice Springs, Australia: Desert Knowledge CRC, 2010), online: <http://www.nintione.com.au/sites/default/files/resource/DKCRC-Working-paper-73_Indigenous-sector-oganisations.pdf>.

26 Tim Rowse, *Rethinking Social Justice: from 'peoples to populations'* (Canberra: Aboriginal Studies Press, 2012).

27 Janet Hunt, "Between a rock and a hard place: self-determination, mainstreaming and Indigenous community governance" in Janet Hunt et al, eds, *Contested Governance: culture, power and institutions in Indigenous Australia* (Canberra: ANU Epress, 2008) 27.

28 Veracini, *supra* note 10 at para 10, drawing on the thinking of Fanon, *supra* note 20, who remarked (at 27-74) that the "the true enemy of the colonized is the European settler."

29 *Council for Aboriginal Reconciliation Act 1991* (Cth).

30 Austl, Commonwealth, Human Rights and Equal Opportunity Commission, *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Sydney: Australian Government Publishing Service, 1997).

tion should look like — is mere symbolic inclusion sufficient or are substantive measures still required to protect Aboriginal and Torres Strait Islander peoples' rights and identity?

Native title: decolonizing Australian land law?

The limited political recognition of Indigenous interests in Australia places greater pressure on legal avenues as a means of resolving immensely political questions. Strelein has noted that the *Mabo* decision was a symbol for and the measure of the relationship between non-Indigenous and Indigenous peoples.[31] When the High Court recognized native title in 1992, they risked destabilizing the fundamental structure of Australian land law. That the Court was prepared to take on this controversial challenge and the emotive language in which they expressed their decision has remained a benchmark for recognition and reconciliation.[32]

The High Court in *Mabo* rejected the presumption that the British could settle a territory already occupied without recognizing the legal rights of the Indigenous inhabitants. To make sense of their decision they needed to reconcile Indigenous occupation of the territories with the legal myth of peaceful settlement, and do so without fracturing the skeletal structure of Australian law.[33] The Court would not reconsider whether Australia was settled, but it was prepared to revisit the "consequences of settlement."[34] Reviewing the implications of the colonization of Australia, the High Court found that the error had been that "the Crown's sovereignty over a territory which had been acquired under the enlarged notion of *terra nullius* was equated with Crown ownership of the lands."[35] The concept of *terra nullius* was essentially applied

31 Lisa Strelein, "Symbolism and function: From native title to Indigenous self-government" in Lisa Strelein, ed, *Dialogue about land justice : papers from the National Native Title conference* (Canberra: Aboriginal Studies Press, 2010) at 137.

32 *Ibid.*

33 *Supra* note 6 at 29. In *Mabo* Justice Brennan stated, "In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency." He further stated:

> [I] f a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be apprehended would be disproportionate to the benefit flowing from the overturning: *supra* note 6 at para 29-30.

34 *Supra* note 6 at para 32.

35 *Supra* note 6 at para 39.

based on the perception that Australia's first peoples were so "low in the scale of social organization" that they should not be regarded as self-governing or as holding laws of their own.[36]

Indigenous peoples were accorded no special status as colonizers claimed sovereignty. Thus, the colonizers did not arrange treaties or agreements and occupied the land without consent or compensation. This perception entrenched an opportunity to appropriate Indigenous lands and create moral justifications for less "peaceful" settlement practices. Central to the *Mabo* decision is the assertion that the change in sovereignty from Indigenous peoples to colonizers did not invariably bring beneficial title to the lands. In other words, in *Mabo* the High Court found that the claim of the British Crown to Australia's states and territories did not have the wholesale effect of extinguishing native title but instead granted the Crown a "radical title." The Crown's title could only be perfected by express intention, and then only piecemeal, when other interests in land issued by the new sovereign are inconsistent with the continued right to enjoy native title.

The preservation of existing non-Indigenous rights and interests has become known as extinguishment.[37] In *State of Western Australia v Ward* the Full Federal Court explored the notion of extinguishment and held that native title can also be partially extinguished:

> [I]f particular rights and interests of indigenous people in or in relation to land are inconsistent with rights conferred under a statutory grant, the inconsistent rights and interests are extinguished, and the bundle of rights which is conveniently described as "native title" is reduced accordingly.[38]

At once colonizing and decolonizing, the law of native title recognizes the wrongs of the past while also reaffirming colonization as an ongoing process. To this end, we can adopt Patrick Wolfe's description of settler colonial invasion as "a structure not an event."[39]

36 *Cooper v Stuart*, [1889] UKPC 1.

37 Chief Justice of the High Court, Robert French, has described "extinguishment" as a misleading metaphor for what is more appropriately described as the withdrawal of recognition: Robert French, "The Role of the High Court in Recognition of Native Title" (2002) 30:2 UWA L Rev 129.

38 *State of Western Australia v Ward*, [2000] FCA 191 at para 91.

39 Wolfe, *supra* note 4 at 2.

Federalism, state power and native title

As a decolonizing strategy, native title needs to compete within a web of interacting legal regimes at both the federal and state level. Federalism is a mechanism for sharing power between different levels of government, generally over contiguous territory. In Australia, there are three levels of government: the Commonwealth, state, and local governments. Plenary powers lie with the state legislatures (as the former colonies) and the Commonwealth Constitution articulates exclusive and shared powers of the Commonwealth or Federal legislatures. Various state government acts outline local government responsibilities.[40] Where the Commonwealth has non-exclusive power, it is able to assert dominance in law-making through the operation of section 109 of the Constitution, by which Commonwealth laws prevail over any conflicts with state legislation. The reach of Commonwealth powers has extended since federation through the creative uses of specific "constitutional pegs," such as the corporations and external affairs powers, which expands the Commonwealth Government's ability to regulate.[41]

As noted in the opening sections of the article, unlike other former British colonies, the Commonwealth Government does not have exclusive legislative responsibility in relation to Indigenous peoples and Indigenous lands. Indeed, a specific "Indigenous" law-making power was specifically excluded from such jurisdiction until 1967.[42] The Federal Government established the native title system through the NTA, relying on the constitutional power to make laws "for the people of any race for whom it is deemed necessary to make special laws": section 51(26). However, as a land issue, responsibility for engaging with native title falls to the states and local authorities. As the jurisdictions with the most to lose from the recognition of native title, the states are positioned as the primary respondent to Indigenous peoples claims, with the Courts and a specialist tribunal as mediator and arbitrator. As native title is an initiative of the High Court, for which the Commonwealth Legislature has assumed authority, state land and water management regimes have been slow to accommodate and change in response to the existence of native title.

40 At the time of writing, there was a proposal to recognize local government in the Australian Government, which will be considered by referendum in September 2013: *Australian Constitution Alteration (Local Government) Bill 2013*.

41 In *Western Australia v Commonwealth* [1995] HCA 47 at para 99, the High Court dismissed the Western Australian Government's argument that the "races power is merely a constitutional peg on which the Commonwealth inappropriately [sought] to hang the [NTA]."

42 Williams, *supra* note 5.

The recognition of native title and the Federal Government's legislative response have been criticized occasionally by state governments as an impingement on their efficient administration of "Crown" lands.[43] The Western Australian Government challenged the constitutional validity of the NTA in *Western Australia v Commonwealth*.[44] A central issue in the case was the extent to which the NTA impairs state functions and controls state legislative powers. The Western Australian Government argued that in restricting the operation of state laws, through providing for circumstances under which state actions are valid or invalid, the NTA effectively restricts the operation of state power. However, the High Court made the distinction between directly invalidating state laws and the fact that the laws were invalid only to the extent of any inconsistency based on section 109 of the Constitution.[45] The High Court noted:

> Three aspects of the operation of the Native Title Act are of central importance to its constitutional character: the recognition and protection of native title, the giving of full force and effect to past acts which might not otherwise have been effective to extinguish or impair native title and the giving of full force and effect to future acts which might not otherwise be effective to extinguish or impair native title.[46]

The High Court reiterated that the NTA provides for the protection of Indigenous rights and interests based on their traditional laws and customs but also protects existing tenures that would otherwise be rendered invalid by the recognition of native title. The NTA also outlines procedures for how future activities can interact with recognized native title rights and interests. In reaching its conclusions, the High Court affirmed that the NTA was validly made under the Commonwealth Government's constitutional power under section 51(26).[47] The High Court decision affirms the original *Mabo* decision and the validity of the legislation with respect to state government regulation. The High Court saw the NTA not as a means of controlling the exercise of state legislative power, but as a means of excluding laws made in exercise of that power from affecting native title holders. At the Commonwealth level, despite initial resistance, it was anticipated by those within the Federal

43 For an account of the original negotiation process, see: Rowse, *supra* note 23.

44 *Western Australia v Commonwealth* [1995] HCA 47 at para 33.

45 Section 109 of the Constitution provides that Commonwealth law will prevail over state law, to the extent that state law is inconsistent with Commonwealth law.

46 *Supra* note 44 at paras 78-93.

47 *Supra* note 44 at para 97 where Chief Justice Mason, and Justices Brennan, Deane, Toohey, Gaudron, and McHugh noted that the removal of the general defeasibility of native title by the NTA for the purposes of s 51(26) of the Constitution is sufficient to demonstrate that the Parliament could properly have deemed that Act to be "necessary."

Government that state government jurisdictions would come to "treat" native title with justice.[48]

As a transitional justice measure, native title provides a mechanism for confronting the question of dispossession and restoring a measure of land justice through transferring a limited form of control over resources back to traditional owners. The higher vested interest of the states in rejecting native title and maintaining their control over lands was partly overcome by narrowing the mechanics of decolonization to legal concepts and processes. That is, rather than relying purely on political negotiation, Indigenous people could resort to substantive rights.

Notwithstanding the appeal to justice, the give and take of transitional justice left native title with its share of discriminatory limbs. As part of the political compromise implicit in the *Mabo* case, the High Court of Australia refused to extend to native title holders the protection of the common law or of the Australian Constitution (and state constitutions) that protect citizens from the arbitrary deprivation of property by the Crown.[49] In the Australian Constitution this takes the form of a guarantee of "just terms" compensation.[50] For Indigenous peoples, however, the Court held that it was legal (even if though morally wrong) to discriminate on the basis of race; therefore, failure to protect or compensate Indigenous peoples for the loss of their land was

48 At the time of the enactment of the NTA, a leaked cabinet briefing from Sandy Hollway, Deputy Secretary of the Department of Prime Minister and Cabinet, revealed that:

> We avoid the administrative and cost problems of setting up a Commonwealth Structure across the country; we avoid those Commonwealth institutions becoming a ready-made target for blame associated with a slowdown in development activity or disruption of land management; the more intransigent States become clearly isolated; more positively, State systems are encouraged to make genuine efforts to take account of native title and treat it with justice (rather than the Commonwealth simply coming in over the top, which is not the most healthy long term solution for the country) (cited by Alan Ramsey, *Sydney Morning Herald(2* October 1993) 31).

49 *Adeyinka Oyekan v Musendiku Adele*, [1957] UKPC 13, [1957] 1 WLR 876 at 880, Lord Denning explained that:

> In inquiring ... what rights are recognized, there is one guiding principle. It is this: The courts will assume that the British Crown intends that the rights of property of the inhabitants are to be fully respected. Whilst, therefore, the British Crown, as Sovereign, can make laws enabling it compulsorily to acquire land for public purposes, it will see that proper compensation is awarded to every one of the inhabitants who has by native law an interest in it: and the courts will declare the inhabitants entitled to compensation according to their interests, even though those interests are of a kind unknown to English law.

See Kent McNeil, "Racial Discrimination and Unilateral Extinguishment of Native Title" (1996) 1 Australian Indigenous Law Reporter 181.

50 *Constitution,* section 51(31).

considered valid.[51] The introduction of the *Racial Discrimination Act* (RDA) in 1975 provides the only form of protection under law.[52] The RDA prohibits discrimination on the basis of race, in accordance with the United Nations *Convention on the Elimination of Racial Discrimination*. By extension the RDA protects against discrimination in the enjoyment of rights to property (including in community with others). It thus protects native title against arbitrary extinguishment by executive arms of government in Australia and also by state legislatures (by virtue of section 109 of the Constitution), effectively extending existing protections to apply equally to native title. The RDA has been successfully asserted against state legislation and executive acts on a number of occasions, including efforts by the Queensland Government to derail the proceedings in the *Mabo* case itself.[53]

While the NTA is a harsh and unjust legal doctrine, there are significant acts affecting the enjoyment of native title that are awaiting compensation claims. Furthermore, a significant part of the NTA considers how native title groups will be consulted and compensated in the future. This unrealized compensation bill implicitly influences native title negotiations and the political and legal positioning of the state and federal governments. Many states maintain high thresholds to accept proof of claims to native title and seek additional assurances of access to land for future development.

Unlike other former British colonies, Australia lacks a formal mechanism for the negotiation of comprehensive agreements or treaties between the government and Indigenous peoples, and does not provide protection for such agreements in a way similar to that provided by section 35 of the *Constitution Act 1982* (Can). There has been considerable debate in Australia about the introduction of constitutional mechanisms that would recognize the historical and political status of Aboriginal and Torres Strait Islander peoples, create a legal framework for agreement-making, and protect rights that are vulnerable to abrogation.[54] The absence of a constitutional framework for the recognition of Aboriginal rights, and title in particular, has been a key contributor to the lack of protection of even recognized native title rights and interests.

51 McNeil, supra note 49.

52 *Mabo v Queensland [No 1]*, (1988), 166 CLR 186.

53 *Ibid*.

54 Australian Institute of Aboriginal Torres Strait Islander Studies, *Submission to the Expert Panel on the Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (Canberra: Submission Australian Institute of Aboriginal Torres Strait Islander Studies, 2011) at 15, online: <http://www.aiatsis.gov.au/ntru/docs/2011constitutionalrecognition.pdf>.

A tier of government or a private interest?

While Australia's law recognizes the distinctive laws and customs of Aboriginal and Torres Strait Islander peoples, this recognition does not capture Indigenous forms of governance. Unlike Canada, Australia lacks a strong public law framework that explicitly addresses the relationship between its Indigenous peoples and the state. In both Australian and Canadian contexts, political discourse has considered measures to include Indigenous governance structures. In the 1980s the Australian Law Reform Commission (ALRC) formally considered the possibility of including Indigenous forms of governance in the recognition of what was then described as Aboriginal customary law.[55] Governance was viewed as a crucial element in restoring Indigenous institutions that were essential to maintaining unique identities, thought traditions, and ways of being.[56] Subsequent Royal Commissions have echoed these same sentiments regarding the interlinkages between self-determination and social dysfunction and poor socio-economic outcomes within Australia's Indigenous communities.[57]

However, despite having to establish a continuing system of law and custom acknowledged and observed by the Indigenous group in order to prove native title,[58] neither the Courts nor the Legislature have substantially acknowledged the public nature of native title recognition thus far. Rather, Australia treats native title as private property interest, represented through corporate rather than governmental institutions, as the prescribed forms of governance under the NTA are responses to property concerns rather than exercises of jurisdiction.

55 Austl, Commonwealth, Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (ALRC Report No 31) (Sydney: Australian Government Publishing Service, 1986). Regarding the Canadian context, Burrows notes that there is a strong connection between Indigenous government and Indigenous law and that the recognition of Indigenous laws and customs is interlinked with concepts of self-determination: John Burrows, *Indigenous Legal Traditions in Canada* Report for the Law Commission of Canada (Ottawa: Law Commission of Canada, 2006).

56 Austl, Commonwealth, Commission of Inquiry into Poverty,*Law and Poverty in Australia Second Main Report* (Canberra: Australian Government Publishing Service, 1975) which notes "[T] he causes are connected with the political subjugation and alienation of Aboriginals and the destruction, over many years, of Aboriginal culture, identity and dignity" at 288.

57 Austl, Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* by Commissioner the Honourable D J O'Dea, *v*ol 1 (Canberra: Australian Government Publishing Service, 1991).

58 *Mabo*, *supra* note 6 at para 68 (Brennan J).

By contrast, the Canadian Supreme Court decision of *Delgamuukw v British Columbia* in 1997[59] and the subsequent decision of *Campbell v British Columbia* (*Campbell*) have hinted at the need to recognize the right of self-government.[60] In particular, the decision of *Campbell* discussed the constitutional validity of governance arrangements under the Nisga's Final Agreement and found that section 35 of the Canadian Constitution does protect Aboriginal self-government.[61] Referring to the judgment of *Delgamuukw*, the Court noted:

> The right to determine the appropriate use of the land to which an aboriginal nation holds title is inextricably bound up with that title. First, it is "aboriginal law" which is part of the source of aboriginal title. Second, the right to decide how to use that land is also a part of the right.[62]

This emerging view has been supported at the policy level. The Canadian Royal Commission on Aboriginal Peoples (RCAP) described Aboriginal peoples as a "third order of government." In 1995, the Canadian Government released the first Federal Policy Guide implementing the inherent right to self-government. Although the guide does not displace existing treaties and recent self-government agreements, it provided a comprehensive framework for negotiation, implementation, and financial arrangements to ascertain the self-government rights of Aboriginal peoples.[63]

The recognition of native title in Australia implies recognition of an extant society for the purposes of establishing claims to rights and interests.[64] The recognition and rationalization of forms of Indigenous governance underpin the success of measures to enable the expression of Indigenous authority and autonomy. Australia has not fully resolved the subsequent question of responsibility to recognize the institutional structures and processes involved in the effective articulation of Indigenous forms of governance. Notwithstanding these findings and the comparative jurisprudence, the Australian High Court

59 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193.

60 *Campbell v British Columbia* (*Attorney-General*), 2000 BCSC 1123, 189 DLR (4th) 333. The concept of "self-government" was rejected by the Supreme Court because it was framed in general terms but returned to trial for determination.

61 These governance arrangements are detailed in: *Nisga'a Final Agreement Act*, SBC 1999, c 2 and *Nisga'a Final Agreement Act*, SC 2000, c 7.

62 *Supra* note 60. This decision has not been affirmed or challenged in higher courts.

63 Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Indian and Northern Affairs Canada, 1996).

64 The elements required to prove native title are articulated under section 223 of the NTA. For further discussion on this point see: Will Sanders, *Towards an Indigenous order of Australian government: Rethinking self-determination as Indigenous affairs policy* (Canberra: CAEPR Discussion Paper No 230/2002, 2002), online: <http://caepr.anu.edu.au/sites/default/files/Publications/DP/2002_DP230.pdf>.

has articulated a view of native title that denies any "parallel law making authority" inherent in the Indigenous peoples.[65]

Under the NTA, once native title has been determined Indigenous groups must establish a native title corporation to hold or manage the recognized rights. In the native title context the legal interests of native title groups in Australia are articulated through their corporate entities — Registered Native Title Bodies Corporate (RNTBCs).[66] As a consequence, legal recognition of interests in land has not translated into the robust institutions and policies required to support the full realisation of these legal gains, in the sense that recognition of native title does not necessarily create a sphere of authority and autonomy in which Indigenous self-government can be enjoyed. Unsurprisingly, the recognition achieved through native title falls short of the expectations and aspirations of the Indigenous peoples. Confusion over the role and scope of recognized native title rights and interests has led to the institutional marginalisation of native title corporations in the governing of Indigenous territories.

Nevertheless, within formal structures of recognition important cultural institutions for decision-making can be given space such that Indigenous laws and social structures can operate with authority. The process of claiming and receiving recognition can reinvigorate Indigenous governance institutions.[67] For example, traditional laws and customs are often an important aspect of the composition of native title corporations. These laws and customs define the composition of the native title group and may flow through to the group's relationship with the corporation and the decision-making processes. At the same time, however, native title corporations are products of the colonial system, governed by the NTA and the incorporating legislation, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). As such, native title corporations sit *between* forms of governance, requiring appropriate structural support and flexibility to function as a mechanism of decolonization rather than a new form of colonization.

Native title is unclear about the intersection of Indigenous and non-Indigenous legal institutions. The authority of these corporate structures, while legally recognized, have yet to be negotiated with and between Australia's

65 *Members of the Yorta Yorta Aboriginal Community v Victoria*, [2002] HCA 58, 214 CLR 422.

66 They are commonly known as Prescribed Bodies Corporate (PBCs). The NTA contains both terms to describe the requirement to establish the body. We will refer to them here as native title corporations.

67 Alexander Reilly, "A Constitutional Framework for Indigenous Governance" (2006) 28 Sydney L Rev 403.

federal and state governments. Moreover, the federal structure of Australian sovereignty and governmental authority has worked against such a renegotiation and has provided an excuse for inaction regarding practical policy implementation. In any event, native title corporations have not realized the potential to provide this space. This legal indeterminacy is not approached through concepts of self-determination and institutional agency but rather through inherently vulnerable and ever-diminishing private rights and interests. Coupled with the lack of state and federal government policies and initiatives to respond to and accommodate recognition of native title, competition between Indigenous and non-Indigenous governance contributes significantly to the marginalization of native title corporations.

The emergence of native title as a "sector" on the political landscape

Despite the obstacles to recognition, native title now covers 20 per cent of Australia's total land mass.[68] These native title lands are managed by over 100 native title corporations which differ in terms of types and form of landholdings, aspirations, levels of capacity, and support. There are a further 443 claimant applications still outstanding, potentially contributing to the growth of a native title corporate "sector."[69] These corporations' holdings of land interests are sometimes augmented by small and large scale settlement or compensation funds and additional corporate structures to manage them. All levels of government have a significant interest not only in the mechanics of native title recognition but the future capacity of native title corporations as the key negotiators regarding native title lands. With so many outstanding claims, the extent of native lands already determined and the growing sector of Indigenous native title holders have received inadequate attention and support.[70] On the policy level, this question has been largely unresolved despite emerging repeatedly in various forums.[71]

In 2001, the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund recommended that na-

68 Austl, Commonwealth, National Native Title Tribunal, *Determinations of Native Title* (27 March 2013), online: <http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/Determinations_map.pdf>.

69 *Ibid.*

70 Toni Bauman & Tran Tran, *First National Prescribed Bodies Corporate Meeting: issues and outcomes, Canberra, 11-13 April 2007* (Canberra: Australian Institute of Aboriginal and Torres Strait Islander Studies, 2007).

71 *Ibid.*

tive title corporations "receive adequate funding to perform their statutory functions and that they receive appropriate training to meet their statutory duties."[72] Similarly, in 2002, research on the funding issue recommended direct funding, either via representative bodies or through a regional support model.[73] Neither of these early calls for funding were actioned. A joint departmental steering committee developed the 2005 *Report on the Structures and Processes of Prescribed Bodies Corporate,* which recognized that, aside from access to funding, native title corporations also need be able to recover costs[74] (for example, through mandatory consultations for land development activities) and have greater flexibility in their governance arrangements.[75] However, despite these calls, over the past two decades state and federal governments have disavowed responsibility for resourcing native title corporations post-determination, resulting in a constitutional impasse. The states claim that the NTA framework is a Commonwealth creation and as such should be maintained by the Commonwealth. The Commonwealth argues that native title once recognized is primarily a land-management matter and as such is the responsibility of the states. In this deadlock, native title corporations were expected to develop autonomy as community organizations with the capacity to compete for and acquit their land-management functions within the revolving grant culture of community organizations. [76] The failure of the private sector is evident, with approximately 70 per cent of RNTBCs currently receiving

72 Austl, Commonwealth, Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Effectiveness of the National Native Title Tribunal in fulfilment of the Committee's duties pursuant to subparagraph 206(d) (i) of the Native Title Act 1993* (Canberra: Australian Government Publishing Service, 2003).

73 Austl, Commonwealth, Office of the Registrar of Aboriginal Corporations, , *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal Councils and Associations Act: Final Report of the Review of the Aboriginal Councils and Associations Act 1976 (Cth)*, by Corrs Chambers Westgarth Lawyers with Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senator Brennan Rashid (Canberra: Australian Government Publishing Service, 2002 (the Rashid report).

74 *The Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011*(Cth) enable RNTBCs to charge a fee for costs incurred in providing certain services and set out a procedure for the Registrar of Indigenous Corporations to review decisions to charge such fees. See also *Native Title (Technical Amendment) Act 2007* (Cth).

75 FaHCSIA "Guidelines for the support of PBCs" provides for "emergency" funding for basic administrative assistance through NTRBs: Austl, Commonwealth, Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), *Guidelines for the support of PBCs* (Canberra: Australian Government Publishing Service, 2009), online: <http://www.aiatsis.gov.au/ntru/docs/researchthemes/pbc/Guidelines2009.pdf>.

76 Native title corporations also exist within a complex "Indigenous sector" of Aboriginal corporations that have formed to fulfil community service functions in many remote Aboriginal communities. According to Tim Rowse, the "Indigenous sector is of fundamental importance in contemporary Indigenous affairs." Yet he also notes the lack of policy and funding support for Indigenous corporations. These corporations are relevant in terms of holding land titles, providing representation, ensuring service delivery, and as a means to generate economic income: s*upra* note 26 at 101.

no income.[77] To this end, the Federal Government has initiated a further review to examine the emerging issues of sustainable and functional native title corporations.[78]

The lack of development of native title corporations is consistent with the general malaise of the Indigenous corporate sector.[79] Limited support for native title corporations is compounded by limited awareness of how social relations have been formalized by the NTA and the related incorporation legislation. In some instances native title corporations exist merely as a formality for native title transactions mediated through non-Indigenous advisors. This effective lack of agency severely diminishes the cultural authority of Indigenous governance. For Indigenous peoples, there is a dilemma of dependence and independence in arguments for and against government funding as a support for native title activities that could provide support to Indigenous governance institutions. This is an ongoing challenge for native groups in Australia in the absence of comprehensive settlements that provide a sustainable funding base independent of non-Indigenous government.

While there has been a marked movement toward more comprehensive settlements of native title claims in some jurisdictions, most notably Victoria, the vast majority of determinations do not contain provisions for ongoing sustainable governance. Furthermore, while there remains a significant unrealized compensation bill for past extinguishment, the 1975 cut-off for compensable acts limits the overall redress of past wrongs. As a result, many Indigenous groups will rely on economic activities or government grants to provide resources for their future development.

Negotiating development on native title lands in the private sphere

By managing the institutional architecture surrounding the NTA, the Federal Government has a large impact on the operation of native title corporations. Through the NTA, the Federal Government has established "processes" for the protection of native title, known as the "future acts regime." The future

77 Deloitte Access Economics, *Review of Native Title Organizations: Discussion Paper* (June 2013), at 15-16, online: <https://www.deloitteaccesseconomics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf>.

78 "Native Title Organisations Review," online: Department of Families, Housing, Community Services and Indigenous Affairs <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/native-title-organisations-review-0>.

79 Sullivan, *supra* note 25.

acts regime regulates activities that may influence native title rights and interests such as infrastructure development and land management. The NTA makes it illegal for a government or private party to engage in an activity that may impair native title rights without complying with the requirements of the future act regime. Depending on the severity of the impact, the NTA may require that the native title holders be notified or consulted. One of the statutory functions of native title corporations is dealing with access requests and processing "'future acts" — activities that would affect or diminish native title rights and interests, such as mining exploration or the building of infrastructure. However, as a vestige of colonialism, the NTA does not give the native title holders the right to refuse permission for an act to proceed.

The inclusion of a "non-extinguishment principle" provides for most acts to pass without any permanent legal extinguishment. Through the future acts regime and the non-extinguishment principle, the Crown's duty to consult is effectively delegated to private companies, further entrenching native title in the private sphere. While statutory royalties and taxes flow to the federal and state governments, native title groups must rely on negotiating a share of the development against a backdrop of compulsion.[80] Native title groups do not have the right to cease negotiations or to choose with whom they do business. Should negotiations falter,[81] parties will default to arbitration, which historically has usually guaranteed that the proposed development will go ahead. [82] Indeed, the current tenure maps still refer to native title lands as "unallocated crown land" (ideally awaiting a more productive use) rather than recognizing the underlying Indigenous native title rights and interests that form a burden on the Crown's qualified title.

Since the legal recognition of native title, state governments' fear of the potential for native title to deliver land and self-government to Indigenous peoples has been replaced by a greater driving force to settle Indigenous resource claims through the private sphere. According to David Ritter:

> The early years of the native title system can be seen as a struggle over the depth and breadth of what would be recognized. What subsequently took place in the mid to late nineties — the transition to "agreement making" as the hegemonically accepted

80 Tony Corbett & Ciaran O'Faircheallaigh, "Unmasking Native Title: The National Native Title Tribunal's Application of the NTA's Arbitration Provisions" (2006) 33:1 UWA L Rev 153.

81 The NTA contains a requirement of "good faith" in negotiations (although this has been less than effective in prompting the Federal Government to introduce amendments to clarify the requirements of good faith negotiations): *Native Title Amendment Bill 2012* (Cth).

82 S*upra* note 80 at 153.

> way of resolving native title matters — was not a product of slow awakening, but the consequence of protracted and multidimensional legal and political tussle.[83]

Parallel to the protracted development of native title corporations are increasing calls to enable capital accumulation on Indigenous lands to develop an economic base. This policy shift has reframed native title as a critical means of "expanding commercial and economic opportunities."[84] While a few native title groups have been successful in securing income through leveraging mining and water development on traditional lands, others who want to preserve or manage their traditional lands have limited resources to pursue their native title aspirations. This system draws attention away from the majority of small and struggling native title corporations to the minority who have successfully leveraged royalties and other benefits from mining or large scale development.[85] Focus has shifted to "optimising the benefits of native title payments" and "maximising outcomes from native title benefits" without recognizing whether this model of private sector development is consistent with the development aspirations of the Indigenous peoples.[86]

At the same time, a narrow characterisation of Indigenous interests constrains many native title corporations, largely excluding them from economic and political rights, with a number of determinations of native title limiting native title rights to personal, communal, ceremonial, and non-commercial areas. The High Court has conceded that the meaning of native title is still open:

> Even if difficulties about the meaning of the word "property" were resolved, it would be wrong to start consideration of a claim under the Act for determination of native title from an a priori assumption that the only rights and interests with which the Act is concerned are rights and interests of a kind which the common law would

83 David Ritter, "Hypothesising social native title" in Lisa Strelein, ed, *Dialogue about land justice: papers from the National Native Title Conference* (Canberra: Aboriginal Studies Press, 2010) 115 at 116.

84 Austl, Commonwealth, Attorney General's Department, "*Terms of reference" Joint Working Group on Indigenous Land Settlements* (Canberra: Australian Government Publishing Service,), online: <http://www.ema.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~JWILS+Terms+of+Reference+06.11.08.pdf/$file/JWILS+Terms+of+Reference+06.11.08.pdf>.

85 Former Commonwealth Attorney General Robert McClelland announced at the Native Title Conference that the native title system should be committed to "real outcomes": Hon Robert McClelland MP, Commonwealth (Austl), *Keynote Address* (Paper presented at the Native Title Conference: Spirit of country, land, water, life, Melbourne Cricket Ground, 3-5 June 2009). See also *supra* note 83.

86 Marcia Langton, "Native title, poverty and economic development" (The Mabo Lecture delivered at the People, Place, Power, Native title conference, Canberra, 3 June 2010).

> traditionally classify as rights of property or interests in property. That is not to say, however, that native title rights and interests may not have such characteristics. The question is where to begin the inquiry.[87]

The High Court rejected the broader reading of the sui generis native title adopted in *Delgamuukw,* in which the unique nature of native title was considered a source of strength. In reaching its decision, the High Court noted that a broader construction of native title from *Delgamuukw* was wrongly assumed to rely on the "different circumstances" occasioned by rights thought to arise from, rather than being recognized by, the *Constitution Act 1982* (Can). Instead, Australian law uses the uniqueness of native title to justify an "inherent vulnerability" in the title that undermines its recognition and robustness.[88]

The narrow interpretation of native title rights and interests forces discussion to fit within the constraints of the law or engage within political processes to force the legal and institutional arrangements surrounding it to change. If we view the incoherence of native title against its rationale and purpose as transitional justice in a decolonizing methodology, we see a retreat from justice. The power relationships established in the formative years of nation building persist as Indigenous people continue to be effectively dispossessed incrementally as non-Indigenous agents identify new uses for traditional lands. Furthermore, a lack of administrative responsibility for native title corporations and the subsequent policy vacuum created by the perceived uncertainties of native title law has hampered the operation of native title corporations within native title communities. The dividing lines created to administer native title corporations vary by state, by degree of capacity for negotiation, by the level of commercial and development interest on native title lands, and by policy pressure and fashion. These factors have influenced the way in which state government representatives have sought to characterize their policy and funding relationships with native title.

Competing governance arrangements

In Australia's constitutional framework, state governments also have legislative responsibility for local government. Despite the fact that native title, in theory, recognizes rights that predate colonization, in reality native title recognition occurs against a backdrop of other, sometimes competing, forms of

87 *Commonwealth v Yarmirr,* [2001] HCA 56 at para 14 (Gleeson CJ and Gaudron, Gummow, Hayne JJ), 208 CLR 1.

88 *Fejo and Mills v Northern Territory and Oilnet (NT) Pty Ltd*, [1998] HCA 58, 195 CLR 96.

representation. The most inextricable are those created through Aboriginal Community Council or local Shire models of community representation supported by state government agencies and funding. While some states have introduced forms of local Indigenous government, the establishment of these governing bodies is not consistent across the country and in some circumstances competes with the interests of traditional owners of territories in which Indigenous communities reside.

As discussed earlier, statutory forms of Indigenous local government predate the recognition of native title and are recognized based on different criteria. As such, overlapping land tenures are effectively "held" for the benefit of differing forms of Indigenous group composition, creating not only internal conflict over "ownership" and control over tenures but also competition over the resources to manage these tenures.

Currently, the Federal Government has limited influence on the extent to which the distribution of programs responds to the needs of Indigenous people throughout different regions, as most service provisions are under state government control.[89] Moreover, successive intervening government policies also further complicate the delivery and payment of services.

There are practical and costly implications of this model of Indigenous administration, especially where a form of "welfare colonisation" supports uncoordinated and short-term governance structures. Yawuru leader Peter Yu explains:

> The whole structure of government in the Kimberley is chaotic and confusing to Aboriginal people who have to deal with approximately forty separate government agencies. Not only does this put enormous pressure on their daily lives, but the services these agencies provide are not meeting basic needs. This is a wastely expenditure of public resources which does little to change peoples' lives for the better but, instead, perpetuates a huge bureaucratic monster which provides employment for hundreds of non-Aboriginal people. [90]

Native title holders not only have statutory responsibilities for the management of their recognized native title lands but also have aspirations to pursue broader social objectives within the context of asserting Indigenous forms

89 Austl, Commonwealth, Australian Government Commonwealth Grants Commission, *Indigenous Funding Inquiry:* Final Report Commonwealth Grants Commission (Canberra: Australian Government Publishing Service, 2001), online: <http://www.cgc.gov.au/index.php/inquiries/other-inquiries/53-2001-indigenous-funding-inquiry>.

90 Peter Yu, "Aboriginal Peoples, Federalism and Self-Determination" (1994) 13:1 *Soc Alternatives* 19.

of governance. Governance in this sense refers to traditional laws and customs as well as the ability of native title holders to make decisions about their recognized land holdings.[91]

Native title is not only a legal right or interest but also the expression of Indigenous relations to territories and the underlying systems of ethics and reciprocal responsibilities that underpin these relationships. Often, once native title has been determined, Indigenous groups seek to capitalize on land-management opportunities through conservation funding and initiatives that align with their priorities and interests in caring for country.[92] These synergies between land management and native title priorities have refocused attention on funding for activities linked to conservation priorities. However, these programs are limited in scope and do not necessarily provide a contemporary form of expressing Indigenous decision-making powers over their territories. For instance, while cultural stories related to the importance and significance of water are recognized in water planning instruments, policy decisions do not take into account the underlying laws and legal traditions defining Indigenous relationships to water.

Engaging with the unique ways in which Indigenous priorities are expressed is central for developing governance structures that enable greater Indigenous participation in managing their traditional lands. Stephen Cornell and Joseph Kalt have found that natural, human, and financial resources are not the keys to development; rather, development is a political matter, requiring sound institutional foundations, strategic thinking, and informed action.[93] In the Australian context, Janet Hunt and Diane Smith describe Indigenous governance as a developmental issue, requiring holistic policies recognizing the social environment, local cultural capital, and a whole-com-

91 Reilly, *supra* note 67 at 435. Reilly also refers (at 407) to governance as:

> [D] ecisions Indigenous communities make individually or collectively about how they might govern themselves regardless of formal rights. Indigenous governance describes the way Indigenous peoples observe and practice their own laws independently of any obligations they have under mainstream law. It is also about how Indigenous people negotiate the intersection of their own laws and rights and obligations they have under the central legal system.

92 Caring for country can be understood as "Indigenous peoples' approaches to land and water management, although with some central distinctions": Jessica Weir, Claire Stacey, and Kara Youngetob, "The Benefits Associated with Caring for Country," Literature review, prepared for the Department of Sustainability, Environment, Water, Population and Communities (Canberra: Australian Institute of Aboriginal and Torre Strait Islander Studies, 2011) at 1.

93 Stephen Cornell and Joseph P Kalt, "Sovereignty and Nation-Building: The Development Challenge in Indian Country Today" (1998) 22:3 *Am Indian Cult Res J* 187.

munity framework.[94] The double bind of increasingly restricted interpretations of the economic potential of native title and the heavy reliance of native title bodies on state and federal government funding affects the ability of native title holders to assert their unique forms of governance. The robustness of Indigenous forms of governance is contingent upon independence derived from adequate resources. The inverse is also true: the greater the dependency of Indigenous forms of governance on ad hoc funding, the weaker native title corporations will become.

Canadian literature has widely discussed the extension of reasoning on Indigenous rights and interests to governance.[95] Temporal elements between traditional Indigenous laws and customs and those that have inevitably arisen with colonial institutions have limited the protection of Indigenous governance. The Australian context recognizes precolonial powers through native title and Indigenous authority is reflected in the construction of native title corporations as a modern institutionalized model for the transmission of Indigenous forms of governance and land management.[96]

The connections between constitutional recognition and governance have been discussed more recently in the Australian context in the consideration of Indigenous constitutional recognition. In the Australian context, Reilly has argued that Australia's constitutional arrangements already require engagement with Indigenous forms of governance, in a form of federalism that supports the "governance capabilities with Indigenous communities."[97] However, this engagement is not actioned in any meaningful way. Proposals have been mooted for an agreement-making provision in the Commonwealth Constitution that gives clear jurisdictional authority to the Federal Government to enter into comprehensive agreements.

Native title holders' formal land management, community development, and governance responsibilities are often misinterpreted in these interactions. Poor translations related to caring for lands and water and maintaining social and cultural relationships through song and ceremony determine how resulting institutions enabling Indigenous governance are defined. These transla-

94 Janet Hunt & Diane Smith, *Building Indigenous community governance in Australia: Preliminary research findings*, CAEPR Working Paper 31 (Canberra: Centre for Aboriginal Economic Policy Research, 2006) at 68.

95 Borrows extends arguments for the recognition of Aboriginal title and the rights and interests flowing from this recognition to preexisting and contemporary forms of governance: John Borrows, "Tracking trajectories: Aboriginal governance as an Aboriginal right" (2005) 38:2 UBC L Rev 285.

96 *Ibid.*

97 Reilly, *supra* note 67.

tions become replicated in the ways in which Indigenous and non-Indigenous people negotiate the building of infrastructure, land access, and other community development on native title lands. Unfortunately, the unique relationships that Indigenous people have to their land and waters, as expressed through native title, are considered to be "last in line," excluding the priorities and aspirations of native title holders in the design, regulation, governance, and funding for native title corporations. The retrospective recognition of native title has required other legal regimes, planning processes, and organizations to adapt to native title corporations as a new governance institution. However, this process has been protracted, creating legal frustrations hampering the work of native title corporations. Given the context-based and community-driven nature of self-determination, the legal and social marginalization of native title combined with its core governance role creates the potential for diminishing the concept of native title as it was originally asserted and recognized in the *Mabo* decision.

Initially designed to ensure that native title rights and interests are protected from extinguishment by state legislative acts, native title interests are not given due consideration in state funding and legislative decisions in areas such as town planning and water management. As such, Indigenous forms of governance are only articulated within these contexts in the form of "consultation" as opposed to meaningful engagement with pre-existing, emerging, and continuing governance structures. This temporal bind is institutionalised on a fundamental level through a form of "uncooperative" federalism that treats responsibility for engagement with Indigenous forms of governance (and the laws and customs underpinning them) as purely symbolic or only having legal clout when translated through mainstream legal structures and institutions. This essential compromise of Indigenous governance is illustrated throughout Australia.[98]

Conclusion

Mabo continues to challenge perceptions of land justice and provides a mechanism for realising equity through the recognition of Indigenous relationships to land and waters. The interactions between these unique identities and other legal regimes remain unclear, as they involve not only issues of law but also of perception. Despite this uncertainty, however, a clear difference exists between enabling participation and consultation and actually transferring the regulation of administration of Indigenous held land and services to the rec-

98 *Ibid.*

ognized traditional owners. While the issue of capacity is imperative, broader questions of the ways in which Indigenous forms of governance are supported and engaged will also need to be addressed. While formal constitutional recognition has been put forward as one form of necessary and important engagement between Indigenous people and the state, practical considerations tied with the complicated impact of federalism on the native title system (and how native title rights and interests are treated) should also become a necessary priority for creating a decolonized space. Central to this project will be the critical engagement with Indigenous forms of governance, in their preexisting modes but also as they have evolved in response to introduced institutions and ideas.

These steps require time and investment in developing solutions appropriate to each group, resolving how native title and the variety of historical institutions and processes can be structured to reflect the needs of Indigenous peoples' governance into the future. Native title is capable of looking back to remedy past injustices and create a present space for Indigenous governance to be recognized. However, further work is needed to provide a sustainable future for Indigenous self-government, as the negotiation of Indigenous self-government agreements with native title groups will not be sufficient. A multitude of government and corporate bodies may be needed in these discussions.

Decolonization has been defined as the process of handing over governance to the Indigenous peoples within a colony.[99] There is a reluctance to discuss Indigenous governance in Australia in the context of decolonization, as it threatens our sense of national identity and legitimacy. However as Veracini has argued, "treating settler colonialism as separate from decolonisation enables a disavowal of many colonisers and their practices, allowing for 'colonialism' to be perceived as something generally perpetrated by someone else."[100] The existing formal structures for the exercise and recognition of native title are complicit in excluding Indigenous forms of governance. The extent to which the Federal Government has control over the implementation of native title is based on parallel state government regimes for land and water management. These regimes have formed to the exclusion of Indigenous interests and will need to renegotiate how native title presently interacts with existing formal structures.

99 Tuhiwai Smith, *supra* note 16.

100 Veracini, *supra* note 10 at para 4.

While industry and government have recognized that native title corporations are not necessarily meeting their needs for access and responsiveness, there is little focus on the appropriate role of native title holding institutions not only as service providers but also as community governance institutions based on recognized Indigenous laws and customs. In Australia, native title is thus viewed, not as a "tier of government" but rather as merely another private interest group.

We do not argue here that recognition by the colonial state is determinative of the continued existence of Indigenous governance. On the contrary, the ability of Aboriginal and Torres Strait Islander peoples to prove native title is testament to the survival of Indigenous socio-legal structures. The decolonization strategy is to create a space for Indigenous governance to continue to "breathe." Facilitating this space means not only recognizing a sphere of autonomy and authority, but also not fuelling unnecessary competition among institutions or overburdening them with administration.

To emphasize the need to create a sphere of authority and autonomy for Indigenous governance does not deny the need to continue decolonizing the institutions of colonial government. If we accept, as Wolfe suggests, that colonization in settler societies is a process rather than an event, then so too is decolonization. The challenge of decolonization strategies for Aboriginal and Torres Strait Islander peoples in their negotiations with Australian governments is that it is an ongoing project. Moreover, Indigenous peoples must negotiate with a state at war with itself, battling the imperative to colonize with the moral understanding of the need to decolonize. To this conflict constitutional reform can provide a partial answer, by making some of the rules more immutable and evening the playing field a little more. The ebbs and flows of political negotiations still remain at the heart of discussions about the place of Indigenous peoples in the governance of their territories.

Eagle Soaring on the Emergent Winds of Indigenous Legal Authority

*Larry Chartrand**

This paper discusses the nature of Indigenous peoples' social order systems and highlights some fundamental "legal" principles that perhaps exemplify many Indigenous nation's legal traditions to a greater or lesser degree depending on the particular nation. They are:

The Principle of Progress as Renewal,
The Principle of Balance,
The Principle of Life-Wide
Legal Agency Equality, and
The Principle of Decentralized
Normativity and Decision-making.

In discussing these principles, the author through his own personal experiences and connection to traditional teachings, reveals the interconnectedness of indigenous legal thought and spirituality and how there is really no essential distinction between the two concepts. The point is also made that the legal cultures of Indigenous and Western societies may be different in nature, process and structure than European-based social order systems, but they were and are no less effective. In addition, the paper discusses issues concerning the right to assert control over justice and legal order within Indigenous communities. It identifies concerns with a domestic Aboriginal rights approach and prefers to ground the claim in the paradigm of international human rights instruments which are significantly less colonial and discriminatory than Canada's Aboriginal rights jurisprudence. The paper ends with some thoughts on strategies for renewal of Indigenous legal thought, principles and processes so that the Eagle can fly freely once more.

L'auteur de cet article examine la nature des systèmes d'ordre social des peuples autochtones et attire l'attention sur certains principes « juridiques » fondamentaux qui illustrent peut-être les traditions juridiques de nombreuses nations indigènes à un degré moindre ou supérieur selon la nation, dont :

Le principe de progrès comme renouveau
Le principe de l'équilibre
Le principe de l'égalité des moyens juridiques
embrassant tous les aspects de la vie
Le principe de la normativité et la prise de
décision décentralisées

En examinant ces principes, l'auteur, par ses expériences personnelles et ses liens avec les enseignements traditionnels, révèle le lien entre la pensée juridique et la spiritualité indigènes et comment il n'y a vraiment aucune différence fondamentale entre les deux concepts. Il fait également remarquer que les cultures juridiques des sociétés indigènes et occidentales diffèrent peut-être de par leur nature, leur processus et leur structure des systèmes d'ordre social européens mais elles étaient et elles demeurent non moins efficaces. De plus, l'auteur examine des questions touchant le droit de revendiquer le contrôle de la justice et l'ordre juridique à l'intérieur des communautés indigènes. Il identifie des inquiétudes liées à une approche intérieure aux droits des peuples autochtones et préfère fonder l'affirmation sur le paradigme des instruments internationaux portant sur les droits de l'homme, qui sont considérablement moins coloniaux et discriminatoires que la jurisprudence canadienne sur les droits des peuples autochtones. L'auteur conclut par des pensées sur des stratégies visant le renouveau de la pensée juridique, les principes et les processus indigènes afin que l'aigle puisse de nouveau voler librement.

* Larry Chartrand is an Associate Professor at the University of Ottawa.

The current climate

Wind is a powerful force of nature. It can be the cause of environmental change in both positive and negative ways. Winds can bring rain clouds when rain is needed to nourish the trees and plants so that they can, in turn, nourish other life. Yet winds can be destructive too and destroy much of what we regard as important in our lives. All we need do is witness the enormous power of the tornado or the hurricane and the helplessness of being unable to do anything to stop or hinder their paths of oncoming devastation.[1]

Like the winds of nature, the Europeans who arrived on Turtle Island brought both beneficial and destructive weather. The winds of European origin are complex in nature: some were beneficial, particularly in terms of early trade relations, but most would agree that the winds of colonization were overall far more destructive, bringing much pain and despair to the camps of Indigenous peoples.[2]

The winds of colonization brought great thunderstorms that blackened the skies. In the wake of the storms much harm has been caused to the dignity and humanity of Indigenous communities: loss of culture, loss of identity, loss

1 There is a Haudenosaunee legend about the Lynx out-smarting the Flying Head (Hurricane):

> This is one of the evil spirits, the Hurricane. Every time it came to the village there was always bad luck, damage, pestilence and death.
>
> The Indians in the village could not do anything about this evil until the Lynx came to dwell among them. She is the mother of nations and has great powers. It is said; she used to travel by night from tribe to tribe warning them of danger, and be back at her Lodge by morning (Source on file with author).

2 I prefer the use of the phrases "Indigenous nations" or "Indigenous peoples" in describing the many peoples and nations indigenous to Turtle Island (North America). I prefer this phrasing over terms like "Aboriginal peoples," "Native peoples," "Indians," or "First Nations." In discussing the peoples that occupied Turtle Island (North America), I wish to emphasis the similarity in their peoplehood status with all other recognized peoples and countries of the world and to use the term in the very simple sense of describing a people who are of a territory and have deep and powerfully committed connections to the land they occupy. I do not want my description of the peoples Indigenous to Turtle Island to attract the colonial presumptions associated with terms that have significance only within the context of a colonial relationship, such as "Indians." In this sense, I use the term "Indigenous peoples" to capture the totality of the tribes, nations, and confederacies themselves. Accordingly, I wish to emphasis the universal political dimension of Indigenous existence in the sense that such peoples have rights no different in kind, but also no less in degree, than any other peoples of the globe. In my opinion, the distinct peoples of Turtle Island possess the necessary indicia of peoplehood status to benefit from the right of self-determination recognized as inherent to all peoples regardless of their cultural, religious, or racial attributes. I recognize that because of the size, composition, and nature of social group units, determining which levels of social organization are capable of possessing collective rights in a normative sense is a contested inquiry, and increasingly so as absolute political boundaries of recent world history and the concretization of concepts like sovereignty give way to more porous and overlapping divisions.

of economic opportunity, loss of language, loss of family, and loss of authority, to name but a few negative impacts of the storms of colonization. Together, these losses have ultimately culminated in intergenerational collective trauma of enormous magnitude.[3]

The winds of colonial destruction continue to this day, although diminished perhaps by countervailing winds born of a growing Indigenous rights and cultural revitalization movement. This paper will focus on one set of colonial winds, those related to the imposition of a hegemonic form of colonial legal authority. More specifically, I would like to explore the destructive winds of the Euro-monopolizing legal cultures (common law and civil law) that have been transplanted onto Turtle Island soil like foreign weeds that now strangle the indigenous plants of the area, threatening their very existence. I will contrast these colonial storm winds with the Indigenous winds now beginning to emerge. Gentle breezes now, with the occasional gust,[4] these emerging winds bring with them a renewed sense of legal authority sourced in their own epistemology that originally existed apart from the legal cultures of the English- and French-Canadian tradition but that now exist largely as shadows of their precolonial vitality. The momentum is towards the solidification, once again, of Indigenous peoples' legal authorities and traditions. Consequently, the challenge for Canada, as professors John Borrows and David Milward have recognized, is how multiple legal traditions can effectively coexist with/within Canada.[5]

This paper will offer some general comparisons and contrasts between the different legal cultures of the peoples indigenous to Turtle Island and the Euro-Canadian legal traditions. I intend to focus on some common themes of political/legal thought that are, in my opinion, broadly characteristic of Indigenous normative values. I recognize that there are differences in substantive and procedural law between Indigenous nations in North America; yet, at a theoretical level, as is the case with nations that are based on Western legal traditions, some broad and common understandings that are generally

3 One of the most powerful descriptions of the overall impact of colonization is contained in the Report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back. Vol. 1* (Ottawa: Minister of Supply and Services, 1996).

4 The Idle No More movement that began in December of 2012 is a good example of a strong wind of renewed Indigenous resistance. Will this gust continue and transform into the "prevailing winds" of the land? Time will tell. See <http://idlenomore.ca/>.

5 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) and David Milward, *Aboriginal Justice and the Charter*: *Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012).

shared do exist among Indigenous legal traditions in North America.[6] Prior to discussing Indigenous legal conceptual understandings, I will offer some personal background and an instructive teaching that captures for me the essence of Indigenous legal thought as focused on respectful kinship in regards to all life. One of the reasons I am undertaking this discussion is to show that even though Euro-Canadian and Indigenous legal traditions involve culturally different conceptual understandings, such societies at their roots strive to achieve the same societal goals of order and security.

I then explore the justifications for Indigenous legal authority acceptance into or beside the overall mainstream Canadian legal system. Canada's duty to recognize and legitimize Indigenous legal authority is grounded in Canada's obligation to respect and recognize the expression of Indigenous self-determination. The peoples indigenous to Turtle Island are "peoples" and, as such, are entitled to exercise the right of self-determination as, indeed, all peoples are entitled to as a fundamental principle of international law reflected in Article 1 of the United Nations Charter.[7]

This approach to justifying Indigenous legal authority is sourced in the political status of Indigenous peoples. However, this approach is not necessarily exclusive. It can recognize the value of a cultural-protection approach to boosting the claim for recognition of Indigenous legal authorities and traditions. A cultural-protection approach can evoke the sympathies of Canadians by relying on their worries of the impact of losing Indigenous authenticity. Although valuable in its support of political claims to Indigenous self-determination, a cultural-protection model will never be sufficient as the sole justification for strong autonomously respected recognition of Indigenous legal traditions. Reliance solely on a cultural-protection approach within a liberal democracy like Canada will only lead to a limited and subservient form of acceptance of Indigenous legal authority; even then, this acceptance is only possible if the cultural differences being recognized do not threaten fundamental "Canadian" principles embedded in the values of the dominant Euro-White society or the colonial claim to a monopoly on ultimate governance authority.[8]

6 See generally the discussion in James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: University of Saskatchewan, 2006) at 116-177.

7 *Charter of the United Nations*, 26 June 1945, Can TS 1945 No 7 online: United Nations <http://ww.un.org/en/documents/charter/index.shtml>.

8 The limitations of including Indigenous knowledge and practice can also be seen in the test for proving Aboriginal title by the Supreme Court of Canada in decisions like *R v Marshall; R. v. Bernard*, 2005 SCC 43 at para 48, 61, 77, 80 and 83 , 2 SCR 220. In this case, the court declared that the Mi'kmaq had no title interest in their historical territories because they were too nomadic

Moreover, liberal principles of multiculturalism or protection of cultural differences for their own sake as the dominant justification perspective is theoretically difficult to support because of the innate problems of cultural relativism. We cannot logically resolve the question of what is authentically Indigenous and distinct from Euro-Canadian culture, and therefore valuable and worthy of protection from assimilative pressures.[9]

Recognition of Indigenous legal traditions based on the political status of self-determining peoples is preferable because it is possible to avoid the unsolvable problems of cultural characterization, as such efforts are irrelevant to Indigenous institutions grounded in peoplehood. It does not matter whether the legal system at issue is culturally "genuine" or not to make valid assertions relying on political status as opposed to cultural or racial differences. The legal system asserted as a political expression of self-determination does not depend on how closely it resembles the pre-contact culture of the Indigenous nations (whether Mohawk, Cree, or Coast Salish). Culture is irrelevant on this score. Some Indigenous communities may wish to retrench legal authority based on a strong representation of historical traditions with little interest in colonial or contemporary Canadian approaches to justice. Others may choose to integrate colonial systems to varying degrees. However, when an Indigenous authority decides to embrace or revitalize traditional processes, including substantive laws, the fact that they may look very different from mainstream Canadian processes or laws should not be confused with the idea that the community lacks a justice system.

Thus, it is important to show how, despite looking and functioning very differently from colonial processes, Indigenous legal orders still achieve functional social order within their communities. Recognition that different nor-

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to establish title under British common law criteria. Thus, the Mi'kmaq have become squatters in their own traditional lands. This conclusion was rendered despite the court's claim that they were taking the Indigenous perspective into account. For an excellent account of this judicial doubletalk see Minniwaanagogiizhigook (Dawnis Kennedy), "Reconciliation without Respect? Section 35 and Indigenous Legal Orders" in *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) at 77.

9 There has always been a school of thought that Indigenous peoples' cultures are worthy of protection and that there is a right to cultural protection separate from any other principle of law governing the protection of their existence. This approach leads down a slippery philosophical and theoretical slope. The fact that certain tribes have historically been defined as Indian and later as White, based on the degree of civilization they exhibit, is evident of the problem of cultural relativism embedded in recognizing Indigenous culture as a right divorced of political status. See Chapter Three "Cultural Relativism and the Doctrine of Aboriginal Rights" in my LLM thesis for a more elaborate analysis of this concern. Larry Chartrand, *The Political Dimension of Aboriginal Rights* (LLM thesis, Queen's University, 2001) [unpublished] See generally Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67.

mative beliefs and mechanisms can achieve effective social order can also help counter stereotypes about the nature of Indigenous legal orders as pre-legal or primitive that continue to be perpetuated by the public and indeed at times by "our" esteemed judiciary.

For example, one need only recount the infamous remarks of Justice McEachern in *Delgamuukw* in which he described the pre-contact society of the Gitksan as "nasty, brutish and short".[10] Perhaps more disconcerting are the remarks made by the Chief Justice of Quebec at Convocation for the graduates of the University of Ottawa law students in the spring of 2011.[11] He spoke of the great contributions England and France made to Canada's legal traditions. He spoke eloquently of how Canada is privileged to have inherited such fine legal traditions and how Canada is an example to the world of how to embrace different legal traditions in harmony. He extolled the virtues of bi-juridicalism. Then, later in his remarks, not wanting to forget mentioning the First Peoples entirely,[12] he spoke of the contribution of Indigenous peoples to Canada. He celebrated that Indigenous peoples contributed a cure for scurvy, invented the canoe and snowshoe, and then finally acknowledged the need to address outstanding land claims. My reaction to his remarks was disbelief leading to grave disgust. How is it, I thought, that a man of such stature, who spoke so elegantly about the imported foreign colonial legal traditions, could be so ignorant about the contributions of the Indigenous peoples that all he could remark upon were canoes and snowshoes?[13]

10 [1991] 3 WWR 97 (BCSC), 79 DRL (4th) 185, McEachern CJ [*Delgamuukw*]. For an insightful review of this trial decision see James (Sákéj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: University of Saskatchewan, 2006) at 118. This book also has much to offer in terms of understanding Indigenous Legal Traditions. See especially Chapter 4 entitled "Nature of First Nations Jurisprudence".

11 The Honourable JJ Michel Robert, Convocation Address (Speech delivered at the Faculty of Law, University of Ottawa, 12 June 2011), [unpublished], online: University of Ottawa <http://www.president.uottawa.ca/video-gallery_32-1.html?movie=20110711-honorary-doctorate-jj-michel-robert>.

12 It was rather ironic that the only graduate student to be awarded a PhD degree in law during that convocation was an Indigenous student who was under my supervision, an Indigenous law professor.

13 For an explanation of why the judiciary is so ignorant and disrespectful of Indigenous peoples' civilizations, see Robert A Williams Jr, *Like a Loaded Weapon: The Rehnquist Court, Indian Rights and the Legal History of Racism in America* (Minneapolis: University of Minnesota Press, 2005). For a Canadian perspective, see Grace Li Xiu Woo, *Ghost Dancing with Colonialism: Decolonization and Indigenous Rights at the Supreme Court of Canada* (Vancouver: UBC Press, 2011). Neither author attributes the disrespect and ignorance of Indigenous peoples by the highest judges in North America as deliberate and conscious racism but rather as manifestations of their socialization in a society that embodied highly stereotypical ideas of "Indians."

Thus, one of the reasons for providing descriptions of some key Indigenous legal concepts is to show these systems are not simple or barbaric with no sense of principled legal rationality or authority. Through attempts to describe complexity, effectiveness, and legitimacy of Indigenous legal traditions, we can dismantle the ignorant myths perpetuated by the public and legal community.

Yet it is not enough simply to include Indigenous perspectives in the common law or to take into account Indigenous customs when sentencing Aboriginal offenders.

Indigenous systems of legal order must be allowed to stand on their own terms.[14] Prior to colonial contact, Indigenous peoples possessed institutions that met the needs of their society. These institutions may not have looked like their Western-European counterparts, but they nonetheless allowed such societies to function and, indeed, flourish within an Indigenous perspective of values.[15] These governing institutions were highly developed, efficient, and interdependent, having evolved over thousands of years.[16]

14 Of course from a practical perspective, given the degree of integration, there will be a need to accommodate both common and civil law systems. Indeed, there may even be a desire within some communities to borrow and adopt various aspects of colonial legal traditions in the same way that Christianity has been adopted and included alongside Indigenous spiritual traditions and has made Indigenous societies even richer and more diverse. The point, however, as I argue later, is that this process must be free from coercion. For a model of how this can be achieved, even within the confines of the *Canadian Charter of Rights*, see Milward, *supra* note 5.

15 The Coast Salish legal tradition is a representative case as significant aspects of its legal processes and structures are an integral part of the pot latch institution. Decisions made within the long house occur within the context of political, spiritual, and legal affirmations. These decision-making processes do not look like the colonial process captured by a single authoritative space with a judge sitting above the rest of the participants separate from political matters. Sarah Morales, professor of law at the University of Ottawa, is completing her PhD thesis on Coast Salish law. For an excellent video summary of her work see Sara Morales, "Cooperation or Conquest: Coast Salish Legal Traditions & the Canadian State" (5 June 2012), online: Lawyers' Rights Watch Canada <http://www.lrwc.org/sarah-morales-cooperation-or-conquest-coast-salish-legal-traditions-the-canadian-state-video/>.

16 Over the years, a number of academics (both Indigenous and non-Indigenous) have increasingly provided descriptive accounts of Indigenous legal traditions. (Michael Coyle, James Dumont, and Rupert Ross are notable earlier contributions.) This trend is growing as academics and Indigenous communities become increasingly more concerned with identifying and revitalizing Indigenous legal orders and, in many cases, through Indigenous research methodologies that challenge the orthodox research paradigm of the academy. (Scholars include Ron George, Val Napoleon, Darlene Johnston, John Borrows, Sákéj Henderson, Kiera Ladner, David Milward, Janna Promislow, Sarah Morales, Hadley Friedland and many others.) Concurrent with this growth in the normative study of Indigenous legal traditions, law schools in Canada are increasingly teaching Indigenous law and processes and are pushing back on the myth of Canada as a bi-juridical state where the imposed colonial English and French systems are the only ones recognized and taught. (See for example, Faculty of Law course curricula from the University of Ottawa, University of Windsor, University of Victoria and the University of British Columbia.) Moreover, many communities have established justice projects to revitalize their legal traditions and, in some cases, to codify their traditional

After colonial contact, Indigenous peoples contributed more than what Canadians typically acknowledge, including structures of government, such as how to establish a federal multinational overarching common constitution.[17] Other forms of knowledge Indigenous peoples shared with the settlers include agricultural technology, health and pharmacological technology, and engineering — not just canoes and snowshoes.[18]

In terms of justice, an essential and related message is that if we remove the Canadian justice system — its laws and institutions and indeed its government — the result is not legal chaos or a legal vacuum. Yet this situation is what politicians and jurists assume would occur if Canadian laws were declared invalid for whatever reason.[19] On the contrary, the default is not chaos,

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laws. (Lac La Matre, Saddle Lake, Teslin Tingit and Carcross/Tagish First Nations are some examples.) On a more regional basis, the Anishinabek communities are undertaking a "Restoration of Jurisdiction" process which includes the incorporation of the traditional clan system and the Seven Grandfather Teachings into their Anishinabek Nation Constitution building exercise. See Union of Ontario Indians, "Serving the Anishinabek throughout Ontario" online: Anishinabek Nation <http://www.anishinabek.ca>.

17 Notable is the contribution of the Haudenasaunee Confederacy model of governance to the creation of the United States Constitution. See Chief Jake Swamp & Gregory Schaaf, *The U.S. Constitution and the Great Law of Peace*: *A Comparison of Two Founding Documents* (Sante Fe: CIAC Press, 2004). This book also contains the Concurrent Resolution of the House of Representatives and the Senate. Significantly the preamble states:

> Whereas the original framers of the Constitutions, including most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts, principles and governmental practices of the Six Nations of the Iroquois Confederacy; and,
>
> Whereas the confederation of the original Thirteen Colonies into one republic was explicitly modeled upon the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself; and,
>
> Whereas since the formation of the United States, the Congress has recognized the sovereign status of Indian tribes, and has, through the exercise of powers reserved to the Federal Government in the Commerce Clause of the Constitution (art. I, s8, cl.3), dealt with Indian tribes on a government-to-government basis and has, through the treaty clause (art. II, s2, cl.2) entered into three hundred and seventy treaties with Indian tribal nations; …

18 See David Newhouse, Cora Voyageur & Dan Beavon, eds, *Hidden in Plain Sight: Contributions of Aboriginal Peoples to Canadian Identity and Culture* (Toronto: University of Toronto Press, 2005).

19 For example, the Supreme Court of Canada always seems to insist that some residual regulatory power remain with federal or provincial governments even when Aboriginal or Treaty rights are upheld and recognized as being possessed by an Aboriginal community as a collective. They worry that without some residual regulatory oversight there would be a legal vacuum and chaos, as if without some regulatory interference, the "Indians" would run wild in the bush exploiting resources. They forget that Indigenous peoples have laws to regulate the use of resources within the environment and are likely more conservation-minded (given the high degree of respect to "mother earth" within many Indigenous worldviews) than any federal or provincial equivalent laws. Emily Walter, Michael M'Gonigle and Celeste Mckay, "Fishing Around the Law: The Pacific Salmon

but rather Indigenous legal authority, which has always existed in the territory now called Canada and continues to exist (despite being weakened and smothered by colonization and racism).

Now, I will offer some ideas of the foundational nature of Indigenous legal cultures as I have come to understand them over the course of some 25 years of life experience and study. I begin with a story of how I came to value Indigenous spirituality and Indigenous legal thought. Later, I will discuss the institutionalization of Indigenous legal orders within Canada.

Appreciating the indigenous world view

In the mid-80s, I began my studies of the laws and legal systems of Indigenous peoples. Later, as an academic, I decided to offer a course on such legal cultures and traditions. The first law course on the legal traditions of the Indigenous peoples at any law school in Canada was one that I developed at the University of Alberta in 1992. The research I completed for this course was extensive, comprising the contents of an entire file cabinet. The table of contents for the course book included descriptions of traditional law from a variety of sources.[20]

However, if I am to write from a place of credibility regarding the knowledge of Indigenous legal traditions, I feel I am obliged to share things about my experience that are not typical of academic curriculum vitae. It is one thing to acknowledge that I have read widely on the subject of Indigenous legal traditions and have researched the field in a way the mainstream expects of academic scholarship. Evidence of my scholarly credibility includes publications, presentations, and courses I have taught concerning Indigenous legal authorities. Less evident is the degree to which I have internalized and participated in Indigenous experiences, teachings, and traditions. These informal non-institutional (in the mainstream sense) experiences have also shaped my understanding of Indigenous authority and legal processes and require some elaboration here.

Management System as a "Structural Infringement" of Aboriginal Rights (2000) 45 McGill L. J. 263. The judicial tendency to ignore Indigenous legal authority is particularly evident in *R v Nikal,* [1996] 1 SCR 1013, [1996] SCJ No 47, *R v Marshall,* [1999]3 SCR 456, SCJ No 55, and *R v Marshall,* [1999] 3 SCR 533, SCJ No 66. I discuss at some length the problem of ignoring the political dimension of Aboriginal rights in my LLM thesis. See Larry Chartrand, *The Political Dimension of Aboriginal Rights* (Queen's University, 2001) [unpublished].

20 At the time there was no commercial textbook. Fortunately, Professors Borrows, Henderson and Milward have undertaken the task of providing texts which I now use for a similar course I currently teach. See Borrows and Milward, *supra* note 5, Henderson, *supra* note 6.

Spirituality and its relationship to law

In the same way that spirituality has and continues to inform the common law, so too does spirituality inform Indigenous legal traditions. In the common law, such connections today are resisted, even denied (lest they taint the rationality of law); in Indigenous legal traditions, however, spiritual elements are naturally accepted. Yet, interestingly, much of tort law, for example, is based on and sustained by Christian beliefs. For example, Lord Atkin relied on the Biblical neighbour principle in his development of the modern-day tort of negligence, one of the most significant of the torts. This precept was then adopted into Lord Atkin's famous determination of the scope of the duty-of-care in the tort of negligence, as articulated in *Donoghue v Stevenson*.[21]

Contemporary Western law tries to maintain a distance from its religious roots. Western culture prefers to characterize law as a rational system divorced from non-legal influences. The law is strongly contested to be based on principled rationality (notwithstanding that the supremacy of God is the first principle articulated in the *Constitution Act*, 1982 and that the formal Head of State, the Monarch, must be of Christian faith [Protestant not Catholic]). Indigenous cultures continue to be more accepting of spiritual beliefs influencing and informing legal thought. Indeed, the idea of separation (given a strong holistic and interdependent belief system) would seem unnatural and foreign.[22] It would be difficult, if not impossible, to separate the law, social norms, and spiritual beliefs into discrete compartments.

Nor is it the case that Indigenous cultures have yet to progress to a Western legal model of thought in which law is perceived and preferred to be in isolation of spiritual and religious beliefs. Indigenous cultures would regard such attempts as fictitious and unnatural. It is important to stress, then, that Indigenous legal traditions are not lower in the scale of evolution simply because of such a holistic epistemological understanding of law that embraces the spiritual realm. Indigenous legal traditions are different, not inferior.[23] Henderson describes Indigenous social orders in a similar way:

> The Indigenous teaching about learning and justice as animate forces in human consciousness continues to justify our efforts to create a fair legal system and legal reform. The answers to the question of the value of law witness the same legal sensi-

21 *Donoghue v Stevenson*, [1932] UKHL 100, AC 562.

22 James (Sákéj) Youngblood Henderson, *"Postcolonial Indigenous Legal Consciousness"* (2002) 1 Indigenous LJ 1 at 27.

23 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide* (Canada: Minister of Supply and Services, 1996) at 14 and 236.

> bility that was operative at the time treaties were signed. We believe in the spiritual force of law and justice in Indigenous knowledge and languages, independent of Eurocentric legal concepts and how Europeans use them.[24]

At this point, I believe that an examination of my own spiritual background will help explain how I came to embrace Indigenous teachings.

I was never raised Christian. My parents had experienced Christianity early in their lives and those experiences were anything but positive, which resulted in their commitment that their children would never be raised Christian or undergo a Christian education. This was sometimes difficult for me as I was growing up in rural Alberta. At one point, I attended a small rural Catholic school in Rivière Qui Barre, Alberta. I remember sitting apart from my grade five classmates who took Religion class as I was excluded from this class. This exclusion resulted in teasing and bullying during recess. I remember spending most of my recesses hiding.

My second introduction to formal spirituality many years later was much more positive through the generosity of Indigenous Elders near Edmonton where I went to university. In particular, I was introduced to Dakota spirituality and began participating in the teachings and ceremony associated with the Dakota sweat lodge tradition. *Wakan Tanka* became my acknowledged spiritual focus and it is this Great Spirit that I ask to hear my prayers. I still pray in the language of the Dakota when I am in the sweat or when I smudge.

I remember my first Dakota sweat vividly. Elder Stan Shanks and his assistant Cliff Pompana were my guides/teachers at the time.[25] They said that I may experience a vision during the sweat but not to worry if one does not come, as it is often the case that participants may have many sweats without ever having a vision. Notwithstanding this reassurance, I did experience what I can only describe as a "vision" that first time. It occurred in a sweat lodge within a mature forest clearing near Sherwood Park close to Edmonton almost 30 years ago, yet I remember it as if it were yesterday:

> It was dark inside and the heat and steam very hot. During the fourth round, I could see an ember in the rock pit of the sweat lodge. The walls and roof that enclosed me seemed to begin to disappear as if I was now standing in an expanse of darkness but with only one light — the ember. That light formed into a newborn infant small, helpless, completely dependent. It cried, but there was no sound to be heard. As the

24 Henderson, *supra* note 22 at 27.

25 Out of respect for these Elders, I will not go into any details regarding these teachings as I am no longer in touch with them.

> ember began to change shape into a baby, it began to rise at the same time towards the sky, and I looked up to where it was heading and all I could see was a brilliant star-filled night sky. I watched it slowly rise as time itself seemed enormously condensed so that I was witnessing an eternity in only a few moments. In the end, the baby transformed into one of the many stars above.

I did not inform my Dakota teachers that I had a vision during that first sweat. I felt unworthy to have one, as I had only begun to learn of Dakota spiritual traditions. I kept the experience of that vision to myself for many years and I have never spoken of it in public. I have yet to be confident of its full meaning or significance. Since that time in the forest I have treasured and sought out as many opportunities to listen to Elders and Spiritual leaders from many of the Indigenous nations. I am grateful for all their teachings and humble wisdom.

For example, over the course of several years I learned foundational teachings relating to the Medicine Wheel and the Eagle, which are prominent symbols with valuable social messages. For the benefit of subsequent discussion, I offer a snapshot of their significance at this point.

The Wheel

The Medicine Wheel is cut into the four directions: North, South, East, and West. The Medicine wheel can offer many teachings to those who understand its gifts. It is as much medicine as it is a tool for teaching. Some of the teachings are legal, in that they convey values and principles of how one is to relate to the environment, to oneself, to others, and to the spirit world. Teachings based on the Medicine Wheel often speak of living a healthy way socially, mentally, spiritually, and physically. Such holistic and nonlinear teachings provide important guidance as to how to behave. A holistic understanding of our relations is embedded in such teachings and emphasizes the fact that as humans we are only one of many within the same circle. There is no apex in the circle; there is only kinship.

The Eagle

The Eagle is prominent within many Indigenous knowledge systems, as it embodies a powerful spirit and demands our greatest respect. Many seek the wisdom of the Eagle. Ceremonies rely upon its feathers as a symbol of respect and courage. The feather represents truth and must be treated with great respect when earned. I earned one when I was working for the University of Alberta as Director of the Indigenous Law Program at the Faculty of Law. I was in

Winnipeg for a lengthy period of time and I got to know the Fontaine family from Sagkeeng First Nation quite well. When I arrived in the community for a visit over Christmas holidays I was met by an Elder from the family, and, to my surprise, he had an Eagle feather for me. He gifted it to me because of my work in promoting and helping Indigenous students obtain a legal education. I was surprised and deeply honoured and thought that I did not deserve it as I had only just started my professional legal career in 1989. I received the feather around 1994 and in 2013 I still carry and protect the feather. I now use it as part of the talking circle protocol in my Indigenous Law Traditions class after I explain its teachings and provenance.

The Eagle feather has been used in court rooms in Canada as a means to bind one's conscience as an alternative to the Bible when swearing an oath. As a recent witness in an Ottawa courthouse involving a minor traffic violation, I have personally relied on it. Although the court clerk did not know what to do when I insisted on using the Eagle feather, the judge decided to let me speak with the Eagle feather in my hand, notwithstanding the lack of precedent. The University of Ottawa Legal Aid Clinic had initiated the "Eagle Feather" project to encourage courthouses to provide an Eagle feather as an alternative for Indigenous witnesses, but the project faded away a few years ago and no longer exists. Given my experience, I suggest the Eagle Feather project should be reinitiated under the careful guidance of local Elders.

A teaching

One teaching stands out more than any other and it came not from an Elder or even a human being but rather from the life of the land itself. It is a sacred place, perhaps unknown to others, although I have difficulty believing that others are not aware of the spot. Maybe it is supposed to remain undiscovered.

About four summers ago, I went fishing with my father and his friend Mervin Bellrose from the Paddle Prairie Métis Settlement. My parents first met Mervin when they lived in a remote part of the Paddle Prairie Settlement on the banks of the mighty Peace River near Carcajou on the way to Armstrong Flats. Mervin was one of our closest neighbours even though he lived about an hour's drive away. It was an untouched place where nature dominated and demanded respect.[26] The nearest grocery store was almost two hours away by

26 For a history of the area and a brief synopsis of my family's life in the Paddle Prairie Métis Settlement in Alberta, see Keg River Historical Book Committee, *Way Out Here: A History of Carcajou, Chinchaga, Keg River, Paddle Prairie, Twin Lakes* (Keg River: Keg River History Book Committee, 1994).

dirt then gravel and then highway to Manning or High Level. My parents lived there for many years before moving south to be closer to Edmonton, mostly for health reasons.

Mervin had recently purchased a fishing camp on an island in the eastern arm of Great Slave Lake between Fort Resolution and Snow Drift. The lake itself is massive (the ninth largest in the world) and the deepest on Turtle Island with many islands and inlets. The camp is accessible by a long boat ride from Fort Resolution. We settled at the fish camp that was to be our base for the next few days while we explored the fishing around the many islands. We paired into three boats and I went with a young man that Mervin knew. It was on the third day that we went northeast. We found a bay and had great luck with catching some big Northern Pike. We then noticed a small corridor at the back of the bay past a weed bed and decided to follow it. It faced straight south and was long and narrow with steep cliffs on both sides.

I had spent the previous day with Mervin. My father, Mervin's usual fishing partner, was not feeling well so he stayed in camp. The morning was bright and sunny and we went west from camp and found an enclosed bay. On a fairly large rocky outcropping there was a small grove of trees. One particular tree stood out; on top of this tree was the home of an Eagle. We could see it circling overhead from time to time and it watched us curiously. We knew we were in a good place to catch fish as an Eagle will only make a home where the fish are plenty. We made a few casts and, sure enough, we had three or four fish. Mervin thought that we should see if there were any Eagle feathers at the base of the Eagle's tree. We landed on the shore near its home and I climbed out of the boat and searched the area. I returned to the boat empty-handed, but Mervin asked that I still toss out one of the larger fish we caught onto the shore for the Eagle and I did.

The next day, back in the narrow channel heading south, my fishing companion and I came upon an opening after navigating that narrow passageway. At first we did not know the significance of the place, but it quickly dawned upon us that we had stumbled upon a most sacred place. We were in a part of the lake into which four channels from each direction converged. There was a slow curved wall of rock and land immediately to the right of us and facing west was a channel that split the rock and land. The same pattern repeated itself in each direction. We were surrounded by a rocky landscape apart from the four channels of water. More significant was the fact that in the middle of that body of water was a small island with an Eagle's nest in a tree. We both then saw the Eagle flying overhead, gliding. Watching. My companion and I

quickly understood the significance of the moment. We were awed. We felt we should not stay there very long and quickly exited through the eastern door. I could not believe that we had come across a naturally formed geographical replica of the Medicine Wheel with an Eagle watching, which we both surmised was there for a special protective reason. We left in silence and did not speak of the gift we received that day again.

Some general reflections on the nature of indigenous legal traditions

In my formal and informal studies of Indigenous legal orders and systems over the years, I have been able to appreciate some dimensions or characteristics that warrant highlighting.

I do not presume to offer a theory of Indigenous legal order because I still have much to learn. Nor am I sure that it is possible to identify a single theory of law characteristic of Indigenous societies on Turtle Island. No doubt there are common threads that exist to a greater or lesser extent among Indigenous nations in how law is conceived and appreciated. Indigenous nations are not isolated islands unto themselves nations within geographical proximity will influence and be influenced by other nations and share similar ideas, values, and worldviews. European cultures also experienced this mutual influencing. The common law, for example, uses language borrowed from the French and Latin traditions.[27] Indeed, there is recent evidence of sharing between common law and Indigenous law as judges of Indigenous heritage incorporate traditional perspectives into their legal opinions and processes.

I intend to discuss certain conceptual characteristics of Indigenous legal orders, some of which can be contrasted with Western legal concepts (a methodology that admittedly risks furthering an inappropriately simplified dualistic analysis fraught with unintentional stereotyping of Western and Indigenous societies). Yet, in undertaking this comparison, I raise some insights about different yet equally functional legal systems and traditions. Thus, my purpose here is rather narrow. I do not intend, nor is it possible within the scope of this paper, to provide a nuanced and comprehensive analysis of prominent Indigenous legal concepts and knowledge. In a modest sense, I capture some of the essence of Indigenous legal thought and tradition as I have come to understand them.

27 Sharron Gu, *The Boundaries of Meaning and the Formation of Law* (Montreal: McGill-Queen's University Press, 2006) at 5.

The principle of progress as renewal

Must knowledge always be "new" in order to be considered progress? Much has been said about the fact that traditional Indigenous knowledge regarding cosmology is inherently circular and that European knowledge is inherently linear.[28] However, little has been claimed about the implications on legal thought or order within Indigenous communities of such cosmological perspectives. Research that turns to this question suggests that such understandings will lead to different expectations of how to deal with social problems and judicial processes. For example, Professor Leroy Little Bear has spoken of how Western philosophy contributes to singular product-oriented thinking as opposed to the cyclical, holistic worldview evident in Indigenous thinking.[29] The Western criminal justice system focuses on the individual and generally filters out other factors and relationships as irrelevant.[30] Conversely, in Indigenous thinking, the offender is not an "abstract" individual isolated from the community but part of a network of relationships which is implicated by the offender's illegal behaviour.

A 1991 Alberta Government Inquiry into the impact of the justice system on Aboriginal peoples (Cawsey Report) explored some of the implications of linear as compared to cyclical thought on the nature and expectations of justice and governance:

> The values that arise out of a linear/singular worldview will differ markedly from wholistic/cyclical worldview.
>
> Linear thinking lends itself to a singularity of view. Implicit is the idea that a line leads to one thing. Ramifications of this idea are beliefs that there can be only on god, only one true answer, one and only one way. Horizontal and hierarchical chronologies are still other outgrowths of the linear and singular worldview.…
>
> In contrast to White society's linear/singular worldview, the Indian and Metis worldviews can be characterized as cyclical/wholistic, generalist and process oriented. The cyclical/wholistic view looks at time in terms of cosmological cycles and patterns and not in terms of an artificial creation of "time units". Cosmological cycles are generally unperceivable in terms of change. Consequently, time at the functional, opera-

28 See for example, Jim Dumont, *First Nations Regional Longitudinal Health Survey (RHS) Cultural Framework* (February 2005) online: <http://www.rhs-ers.ca/sites/default/files/ENpdf/RHS_General/developing-a-cultural-framework.pdf>. How distinct these cosmological differences remain today as a result of many years of mutual acculturation remains debatable.

29 Leroy Little Bear, "What's Einstein Got to Do With It?" in Richard Gosse, James (Sákéj) Youngblood Henderson & Roger Carter, eds, *Continuing Poundmaker and Riel's Quest* (Saskatoon: Purich Publishing, 1994) at 71.

30 *Ibid* at 72.

> tive day to day level is not considered dynamic, and therefore, is not an important referent. The wholistic view leads to an implicit assumption that everything is interrelated. Inter-relatedness leads to an implicit idea of equality among all creation. Equality is brought about by the implicit belief that everything — humans, animals, plants, and inorganic matter — has a spirit.[31]

There is value in returning to tradition. The use and preservation of traditional knowledge is understood as part of the whole and integral to the cycle and progress of life. In such a context, law is reserved for fundamental principles to guide social behaviour. Such laws are broad enough to be recycled to fit new situations. Laws do not necessarily need to be reinvented to fit new situations; they simply need to be applied in thoughtfully calculated ways to meet new circumstances. Law-making (legislative function) and the application of the law (judicial function) are virtually identical in traditional Indigenous legal thought, as social order problems are solved within the context of individual disputes relying on legal function broadly defined.

In contrast, the Western worldview is future-oriented and concerned with discovery and the production of new knowledge — Western society considers this progress. This belief is manifest in the need to create new laws for new problems. The internet is new; we need a new law. Cloning of humans is new; we need a new law. Technological advancements compromise privacy; we need a new law. More is better. We have so many laws and regulations in Canadian society that it is impossible to know them all. The rule of law becomes devalued as new legal solutions are created for every new problem. As a result, its spirit is becoming diluted. Now, law itself is becoming increasingly trivial as it becomes diluted in the mundane; its normative rigour made qualitatively weaker in the process. But that is another story for another day.

The interrelated and cyclical idea of human existence helps explain why social disorder within many Indigenous communities is not the exclusive domain of only a few "relevant" actors. There are no restrictions on who can participate in the resolution of social disorder. Everyone is potentially affected within an epistemological view of interrelatedness. This idea includes not only human but also animal and spiritual participation in the resolution of social problems.[32] In such places of wide deliberation with many affected

31 Alberta, Justice and Solicitor General, *Justice on Trial (Cawsey Report)* (Edmonton: Government of Alberta, 1991) at c 9-2 – c 9-3.

32 It is also true that authority may not necessarily rest in the hands of human agency, but in the spiritual realm or animal realm. For example in Dene legal traditions, medicine power exists as a means to bring about resolution of social harm. Moreover, legal relations can exist between human and spirit or between human and animal (other life). Thus, it is not only humans that possess legal

voices speaking, technical, concrete, and prescriptive regulations will often have little value. The focus is on the broader legal principles and how they are to be interpreted in line with the ultimate objective of maintaining healthy kinship. Certainty of interactional expectations is developed and fostered in kinship and thus contributes to a sense of social security. Brenda MacDougall brings this perspective to life in her analysis of Métis culture in northwestern Saskatchewan. She states:

> What makes the northwest truly compelling is that it is home to one of the oldest, most culturally homogenous Metis communities in western Canada, a community of people who grounded themselves in the lands of their Cree and Dene grandmothers by adhering to a way of being embodied in the protocols of *wahkootowin*. The Metis family structure that emerged in the northwest and as Sakitawak was rooted in the history and culture of Cree and Dene progenitors, and therefore in a worldview that privileged relatedness to land, people (living, ancestral, and those to come), the spirit world, and creatures inhabiting the space. In short, this worldview, wahkootowin, is predicated upon a specific Aboriginal notion and definition of family as a broadly conceived sense of relatedness with all beings, human and non-human, living and dead, physical and spiritual.[33]

The principle of balance

The concept of balance figures prominently in Indigenous normative thinking. It is inherently a relational concept and related to the principle of interconnected holism discussed above. Social harmony and order, is achieved through balance. Balance reflects the idea that no single life force should possess unlimited detached power over others. It also means that law is not merely an abstract set of ideas, obligations, and rights. Rather, law is more of an internalized set of understandings for valuing harmonious relationships. Law is but one of many interrelated tools for maintaining social and ecological balance.[34] The boundaries between law, politics, spiritual beliefs, and social mores are porous. In this sense, problems are resolved holistically. In Western society, by contrast, there is a strong desire to keep law separate from politics. Indeed, judges will be strongly criticized for entering into the political and executive branches of government and vice versa as political and executive government

agency but rather all life. For example, the story "Cheely Brings the Caribou to K'Ahbamitue" recalled by George Blondin demonstrates a kinship relationship between a Dene community and the caribou. From a Western perspective this agreement might be characterized as "contractual." See George Blondin, *Yamoria the Lawmaker*: *Stories of the Dene* (Edmonton: NeWest Press, 1997) at 116.

33 Brenda MacDougall, *One of the Family: Metis Culture in Nineteenth-Century Northwestern Saskatchewan* (Vancouver: UBC Press, 2010) at 3.

34 Henderson, *supra* note 6.

actions will be found unconstitutional if they intrude too far into the judicial branch.[35] This division of powers is seen as essential in a Western democracy like Canada to ensure proper checks and balances. The risk of corruption and dictatorial arbitrary power ever looms over those who act for the benefit of the public. Dividing power minimizes such risks. This division also ensures accountability as actions of one branch will always be reviewable by the other branches.

From a Western perspective, the idea that legal problems can be simultaneously approached from a holistic perspective may seem to risk abuse of authority. This perspective may be true if the decisions being made are from entrenched centralized authority (such as a judge or political leader). It is less risky when decisions are made in a highly decentralized manner with ultimate authority residing in the community as a whole. In this context, individual leadership is practical, functional, conditional, discretionary, and based on recognized knowledge and skill concerning the matters at hand rather than based on entrenched status through some abstract "office" of authority. In this structure, accountability is widespread and direct. I have witnessed the effectiveness of this kind of decentralized community-based decision-making process through the traditional consensus-circle process (for example, as used in law-school sponsored Kawaskimhon Moot programs) in which monopolization of discussion and manipulation is difficult if not impossible to achieve. Thus, the Western model is not the only model for ensuring accountability and minimizing risk of abuse of authority. Unfortunately, problems arise when the democratic Western model of the abstract "office" of Chief and Council is imposed without correspondingly effective culturally sensitive Western-model checks and balances.

The principle of life-wide legal agency equality

Western society views humanity as the focus of legal agency. In Western legal thought, we speak of "human" rights. However, this narrow focus is itself culturally determinative. From a Western liberal democratic perspective, law is about human agency and how to maximize human security, freedom, and wealth. Thus, when humans are the only legally relevant reference, it matters less how non-human life is affected. It thus becomes possible to own animals, plants, and the land itself. If we do not limit our focus to human rights, but instead expand the inclusion of legal agency to all life, then rather than speaking of human rights we can speak of *life* rights.

35 See *Macmillan Bloedel Ltd v Simpson,* [1995] 4 SCR 725 at para 8, SCJ No 101.

Some Indigenous legal traditions have an extended awareness of interests worthy of independent legal recognition. There is an understanding of respect for all life that equates all life with equal worth and a communally authoritative voice. Humans are no better or worse than other life. Consequently, other life, including Mother Earth, has a voice and a right to negotiate its relationship with others, including humans. The relationship does not allow one to disregard the perspective of the land or the animal. Rather, humans must consult with the animals and the earth if we wish to engage with them or rely on them for life sustaining resources. This principle of balance and equality demands respect for these other non-human perspectives.[36]

The principle of decentralized normativity and decision-making

Indigenous legal decision making is highly decentralized. This decentralization may be a by-product of the oral tradition in the historical context of highly panoptic homogeneous communities.[37] Related to this characteristic is the closeness of normative responsibilities to the individual, family, and community. The responsibilities of normative order are not delegated to a specialized body or group but rather are more internal and immediate, thus allowing for a wide network of verification. This characteristic accounts for its horizontal and egalitarian features[38] but does not mean that certain individuals or groups (families, Houses, clans, Totems) do not have distinct roles and responsibilities in resolving conflict or determining rights and obligations.[39]

Through this process, the law is more internalized and intimate. There is close control over legal matters and more widespread agency in regard to the nature of the law. Because of this internalization, a legal system with these characteristics prevents people from being a slave to "the law." Such social ordering processes also tend to prevent law as a social concept from being too powerful. The value of law as a concept is kept in check and not overstated in its importance as a societal institution. These features may make Indigenous legal orders seem almost invisible to the outsider. Yet visible mechanisms exist when the issue demands greater witness and prudence, such as when

36 Borrows, *supra* note 5 at 244-245.

37 Val Napoleon, "Living Together: Gitksan Reasoning as a Foundation for Consent" in Jeremy Webber & Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2010) at 64.

38 Napoleon, *ibid* at 60.

39 Napoleon, *ibid* at 65.

community members become a serious threat to the wellbeing of the entire community.[40]

Both Indigenous legal traditions based on customary law (articulated in oral legends and stories passed down from generation to generation) and the common law have similar roots in local laws as understood by the local community. The primary difference, however, is that in the common law, a specialist enforcer or decision-maker such as a judge interprets and applies the law. In Indigenous systems, the community as a whole fulfills this role, in the sense that each member has the responsibility and authority (usually in consultation with Elders) to apply the law as understood communally. Hence, Euro-Canadian law tends to be more rigid and inherently more concrete and passive, characterized by externalized abstract binding rules and detached authority.

Indigenous societies can be described as inherently complex, dynamic, and liberal systems of governance. Related to this conception is the highly free nature of Indigenous societies, as law is generally "contained" for socially important purposes of maintaining harmony and social order within society. The ethic of "non-interference," identified by the Manitoba Justice Inquiry, reflects the importance given to individual freedom in traditional Indigenous societies:

> It promotes positive interpersonal relationships by discouraging coercion of any kind, be it physical, verbal or psychological. It stems from a high degree of respect for every individual's independence and regards interference or restriction of a person's personal freedom as "undesirable behaviour."[41]

The above accounts of fundamental legal principles within Indigenous society are not meant to be a comprehensive overview and may not apply to all the diverse legal traditions of Turtle Island. Nor may they necessarily reflect the dominant views of the contemporary community as colonization has eroded their relevance over time. Band Councils often function within the Western framework of governance, producing written by-laws that become specialized discrete positivist prescriptions of authority not easily compatible

40 Hadley Louise Friedland, *The Wetiko (Windigo) Legal Principles: Responding to Harmful People in Cree, Anishinabek and Saulteaux Societies — Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns* (LLM thesis, University of Alberta, 2009) [unpublished].

41 Public Inquiry into the Administration of Justice an Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People, Vol. 1* (Manitoba: Queen's Printer, 1991) at 31.

with traditional legal orders. My purpose is to describe principles that have some general resonance and ongoing endurance, notwithstanding the imposition of the Western model, in order to demonstrate that legal traditions may look very different from the Western Euro-Canadian system but still achieve their ultimate purpose of maintaining human security. Indigenous communities have had a coherent set of principles which have inherent value as a means of achieving social order. It is understandable that such communities may wish to reinvigorate these principles within the broader Aboriginal rights movement. Yet, when a community wishes to reinforce such traditional values and approaches, the implementation will be met by the intransient and often unyielding monopolizing force of the Western common and civil legal traditions. The following discussion explores ways of overcoming such barriers to judicial self-determination within Canada.

Changing the climate: institutionalizing indigenous social order traditions

At this point, I would like to discuss the principal sources for legal and political recognition of Indigenous legal systems as authoritative in Canada. Some argue that Indigenous legal traditions should be recognized and protected because of their cultural value. Unfortunately, this approach can diminish or detract from the objectives of political recognition of Aboriginal peoples and nations as sovereign authorities. I agree with Avigail Eisenberg that cultural rights arguments can benefit Aboriginal peoples,[42] but ultimately you can have all the cultural rights you want recognized (even Aboriginal self-government as a form of protected cultural right)[43] but the Aboriginal community will remain subordinate to Canadian legal authority. I prefer to argue for the recognition of Aboriginal legal traditions based on the principle of self-determination of peoples (i.e. peoplehood).[44] As a people, Indigenous

42 Avigail Eisenberg, "Domestic and International Norms for Assessing Indigenous Identity Claims" (Presentation delivered at the Indigenous Peoples and Governance International Conference of Montréal, 17 April 2012) [unpublished] online: Michigan Law <http://www.law.umich.edu/workshopsandsymposia/Documents/Eisenberg%20Workshop%20Paper%20(2).pdf>.

43 In *Alberta v Cunningham,* 2011 SCC 37 at para 88, 2 SCR 670, the Supreme Court of Canada characterized the Métis Settlements legislation, which sets aside separate lands held in common by the Métis communities and governance authority, as an ameliorative program designed to protect the unique and distinct Métis culture under s 15(2) of the *Charter* in response to a challenge by someone who regained Indian status and thus could no longer live on Métis settlement land.

44 The Royal Commission on Aboriginal Peoples concluded in 1996 that "Aboriginal peoples are not racial groups; rather they are organic political and cultural entities." As such, they are "nations vested with the right of self-determination" and are "sovereign within their several spheres" of

communities and authorities possess the right to self-determination, including the right to maintain and develop their own legal traditions and not to have another imposed.[45]

The value of cultural differences is in the sharing between societies. Comparative legal studies is a valuable exercise in itself that can lead to various insights.[46]

I do not propose to offer any assessments of which legal tradition is better than the other; one legal culture deserves no greater or lesser protection as against the other legal tradition. Differences in how social order is maintained do not justify diminishing the status of the other or rendering traditional values essentially invisible by the overwhelming force of colonization. If there is to be a measure of how well a legal tradition functions, then we must turn to the regime of international human rights.[47] As long as a social order system does not condone the abuse of accepted human rights (e.g. slavery, arbitrary discrimination, etc.), we must deem this system acceptable regardless of its institutional characteristics or how they differ from Euro-Canadian institutions. Even so, it is up to Indigenous nations to be mindful of these human rights in their governance. Self-governing entities, even within a broader union, are not exempt from complying with international human rights standards. However, it is not up to Canada or any other government entity to "enforce" these human right standards in violation of other human rights, such as the collective human rights of Indigenous self-determination.[48] The *Charter*

authority. Royal Commission on Aboriginal Peoples, *Restructuring the Relationship Volume 2, Part One,* (Canada: Minister of Supply and Services, 1996) at 177, 180 and 244, respectively.

45 Royal Commission on Aboriginal Peoples, *ibid* at 254-256.

46 Borrows, *supra* note 5 at 21-22.

47 I am not naïve to the fact that international law has not been fair or just in the development of fundamental principles of human rights; how can a system or process be credible if it has historically excluded certain national voices in the discussion of international law? For a historical review of the early international period regarding the peoples of the "new world," see L Leslie C Green & Olive Patricia Dickason, *The Law of the Nations and the New World* (Edmonton: University of Alberta Press, 1989). The legitimacy of the international human rights standard-setting process is vitally dependent on the inclusion of Indigenous peoples. Confidence in its credibility demands no less. A step in the right direction, the United Nations Indigenous Forum offers a permanent voice at the international level and is a critical element in furthering the credibility of international law. Nevertheless, there are problems with the degree to which the Indigenous voice is heard due to the subordinate level in which the Forum is situated within the United Nations hierarchy, as an expert advisory body to the Economic and Social Council.. See the official United Nations website of the Permanent Forum: http://social.un.org/index/IndigenousPeoples.aspx.

48 The right of self-determination is found in Article One of the United Nations Charter itself. Its application to Indigenous peoples has been recently confirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st Sess, Annex, Agenda Item 68, UN Doc A/Res/61/295 (2007) at 1 [*UN Declaration*] passed overwhelmingly by the United Nations General

of the United Nations and the edicts of human rights agencies must only apply to the independent governments of Indigenous peoples by agreement and not by unilateral imposition.[49]

In making this statement, I purposely place myself within a certain uncompromising perspective from which Indigenous independence and authority must be free from unilateral external imposition by Canadian authorities. This position cannot be easily reconciled with the view that individuals whose rights are abused by Aboriginal governments should be allowed to find redress by resorting to Canadian legal processes. I acknowledge that in some Aboriginal communities, governance is incapable or unwilling to protect members from abuses, sometimes because traditional internal normative processes have been damaged by colonization or because individual leaders do not identify with certain human rights standards for usually selfish reasons. I am also aware that it is mostly the vulnerable (women and children) who are disproportionately unable to have their human rights respected when such communities are dysfunctional.[50] Despite acknowledging these harms, and despite knowing that Canadian human rights law may rectify such abuses if applied, I will not alter my position against Canadian legal imposition without the consent of the Aboriginal community or leadership to which such members belong.

Assembly. As a declaration, it may not in itself be effective to raise legal arguments because it is not a binding document per se. However, in a number of instances this comprehensive human rights instrument is declaratory of customary international law, which is binding. One of the principles of customary law is the principle of the right to self-determination. Canada is likewise bound to give recognition to this principle. Moreover, "courts have the legal capacity to take the *Declaration* into account in interpreting Indigenous peoples' rights." See Paul Joffe, "Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?" in Jackie Hartley, Paul Joffe & Jennifer Preston, eds, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (Saskatoon: Purich Publishing, 2010) at 91.

49 This discussion reflects the tension between rigorously upholding self-government and the protection of individual human rights guaranteed under Canadian law. This tension seems to be a constant in politics, law, and policy initiatives in Canada these days. Attempts to diffuse this tension range from ignoring it altogether to making Aboriginal governance and laws subject to the individual rights protections contained within Canadian human rights law. See the history and analysis around section 25 of the *Charter* and compare it to the new provisions of the *Canadian Human Rights Act*, RSC 1985, c H-6 that now allows for it to apply to *Indian Act*, RSC 1985, c I-5 government authorities. See Pamela D Palmater, *Beyond Blood: Rethinking Indigenous Identity* (Saskatoon: Purich Publishing, 2007) for an insightful discussion and perspective on this issue. For an interesting discussion of this tension in the United States context see Dan Russell, *A People's Dream* (Vancouver: UBC Press, 2000).

50 See Larry Chartrand & Celeste McKay, *A Review of Research on Criminal Victimization and First Nations, Métis and Inuit Peoples 1990 -2001* (Ottawa: Department of Justice, 2006).

Of course, I acknowledge that states have a duty to protect and it is at this point when states are not only justified to intervene, but that they have a duty to do so in order to protect vulnerable populations.[51] However, through persuasion and human rights awareness and knowledge, I advocate for positive institutional change in the protection of individual human rights, short of the violation of the community's right to responsible self-determination. This position does not mean pushing for a Western cultural understanding of human rights or the values that inform them. I know that healthy Indigenous traditions would not countenance such abuses either.[52] It matters not, however, which model — Western, Indigenous or hybrid — is ultimately adopted by Indigenous peoples to deal with human rights or social order as long as the decision is based on their own informed choice and not imposed externally.

It is in the face of these Indigenous government decisions and processes that Canadian governments are now obliged to give way. This obligation to provide jurisdictional space for Indigenous legal traditions to apply to their territories and citizens stems from Canada's responsibility to uphold the minimum human rights standards as they apply to Indigenous peoples including respecting the right of Indigenous peoples to exercise the right of self-determination.

It is no longer acceptable to impose Canadian law or processes without consent or consultation. This kind of unilateral act is colonialism, and I would add that it is the kind of action that exemplifies systemic racism as well.[53] In order to appreciate why such a unilateral action is wrong, one must appreciate that Indigenous communities, as distinct peoples, possess distinct

51 It may be argued that if the leadership in a community is so completely dysfunctional, then such a state of affairs is akin to a community possessing no effective government at all. Under such circumstances, other governments may be justified in intervening as such a dysfunctional government is not in a credible position to protest the interference within their internal affairs for the purpose of protecting fundamental human rights. The universal protection of human beings from unjustified harm in the context of complicit leadership and authority overrides formal jurisdictional barriers of sovereignty. Sovereignty must be exercised responsibly. This is the hard lesson the international community has learned from the Rwanda genocide, for example. The development of the "Responsibility to Protect" principle in international humanitarian law is an example of when it is justified to intervene in the internal affairs of self-governing states for humanitarian reasons. Gareth Evans, "From Humanitarian Intervention to the Responsibility to Protect" (2006) 2 Wis Int'l LJ 703. For an account of the failure of the international community to intervene when they had a duty to do so, see Roméo Dallaire, *Shake Hands with the Devil: The Failure of Humanity in Rwanda* (Canada: Random House of Canada, 2003).

52 For example, see Taiaiake Alfred, *Wasáse*: *Indigenous Pathways of Action and Freedom* (Toronto: University of Toronto Press, 2005).

53 Williams, s*upra* note 13.

and independent political governments.[54] They entered into treaties with the British and subsequent Canadian governments on a nation-to-nation basis and in some cases as wartime allies.[55] From the beginning, the imposition of the *Indian Act* was wrong and marked a serious violation of the independent governance rights of the First Nations and a violation of their right to self-determination. It might be excusable to have imposed the *Indian Act* unilaterally on the Indigenous nations in 1879, before an understanding of human rights evolved to what it is today, but that excuse is no longer acceptable and the Federal Government knows that. More difficult to justify is how British/Canadian authority was dishonest and deceitful with regard to promises made in Treaties by enacting legislation that is directly contradictory to such contractual obligations or by simply ignoring them.[56] Regardless of what view of human rights may have prevailed at the time, deceit and fraud were clearly as wrong then as they are today.[57]

Although it is now arguably legally wrong to pursue policies unilaterally that affect Indigenous peoples, according to current views of the state's minimum human rights obligations, without proper consultation and consent unilateral imposition is also now unacceptable within Canada's own domestic internal legal system. The Supreme Court of Canada has recently stated in several important landmark cases (*Haida, Mikisew, Rio Tinto*, and *Beckman*)[58] that if the government proposes legislation or policy that has an impact on valid interests possessed or claimed by Indigenous peoples, it must meaningfully consult with Indigenous communities and "accommodate" their concerns in the case of unproven rights and, in cases where there is serious and

54 Royal Commission on Aboriginal Peoples, *supra* note 44.

55 For an excellent understanding of the nature of the treaty relationship, see Office of the Treaty Commissioner, *Treaty Implementation: Fulfilling the Covenant* (Saskatoon: Office of the Treaty Commissioner, 2007). For an excellent historical case study of the Haudenosaunee resistance to British/Canadian authority based on their position as a national ally of Britain see Constance Backhouse, "'They are a People Unacquainted with Subordination' — First Nations Sovereignty Claims: *Sero v Gault*, Ontario, 1921" in *Colour-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: University of Toronto Press, 1999).

56 The violation of Treaty terms has occurred in every part of Canada from the Maritimes to Nunavut. In terms of the numbered treaties, on the prairies violations occurred in terms of governance, resource use, reserve creation, and legal authority. See Office of the Treaty Commissioner, *ibid*.

57 Andrea Carmen, "The Right to Free, Prior, and Informed Consent: A Framework for Harmonious Relations and New Processes for Redress" in Jackie Hartley, Paul Joffe and Jennifer Preston, *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (Saskatoon: Purich Publishing, 2010) at 126.

58 *Haida Nation v British Columbia (Minister of Forests),* 2004 SCC 73, 3 SCR 511 [*Haida*]; *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69, 3 SCR 388 [*Mikisew*]; *Rio Tinto Alcan Inc v Carrier Sekani Tribal Council,* 2010 SCC 43, 2 SCR 650 [*Rio Tinto*]; *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53, 3 SCR 103 [*Beckman*].

significant interference, obtain full consent (akin to a veto) even in the case of proven rights.[59] Surely the "governance" interests, including Indigenous traditions of social order, would trigger the duty to consult and accommodate when such interests are asserted and may be negatively affected by proposed government action. Thus, to undertake legislative or policy actions that have a potentially negative effect on these governance interests, Canadian governments are, at minimum, constitutionally bound to consult. In *Beckman*, Justices LeBel and Deschamps, in exploring the nature of the duty to consult, held that it flows from the Honour of the Crown, which transcends classification as an Aboriginal or Treaty right. The duty to consult is a standalone constitutional obligation.[60] Arguably, then, this duty applies to any collectively asserted Indigenous interest and would naturally lead to the collective right to manage and apply an autonomous judicial system.[61]

International legal recognition of human rights — as belonging to Indigenous peoples and outlined in Canada's Constitution — demands a meaningful consultation process before the federal or provincial governments can enact any legislation that may affect Indigenous peoples' interests.[62]

As I will explain below, I do not pursue the case that an Aboriginal right to revive and/or apply an Indigenous legal tradition flows from Canadian common law recognition of Aboriginal rights in section 35 of the Constitution. The case has been made that an Indigenous judicial system is an Aboriginal

59 In terms of asserted, but unproven claims see *Haida, ibid,*, and *Rio Tinto, ibid,* and in terms of proven claims, see *Delgamuukw*, *supra* note 10. In terms of the duty applied in a treaty context see *Mikisew, ibid,* and *Beckman, ibid.*.

60 *Beckman, ibid at* para 141.

61 It is yet to be determined whether the dicta in *R v Pamajewon,* [1996] 2 SCR 821 at 27, 4 CNLR 164 regarding the inability of the court to entertain broadly framed claimed rights will be applied to asserted but unproven claims or rights. If this limitation of what is considered "cognizable" enough is applied to asserted but unproven rights under a duty to consult analysis, then it may be difficult or impossible for an Indigenous community to assert a broad right to control justice or social order even if only for the purposes of a duty to consult analysis based on the honour of the Crown principle as per *Haida*, *supra* note 58.

62 Contra, *R v Lefthand,* [2007] 4 CNLR 281 (ABCA) at para 38 held that the duty to consult cannot bind Parliament's authority to legislate and therefore the duty does not apply to proposed as opposed to enacted legislation. One must wait until the legislation is passed before it can be challenged. In my respectful opinion, the court's reasoning is weak on this point because it fails to fully appreciate that the process nature of the duty to consult is a constitutional principle which in the case of legislation that impacts Aboriginal interests should bind Parliament's authority. There is no logical distinction between Parliament making decisions and an administrative board as far as the duty to consult obligation is invoked. After all, administrative boards are given delegated powers from Parliament. Theoretically, Parliament could repeal all delegated powers to administrative boards. Where then is the duty to consult?

right (and in some cases as a treaty right).[63] Despite the value in consultation, consultation is not consent. Moreover, achieving formal recognition through reliance on section 35 in the courts is largely illusory, as the claims must be characterized to fit within an excessively narrow colonial construct and is difficult and expensive to prove.[64] I intend, rather, to rely on international law. Recognition of the right to self-determination flows from an international human-rights perspective of equality rather than the inherently colonial one currently embedded in the doctrine of Aboriginal rights, as defined by the Supreme Court of Canada in its Eurocentric interpretation of section 35 of the Constitution that unsuccessfully attempts to lessen the racist impact of the doctrine of *terra nullius*.[65]

The international human right of indigenous legal authority

I see the source of the emergent winds of Indigenous legal authority coming principally from within our communities as part of the larger Indigenous rights and cultural regeneration movements.[66] It is first through our own actions and within our own communities that we must begin to rebuild our political strength and thereby be in a position to reassert our own legal traditions, regardless of the degree to which we hold to pre-contact practices and values. It is the assertion itself that matters, not the content of those assertions. We can sort out the characteristics of what is being asserted internally, between ourselves, within our communities, on our own terms. Most importantly, in the assertion of this right to decide, we must stand united. It is our right and our responsibility.

Indigenous scholar Patricia Monture-Angus knew this was the path we must follow. She knew that the wellbeing of Indigenous peoples is primarily

63 Royal Commission on Aboriginal Peoples, *supra* note 44 at 254-256. For a very detailed and thorough analysis, see Matthias Leonardy, *First Nations Criminal Jurisdiction in Canada*: *The Aboriginal Right to Peacemaking Under Public International and Canadian Constitutional Law* (Saskatoon: University of Saskatchewan, 1998).

64 Milward, *supra* note 5 at 40.

65 Larry Chartrand, "The Story in Aboriginal Law and Aboriginal Law in the Story: A Métis Professor's Journey" in Sanda Rodgers & Sheila McIntyre, *The Supreme Court of Canada and Social Justice: Commitment, Retrenchment or Retreat* (Toronto: LexisNexis Canada, 2010).

66 Gordon Christie, "Culture, Self-Determination and Colonialism: Issues Around the Revitalization of Indigenous Legal Traditions" (2007) 6 Indigenous LJ 13. The view that transformative fundamental reform will be obtained from change driven from within our communities is consistent with Indigenous critical theory. See Tracey Lindberg, *Critical Indigenous Legal Theory* (Diss. Faculty of Law, University of Ottawa, 2007).

up to us as citizens to manage and that we must actively shed the colonial baggage we carry and free ourselves from the control of the colonizer: that is, we must become *free*.[67] Our independence begins within each of us as Indigenous peoples. We can view the emergence of the Idle No More movement as a manifestation of this obligation.

Indeed, the way to freedom is the Eagle's path.

International human rights law as it is contextualized to the experience of colonization will provide support in following the Eagle's path. The right to Indigenous legal authority is recognized in the United Nations Declaration of the Rights of Indigenous Peoples. Indeed, there are a number of articles that directly relate to this collective human right of Indigenous judicial recognition:

> Article 9 of the Declaration asserts that "Indigenous peoples have the right to belong to Indigenous communities or nations according to their own traditions and customs."
>
> Article 19 provides that "Indigenous peoples have the right […] to maintain and develop their own decision making institutions."
>
> Article 33 recognizes that Indigenous peoples have the "right to maintain a justice system in accordance with their legal traditions".[68]

In addition, the Organization of American States has produced a draft Declaration on the Rights of Indigenous Peoples.[69] Article 15 and 16 expressly deal with the right to self-government and Indigenous law, respectively. With respect to the right to maintain Indigenous structures of legal authority, Article 16 states:

> 1. Indigenous law shall be recognized as a part of the states' legal system and of the framework in which the social and economic development of the states takes place.
>
> 2. Indigenous Peoples have the right to maintain and reinforce their Indigenous legal systems and also to apply them to matters within their communities, including

67 Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999).

68 *UN Declaration*, *supra* note 48. For a copy of the Declaration along with useful commentary, see Indigenous Bar Association, *Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples: An Introductory Handbook* (Winnipeg: Indigenous Bar Association, 2011).

69 Approved by the Inter-American Commission on Human Rights, *Proposed American Declaration on the Rights of Indigenous Peoples* (Washington, DC: Organization of American States, 26 February 1997) online: Organization of American States <http://www.cidh.oas.org/indigenas/chap.2g.htm>.

> systems related to such matters as conflict resolution, crime prevention and maintenance of peace and harmony.
>
> 3. In the jurisdiction of any state, procedures concerning Indigenous Peoples or their interests shall be conducted in such a way as to ensure the right of Indigenous Peoples to full representation with dignity and equality before the law. This shall include observance of Indigenous Law and custom and, where necessary, use of their language.

It should be clear that I do not rely on domestic Canadian law as it has been defined in the common law or in reference to section 35 of the Constitution. I do not attempt to make an argument that Indigenous legal orders are practices, customs, or traditions integral to the distinctive culture of Aboriginal peoples prior to European contact and have continuity to the present day.[70] The doctrine of Aboriginal law as it has matured over time remains immoral and indefensible despite the occasional progressive decision. After all, "decolonization cannot be accomplished by applying colonial law more rigorously".[71]

Yet, despite how deeply entrenched colonial thinking informs Aboriginal rights jurisprudence, Felix Hoehn has convincingly demonstrated that the doctrine of Aboriginal rights may indeed be subject to an *emerging* paradigm shift that places the principle of equality of peoples squarely within the legal analysis of the reconciliation process as embedded in the interpretation of section 35 of the Constitution.[72] For example, Hoehn highlights recent cases such as *Haida* and *Taku River*[73] that now acknowledge the pre-contact sovereignty status of the Indigenous nations as early indications of an emerging paradigm shift. More importantly, these remarks lead to the conclusion that

70 Although one could make a strong argument for this position, I will not give legitimacy to the doctrine of Aboriginal rights by doing so because the doctrine is fundamentally flawed and racist at its core.

71 Grace Woo, *supra*, note 13 at 201. Woo's book is primarily a sociological study of the Supreme Court of Canada's jurisprudence on Aboriginal rights cases beginning with the 1983 decision of *Nowegijick v The Queen* [1983] 1 SCR 29 and ending with the 2005 decision of *Mikisew*. The author systematically assesses these cases according to factors that exhibit the colonial and postcolonial impact. The author first identifies indicia that lead to a colonial understanding of Aboriginal rights analysis. In addition, the author also identifies indicia that support a postcolonial understanding of Aboriginal rights analysis. Together these sets of indicia produce a binary model for analysis. Thus, a decision can be assessed on both scales in this binary model. A judicial opinion could theoretically exhibit simultaneously, within the same judicial opinion, both colonial and postcolonial factors. On a scale of 1 to 10, Woo concludes that the judicial opinions in her study on average score 8 out of 10 for exhibiting indicia of colonial reasoning, whereas the average score for postcolonial indicia is 4.9 out of 10.

72 Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: University of Saskatchewan, 2012).

73 *Haida*, *supra* note 58; *Taku River Tlingit First Nation v British Columbia (Project Assessment Director),* 2004 SCC 74, 3 SCR 550 [*Taku River*].

without consent by way of treaty, Canada's sovereignty will remain invalid and incomplete until there has been consensual agreement between the respective sovereignties.

The principles contained within the UN and OAS Declarations will hopefully guide this jurisprudential paradigm shift and replace existing colonial doctrine with more respectful principles that recognize the collective human rights and legal traditions of Indigenous peoples. Notwithstanding Hoehn's optimism, however, the courts are unlikely to transpose recognition of past Indigenous sovereignty into the present day. The courts will likely maintain the fiction that the assertion of sovereignty (whether coupled with the concept of "effective occupation" or not) is sufficient to establish English sovereignty in a given territory, regardless of the prior Indigenous sovereignty.

The problem the court faces, however, is that this conclusion defies logic. How can one sovereignty dominate another without consent? What logical criterion justifies one having authority over the other? Past justifications based on racial discrimination and prejudice do not satisfy the need for a logical and principled explanation. The Supreme Court will be unable to reconcile this dilemma and is not required to, given the nature of the common law. The Court can simply ignore this problem and conveniently rely on past precedent to justify its conclusions. Yet perhaps a simple appeal to logic and respectful kinship may shift the colonial perspective.

Global warming of indigenous legal climate

Until there are clear skies, the Eagle will have difficulty flying. Canadian legal culture is often praised for being tolerant and even accepting of diversity, including the recognition of both French and English linguistic and juridical cultures. Despite the positives, it is a destructive myth only to think of Canada as bi-juridical or bilingual. This idea of Canada as founded on dual cultures excludes the legal traditions of Indigenous peoples. Yet the impoverished understanding of Canada as only a bi-juridical nation is strongly entrenched.

Despite small pockets of respect and understanding that existed occasionally during early colonial contact, the predominant view of the colonists towards the Indigenous societies became increasingly one of intolerance and disrespect.[74] Well-entrenched within the psyches of the newcomers were de-

74 For an account of mutually respectful relations where there was an adherence to Indigenous legal authority by early European traders see Janna Promislow, "Thou Wilt Not Die of Hunger ... for I Bring Thee Merchandise": Consent, Intersocietal Normativity, and the Exchange of Food at York

finitive conceptions of justice and what law and legal processes should look like. These Western ideas of justice were highly regarded with elaborate protocols connected to their spiritual belief systems. They include a single independent judge, written laws, court rooms with elaborate protocol and costumes, and a written creation story and legends (the Bible) to bind the participant's conscience. Particularly foreign to Indigenous societies, laws and processes were not designed to be applied or carried by the public at large as their own internalized responsibility, but instead wielded by specialized guardians of the law called "lawyers."[75]

These ideas of justice and law acted as a kind of filter. When Europeans arrived, they did not see similar institutions of governance and law among the Indigenous people and thus often assumed the Tribes did not have an organized or civilized system for maintaining law and order. Such societies were accordingly devalued and misunderstood because of this mismatch of culturally determined systems of social order between the peoples of Europe and the peoples of Turtle Island.

In conjunction with the social, political, and economic intolerance that characterized English colonial domination over the peoples Indigenous, there existed heightened legal intolerance, which I term "legal colonization."[76] Others have described the impact of legal colonization from a variety of perspectives; I shall not go into detail in this paper about its destructive impact. Indeed, the literature describing the impact of colonization and its current manifestations in the social and economic statistical profile of Indigenous peoples reflects an overwhelming avalanche of collective social pain.

Yet in the aftermath of destruction caused by colonialization, there is another wind emerging from within the Indigenous spaces, even if only a fragile, preliminary breath. There is now a conditional recognition that the Indigenous roots, although almost destroyed by hurricane winds, can now be "allowed" to grow once again.

However, today's political and legal context is not capable of allowing this growth to occur unrestrained, given the perceived threat to mainstream colo-

Factory, 1682-1763" in Jeremy Webber & Colin Macleod, eds, *Between Consenting Peoples: Political Community and the Meaning of Consent* (Vancouver: UBC Press, 2011).

75 Leroy Little Bear. "Dispute Settlement Among the Naidanac" in Richard Devlin, ed, *Introduction to Jurisprudence* (Toronto: Emond Montgomery, 1990).

76 I am purposely being obtuse with this phrase knowing that it has a double meaning. It means that the displacement of Indigenous legal traditions was considered lawful from the perspective of the colonizer's law.

nial inherited interests that may arise from a vigorously pursued Indigenous revitalization movement. The doctrine of Aboriginal rights as defined by the Canadian courts continues to be a valuable tool in circumscribing and limiting what is possible under this movement. The natural freedom that this Indigenous wind should enjoy is thereby conditioned and contained. There is not yet enough wind for the Eagle to soar freely.

When it comes to revitalizing Indigenous legal traditions, there are barriers to doing so on their own terms. This prevention is not necessarily solely the result of fearful self-interest by the mainstream. The impact of decades of being unable to pursue Indigenous forms of governance and the corresponding damage caused by the incessant messages of inferiority and shame fuelled by prejudice and discrimination are further barriers to advancing the movement. Arguably, much has been irrevocably changed by the passage of time under an intolerant regime. The landscape is permanently scarred by colonial interests that have been internalized by the colonized. Sadly, it is this scarred landscape that is now in many cases the familiar and the Indigenous unfamiliar.

Moreover, it is difficult to determine what this new Indigenous wind of governance in general and legal authority in particular will look like. Valid questions arise as to whether the new wind is indeed even Indigenous in nature.[77] Professor LaRocque has critiqued common assumptions about traditional justice as only about healing and reconciliation and how blind acceptance of this dogma may lead to further victimization of the vulnerable.[78] She asks whether justice is healing or whether healing is justice. Nor is the characterization of traditional justice processes as healing-oriented based on circle consensus-building restorative processes necessarily completely accurate of traditional justice.[79] My research has shown that traditional justice was at times anything but "healing" or restorative in nature but rather immediate, retributive, punitive, and uncompromising.[80] That is not to say that a healing model that focuses on the underlying causes of crime, along with

77 Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997).

78 *Ibid*. See also David Milward, *supra* note 5, Chapter 6 in particular, in which he provides a very thoughtful discussion of how victims interests are at risk within reconciliation models of justice; he proposes minimizing these risks by applying certain safeguards and adequate resources.

79 See for example Michael Coyle, "Traditional Indian Justice in Ontario: A Role for the Present?" (1986) 24 Osgoode Hall LJ 605. I also note that Blackfoot Elders recounted a time when a man was caught tepee crawling. He was tied to a stake with honey poured on him and left there for punishment. (Transcript on file with author.)

80 See also the summary of this aspect of Indigenous traditional justice at Milward, *supra* note 5 at 21.

reconciliation and balance, is not now more appropriate given the impact of colonization; the socio-economic inequalities have exacerbated and disrupted Indigenous society to such a degree that neither traditional pre-contact, nor Western adversarial models are sufficient or appropriate. The "healing model" of justice may very well be a colonial reaction. However, justice cannot, as Professor LaRocque reminds us, focus solely on the interests of the offender and leave the victim(s) behind.

Moreover, Indigenous self-government agreements tend to reflect Western notions of governance. For example, the Nisga'a governance institutions under the land and self-government agreement are very much structured on Western models of democracy, although Indigenous traditions are not altogether ignored. For example, in the Nisga'a Final Agreement, there is a power for the Nisga'a government to create its own Nisga'a court.[81] However, it must function within the existing provincial adversarial model. Traditional customs and knowledge are acknowledged but, with few exceptions, are subordinate to the Euro-Canadian governance structures and institutions adopted in the agreement. It is true that the *Ayuuk*, the ancient legal code of the Nisga'a, is recognized in the land-claim agreement and provides guidance in Nisga'a law-making.[82] Yet the overall structure of the land-claim agreement remains strongly entrenched in a Western model of governance and justice, keeping the *Ayuuk* restrained and subject to overall Canadian legal authority.

Likewise, the Manitoba Justice Inquiry report, progressive as it was, made recommendations that would have resulted in the creation of a mirror image of the Canadian model of how law and legal process is structured and decided.[83] Indigenous bodies would fill the roles of judge and prosecutor and would be more sensitive to culture and language, but it would still be a Western adversarial court system. This tendency to accept Western structures of governance is not unusual to Canada. This has long been the major experience in the United States.[84]

How much of the scarring is permanent and how much can be reclaimed are the questions we need to ask.

81 Nisga'a Final Agreement (Victoria: Queen's Printer, 1999) at Chapter 12, Article 30-52.

82 Law Commission of Canada, *supra* note 6 at 7.

83 Manitoba Justice Inquiry, *supra* note 41.

84 Bradford W Morse, *Indian Tribal Courts in the United States: A Model for Canada* (Saskatoon: University of Saskatchewan, 1980).

Resistance to the reclamation of traditional justice can be conceptualized as being sourced in two kinds of agency, outside and inside. Resistance to reclamation by internal agency is acceptable to the extent that it is made freely and with full dialogue and awareness. If an Indigenous community decides to accept the Canadian system in whole or in part, it would be an acceptable expression of self-determination if it occurred after a fully informed assessment of the circumstances and the acknowledgement of the right to reclaim justice without interference (including what a system based on their traditions would look like in a modern context). The appropriate decision-making levels of the Indigenous peoples must internally decide whether to adhere to traditional institutions, customs, and processes or to meld such traditions with mainstream contemporary influences. This view is not necessarily inconsistent with a traditionalist's agenda. For example, I believe that the right to maintain traditional values and structures of governance is best protected by relying on the inherent political rights of the nations as exercising self-determination. These rights are a stronger source for protecting Indigenous culture because they are beyond the confines of what is possible within a liberal mainstream democracy such as Canada. Within a liberal rights regime like Canada, there are too many limitations and conditions placed on the protection of Indigenous interests because they become translated into cultural interests no different in kind from other cultural interests that are protected for the benefit of minority groups. Such cultural minority interests are not allowed to prevail over the dominant cultural interests of an entrenched Euro-Canadian society.

The well-known case of *Thomas v Norris* illustrates this conflict.[85] In this case, the civil rights of the plaintiff were held to prevail over the Coast Salish Spirit Dance initiation ceremony. Framed as an Aboriginal cultural right, the individual freedoms protected by the common law of battery and false imprisonment prevailed over the rights of the Coast Salish to engage in the cultural/religious practice of the Spirit Dance. Had the issue been framed as a contest between the Coast Salish relationship healing law and the Canadian common law of tort, the issue of Aboriginal jurisdiction over social order and the Canadian jurisdiction over social order would have become much more apparent. The court could not then so easily rely on the argument that cultural and religious rights are not absolute and that they must give way to the interests of the public at large. Framed in the alternative, it no longer becomes individual rights versus collective rights within the same legal system. It becomes a contest between legal systems. From such a perspective, once the boundaries of

85 *Thomas v Norris,* [1992] 2 CNLR 139 (BCSC).

each jurisdiction has been identified, the issue is properly transformed into a conflict of laws or a jurisdictional competency issue.

No doubt, some cultural differences will be recognized within a tolerant liberal democracy so long as they do not threaten Canadian interests and values. We can eat bannock and dance the jig, have powwows and sing our songs, but Indigenous "cultural" interests will not be allowed to intrude too far or conflict too deeply with accepted Canadian values and institutions. For these reasons, I prefer to source the protection of Indigenous traditions and culture including Indigenous legal culture within the broader protection afforded to Indigenous self-determination under the United Nations Charter.[86] I ascribe to this perspective and rely on the exercise of my (prairie Métis) nation's political rights to protect our cultural heritage and values. Having said that, I would likely be considered more of a traditionalist during internal debates within the Métis Nation as to how we should govern ourselves. Indeed, I have expressed such views during community self-government consultation meetings hosted by the Manitoba Métis Federation.

I believe that traditional Métis customs of governance are more appropriate for us than the processes and structures that currently exist within the Métis Nation. Rather than relying on federal or provincial corporations as the vehicle for political decision-making and Robert's Rules of Order, should we not first consider our own traditions?[87] How our leaders were chosen and how the community was governed according to our customs differ from what is required under Canadian-imposed corporate law. Traditionally, we were beholden to no other government and had to report to no one else but ourselves. We had a process for resolving disputes and our substantive laws were tailored for our environment and lifestyle. Our traditional substantive and procedural laws can and should evolve to meet our contemporary needs. I have no issue with borrowing from other cultures but let us begin first with our own. Yet even if I find my views ultimately to be within the minority of our Métis nation, I can accept the majority as the collective will of my people. However, I believe it is unacceptable when prevention or hesitation to reclaim traditional governance comes from outside influences because of racial and colonial reasons or because of the community's own advisors or negotiator's adherence to the unjust doctrine of Aboriginal rights.

86 James (Sákéj) Youngblood Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing, 2008) at 91.

87 Lawrence Barkwell, "Early Law and Social Control Among the Metis" in Samuel Walter Corrigan & Lawrence J Barkwell, eds, *The Struggle for Recognition: Canadian Justice and the Métis Nation* (Winnipeg: Pemmican Publications, 1991).

Presently, there is much of this unacceptable influence occurring. Growth or change within an Indigenous community, to be acceptable from a Canadian legal perspective, must look more like the colonially scarred environment, that is, like Western forms. Whether it is Coast Salish, Algonquin, or Métis, such institutions must be adhere to Euro-Canadian concepts of justice. This insistence on courts, criminal codes, and authoritarian police, evident in the cultural heritage of the colonizer, is a particularly insidious form of assimilation. This legal assimilation is rarely questioned because it possesses legal authority. How can we as lawyers and academics prevent this moulding from taking place?

First, we need to understand what Métis, Algonquin, or Coast Salish governance and legal order is on its own terms and resist using comparison to Euro-Canadian systems for validation. Lawyers are a Western concept and exclusively trained in the Western system. Thus, to bridge the cultural divide and to appreciate Indigenous legal orders on their own terms, lawyers need to transcend their institutional indoctrination. To do so means redefining law and legal process. It requires being open to understanding the function of law as a means to order society in meaningful ways that are comprehensible to the community.

Can law and social order be achieved without Western values, processes, and institutions? The answer is obviously yes, since pre-contact Indigenous societies had lawful and ordered societies without written laws, court rooms, or lawyers. Once cultural influence and imposition are removed, Western-trained lawyers will be better able to see that justice can be achieved through different institutions with their own legal concepts and processes and understand how this justice is communicated and its importance or value as a means of achieving effective social order.

In addition to being open-minded and not prejudging Indigenous systems based on Euro-Canadian terms, the second task is to take Indigenous legal systems seriously by paying them due respect. Law schools can do much to respect Indigenous legal traditions by teaching Indigenous law as part of the curriculum, especially the legal tradition of the nation that occupies the territory in which the university is situated. In Ottawa, this land is the unsurrendered territory of the Algonquin nation. At the Faculty of Law at the University of Ottawa, I have been teaching a course called Indigenous Legal Mechanisms for four years; my pedagogy differs from other law courses. For example, I apply the talking circle methodology employing the Eagle feather to engender respect for the circle and its participants. As academics of law, we

can be more active in teaching Indigenous peoples' laws and legal traditions. We can demonstrate and apply Algonquin law or Dene or Coast Salish laws and processes to resolve legal problems within Canadian legal education.

Canadian courts, however, have not been so willing to accept Indigenous law as an authority for resolving disputes. It is one thing to teach traditional justice in a university classroom and another to implement these practices in a conflict resolution body — particularly an Anglo-Canadian structured court room. A representative case involved a conflict between Algonquin and Ontario law. In the *Frontenac* case, a mining company wished to develop a mine on certain lands in southeastern Ontario.[88] A nearby non-Indigenous community became concerned as the area was already extensively developed. The Algonquin community felt that the land could not sustain additional development and would be harmed. Community deliberations and consultations with Algonquin Elders clarified the obligations of the community to the land: the land is a living entity and under Algonquin law when the land needs help, as in this case, the Algonquin have a legal obligation to provide that assistance. According to John Borrows, this obligation to the land is consistent with Anishinabek principles generally.[89]

In this case, the community felt compelled to set up a road block to prevent the mining operation. Members of the community were charged with contempt of court and some went to jail for resisting.[90] The trial court did not regard the situation as a conflict between two normative orders, but rather assumed that the Canadian legal order was the only valid authority. This kind of judicial response is no longer acceptable. What is needed is respect for Algonquin law and a means to determine mechanisms for resolving issues of authority between Canadian law and Algonquin law (preferably through mechanisms adopted within treaties negotiated equitably and in good faith) where they are perceived as incompatible.

88 *Frontenac Ventures Corporation v Ardoch Algonquin First Nation*, 2008 ONCA 534, 3 CNLR 119 [*Frontenac*].

89 John Borrows, *supra* note 5.

90 The decision to resist Western law is not taken lightly as it may negatively affect a person's life in many ways. The cost to do so to an individual is great: potential loss of job, reputation, criminal record, inability to relocate, etc. For many, however, the cost is greater to remain idle and accept the status quo. Resistance then becomes the least costly option.

The forecast

How can we reframe the issue of self-determination to make it less threatening to the Euro-Canadian system? One way is to avoid the implication that it is an either-or outcome. We must challenge the idea that there can only be one system of law. The conversation needs to change from one of conflict between Indigenous legal orders and Canadian legal orders to one of how to implement a viable system of legal pluralism. Focusing on the concept of legal pluralism helps shift the focus from contestation to compatibility.

Legal educators have a role in reframing this debate and in furthering processes to facilitate the coexistence of Indigenous and colonial legal orders, beginning with the incorporation of Indigenous legal traditions within our substantive law courses. Although I have started to teach Indigenous legal mechanisms as a standalone course, I think it equally important to include Indigenous law within core courses such as contracts or torts.[91] For example, in tort law I now reference Algonquin legal principles regarding land ownership in the context of the Tort of trespass. Moreover, I expect my students to reference such principles in their assignments and exams where appropriate. I have only begun to do this, but we all have a duty to learn and embrace all of Canada's laws — beyond the colonial ones. Fortunately since law is interpreted though our own human agency we can effectively control the legal climate and manipulate the prevailing winds. The legal forecast is up to all of us to decide. Will it be a bright sunny day where the Eagle can fly free or will the forecast be continuing storms on the horizon?

91 John Borrows offers considerable advice as to how to accomplish this including a model law school curriculum integrative of Indigenous legal traditions. Borrows, *supra* note 5.

Indigenous Cultural Rights and Identity Politics in Canada[1]

Avigail Eisenberg[*]

This paper explores how the recognition and protection of Indigenous cultural practices became one of the central ways in which courts use the Constitution Act, 1982 *to recognize and protect Indigenous rights. It considers the Court's 1996 "distinctive culture test" as a response to issues about cultural identity and citizenship raised in Canadian politics and scholarship in the 1970s and 1980s. Whereas serious challenges and risks can develop when judges attempt to assess the cultures of Indigenous people, these challenges are a conventional part of coexistence in diverse societies, to which there are effective responses. Public institutions are obligated to address these challenges in order to develop just and fair relations between Indigenous peoples and the Canadian state. That they have not done so effectively is uncontested, but that they do not have the capacity to do so, I argue, is mistaken and can be misleading in seeking a solution to problems found in the jurisprudence. The key problem with the distinctive culture test is the specific message it conveys — that Indigenous culture can be protected by courts without the state recognizing the right to self-determination — rather than the fact that it sanctions the legal interpretation of Indigenous cultural practices.*

L'auteure de cet article examine comment la reconnaissance et la sauvegarde des pratiques culturelles indigènes sont devenues une des façons essentielles dont les tribunaux utilisent la Loi constitutionnelle de 1982 *pour reconnaître et sauvegarder les droits indigènes. Elle examine le « critère d'une culture distinctive » de la Cour (1996) comme réponse aux questions liées à l'identité culturelle et la citoyenneté soulevées en politique et dans les recherches universitaires effectuées au Canada dans les années 1970 et 1980. Alors que des défis et des risques importants peuvent se présenter lorsque les juges tentent d'évaluer les cultures des peuples autochtones, ces défis sont une partie classique de la coexistence dans les sociétés diverses auxquels il existe des réponses efficaces. Ces défis devraient être envisagés comme des défis que les institutions publiques doivent aborder afin d'établir des relations justes et équitables entre les peuples autochtones et l'État canadien. Qu'elles ne l'ont pas fait efficacement est incontesté mais qu'elles n'ont pas la capacité de le faire, soutient l'auteure, est erroné et peut être trompeur lorsqu'on cherche une solution aux problèmes rencontrés dans la jurisprudence. Le problème clé avec le critère d'une culture distinctive est le message précis qu'il communique, soit que la culture indigène peut être sauvegardée par les tribunaux sans que l'État reconnaisse le droit à l'autodétermination, plutôt que le fait qu'il approuve l'interprétation juridique des pratiques traditionnelles indigènes.*

* Professor in the Department of Political Science and Faculty Associate in the Indigenous Governance Program at the University of Victoria.

1 My thanks to Michael Asch and two anonymous reviewers at the *Review of Constitutional Studies* for their comments and suggestions.

In 1982, those who advocated for a renewed relationship between Indigenous peoples and Canada were understandably ambivalent about the entrenchment of Aboriginal rights in the *Constitution Act, 1982*.[2] Indigenous peoples had not been full participants in the amendment process leading to entrenchment. They were instead relegated to "observer status" during first minister's talks and largely left on the defensive, trying to ensure, through lobbying efforts in Ottawa and the United Kingdom, that the deal forged amongst the provinces and Federal Government would not supersede treaty obligations or have a negative impact on state recognition of Aboriginal status.[3] This was not the first time Indigenous peoples were implicated in Canadian constitutional politics and, based on past experiences, including the recent (at the time) 1969 White Paper,[4] they had good reasons to be skeptical that sections 25 and 35 would transform relations with Canada in a manner consonant with aspirations for self-determination. Indeed the White Paper, the Berger Inquiry into the Mackenzie Pipeline, and the residential school experience all amplified a legacy of exclusion and subjugation suffered by Indigenous peoples in relation to the Canadian state. Few if any scholars or activists thought the Constitution would undo this legacy. Indeed, several legal scholars expressed skepticism about the progressive potential of the new constitutional guarantees and argued that the Constitution did little to recognize the nation-to-nation relation between Indigenous people and Canada or to acknowledge the existence of Aboriginal constitutional orders that predate the settler state.[5]

Yet little doubt exists that the entrenchment of the Constitution signaled the beginning of a new constitutional order in Canada. Although the Constitution was developed and entrenched without adequate participation or consent of Indigenous peoples, Quebec, or indeed any group except the nine

2 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c11 [*Constitution*].

3 For a comprehensive discussion of the participation of Indigenous organizations in the constitutional reform and patriation process, see Russel Lawrence Barsh & James [Sákéj] Youngblood Henderson "Aboriginal Rights, Treaty Rights, and Human Rights: Indian Tribes and 'Constitutional Renewal'" (1982) 17 Journal of Canadian Studies 55 at 73-80 [Barsh and Henderson 1982].

4 Department of Indian Affairs and Northern Development, Statement of the Government of Canada on Indian Policy, (Ottawa: no publisher, 1969), online: Government of Canada <http://www.aadnc-aandc.gc.ca/eng/1100100010189/1100100010191#chp1>.

5 See e.g. Barsh and Henderson 1982, *supra* note 3; Roger Gibbins, "Citizenship, Political and Intergovernmental Problems with Indian Self-Government" in J Rick Ponting, ed, *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1986) 369; Kent McNeil, "The Constitutional Rights of Aboriginal Peoples of Canada" (1982) 4 Sup Ct L Rev 255; Keira L Ladner & Michael McCrossan, "The Road Not Taken: Aboriginal Rights after the Re-Imagining of the Canadian Constitutional Order" in James B Kelly & Christopher P Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 263 [Ladner and McCrossan 2009].

provincial executives, it was negotiated at the height of what has come to be known as an era of identity politics, during which a diverse array of groups had become mobilized and politicized on the basis of features of identity such as gender, race, ethnicity, indigeneity, religion, disability, and sexuality. Even though identity groups were not participants in the official negotiations leading to the 1982 agreement,[6] political struggles involving identity groups and their claims were reflected in the very terms set in the Constitution, for instance, in its provisions to protect against discrimination on the basis of race, religion, gender, disability, and so forth, to recognize multiculturalism, and to guarantee Aboriginal rights.[7] Whereas the mobilization of groups on the basis of identity is not new to Canada, the late 1970s witnessed an increase and intensification of struggles throughout the world by national and cultural minorities, many of which advanced claims for the recognition and protection of their cultural identity, language, customs, traditions, and resources. Indigenous peoples in Canada, the United States, and Latin America were key actors in these struggles and mobilized on the basis of Indigenous identity to advance claims for the recognition of their distinctive cultures and to secure land and other resources needed to protect their ways of life. In Canada, their mobilization was especially intense in reaction to the assimilationist politics of the White Paper in 1969,[8] the politics leading to the Berger Inquiry,[9] and the constitutional reform processes throughout the 1970s. During this time Indigenous people reasserted their treaty rights, reminded Canada of its obligations under international law, and advanced claims for the recognition and protection of customs, traditions, and resources as constitutionally protected Aboriginal rights.

This paper explores how the assessment of Indigenous cultural practices became one of the central ways in which courts recognize and protect Indigenous rights under the Constitution. The first part of the paper looks at the historical background and context from the 1970s until the early 1990s, in which legal protections for Indigenous culture became a primary means to protect Indigenous rights; the second part examines the legal test, which

6 The 1981-2 processes are well known for the elite driven and executive style of decision making.

7 *Supra* note 2 at ss 15, 25, 27, 35.

8 See, for example, Harold Cardinal's visceral reaction to what many Indigenous people now view as a proposal that would have nearly eliminated Aboriginal rights from the Canadian legal landscape in Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: MG Hurig, 1969).

9 Thomas Berger was commissioned for the Inquiry in 1974 and reported in 1977. See Thomas R Berger, *Northern Frontier, Northern Homeland : The Report of the Mackenzie Valley Pipeline Inquiry* (Vancouver: Douglas & McIntyre, 1988).

came to be known as the distinctive culture test, that was eventually adopted by the courts in 1996 to assess claims for the recognition and protection of Aboriginal cultural practices. The distinctive culture test sent two messages about the protection of Aboriginal rights. First, the court presented the test as a way to ensure that important features of Indigenous ways of life are constitutionally protected. Second, the test entrenched the power of the Canadian state to shape Indigenous ways of life by allowing courts to decide, in the current context, which cultural practices merit constitutional protection.

Here, the distinctive culture test is considered a response to the issues raised in the Canadian politics and scholarship about cultural rights in the 1970s and 1980s. The aim of the Supreme Court's test is to protect Indigenous ways of life but only by de-linking this protection from the recognition of Indigenous claims for sovereignty and self-determination. The paper considers two objections to the test and to the project it represents of allowing Canadian courts to assess Indigenous culture as a means to interpret Aboriginal rights in the Constitution. First, the *criteria objection* is that the specific criteria proposed by the judges in the test are narrow and constrain the kinds of claims that can be made. Second, the *general objection* is that the general project endorsed by the test, to allow the court to interpret Indigenous cultural practices, is deeply if not irrevocably flawed. According to the general objection, the legal assessment of cultural practices is a futile and excessively dangerous project.

After considering the test in its historical context, I argue that the general objection is mistaken. Whereas the challenges and risks that can result when judges or other state actors assess the cultures of Indigenous people are both real and serious, they are also a conventional part of and an effective response to coexistence in diverse societies. Canadian public institutions are obligated to address these challenges and risks in order to develop just and fair relations between Indigenous peoples and the Canadian state. That they have not done so effectively is uncontested, but that they do not have the capacity to do so, I argue, is mistaken and misleads us in considering feasible responses to problems found in the jurisprudence. The key problem with the distinctive culture test is the contextually situated message it conveys that Indigenous culture can be adequately protected without the state recognizing the right to self-determination, rather than the general project sanctioned by the test that allows for the legal interpretation of Indigenous cultural practices.

Background and context

In 1990, the Supreme Court of Canada's decision in *R v Sparrow* temporarily allayed some of the skepticism Aboriginal rights scholars and activists initially expressed about the constitutional revisions.[10] In *Sparrow*, the Court held that customs, traditions, and practices that predate European contact could be a basis for Aboriginal rights that were not extinguished by state sovereignty.[11] Moreover, the Court held that the Constitution called for a new "just settlement" for Aboriginal peoples and renounced "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."[12] With these words, the Supreme Court seemed to embrace an understanding of sections 25 and 35 at least somewhat consistent with an Indigenous vision — that constitutional rights ought to guarantee a basis for recognizing the pre-existing claims and legal orders of Indigenous peoples — and, as some have suggested, appeared to provide an opportunity to establish a postcolonial order in Canada.[13]

It was during this time and in the decade subsequent to the *Sparrow* decision that a large and growing scholarly literature emerged in normative legal and political theory that explored a more general, albeit related, philosophical question, namely, how claims to cultural recognition and the accommodation of identity relate to broader principles of justice, freedom, human rights, and democratic citizenship.[14] The leading scholars on the subject, some of whom are Canadian, offered a wide range of arguments to explain why people have a strong sense of identification with their languages, culture, territories, and religions and how this identification can generate legitimate claims that have often been unjustly ignored or suppressed in contemporary nation-states. [15] In their view, these claims can be seen as advancing principles of freedom and equality by remedying the unjust forms of disadvantage or oppression that

10 *R v Sparrow,* [1990] 1 SCR 1075, 70 DLR (4th) 385 (QL) [*Sparrow*].

11 *Ibid* at paras 43-44.

12 Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 Osgoode Hall LJ 95 cited in *Sparrow, ibid* at para 54.

13 Gordon Christie, "Aboriginal Rights, Aboriginal Culture and Protection" (1998) 36 Osgoode Hall LJ 447 at 471-473 [Christie]; Ladner and McCrossan 2009, *supra* note 5 at 272.

14 See e.g. Kwame Anthony Appiah, *The Ethics of Identity* (Princeton: Princeton University Press, 2005); Amy Gutmann, *Identity in Democracy* (Princeton: Princeton University Press, 2003); Will Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) [Kymlicka 1995]; Charles Taylor, *Multiculturalism and the 'Politics of Recognition'* (Princeton: Princeton University Press, 1994) [Taylor]; James Tully, *Strange Multiplicity: Constitutionalism in the Age of Diversity* (Cambridge: Cambridge University Press, 1995) [Tully].

15 Kymlicka, *ibid.;* Taylor, *ibid*.; Tully, *ibid*.

have historically limited the freedom and equality of members of these groups. Identity has the potential to be a helpful and revealing way to track social exclusion and institutional bias. The recognition of identity came to be considered an important means to accord respect to others[16] and identity claims were considered a means by which groups could advocate for a change in the terms by which they had been incorporated into the state. In several cases, historical injustice towards Indigenous people was the leading "real-world" example that these scholars used to illustrate their arguments.[17] In these ways, the normative literature reflected the view that, in real-world struggles, a politics sensitive to considerations of identity can promote justice and emancipation.

Just as the normative scholarship drew inspiration from real world examples of group oppression, including the experience of Indigenous peoples, in the decades following constitutional entrenchment, constitutional scholars drew on this normative scholarship in developing arguments to advance Indigenous claims for renewed and just relations with Canada. Many were optimistic that the aims of the normative theories could inform legal arguments and constitutional guarantees for Indigenous people. Some argued that the Constitution invited the courts to recognize Indigenous identity, or what Patrick Macklem termed "Indigenous difference."[18] As Macklem observed, in the past, cultural difference had served to deny Aboriginal people the right to exercise jurisdiction on their ancestral territories, to vote, and to educate their children in traditional ways, amongst other injustices.[19] However, in the Constitution, "Aboriginal cultural difference, in particular, can serve as a constitutional category that protects everything from ancient customs, practices and traditions to Aboriginal territory and sovereignty."[20] Macklem noted that if the courts narrowly interpreted cultural difference as only referring to culture in a static and isolated form, the potential for positive change was limited: "… the protection of Aboriginal cultural practices captures only a small part of the constitutional relationship between Aboriginal people and the Canadian state."[21] Kymlicka expressed a similar concern about the narrow-

16 David Copp, "Social Unity and the Identity of Persons" (2002) 10 Journal of Political Philosophy 365; Margaret Moore, "Identity Claims and Identity Politics: A Limited Defence" in Igor Primoratz & Aleksandar Pavković, eds, *Identity, Self-Determination and Secession* (London: Ashgate, 2006) 27; Taylor, *ibid*.

17 See especially Kymlicka 1995, *supra* note 14; Tully, *supra* note 14.

18 Avigail Eisenberg, "The Politics of Individuals and Group Difference in Canadian Jurisprudence" (1994) 27 Canadian Journal of Political Science 3 at 12; Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2001) [Macklem].

19 Macklem, *ibid* at 56.

20 *Ibid.*

21 *Ibid* at 62.

ness of arguments based on cultural difference and claimed that those who defend Indigenous rights solely on the basis of radical cultural difference may unintentionally encourage paternalistic attitudes towards Indigenous people by implying that Indigenous peoples cannot safely be exposed to other ways of life or that, given their differences, they are incapable of making informed judgements about external influences. On his view, arguments that use the cultural distinctiveness of a people as a principle justification for recognizing special rights can lead to policies that seek to preserve and isolate communities rather than recognize their self-determination.[22] In contrast, to abandon arguments for Indigenous rights based on radical cultural difference is to connect Indigenous rights to traditional norms of human rights and therefore, at least in this sense, to suggest that Indigenous values are not starkly different from Western values.

In the 1980s and 1990s, as normative scholars were debating cultural rights and theories of multicultural citizenship, Indigenous peoples were engaged in political struggles against the state. In the context of these struggles, Indigenous leaders and scholars often referred to the cultural distinctiveness of Aboriginal societies in presentations, speeches, and briefs intended to mobilize their communities and to explain their opposition to state policies.[23] At the same time, in Canada, most Indigenous actors criticized the state for failing to be faithful to the treaties and not recognizing the Indigenous right to sovereignty and self-determination. For instance, Michael Asch underlined the importance of sovereign nation status to Indigenous goals by framing the argument in *Home and Native Land* in terms of rights to self-determination and self-government rather than rights to hunt, fish, trap, or follow customary practices.[24] In Asch's view, Indigenous peoples are nations and Canada is a multinational state akin to Switzerland and Belgium. Asch explains that the Aboriginal peoples' view on their rights embraces sovereignty first.[25] A consensus view amongst several leaders, he reports, is that

22 Will Kymlicka, "Theorizing Indigenous Rights" (1999) 49 UTLJ 281 at 290-291.

23 See e.g. Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1990) 3 Can Hum Rts YB 3 and Menno Boldt & J Anthony Long, "Tribal Philosophies and the Canadian Charter of Rights and Freedoms" in Menno Boldt and J Anthony Long, eds. *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 333. Despite the emphasis in both papers on cultural distinctiveness as a basis for Aboriginal rights and the argument that cultural difference is the leading reason why the *Charter of Rights and Freedoms* imposes foreign and potentially destructive values on Indigenous communities, in neither case do their arguments preclude the right to self-determination.

24 Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Vancouver: UBC Press, 1984) at 1.

25 *Ibid* at 26.

"aboriginal rights is founded on the fact of 'original' sovereignty" that has not been extinguished through the subsequent occupation by European settlers.[26] The rights of Indigenous peoples to survive and develop as distinct nations and peoples flow from this primary right to sovereignty; Asch notes that the objective that unites native organizations is "limited to insuring that the aboriginal peoples continue to survive and develop as distinct nations."[27] This goal requires restructuring the Canadian political system in a manner that guarantees Aboriginal people the exclusive legislative authority deemed "necessary for…survival and development as a distinct people (or peoples)."[28] In Asch's view, the cultural distinctiveness and survival of Indigenous communities are the leading but not the only reasons why the state should recognize the Aboriginal right to self-determination. Indigenous leaders identify other compelling reasons for the state to recognize Aboriginal rights, such as the existence of self-determining Indigenous societies prior to European settlement, the establishment of treaties, and the absence in these agreements of consent by Indigenous people to cede their rights of self-government and self-determination. Cultural distinctiveness and survival are important values in the context of these broader arguments for self-determination.

Similar views that tie cultural distinctiveness and survival to self-determination are found in numerous official statements of Indigenous organizations in the 1980s and 1990s. In Boldt and Long's 1985 edited collection *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, Indigenous leaders including Oren Lyons, David Ahenakew, Fred Plain, Peter Ittinuar, Clem Chartier, Bill Wilson, and Chief John Snow all argue that cultural survival is a central element of the right to self-determination.[29] Legal and political scholarship by Indigenous[30] and non-

26 *Ibid* at 29.

27 *Ibid* at 35.

28 *Ibid* citing the Rt Honourable Pierre Elliot Trudeau, Opening Statement (Speech delivered at the Constitutional Conference of First Ministers' on the Rights of Aboriginal Peoples, Ottawa, 15 March 1983), Government of Canada.

29 See especially David Ahenakew "Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition" in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 24 at 25 and see also Fred Plain, "A Treatise on the Rights of the Aboriginal Peoples of the Continent of North America" in Menno Boldt & J Anthony Long, eds, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press) 31 at 32.

30 For instance, Barsh and Henderson 1982, *supra* note 3 at 70, make this point by drawing a comparison between Pierre Trudeau's universalist perspective on rights and Rene Levesque's perspective which is based on a "cultural of respect" and equitable division of sovereignty: "This is not Mr Trudeau's utopia in which men are joined by pure reason and abstract political principles, but at once a pragmatic and idealistic appreciation that cultural diversity is real, is unlikely to go

Indigenous scholars,[31] as well as presentations and statements by the Dene, the Metis, the AFN, the Inuit and other organizations during the constitutional conferences discuss cultural distinctiveness alongside the right to self-determination.[32] Nearly all of these accounts frame Indigenous claims as demands for sovereign authority or at least for the recognition of Indigenous peoples as national minorities with the right to self-determination. In much of the scholarship at the time, the right to self-determination is understood as a right to survive as distinct societies with particular ways of life, cultures, and values that are unlike Western values in fundamental respects. In this way, cultural difference was fused to self-determination, and the picture that emerges from this Indigenous discourse during and directly after constitutional change is one that illustrates that Indigenous sovereign authority over certain territories and aspects of life is what it means for distinctive Indigenous ways of life to survive and develop.

Constitutional protection for Indigenous cultures

In 1996, against the background of these debates, the Supreme Court of Canada began to interpret Aboriginal rights as entitlements that protect the distinctive cultures of Indigenous people and, in *R v Van der Peet*, devised the distinctive culture test to determine when an Aboriginal practice (e.g., to hunt, fish, trade, etc.) constitutes a right protected under s35 of the Constitution.[33] The Court's approach can be understood as part of the growing trend in political and legal decision-making to interpret rights through the lens of different dimensions of identity — culture, nation, language, indigeneity, gender, and so on. Canada was not the first to adopt constitutional provisions designed to recognize and protect individual and group identity.[34] Yet the

away without a struggle, and can be harnessed as an asset rather than deplored as a curse, if built upon rather than marked for destruction…. Recognize these communities as substates within a competitive national union, and enjoy the synergy of many cultures loyal to the constitution that entrenches and preserves their right to self-determination."

31 Sally Weaver, "Federal Difficulties and Aboriginal Rights Demands," in Boldt & Long eds. *supra* note 29, 139 at 140-1.

32 See, especially, *supra* note 24

33 [1996] 2 SCR 507, [1996] SCJ No 77 (QL) at paras 48-75 [*Van der Peet*].

34 In the last 30 years, explicit commitments to protect cultural rights or "indigenous identity" have been written to the constitutions of Argentina, Belize, Bolivia, Brazil, Bulgaria, Canada, Croatia, Ecuador, Guatemala, Kosovo, Mexico, Nicaragua, Panama, Paraguay, Peru, Poland, Romania, Slovakia, Slovenia, Venezuela, as well as statutes passed by regions in Italy, Spain (Catalunya), and Germany (Lander). At the international level, protections for identity have been written into EC, *The Charter of Fundamental Rights of the European Union,* [2000] OJ C 364/1, *The Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/RES/61/295, (2007) 1, *The International Labour Organization Convention No. 169*, ILO, (1989),

Canadian test was unique partly because it included such narrow criteria and because it included the "pre-contact requirement," which stipulated that, to be eligible for protection, practices must be traced to a time before contact between Indigenous people and European settlers. The test attracted two types of objections: the *criteria objection*, which focuses on the specific and narrow criteria stipulated in the test, and the *general objection*, which focuses on the general project of cultural interpretation, of which the test is one example.

The criteria objection

According to the *criteria objection*, the legal test developed by the Court is excessively narrow and includes requirements that unfairly limit the kinds of claims Indigenous communities can make. With respect to narrowness, the test requires that claimants define the practice they wish to protect and show that it is jeopardized by specified state regulations,[35] that it is distinctive and integral to the Indigenous culture of their community,[36] and "a defining characteristic"of their culture.[37] These criteria alone invited strong criticism of the test. Some critics charged that the court was essentializing Indigenous culture by reducing complex ways of life to mere practices.[38] Another concern was that the specificity required by the test would dissuade claimants from arguing cases for constitutional protection because, in order to do so, they must submit something like a predefined script, which would then be assessed by outsiders to determine whether it is central to the culture as a whole (which

online: International Labour Organization <http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm>, *Convention on the Rights of the Child*, UNCRCOR, 51st Sess, UN Doc CRC/C/GC/12, (1990), as well as the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UNGAOR, 92d Plen Mtg, UN Doc A/RES/47/135, (1992), to name a few.

35 *Supra* note 33 at paras 51-54.

36 *Ibid* at para 55.

37 *Ibid in Summary of Reasons.* More precisely, the distinctive culture test requires that claimants 1) define the practice they wish to protect precisely and show that it is jeopardized by specific state regulations; 2) show that the practice is of central significance to the culture in question in the sense that it "makes that culture what it is" (Ibid para 85) 3) show that practices have "pre-contact" origins, which means that the practice (in its original form) was central to the distinctive Indigenous culture of the community before Europeans made contact; 4) balance the practice with the legal system with which it conflicts. The Court's job is to render Aboriginal perspectives "cognizable to the non-Aboriginal legal system" through a reconciliation process that places equal weight on each perspective.

38 John Borrows, "Frozen rights in Canada: constitutional interpretation and the trickster" (1997-1998) 22 Am Indian L Rev 37 at 59 [Borrows 1997-1998]; Russel Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet trilogy: Naive imperialism and ropes of sand" (1997) 42 McGill LJ 993 [Barsh and Henderson 1997]; David Murphy, "Prisons of Culture: Judicial Constructions of Indigenous rights in Australia, Canada, and New Zealand" (2008) 87 The Canadian Bar Review 357 [Murphy].

implies that a whole can be delimited) and whether it is distinct in the sense that it alone distinguishes the culture from other cultures.[39] Several critics argued that this requirement was an impossibly tall order. Practices that are adaptable, executed in diverse ways, or whose importance changes over time and circumstances might not pass this test. Indeed, the number of practices that would fit the criteria is likely to be small and the more claimants try to press their claims by presenting their practices to fit the criteria, the more likely they will be inclined to define their practices statically and narrowly.[40] As one litigator describes the problem, the more successful claimants are at passing the test, the more likely they will win constitutional protection for practices that are too narrow to be of real value to them.[41]

A second dimension of the criterion objection is that the "pre-contact requirement" unfairly limits the claims that communities can make. The pre-contact requirement states that only practices central to the community before Aboriginal-European contact, and which remain central today, qualify for protection under s. 35 constitutional guarantees. This criterion operationalizes one of the key aims of the test, which is to protect Canadian sovereign authority by stipulating that the presence of settlers, who eventually established settlements and founded a sovereign state, marks a constitutional change in the terms by which peoples on the territory of Canada can protect their identities and ways of life. Any practice that arose as a result of relations between Aboriginal and settler communities, whether central and culturally distinctive or not, is not eligible for constitutional protection. Practices that are symbolic today but had important functions before contact are more likely to pass the test than practices that are crucial to a community's present way of life but arose mainly as means to help Aboriginal communities survive in the midst of colonization.

Therefore, the distinctive culture test has been criticized for essentializing Indigenous cultures because it entrenches in law and policy stereotypes based on static, narrow, and nostalgic views of a group's cultural identity. It has also been criticized for co-opting Indigenous peoples by incentivizing the defense of narrow and static practices and for rendering a problem about subjugation and colonial domination into a matter of cultural difference.[42] As

39 Barsh and Henderson 1997, *ibid* at 1000-1003.

40 The Court will redescribe claims if it finds that disputed practices have been defined opportunistically or in an overly cautious manner in order to meet the criteria.

41 Michael Ross, *First Nations Sacred Sites in Canada's Courts* (Vancouver: UBC Press, 2005).

42 Jean LeClair, "'Il faut savoir se méfier des oracles': Regards sur le droit et les autochtones" (2011) 41 Recherches Amérindiennes au Québec 102.

Borrows put it, the test "is about what was, 'once upon a time,' central to the survival of a community, not necessarily about what is central, significant and distinctive to the survival of these communities today…"[43] Finally, the test uses Indigenous-European contact as the definitive event to determine what counts as a constitutionally protected cultural practice. Whereas the *Sparrow* decision held out some promise for renewed postcolonial relations between the state and Indigenous people, in *Van der Peet* the court retracts this promise not only by recognizing the Crown as the ultimate sovereign power but also, through the pre-contact requirement, by recognizing the mere presence of European colonists on Aboriginal occupied land as determinative of what counts as distinctive to Aboriginal culture for constitutional purposes.[44]

The general objection

Apart from concerns about the criteria found in this particular legal test, several critics also object to the overall project of cultural assessment as a means to guaranteeing rights. These objections connect concerns about the approach adopted in *Van der Peet* to criticisms of the broader normative project of using cultural and other kinds of identity-based rights as a means to advance freedom and justice for marginalized and oppressed groups. In the case of *Van der Peet*, several critics rejected the very possibility that the courts' interpretation of culture could advance freedom and equality for Indigenous peoples. According to one view, culture cannot be protected by laws that focus on protecting particular practices deemed important to the group; as Gordon Christie argued, practices are manifestations of culture rather than culture itself. In order to protect Aboriginal cultures, courts would have to protect core principles and values that go into structuring the worldview of the people in question, which is not a project credibly undertaken by the court or, for that matter, any outsider to the community in question.[45] Rather than promoting cultural rights, a better way to protect culture is to recognize Indigenous law as having authority over the appropriate practice of Indigenous customs and traditions except where this authority has been surrendered by treaty or legiti-

43 Borrows 1997-1998, *supra* note 38 at 43.

44 Whereas Canadian sovereignty is used as the standard in cases about establishing Aboriginal title, settler–Indigenous contact is used as the standard in cases about cultural practices. See Christina Godlewska & Jeremy Webber "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a" in Hamar Foster, Jeremy Webber, & Heather Raven, eds, *Let Right Be Done: Aboriginal Title, the Calder Case and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 1 at 20-21 and Murphy, *supra* note 38 at 363.

45 Christie, *supra* note 13 at 484.

mately extinguished by the Crown.[46] Another concern related to the general objection is that to determine the centrality of a practice to a culture is futile because practices are usually interdependent so that none is more central than any other and centrality changes over time as circumstances demand.[47] Judgments regarding what is distinctive, specific, or central to a culture are bound to be subjective and pluralistic within a community. To use such subjective judgments as markers for legal rights, as John Borrows points out, is "to permit the determination of rights to be colored by the subjective views of the decision maker."[48]

These are just some ways in which critics questioned the broader enterprise of cultural interpretation and cultural rights. As a means to establish legal rights, the cultural approach of the distinctive culture test seemed deeply flawed not merely because the Court hit on the wrong criteria but also more generally because culture is too subjective, fluid, complex and indeterminate to be interpreted by courts let alone used to establish human rights entitlements.[49] The risk is that a cultural test would "freeze" Indigenous rights and thereby deny to Indigenous people the very kind of protections that they were claiming.[50]

In defense of cultural rights

As the discussion above shows, the objections to *Van der Peet* are twofold. On one hand, the specific criteria of the test were criticized for being narrow, essentialist, and for providing incentives for claimants to expend resources defending practices that may be of little use to them in ensuring the survival of their cultures and communities. On the other hand, several critics objected to the general project of cultural assessment sanctioned by the distinctive culture test. The general objection holds that, broadly speaking, cultural approaches

46 See Barsh and Henderson 1997, *supra* note 38 at 1008. Another way to proceed is for courts to protect key aspects of culture, such as language, that are less open to misinterpretation by outsiders. For consideration of this view in relation to *Van der Peet* and several other cases see Neil Vallance, "The Misuse of 'Culture' by the Supreme Court of Canada" in Avigail Eisenberg, ed, *Diversity and Equality: The Changing Framework of Freedom in Canada* (Vancouver: UBC Press, 2006) 97.

47 Barsh and Henderson 1997, *ibid* at 1000-1001.

48 John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 69. Here Borrows is concurring with the argument given by Justice Beverly McLachlin in her dissenting opinion in *Van der Peet, supra* note 33 at para 247.

49 These concerns have generally been raised by numerous critics across a broad range of scholarly disciplines.

50 Borrows 1997-1998, *supra* note 38; Murphy, *supra* note 38 at 361, 366-376.

carry with them risks that are so great — even insurmountable — that they outweigh any advantages to be gained by groups using them.

It is the second objection, i.e. the general objection, that I argue is mistaken and misleading in ways that distort the understanding of cases such as *Van der Peet* and the determination of ways in which Indigenous-state relations may be improved through the law in the future. A practical and immediate problem is that the general objection makes little sense of the Court decision in *Van der Peet*. Despite the Court's efforts in this case to develop a comprehensive test to assess the centrality of cultural practices, in the end the decision largely rests on one specific criterion, namely the pre-contact requirement that has little to do with interpreting culture. Dorothy Van der Peet lost her case to have salmon trade for the Sto:lo people recognized as an Aboriginal right under the Constitution because the Court decided that this trade became an important part of Sto:lo culture only after Sto:lo contact with European people. In this and several subsequent decisions that employ the distinctive culture test, the main issue is not that the claimants' Aboriginal culture is misinterpreted, but that the pre-contact requirement imposes unfair constraints on Aboriginal rights.[51] As *Van der Peet* showed, the intention of the pre-contact criterion is to ensure that Canadian sovereignty, not culture, is the determining feature for interpreting Aboriginal rights. On this matter, the Court was divided. The dissenting opinions of Justices McLachlin and L'Heureux-Dubé point to the controversial nature of pre-contact. Both suggested that not only does contact have nothing to do with what counts as an important cultural practice, but the criterion limits the breadth and scope of Aboriginal rights as

51 The pre-contact requirement is not the only criterion by which courts have denied claims. In some cases, courts have denied commercial practices, such as the right to fish for commercial purposes (*R v NTC Smokehouse Ltd*, [1996] 2 SCR 672) or to harvest trees to build and sell furniture for commercial purposes (*R v Sappier*; *R v Gray,* [2006] 2 SCR 686, 2006 SCC 54 [*Sappier*]), sometimes by arguing that the practice did not exist in commercial form. They have denied that practices, as defined by claimants, were ever central to communities (e.g. high stakes gambling in *R v Pamajewon*, [1996] 2 SCR 821, [1996] SCJ No 20) and, in *Mitchell v MNR*, 2001 SCC 33, [2001] 2 SCR 911 [*Mitchell*], they ruled that the importance of a practice has to be defined specifically and, in this case, geographically. In *Mitchell*, the Mohawk community claimed that trade of goods across the border between Canada and the US was a distinctive and integral practice that should be recognized as an Aboriginal right. The court held that "The importance of trade — in and of itself — to Mohawk culture is not determinative of the issue. It is necessary on the facts of this case to demonstrate the intregality of this practice to the Mohawk in the specific geographical region in which it is alleged to have been exercised … rather than in the abstract" (*Mitchell* at para 55). My claim is not that the pre-contact requirement is the only reason why courts deny Aboriginal claims using the distinctive culture test but rather that it is one of the key reasons. The question of whether the court has misinterpreted culture in denying the claims at issue in these other cases is not explored here and, to my knowledge, no consensus on this question exists in the scholarship.

they would have been interpreted had the Court displayed fidelity to interpreting rights on the basis of what is important to cultural identity.

Since the general objection to cultural interpretation does not help make sense of the Court's substantive decision in *Van der Peet*, it cannot offer a good sense of the significance of the decision. After all, the Canadian State hardly needs a legal test to essentialize or co-opt Indigenous peoples. For over 100 years policymakers have used views of Indigenous people as childlike, savage, and uncivilized to justify coerced assimilation by banning cultural practices such as the potlatch and winter dances, by removing children to residential schools and thereby destroying family and kinship systems, and by prohibiting Indigenous peoples from voting or hiring lawyers unless they abandoned their reserves and thereby gave up their claim to status in their communities. In these and many other respects, courts and legislatures justified their policies on the basis of essentialist interpretations of Indigenous ways of life, sometimes with the help of expert anthropologists and educators, well before a time when culture rights were recognized, let alone constitutionally recognized. Because of this history, in which cultural difference has been used against Indigenous people to justify disadvantage and subjugation, efforts today to recognize cultural difference as a source of respect and thereby a resource rather than a liability are viewed as attractive and promising by scholars and social movements throughout the world.

Of course, many critics of cultural rights have argued that the best response to historical legacies such as Canada's — namely, treating cultural difference as a liability — is to avoid recognition of any kind of group-based rights or the protection of cultural or other forms of difference.[52] However, one potential consequence of policies that ignore group-based differences in favour of a universalistic ideal of the individual and her rights is the privileging of the majority's culture and a preference for policies that encourage assimilation into a common, usually majoritarian, norm. Canada's historical approach to Indigenous people is once again instructive in this respect. The attempt in 1969 to extend individual rights to Aboriginal people in the White Paper was built on a philosophy of ignoring cultural difference in favour of the rights of universal individual citizens. The White Paper promised equal rights of citizenship and in return would rescind Indigenous entitlements to land, rights, and other claims for jurisdictional sovereignty. The White Paper thereby ignored cultural rights and in doing so threatened to erase a history of

52 For an elaboration of this position see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Cambridge, Mass: Harvard University Press, 2001).

imperialism that characterized settler-Aboriginal relations. Critics feared that universal individual rights would obscure the real power differences between Aboriginal and non-Aboriginal groups and, for the next ten years, Indigenous people emphasized the importance of their cultural survival in part to remind the state of its misguided White Paper. This experience illustrates perhaps better than any other that, in real-world contexts, a commitment to ignore cultural difference need not make public officials immune from distorting group identities in essentialist ways or from using these distorted views to obscure policies of assimilation. Instead, failure to respect cultural difference can lead to the domination of a minority by a majority.

The failure to take cultural difference seriously as a human rights issue led to the mobilization of a large number of identity-based groups throughout the world in the 1970s and 1980s, to the development of normative approaches to human rights that recognize the strong attachments people have to their cultures, languages, genders, religions, and so forth, and to laws and policies at the national and international level that encourage public decision-makers to take minority identity claims seriously. Unsurprisingly, some of these policies have led to concerns similar to those raised in relation to Canada's distinctive culture test, that public decision-makers can essentialize cultures, co-opt communities, and freeze their rights. However, these are not new kinds of problems; they often arise in diverse societies and have acted as the impetus for developing principles of democratic legitimacy and accountability, norms of publicity and consent, collective rights, mechanisms of dialogue, and obligations for consultation. On the basis of these norms and principles, many democratic states are constitutionally obligated to address these problems as a requirement of fair governance. Unsurprisingly, policymakers and courts have fallen short of doing so well in all cases, as is well-illustrated by the narrow and constraining criteria of the distinctive culture. Yet it is difficult to conclude on this basis that the assessment of culture per se leads to minority subjugation, as some critics suggest, because to believe this view is to discount the power that courts and other public institutions have to interpret cultural rights generously and fairly.[53] In other words, the risk of accepting the general objection in cases like *Van der Peet* is that doing so discounts the power and capacity of courts to decide differently and more fairly. The reason why Canadian courts are interpreting Indigenous cultures in a distorted and narrow way is not

53 For example, international bodies have offered much broader and more generous interpretations of Indigenous culture claims. See Avigail Eisenberg, "Domestic and International Norms for Assessing Indigenous Identity" in Avigail Eisenberg & Will Kymicka, eds, *Identity Politics in the Public Realm* (Vancouver: UBC Press, 2011) 137 for a comparison of domestic and international norms of assessing Indigenous cultures.

because cultural interpretation is inevitably unsuccessful but rather because of the failure of courts, legislatures, and other state institutions to adhere to norms of democratic accountability, legitimacy, consent, and dialogue in their decision making. It seems highly unlikely that it is the court's mistaken interpretation of culture that explains their unwillingness to adopt more expansive, future-oriented, and generous interpretations of culture.

A better understanding of the significance of *Van der Peet* requires considering this decision and the distinctive culture test in the context of ongoing debates at the time. With the distinctive culture test, the court takes a well-discussed problem — namely, how best to protect the distinctiveness of Indigenous cultures and the survival of Indigenous ways of life, which has been the subject of discussion amongst scholars and Indigenous leaders throughout the 1970s and 1980s, many of whom have couched that problem specifically in terms of Indigenous sovereign authority and self-determination — and it creates a test that sets aside the self-determination of Indigenous peoples and focuses instead on guaranteeing cultural rights. The message of the Court in 1996 is that the Aboriginal rights protected in s35 of the Constitution are rights to cultural protection and not sovereign authority.

The Court's message that the cultural rights of Indigenous people exist apart from the right to self-determination stands against two decades of discussion and dialogue with Indigenous leaders. And it is this message which best explains the Court's approach and why the distinctive culture test is problematic. This message is also the thread that unites a court decision that is otherwise split by two seemingly strong dissenting opinions. In one dissent, Chief Justice Beverly McLachlin recognizes the potential distortion of cultural rights created by the pre-contact requirement, stating that "[a] practice need not be traceable to pre-contact times to qualify as a constitutional right. Aboriginal rights do not find their source in a magic moment of European contact."[54] However, according to McLachlin, the problem created by the pre-contact restriction is solved not by recognizing the right of Indigenous peoples to determine their own cultural protections, but rather by replacing the pre-contact requirement with a "pre-state" requirement which directs the court to determine instead "what laws and customs held sway before the superimposition of European laws and customs."[55] In another dissenting opinion, L'Heureux-Dubé is also aware of the pitfalls of the majority's test and criticizes the "frozen rights approach," which she distinguishes from her preferred "dy-

54 *Supra* note 33 at 8.
55 *Ibid* at para 248.

namic rights approach." She argues that twenty to fifty years is sufficient to determine which practices count as distinctive and integral, but she fails to question the overall project of assessing cultural rights in the absence of recognizing Indigenous self-determination. Whereas both dissenting opinions find fault with the specific terms of the distinctive culture test, neither challenges the basic point of the decision, which is to assert State sovereignty and thereby place the Court in a position of deciding what is distinctive to Indigenous cultures rather than understanding the survival of distinctive ways of life as tied to the constitutional recognition of Indigenous self-determination. After at least two decades of debates in normative political theory and constitutional scholarship, against the background of a surge in Indigenous mobilization brought about, in part, by the exclusion and marginalization of Indigenous peoples in key policy debates and political struggles, in 1996 cultural distinctiveness rather than self-determination becomes the constitutional right protected in section 35.

Why defend cultural rights?

Despite the optimism amongst some normative theorists that cultural rights could be used to advance the claims for justice and emancipation of marginalized groups, some, perhaps especially those who struggled to see Aboriginal rights entrenched in the Constitution, saw the 1996 *Van der Peet* decision and the use of the distinctive culture test in subsequent cases as a defeat.[56] The test imposes narrow and constraining criteria — key amongst these is the pre-contact requirement — that make it difficult for claimants to use section 35 to protect their cultural wellbeing and ensure the survival of their communities. Moreover, despite calls from within the Court for generous and purposive interpretations of section 35 rights,[57] the Supreme Court of Canada further constrains what Indigenous people might gain by excluding commercial activities from protection using the legal test and limiting access to resources for cultural practices at the level communities would have enjoyed in pre-contact times.[58] These restrictions scuttled what David Murphy

56 See e.g. Asch's discussion of *Van der Peet* in Michael Asch, "The Judicial Conceptualization of Culture after *Delgamuukw* and *Van der Peet*," (2000) 2 Rev Const Stud 119.

57 See *Van der Peet, supra* note 33 at paras 23, 24, 142.

58 For instance, the claim of Mi'kmaq and Maliseet communities in Nova Scotia to cut timber on Crown land without state permission in order to build furniture was accepted by the Court using the distinctive culture test, but limits were placed on the amount of timber they could harvest according to what they needed for domestic use within the community, not accounting for selling furniture outside the community. The majority decision reasoned that the amount of timber allowed depended on what was needed for the survival of the Mi'kmaq and Maliseet communities

describes as the noble aims of section 35 rights, to acknowledge the existence of pre-existing Indigenous societies as a source of Indigenous rights and to carve out a legal space for Indigenous worldviews and practices to inform the scope of those rights. The criteria of the distinctive culture test together with the Court's interpretation of those criteria "renders indigenous right more vulnerable to the impact of colonialism, … [and] places discriminatory restrictions on the capacity of indigenous peoples to translate those rights into employment and development opportunities in the modern economy."[59] For these reasons, Murphy concludes, the pre-contact requirement "seems almost custom-designed to frustrate the judicial objective."[60]

I have distinguished between the *criteria objection* to the distinctive culture test which focuses on the Court's interpretation of test's criteria and the *general objection* to the interpretation of Indigenous culture by Canadian courts. Whereas the distinctive culture test is indeed flawed in numerous ways, including those explored above, the general objection to Canadian courts interpreting Indigenous cultures for the purposes of adjudicating rights is mistaken and misleading. The problem with *Van der Peet*, according to the advocates of the general objection, is that it invites Canadian courts to interpret Indigenous culture, which is a project doomed to fail because culture cannot be reliably interpreted for the purpose of establishing rights. I have argued that cultural difference has long been used by state courts and policymakers to establish policies about Indigenous people and so, in this respect at least, the distinctive culture test is not new. Instead, what is new is that the test is presented as a way to treat Indigenous cultural difference as an advantage, rather than as a disadvantage — to carve out a legal space for Indigenous worldviews and practices — and is situated in a context of scholarly debates about the role of culture and people's attachments to their culture in advancing human rights. This context does not diminish the flaws of the Canadian test, but it indicates that the larger project that informs the test might nevertheless be a valuable one. Perhaps more importantly, these factors should lead us to ask why the courts have abandoned the aims of this larger project in favor of the narrow criteria reflected in the Canadian jurisprudence.

As we have seen, the answer to this last question points to another project that has informed the court decision in *Van der Peet*, namely to respond to Indigenous arguments for self-determination by de-linking the protection of

today according to standards similar to those that existed before contact. See *Sappier, supra* note 51 at para 25.

59 Murphy, supra note 38 at 377.

60 *Ibid*.

Indigenous culture from the recognition of self-determination and sovereign authority. This second project has had a greater impact on Indigenous rights in Canada than the human rights aims of cultural approaches.

I have argued that the general objection to interpreting Aborigional culture makes little sense of the Court's decision in *Van der Peet* and obscures its significance. The impact of "contact" on the assessment of cultural rights is diminished when the "real" problem with the decision is diagnosed to rest on the confounding qualities of culture as subjective, fluid, circumstantial, and ephemeral and thereby on the futility of cultural interpretation. The substantive positions of Indigenous leaders, scholars, and activists throughout the political struggles of the 1970s and 1980s are obscured when the general objection is taken as the principal explanation for what is wrong with *Van der Peet*. Indeed, their message, with its emphasis on "cultural survival" and the existence of "cultural difference" (albeit within a context of Indigenous sovereignty), may appear, from the vantage created by the general objection, to be misguided and even dangerous. As the general objection tells us, there is no single "culture" or one stable kind of cultural difference worth saving without risking essentializing, stereotyping, and coopting people.

Thus the general objection is misleading, both in its understanding of the Court's decision and its perspective on the significance of that decision. To accept this objection is to diminish the responsibility of the Court to engage in cultural assessments generously and in a manner that is informed by democratic principles. Moreover, the general objection misleads us about what might be expected in the future and how to get there. In this respect, it is worth considering that attempts by one group to change its laws and policies in order to recognize, respect, and protect the distinctive practices of another group can be both a necessary and just move. If, in Canada, jurisdiction over territory, wildlife, industry, and law is shared, the obligation to interpret the constitutional protections of Indigenous rights as mandating protection for cultural practices may be appropriately understood as a step that could improve just and fair relations between Indigenous people and the State. In other words, something like the distinctive culture test, without the pre-contact requirement, may be a beneficial and necessary feature of a legally pluralistic postcolonial regime in Canada.

That being said, there are good reasons to be concerned about recent Supreme Court decisions that have become narrow and restrictive in how they assess Aboriginal rights. However, it is possible that the narrowness of these decisions has less to do with the risks and constraints associated with

the distinctive culture test and more to do with the influence on the Court of a set of State interests that are guided by the legislative agendas of provincial and federal political leaders who respond to business and corporate interests in ensuring access to lucrative resources and lands. Many of the cases in which the distinctive culture test has been employed involve disputed claims to scarce resources — for example, trade in salmon on the west coast[61] or harvesting trees for commercial purposes in New Brunswick[62] — where competition exists between Indigenous and non-Indigenous communities for access to these natural resources. Unsurprisingly, these disputes become more intense as resources become threatened by the effects of climate change and environmental degradation, and in the case of the Northern Gateway pipeline, where generating regional and industrial wealth are likely to place communities at risk. Depleted resources and threatened wildlife in most places in Canada often have a direct and measurable impact on the cultural survival of Indigenous communities and so, unsurprisingly, Indigenous peoples repeatedly voice concerns about the survival of their communities in presentations before legislators and judges, at environmental review boards, and during protests and community meetings. At the same time, there is pressure to limit the scope of Aboriginal rights and to negotiate settlements that ensure continued access for industry to exploit resources. The clash between these political interests today, and the question as to whether governments are willing to use robust principles of democratic accountability and fair governance to find solutions, likely provide a better explanation than the Court's interpretation of Indigenous cultural practices for why several high profile Indigenous cases have been decided in the narrow and restrictive ways that they have.

61 *Supra* note 33.

62 *Sappier*, *supra* note 51.

What Does Indigenous Participatory Democracy Look Like? Kahnawà:ke's Community Decision Making Process

Kahente Horn-Miller*

With the 1979 Community Mandate to move towards Traditional Government, the community of Kahnawà:ke has consistently requested more involvement in decision-making on issues that affect the community as a whole. The Kahnawà:ke Community Decision Making Process is a response to the community's call for a more culturally relevant and inclusive process for making community decisions and enacting community laws. The Process is a transitionary measure to assist and facilitate the legislative function of Kahnawà:ke governance. This paper examines the development of the process and how it functions in the modern setting of Kahnawà:ke with the goal of illustrating Indigenous participatory democracy in action.

Avec le mandat communautaire de 1979 de passer à un gouvernement traditionnel, la communauté de Kahnawà:ke a constamment demandé un engagement accru en matière de processus décisionnel par rapport aux questions touchant la communauté dans l'ensemble. Le Kahnawà:ke Community Decision Making Process est une réponse aux demandes de la communauté pour un processus qui convient mieux et qui est plus inclusif sur le plan culturel pour la prise de décisions touchant la communauté et l'adoption des lois de la communauté. Ce processus est une mesure de transition visant à aider et faciliter la fonction législative de la gouvernance de Kahnawà:ke. Dans cet article, l'auteure examine l'élaboration du processus et son fonctionnement dans le cadre moderne de Kahnawà:ke dans le but d'illustrer la démocratie participative indigène à l'oeuvre.

* Dr. Kahente Horn-Miller is a Kanienkehaka (Mohawk) from the community of Kahnawà:ke. Currently she is the Co-ordinator of the Kahnawà:ke Legislative Coordinating Commission and Sessional Lecturer at both Concordia and McGill universities in Montreal, Quebec.

We the people of Kahnawà:ke, as part of the Rotinonhsón:ni (Five Nations) Confederacy;

We are, and have always been a sovereign people; we have our own laws, government, culture and spirituality;

Our lives are governed by the principles of the Kaianere'kó:wa (Great Law of Peace); a covenant made in ancient times;

We respect the covenant, for it describes our right and responsibility to govern our own affairs in our own way;

We consider this covenant to be a precious inheritance of our children, and of future generations, with which no one can interfere.

— Kahnawà:ke Decision Making Process Preamble[1]

Introduction

Participation in a consensus-based decision making process is a unique experience and requires a change in thinking. Often, the initial feeling amongst participants is skepticism of the possibility that everyone present might be able to agree on something. However, participants involved in the consensus process often express feeling surprise and relief once a decision is reached. As a Kanien'kehá:ka (Mohawk) person I have had the opportunity to participate in this process, both in the traditional Longhouse[2] and in dealing with modern political issues in the community of Kahnawà:ke. In both settings the achievement of consensus on a question feels the same. This was a surprise to me, even though I understood the historical background of the process, its inner workings, and implications in the longhouse and modern political setting of the Kahnawà:ke Community. This said, the Community Decision Making Process is a form of participatory democracy that utilizes the same principles of respect for individual thinking and ideas and unanimity in decision making that were used by my ancestors. It is a living process in which theory is put into practice.

1 The statement and preamble was developed by Kahnawà'kehro:non (people of Kahnawà:ke) at a Community Decision Process Information Session, and accepted through Mohawk Council Executive Decision 34-2008/09.

2 The Longhouse was the original structure in which Haudenosaunee people lived. As people moved away from living communally to single family homes, the Longhouse has taken on a symbolic meaning where it is now a space where political, social and spiritual life takes place outside of the wider community and individual homes. The Longhouse also serves as the organizing basis for the Kaienere'kó:wa political, social, and spiritual structure and is used as an all-encompassing term to describe the spiritual and intellectual traditions of the Haudenosaunee as a whole.

Through lived experiences and academic work I have built a knowledge base about the history and culture of the Haudenosaunee from which I inform both my work in the university classroom and in the modern world of Indigenous governance. Many of the principles that underlie the Process that this work describes are not expressed explicitly in journals and chapter articles to date. As a result, citations on the practical enactment of Haudenosaunee philosophical traditions are difficult to find, and those that exist usually come from an outsider perspective. This work is part of a larger effort to add to the body of literature on the practical applications of Indigenous philosophy. There are many Indigenous peoples and academics making the necessary connections between Indigenous philosophical traditions and their practical applications in the political, social, and spiritual realms of living communities. This work describes one effort taking place.

The Community Decision Making Process itself is a bridge between old practices and the modern world. The purpose of this work is to illustrate the principles that underlie the form of participatory democracy carried out by my ancestors, outline the development of the Process, and explain the issues and current adaptations to community needs and concerns. The importance of this work for the wider Indigenous and non-native communities lies in the fact that ancient Haudenosaunee democratic principles are still at play in the modern setting of Kahnawà:ke and also have a role to play in modern forms of Indigenous governance and law making. In doing so, old practices are made new again.

Background/History

Kahnawà:ke — meaning "by the rapids" — is one of seven communities of the Kanien:keha'ka and is located on the south shore of the St. Lawrence River across from Montreal, Quebec, Canada. With an estimated resident population of approximately 7,719 and non-resident population of 2,617 in 2013,[3] the community is situated on a land base of less than 11,888 acres,[4] with the land-claim negotiation of Seigneury of Sault St. Louis potentially restoring significant area back to the Indigenous community.[5] The Kanien:keha'ka

3 "Residents" (2013), online: Aboriginal Affairs and Northern Development Canada: Kahanwake Band <http://www.aadnc-aandc.gc.ca/Mobile/Nations/profile_kahnawake-eng.html>.

4 "Surface" (2013), online: Aboriginal Affairs and Northern Development Canada: Kahnawake Band <http://www.aadnc-aandc.gc.ca/Mobile/Nations/profile_kahnawake-eng.html>.

5 "Seigneury of Sault St. Louis Historical Pamphlet" (2012), online: Mohawk Council of Kahnawà:ke <http://www.kahnawake.com/council/seigneury.asp>.

are part of the Haudenosaunee or Iroquois Confederacy.[6] Brought together for the purposes of peace and mutual protection, the Confederacy encompasses six Indigenous nations: the original five nations comprising Kanien:keha'ka (The Mohawk Nation), Oneniote'á:ka (The Oneida Nation), Ononta'kehá:ka (The Onondaga Nation), Kaion'kehá:ka (The Cayuga Nation), Shotinontowane'á:ka (The Seneca Nation), as well as the final nation to join the fold in 1722, Tehatiskaró:ros (The Tuscarora Nation).[7] Each nation in the Confederacy joined with the common goal of maintaining peace and harmony, yet also remained independent nations responsible for their own affairs. This notion is depicted in the Hiawatha Belt, which portrays the original five nations as independent nations linked together by a common thread. This common thread, however, does not strip the nations of their independence.[8]

The earliest records indicate adherence to a way of life that encompassed principles of peace, power, and righteousness incorporated into a functioning Constitution called the Kaienere'kó:wa,[9] or the Great Law of Peace. This Constitution is documented using mnemonic devices known as wampum belts. Recited every four years, these belts reference political, social, and spiritual aspects of life encompassed in the Constitution. Narrativized as The Peacemaker's Journey, the story describes the formation of the Confederacy and the principles inherent in the Kaienere'kó:wa. The Wampums or Laws in the Kaienere'kó:wa are based on natural relationship between plants, animals, and humans and developed into a functioning Constitution that served to guide the six nations through difficult times into a peaceful relationship. The relationship deepened further between the nations and became one of mutual respect and survival as colonization arrived in North America.

The Kaienere'kó:wa is where the principles of justice are codified, with the fundamental principles of peace and harmony at its foundation. The Kaienere'kó:wa establishes rules for governing over matters such as adoption, emigration, relations with foreign nations, war, treason, succession, religion,

6 Haudenosaunee, Rotinonhsón:ni are all terms used to describe the Iroquois Confederacy. Essentially they are variants on the same term and mean "people of the long house."

7 For further discussion on dating the formation of the Confederacy, see William A Starna, "Retrospecting the Origins of the League of the Iroquois" (2008) 152:3 American Philosophical Society 279.

8 Tom Porter, "The Great Law of Peace Part 1: The Birth of the Peacemaker" in *And Grandma Said … Iroquois Teachings As Passed Down Through the Oral Tradition* (Bloomington, IN: Xlibris, 2008) 272.

9 Extensive literature exists on the Kaienere'kó:wa. See Kahente Horn-Miller, *The emergence of the Mohawk warrior flag: a symbol of indigenous unification and impetus to assertion of identity and rights commencing in the Kanienkehaka community of Kahnawake* (MA Thesis, Concordia University, 2003) [unpublished].

laws of descent, funerals, and civil matters.[10] As a true democratic document, the Kaienere'kó:wa describes a process in which everyone has a voice. Law is based on achieving substantial agreement and consensus in decision making since the Constitution focuses on resolving community or national concerns rather than individualistic ideals. In this way of thinking, each individual is part of a greater collective body; every act that an individual performs has direct or indirect impact on the world around them. Known as the *Seven Generations Principle*,[11] this doctrine serves as the basis for understanding that a person's responsibilities are more far reaching than the individual. This philosophy is inherently about accountability and respect for oneself and the future seven generations. This important principle at the heart of the Kaienere'kó:wa is also reflected in the procedures surrounding the enactment of the Constitution. The Thanksgiving Address or Ohenton Karihwatekwen, held prior to any community gathering, is a recitation of thanks to all living things from the smallest creatures and plants in the earth all the way up to the clouds in the sky. The recitation reminds those gathered that they have a duty not only to uphold the Law, but also a responsibility to care for the natural world.[12]

The natural world is characteristically diverse. The idea that no two things are alike is also captured in the Kaienere'kó:wa and more specifically in the consensus process. The rules and procedures of Haudenosaunee governance are based on the philosophy that the power to govern flows directly from the people. At the Confederacy and national levels, substantial agreement amongst the chiefs of the particular nations is necessary, while at the community level, consensus must be reached amongst the clans. Decisions must be made that reflect the will of the people and be made with their welfare in mind. Thus the decision making process is not an adversarial one. It relies on calm deliberation, respect for diverse views, and substantial agreement. The main objectives are engagement, respect, and the peaceful resolution of all matters.

10 Arthur C Parker, "The Constitution of the Five Nations or The Iroquois Book of the Great Law" in *The Constitution of the Five Nations or The Iroquois Book of the Great Law* (Ohsweken, ON: Iroqrafts, 1991). (Originally published by The University of the State of New York, 1916.)

11 The Seven Generations Principle is a philosophy that is passed down orally. See Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (New York: Oxford University Press, 1999) at xxii.

12 For a full recitation and discussion, see Tom Porter, "The Opening Address" in *And Grandma Said … Iroquois Teachings As Passed Down Through the Oral Tradition* (Bloomington, IN: Xlibris, 2008) 8; Haudenosaunee Environmental Task Force, *Words That Come Before All Else: Environmental Philosophies of the Haudenosaunee* (Akwesasne, ON and NY: Native North American Indian Travelling College, undated).

Consensus-based decision making

Consensus decision making is an alternative to commonly practiced non-collaborative decision making processes. Robert's Rules of Order, for instance, is a process used by many groups. The goal of Robert's Rules is to structure the debate and passage of proposals that win approval through majority vote.[13] This process does not emphasize the goal of substantial agreement. Critics of Robert's Rules believe that such a process can create adversarial debate and the formation of competing factions. These dynamics may harm intra-group relationships and undermine the ability of a group to implement co-operatively what might turn out to be a contentious decision.[14]

Consensus is a process of collaborative discussion that respects both the group and the individual. In consensus, the whole group makes decisions instead of a majority or minority rule. Consensus is not simply a process of finding the sum of individual viewpoints and tallying up the assents and dissents. The goal is to discern what the best decision is for the group and take into consideration the needs of the collective. Through consensus, each individual's concerns and ideas are considered. Every participant must have equal access to the process for it to be true consensus decision making. The group works with and adjusts a proposal until all can consent to its final form.

Consensus does not mean unanimity. With consensus there may not be a complete agreement in every decision, but there is always complete consent. This process gives voice to individuals with minority viewpoints. One member can express dissent to a decision if he or she feels it is against the best interest of the collective. However, that person has the responsibility to provide an alternative idea or contribute to a resolution. When individuals disagree, they are acknowledged and asked to provide a solution or additional information, which is then added to the deliberations. If the decision is still the same, their dissent is recorded and they are asked if they can consent to the group decision.

It is important to consider that community members are working actively to make a decision in the best interests of the community and not only themselves as individuals. In adherence to the Seven Generations Principle, involvement in this process requires a shift away from the individualism that

13 See Tom Atlee and Rosa Zubizarreta, "Comparison of Roberts Rules of Order, Consensus Process and Dynamic Facilitation" (2013) online: *The Co-Intelligence Institute* <http://www.co-intelligence.org/I-comparisonRR-CC-DF.html> for elaboration on merits of Roberts Rules of Order [Atlee].

14 See Atlee, *ibid* for a comparison of processes.

characterizes many current societal structures in First Nations communities. As this process plays out, Indigenous peoples become cognizant of the strong influence of the colonial legacy on our everyday lives. Colonization has profoundly changed the way Indigenous peoples think and live as a community of people. In many instances, individualized thought is clearly in conflict with communal ideals. Finding solutions to issues proves to be difficult in this circumstance.

Consensus decision making is also an alternative to the "top-down" decision making commonly practiced in hierarchical groups. Top-down decision making occurs when leaders of a group make decisions in a way that does not include the participation of all interested stakeholders. Proposals are not developed collaboratively and full agreement is not a primary objective. Critics of top-down decision making believe the process fosters incidence of either complacency or rebellion among disempowered group members.[15] These effects have clearly been seen with the elected Band Council system currently used in First Nations communities across Canada in which community members are often left feeling voiceless and powerless. Additionally, the resulting decisions made by the Council sometimes overlook important concerns of those directly affected. Poor group dynamics and problems implementing decisions often result.

Consensus decision making attempts to address the problems of both Robert's Rules of Order and top-down models. Outcomes of the consensus process include:

> Improved decisions that include input from all stakeholders, with the resulting proposals better able to address all potential concerns.
>
> Better implementation processes that include and respect all participants and generate as much agreement as possible, thus setting the stage for greater cooperation in implementing the resulting decisions.
>
> Stronger group relationships in which cooperation and collaboration foster greater group cohesion and interpersonal connections.[16]

Consensus building is not simply making a compromise, nor is it a way of persuading others of the value of an idea or outcome. Value lies in the meth-

15 See Michael T Seigel, "Consensus building revisited: lessons from a Japanese experience" (2012) 24:3 Global Change, Peace and Security (formerly Pacifica Review: Peace, Security & Global Change) 331, for full background and discussion on consensus building [Seigel].

16 See Seigel, ibid for further elaboration on these outcomes.

odologies of reaching consensus and finding solutions to problems. Toshio Kuwako argues that the same differences of opinion that can be a source of conflict can also be a resource for a more creative solution.[17] The varieties of opinions assist in everyone understanding all aspects of the issue. Thus, minority viewpoints are often the most valuable as they are often overlooked by the majority.

The Haudenosaunee process of participatory democracy has its foundation in the family and acknowledges all voices. Governance was rooted at the clan-family level and radiated outward to the larger confederacy level in concentric circles of clan-family, community, and then national participation. In this process, decisions were made by the clan-family and handed to their community leader who then brought it to the larger community and eventually to the nation. Leadership in this way was not top down; rather, leaders served as the holders of the stories and ancient knowledge and they were given the responsibility to enact a decision made by the people. Fundamental principles of this system made it effective for democracy. These principles include: everyone has a voice, the Seven Generations Principle, acute listening, and responsibility to participate.

Historical development of governance in Kahnawà:ke

Prior to the establishment of a band council system of governance in the late-19th century, Kahnawà:ke was governed by a council of seven chiefs. Each chief represented one of seven different clans in the community: Ratiniáhten ("Turtle"), Rotikwáho ("Wolf"), Rotiskerewakaká:ion ("Old Bear"), Rotiskerewakekó:wa ("Great Bear"), Rotinehsí:io ("Snipe"), Rotineniothró:non ("Rock"), and Rotihsennakéhte ("Deer").[18] The seven chiefs held their position for life. Historian Gerald Reid writes that a council of chiefs based on the clans system probably existed in the community since the late 17th century, but that the seven-chief council may date to only about 1840. Throughout the 1870s and into the early 1880s, there were several efforts to reorganize the council into a system more consistent with the model of governance that Canadian authorities were attempting to establish through the *Indian Act* system. When the *Indian Advancement Act* was applied to the reserve in 1889, the seven-chief system was only a half-century old but still

17 Toshio Kuwako in Seigel, *ibid* at 335.

18 Gerald F Reid, "Kahnawake's Council of Chiefs: 1840-1889" (2012), online: *Haudenosaunee: Kahnawake branch of the Mohawk nation six nation confederacy* <http://www.Kahnawakelonghouse.com>.

rooted in the Haudenosaunee system of clans and consensus decision making. Reid describes this modified council format as not a traditional government but rather one based on two important principles at the heart of the Iroquois political organization — equal-voice government and decision making based on the clan system.[19]

In this early band council governance system, laws were handed to the Indian Agent. The band council had limited lawmaking authority. Legislation was developed at the federal level and handed over to the community to be enforced. Indian Agents were automatically appointed as Justices of the Peace under section 107 of the *Indian Act*. These Justices, appointed by the Governor in Council of Canada, were authorized to hear offences under section 81 of the same Act and could hear offenses under the Criminal Code of Canada relating to cruelty to animals, common assault, breaking and entering, and vagrancy in those cases in which the offense is committed by an Indian or relates to the person or property of an Indian. Section 81 of the *Indian Act* empowered Indian Bands to pass bylaws in relation to 18 areas including health, law and order, trespassing, zoning, land allotments, regulation of bee-keeping and poultry-raising, control and regulation of public games, preservation and protection of fur-bearing animals. Section 82 of the *Indian Act* also outlines the process of how bylaws are to be enacted. The Minister of Indian Affairs could arbitrarily approve or disallow a bylaw.

In 1940, with the appointment of Kahnawà:ke resident Frank McDonald Jacobs as Justice of the Peace, Kahnawà:ke began the process of administrating its own justice. Over the years various community Justices were appointed for the Court of Kahnawà:ke. The assumption made by the Canadian Government was that these Justices of the Peace would sit in a Provincial Court. Kahnawà:ke made a determination that it could create its own court. In 1979, Kahnawà:ke began expanding its activities to hear matters other than traffic offenses. The Court began hearing bylaws created under section 81 of the *Indian Act* and the approval process contained in section 82 of the Act, as well as summary conviction offenses contained in Part XXVII of the Criminal Code of Canada.[20]

19 For further discussion on the evolution of Kahnawà:ke governance, see Gerald F Reid, *Kahnawà:ke: Factionalism, Traditionalism, and Nationalism in a Mohawk Community* (Lincoln, NE: University of Nebraska Press, 2004) at 56.

20 Tonya Perron, *Final Report on the Administration of Justice in Kahnawake* (Prepared for the Intergovernmental Relations Team, 2000).

In 1987, the Mohawk Council of Kahnawà:ke began moving closer toward the goal of judicial autonomy with the approval of the members of the Justice Committee and implementation of the Justice System. Shortly thereafter, the Mohawk Council of Kahnawà:ke formally decided not to submit any further bylaws to the Minister for approval, which was inconsistent with section 81 of the *Indian Act*. Kahnawà:ke decided to legislate outside of sections 81 and 82 and began to create its own communal laws. Throughout this time, Justices of the Peace continued to be appointed by the Governor in Council, although they could not hear Kahnawà:ke Communal Laws because they were answerable to the Crown. Until the 1996 signing of the Policing Agreement between Kahnawà:ke, Quebec, and Canada, the Kahnawà:ke Peacekeepers[21] could also not enforce Mohawk law. This created a void in community needs with regards to justice.[22]

History of Kahnawà:ke's community decision making process

During community consultations held in 1979, the People of Kahnawà:ke expressed the desire to return to a more traditional form of governance. A Mohawk Council Resolution was signed in 1982 to this effect and reaffirmed in 2000 by the elected chief and council. Despite these declarations, no resolution to this issue was found until 1995 when the Mohawk Council of Kahnawà:ke delegated the Kahnawà:ke Justice Commission to create laws for the community. However, there was conflict because the people who comprised the Commission were also responsible for the enforcement and interpretation of law in the community. Community members felt that there needed to be a separation of the legislative and judicial aspects of the Kahnawà:ke justice system. Added to this tension was the Kahnawà:ke community's dissatisfaction with the way decision making occurred as members wanted more involvement. To address this dissatisfaction, the Mohawk Council of Kahnawà:ke gave the mandate to the Office of the Council of Chiefs (OCC)[23] to research

21 The Iroquois Police Force was created in 1976, and its members were appointed by the Royal Canadian Mounted Police. This Force was mandated to enforce Canadian and Band By-Laws. This force changed to the Amerindian Police Force from 1975 to 1979, and in 1980 the current Kahnawà:ke Peacekeeper Force was created. An agreement signed between Kahnawà:ke, Quebec and Canada in 1996 allows for the Peacekeepers to enforce Mohawk Law.

22 Much of this history was compiled and presented to the community during a series of Kahnawà:ke Justice Community Consultations that took place in January 2009. Kahnawake Justice Community Consultation. Powerpoint presentation.

23 The Office of the Council of Chiefs provides support services to the Mohawk Council of Kahnawá:ke Chiefs in the areas of politics and governance. The OCC first started as the Advisory Unit in 1999

and develop a community decision making process, one which would have community involvement in its development and direct participation in the resulting process.

The OCC researched the issue of consensus-based decision making by looking to past practices of the Kahnawà:ke community as well as present customs of other Indigenous communities. The OCC drafted the Community Decision Making Model that included principles and format similar to the Haudenosaunee traditional methods of making decisions. Its development is seen as an effort to move towards the 1979 expression of returning to a more traditional way of dealing with disputes.

The Mohawk Council of Kahnawà:ke established the Interim Legislative Coordinating Committee (ILCC) on 30 May 2005 as the body responsible for the legislative process. The ILCC was given the Community Decision Making Process Model as one of its administrative tools on 14 October 2005. The KLCC officially came into force 1 April 2007.[24]

In 2005, ILCC was given the task of further developing the Model which later became the Community Decision Making Process. Numerous community consultations were held between 2005 and 2007. Prior to 2005, the Process was seen as too cumbersome, with a 21-body legislative assembly comprised of community, governmental, and organizational representation. Throughout this development process, approximately nine community organizations were identified and nine participants from each were interviewed. The process was streamlined through further consultation during those two years. It evolved from a 14-phase Process into the 3-phase Process it is today with the intent and realization that it is up to the community to continue its development further. This was done through consultation with approximately 100 employees from the nine community organizations, various other organizations, specific interest groups, and government factions of the community, among them the Traditional Government Working Group. The evolution of the Process has been and continues to be at the grassroots level and is an ongoing process.

The ILCC was instructed by the Mohawk Council of Kahnawà:ke to test the Community Decision Making Process by conducting three mock sessions held 12 September 2007, 21 November 2007, and 12 January 2008. The pur-

and was formerly known as the Intergovernmental Relations Team. The OCC receives its primary direction from the elected Council, online: <http://www.kahnawake.com>.

24 The ILCC later became the Kahnawà:ke Legislative Coordinating Commission (KLCC).

pose of these sessions was to inform and educate the community on the new Process and to gain feedback regarding the community's insight into values and principles important to law making.[25]

Community participants of the mock sessions created a draft Preamble which was used to launch the discussions at the first Community Decision Making Process Phase I Community Hearing held 1 September 2009. Following the mock sessions on the Community Decision Making Process, the ILCC began Phase I of the *Justice Act*. This was the first piece of legislation to undergo Process. Throughout the sessions held to acquire the mandate of the proposed *Justice Act*, the ILCC received considerable feedback on the Process itself and worked at revising the Process to its current state.

The Kahnawà:ke legislative coordinating commission (KLCC)

The Kahnawà:ke Legislative Coordinating Commission oversees the activities of the Coordinator and ensures laws currently in process go through the CDMP in a timely manner. Its members provide expertise and input on aspects of the CDMP as they relate to laws that are currently on the Legislative Agenda.[26] The Commission is made up of representatives from the following areas of the Mohawk Council of Kahnawà:ke: Office of the Council of Chiefs Secretariat, Legal Services, Communications, Justice, the Community, and The KLCC Coordinator.[27] There is also a Community Representative who expresses the interests of the community to the Commission.

The community decision making process (CDMP) — Overview

Any Kahnawà:ke community member over the age of 18 years, Mohawk Council of Kahnawà:ke Unit, or Kahnawà:ke organization can submit a reasonable Request For Legislation or a request for revisions to a current piece of legislation. A letter is sent to the KLCC which then sends the request to Legal Services to be categorized as either a Type I or Type II piece of legislation. Type I process categorization applies to Kahnawà:ke Laws of General

25 Mohawk Council of Kahnawà:ke, *Community Decision Making Summary Report*, 2008.

26 Laws currently in process are the Kahnawà:ke Justice System (Act), Matrimonial Real Interests Law, Kahnawà:ke Membership Law, Kahnawà:ke Land Code, and the Kahnawà:ke Elections Law.

27 Members of the Commission approved through the Mohawk Council of Kahnawà:ke Executive Directive (MCED) No. 51/2010-2011, and No. 74/2011-2012.

Application or laws that affect the entire community of Kahnawà:ke. A Type II process categorization applies to regulatory, financial, and/or administrative laws, or laws that affect a specific sector, interest group, or portion of the community. Those laws deemed urgent are given the recommended categorization of *Urgent* which is based on established criteria: "*The necessity for immediate legislative action due to issues which pose (or will soon pose) an internal or external imminent objective threat to the security and safety (environmental, fiscal, legal, social, cultural or political) of Kahnawà:ke Territory and the collective rights of its Peoples*."[28] The community determines the level of urgency and the resulting time-frame is applied as they law goes through the Type I or Type II processes at an accelerated rate.

Contrary to the previous practice of law making in the community, Kahnawà:ke chiefs, or Kahnawa'kehró:non Ratitsénhaienhs,[29] must incorporate community input into laws that are developed or revised. Previously, laws were made by Canada and handed over to be enacted in the community; in the 1960s Kahnawà:ke took over its own law making and the chiefs began making laws for the community through a process called Mohawk Council Resolution (MCR).

In the current CDMP, the Kahnawa'kehró:non Ratitsénhaienhs have distinct roles to play in the development of Type I, Type II, and Urgent legislation. In a Type I process, they are responsible to ensure consistency in the development of all aspects of potential legislation and its implementation within the formal and duly convened legislative sessions; to participate at Community Hearings and Readings as a community member; to serve as a member of the Chiefs Advisory Committee; to ensure that the KLCC strictly adheres to the procedure for enacting laws in Kahnawà:ke; to attend regularly scheduled KLCC meetings, hearing, readings, and other activities; and to provide guidance to the KLCC members and ensure the health, safety, and well-being of the community of Kahnawà:ke. In a Type II process, they are responsible to ensure consistency in the development of all aspects of potential legislation and its implementation within the formal and duly convened legislative sessions; to participate at Community Readings as a Chief; to act

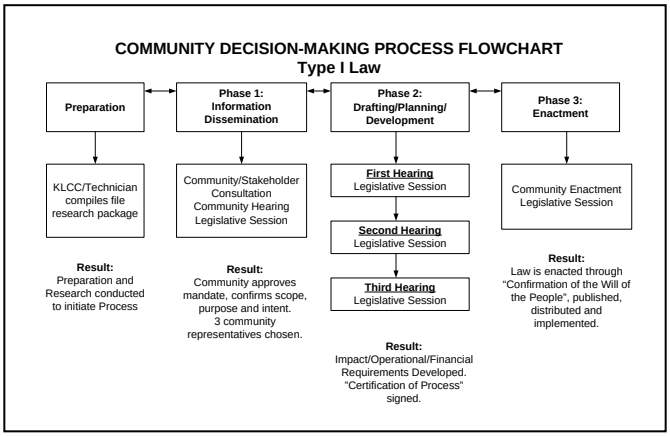
28 On April 30, 2012 the KLCC was mandated to develop a third law-making process in response to the Matrimonial Real Interests legislation issue in order to address the need for urgent law making, laws that are time sensitive, affect jurisdiction, affect community security and safety. This process has been developed and put to the Kahnawà:ke community for their feedback.

29 Kahnawa'kehró:non Ratsénhaienhs/Ietsénhaienhs is the Kanien'kéha word for Mohawk Council of Kahnawà:ke Council Chief (singular). Note: Literal translation is "the Resident (singular) of Kahnawà:ke, he/she put a fire in place" — habitual tense.

as a member of the Chiefs Advisory Committee; to ensure that the KLCC strictly adheres to the procedure for enacting laws in Kahnawà:ke; to attend regularly scheduled KLCC meetings, hearing, readings, and other activities; and to provide guidance to the KLCC members and consider their well-being. The chiefs also act as the voice of the silent component of the community who may not be directly affected by the legislation. They act as counterweights to the special interest groups who are directly affected by the legislation. In the Urgent Law Making Process they are responsible for bringing the law or urgent issue to the attention of the KLCC and making the formal submission of the law to the Process.

After the law has been categorized, a technician or advisory team is assigned to the law. They guide the law through the CDMP and ensure that all necessary steps are taken from proposal to enactment. The first step is a lengthy information-gathering process. This information is then conveyed to the community to gauge opinion on the law or proposed amendments. General and specific-interest group-based community consultations consist of methods such as kiosks, questionnaires, focus groups, and radio talk shows. Minimum communications standards have been developed for this purpose. Once an opinion has been obtained, the technician posts a report on the preparation phase to the community for a minimum of 30 days.

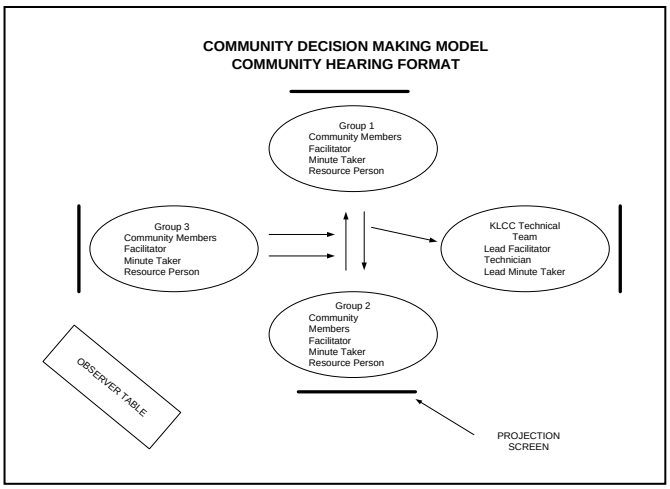
Type I process



In the Type I process, after the preliminary community consultation, a date is set for the first community hearing in which the technician obtains the mandate, scope, purpose, and intent from community members. This is

done using the consensus-based decision making process. Divided into three groups, the community members deliberate and pass decisions back and forth from the first group to the second until consensus is reached. Each group is comprised of a Facilitator, a Resource Person, a Minute-Taker, and various community members. A Lead Facilitator and Lead Minute-Taker are also present. In the interest of transparency, all minutes and relevant documents are posted onto the www.kahnawakemakingdecisions.com website.

Consensus process



In this process, each group appoints a Speaker as representative. When consensus is reached, the first group's Speaker stands and states the group's position. The second group is then asked to discuss the first group's statement. When consensus is reached by the second group, their Speaker stand stands and states whether they agree, disagree, or have comments to add to the first group's position. In this way the two groups send the discussion back and forth until they reach consensus.

During this time, the third group watches and listens to the discussion taking place in the first and second groups and also discusses the issue amongst themselves. If the third group requires clarification or questions arise, this information is passed on to the Lead Facilitator. The Lead Facilitator then passes on the request to the three groups and all three respond. After the first and second groups reach consensus, the issue is then passed to the third group for their input. The Speaker for the third group stands and states whether the

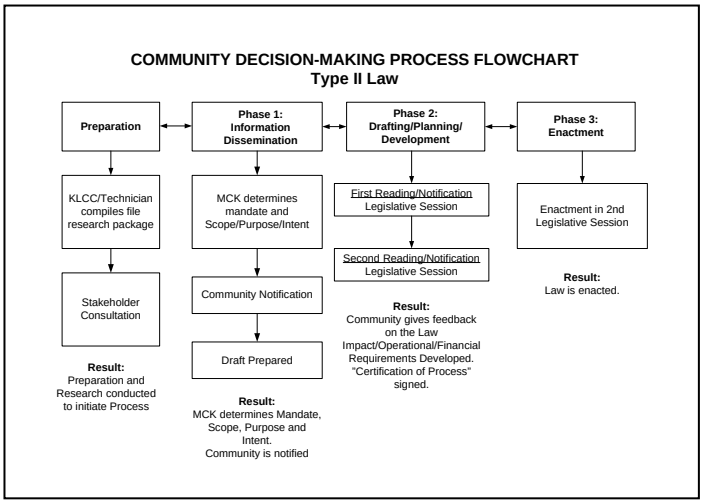
group agrees, disagrees, or has suggestions to add to the decision of the first and second groups. If the third group has a different decision from those of the first and second groups, the process has to begin again with the issue sent back to the first group who has to consider all new information until consensus is reached. Consensus must be reached by all three groups to complete the process.

This process of deliberations between groups one and two and the ratification by group three provide the necessary checks and balances that make this process work and make all those present accountable for their decision. It does not allow for coalition building and "stacking" of meetings like band meetings in the past. There have been instances in which band meetings were stacked to get a desired result. The problem of coalition building has been addressed in recent revisions to the Type II process in which stakeholder consultations are to occur before the chief and council are asked for the mandate, scope, purpose, and intent. In this way, all points of view are considered.

The CDMP process follows community meeting Rules of Order that ensure everyone has a voice and that peace and calm are maintained throughout. Achieving the mandate, scope, purpose, and intent of the law or amendments may take more than one meeting. In the case of the Kahnawà:ke *Justice Act* currently in development, this part of the process took a period of five months and within that time six community hearings took place. All hearings are done during a two-and-a-half-hour time period and there are never two hearings in one week.

The decision by the community to draft or revise a law is presented to Kahnawá'kehró:non Ratitsénhaienhs at a Legislative Session. After the mandate, scope, purpose, and intent are confirmed, Legal Services completes a first draft of the legislation. This draft is completed with the help of a drafting committee which includes community members selected at the time the mandate was given. This draft goes out to the community two weeks in advance of a community hearing. At the second and third hearings, the consensus process described above is used to get feedback on the drafts. In the third hearing, the law should be nearly complete. After every hearing, the law is redrafted by Legal Services and presented and confirmed by Kahnawá'kehró:non Ratitsénhaienhs at a Legislative Session. It is at the third hearing that the final draft is approved by community members and the Certification of Process and Will of the People documents are signed. After this, the law is enacted by Kahnawá'kehró:non Ratitsénhaienhs at a Legislative Session. It is then published, distributed, and implemented.

Type II process



The Type II process is utilized when addressing laws that affect only a portion of the population or a specific interest group. These laws are usually regulatory, financial, and/or administrative in nature. The Type II process can be initiated by any community organization, entity, or individual by submitting a Request for Legislation. As the Government of the day, the Kahnawá'kehró:non Ratitsénhaienhs have the responsibility to ensure the health and safety of their population and are required to determine/confirm the mandate, including the scope, purpose, and intent for the development of Type II Requests for Legislation. This requirement is the major difference between the Community Decision Making Type I and Type II processes and provides a proper check-and-balance mechanism that deters any one specific interest group from influencing the process and passing legislation in their favor.

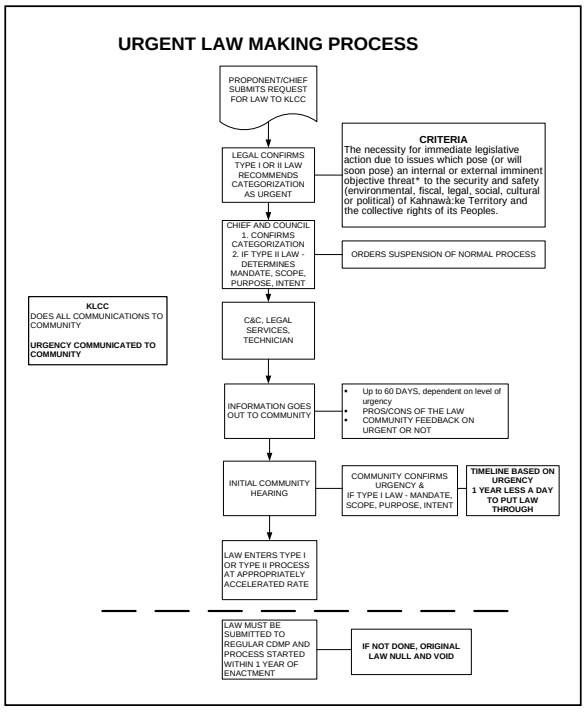
The Unit/Chief submits request for legislation or amendment to legislation. The KLCC Technical Team submits an RFD to the Kahnawá'kehró:non Ratitsénhaienhs requesting approval for the Legislative Mandate, including the scope, purpose and intent for said legislation. After the mandate is determined, the Technician conducts further community and stakeholder consultations to determine the impacts of the law or proposed amendments.

Information is distributed to the community and posted for a minimum of 30 days. The verbal and written feedback is outlined in a Feedback Report. This community feedback is incorporated into a draft of the law by

the Technical Team assigned for this process. This Team is comprised of the Technician, members of the Mohawk Council of Kahnawà:ke Units affected by the Law, a Legal Services representative and three community members. The Draft is sent to Legal Services for verification and to ensure proper legal formatting. A community reading is scheduled in which the draft is read out loud and community members provide further feedback. The draft is then brought to a Legislative Session of Council in which further input is obtained from the Kahnawá'kehró:non Ratitsénhaienhs who approve the draft. Then the process begins again.

This same process of information dissemination, the incorporation of feedback, and community reading occurs for a second time and is approved by the Kahnawá'kehró:non Ratitsénhaienhs. After this second process, the law should be in its final format. At the second and final reading, the Chief responsible for the area over which the law governs, such as Lands, reads the law in its entirety into the record. After the second reading, the law is presented to Kahnawá'kehró:non Ratitsénhaienhs at a Legislative Session where it is enacted.

Urgent law making process



The Urgent Law Making Process is applied at the beginning of the regular Type I and Type II processes which are appropriately accelerated based on the input by the community members who determine the level of urgency. This process deals with the issue of categorization and application of an appropriate level of urgency to the law as it goes through the CDMP. When the law has completed this accelerated process, it must be reviewed within one year in order to address any further concerns that may have been overlooked while it went through the CDMP at the accelerated rate. If the review is not done, the law becomes null and void.

Issues

A number of issues have come to the attention of the Commission regarding the CDMP process. By no means is the process perfect; rather, it is a work in progress. Each issue illustrated here is currently being examined and solutions are being sought.[30]

Application of Laws in relation to Canada — The interrelation between laws of different jurisdictions is governed by "conflict of law" rules. An example of these types of rules is in the Civil Code of Québec starting at article 3083. These rules determine which jurisdiction's laws apply to a particular situation. Eventually Kahnawà:ke will be required to develop their own set of conflict of law rules much like other jurisdictions have. In the interim, agreements with Québec and Canada may be required.

How are individual and collective rights respected? — In Canadian Law (s1 Charter) and Québec Law (s9.1 Charter) the courts seek to strike a balance between individual rights and collective rights through the process of seeking a reasonable accommodation in which conflicting rights can co-exist. The Legal Service Department representative on the KLCC points to the balancing of rights inherent in the Kaienere'kó:wa when individual rights conflict with collective rights. This issue deserves further discussion but is not the focus here.

Time — There has been considerable criticism from Chiefs, MCK Staff, and community members that the process takes too long. Initially, the process was much longer and contained more procedures. Over time, it has been pared down to what it is today. With our modern conception and use of time,

30 Lawrence Susskind discusses many similar difficulties related to implementing consensus as the basis for deliberative democracy instead of using top-down approaches. See Lawrence Susskind, "Deliberative Democracy and Dispute Resolution" (2009) 24:3 Ohio State Journal on Dispute Resolution.

this criticism comes as no surprise. Even now, the Commission is working towards ensuring that the process is streamlined even more without losing any of its intrinsic principles of participatory democracy. Recently, the Type II process was revised to reflect the desire for a shortened process. In this revision, the number of Community Hearings was reduced from three to two.

Community participation — One of the main challenges is getting community to participate in the CDMP. There are different areas in which community participation is required. First, members have the opportunity to submit a proposal for a law or amendments to a law. Second, their participation is required for feedback on proposed laws or amendments. Third, they are required at all community hearings and readings. This issue relates to community members' trust in and knowledge of the process. Implementation of the process also asks the community to change its way of thinking, that is, to go from thinking only of individual needs to considering the needs of the collective and the impacts of those decisions seven generations into the future. The Commission is working to address this issue by educating the community on the process through kiosks, kitchen table discussions, YouTube videos, presentations, television, radio, and print. The pulse of the community is taken on an ongoing basis to gauge people's perception and knowledge of the process. The Commission members are finding an increasing knowledge of the process and its value as the only means of passing or amending laws. This is evident in the recent submission to the process by 38 community members who signed a submission letter for a new law — the Karihwakwenienhtshera or "Respect" Law — to be passed for the community in the area of land management.

Trust – There is a faction of the community that maintains that only the present "traditionalists" are eligible to control the politics and political systems of the community, but another group also claims the right. Others believe that no group, not even the elected council, is qualified to take the responsibility for governance. Many Kahnawà:ke community members argue that the biggest obstacle is ignorance and fear of the unknown. Governance is made out to be scary and difficult, yet we are already implementing it. There is mistrust in the leadership of the community because they are put in place by a system that is not of our choosing. Therefore, any initiative driven by the Mohawk Council of Kahnawà:ke is not trusted by part of the population, which has direct effect on the number of participants in the process.[31]

31 For discussion on this, see Organizational Development Services, "Final Report Tekariho'tahrhon (Of the Dispute at hand): Community Consultation Project" Organizational Development Services and Resolution Alliance Inc. (1999) at 11.

Abolishment of Type II Process — In the Type II Process, it is the Chief and Council who determine the mandate, scope, purpose, and intent of a law or an amendment to a law. This fact creates mistrust for the Type II Process for the reasons illustrated by the previous issue. There have been numerous requests by community members for the removal of this categorization process and that all laws should go through a Type I Process in which there is full community input on all aspects of a law from inception to ratification.

Workload —Technicians assigned to champion a law through the CDMP, members of the Technical Team and KLCC, and community members themselves find it difficult to keep up with the level of work required to put a law through the process. Technicians are responsible for different laws as well as issues related to governance of the community. The Technical Team, recruited to draft a law or draft amendments to a law, also have other responsibilities related to their full-time work. Community members themselves have difficulty in finding the time to participate in the hearings and readings as they too have work and family responsibilities to consider. This illustrates the fact that participatory democracy takes a lot of personal commitment. One has to consider if the process fits today's society or how to make it fit.

Resources — There are limited financial and manpower resources to support the process. Currently, the KLCC is housed within the Mohawk Council of Kahnawà:ke Office of the Council of Chiefs (OCC). The OCC provides the necessary infrastructure and support needed to maintain the Commission and CDMP as a whole.

Implications/Conclusions

There is a natural fear of the unknown, especially in terms of the practical meaning of traditional government and the Community Decision Making Process. For Kahnawà:ke community members not only is there a fear of change, but questions also arise as to the implications of the CDMP on the Mohawk Council of Kahnawà:ke as an institution. The process is a clear step away from the long-held paternalistic relationship between the community of Kahnawà:ke and Canada. The process could be viewed as a form of self-determination. Stepping out and taking ownership of one's actions is scary at the best of times. At the least, this form of participatory democracy requires individuals to bring their knowledge, expertise, and love for their community to the table. The decisions they make will have far reaching implications, seven generations into the future.

On a related note, by taking away the ability of Canada to make laws for the community, a certain sense of ownership and responsibility comes with making laws that regulate a community's actions. Yet we are not completely secure about our right to govern over our own affairs. This comes from insecurity about our relationship with Canada regarding economic, legal, and political issues. In the time since we signed political treaties with the colonizers, our trust in the non-native signatories has truly been tested. Time and time again we have been made to cede our land, rights, and lives to the colonizers. Added to this is a certain fear of our own culture as a consequence of the efforts of Canada and the Church to assimilate our people.

Indigenous peoples have been taught to fear our own ancient traditions and language. The well-documented effects of this are seen in the loss of language, culture, and traditional knowledge. Since 1492, we have moved away from social, political, and spiritual processes that worked and kept us alive. Yet all is not lost. Part of this has been kept alive and we see the effect of this in the revitalization of participatory democracy in the form of the Community Decision Making Process.

As more cutbacks to funding occur, we will see more instances in which we will have to take ownership of our own future. Canada no longer has the money to uphold its treaty obligations to Indigenous peoples. As a result, we are the masters of our own domain. The Community Decision Making Process should be seen as a self-empowered, controlled, and gradual step towards a form of traditional governance. It is taking a step in the right direction.

Book Review of Felix Hoehn, *Reconciling Sovereignties. Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012).

*Janna Promislow**

Felix Hoehn's *Reconciling Sovereignties* explores an idea that was once too radical to be taken seriously by the legal profession: settling Aboriginal rights claims requires an inquiry into how the Crown acquired sovereignty in what is now Canada and the consequent nature of that sovereignty. Where Bruce Clark unsuccessfully and infamously challenged the jurisdiction of Canadian courts to hear Aboriginal jurisdictional claims on the basis of unceded Aboriginal sovereignty,[1] Felix Hoehn now questions the legitimacy of Crown sovereignty in a less threatening manner. He succeeds in presenting a hopeful and convincing argument that suggests that the Aboriginal rights jurisprudence has matured to the point of tolerating — and in his view, requiring — this conversation.

Hoehn's thesis is that the 2004 decisions of the Supreme Court in *Haida Nation v British Columbia (Minister of Forests)*[2] and *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*[3] mark the beginning of a shift in paradigm, one that moves away from a "discovery paradigm" to a "sovereignty paradigm" that recognizes the equality of peoples and the respective sovereignty claims of Aboriginal peoples and the Crown. Building on critiques of the doctrine of discovery as ethnocentric, racist, and immoral,[4]

* Assistant Professor, Thompson Rivers University Faculty of Law.

1 See e.g. *Delgamuukw v British Columbia* (12 September 1995), Ottawa, 23799 (SCC) (Transcript and Decision on a Motion to State a Constitutional Question), reprinted in "Appendix," Bruce Clark, *Justice in Paradise* (Montreal-Kingston: McGill-Queen's University Press, 1999) at 364-367 and available online: <http://sisis.nativeweb.org/clark/sep12scc.html#decision>. Clark argued that the jurisdictional argument was critical to the rule of law and he accused judges of being complicit with genocide for not addressing this point. Chief Justice Lamer roundly rejected this accusation, calling Bruce Clark a "disgrace to the bar" (*Justice in Paradise* at 366).

2 2004 SCC 73, [2004] 3 SCR 511 [*Haida Nation*].

3 2004 SCC 74, [2004] 3 SCR 550 [*Taku River*].

4 See e.g. John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) [*Borrows 2010*]; Patrick Macklem, "Distributing Sovereignty: Indian Nations and Equality

Hoehn argues that the Canadian Constitution and international law demand scrutiny of unilateral Crown claims of sovereignty and that such an approach is critical to the project of reconciliation between Aboriginal and non-Aboriginal peoples.[5]

He first outlines how the Canadian adoption of the discovery paradigm failed to recognize Aboriginal sovereignty, noting that an Aboriginal title doctrine built upon feudalism and racial hierarchy provides "a poor vehicle for taking Canada to the reconciliation promised by s. 35(1)."[6] Hoehn's review of the inadequacies of the discovery and Aboriginal title doctrines provides a succinct history of the development of these doctrines and gestures to the precarious status of Aboriginal title as a legal interest in the late-19th century.[7] His review of the historic Marshall decisions[8] from the United States is particularly interesting. He reaches beyond the oft-repeated quotations and principles to survey a larger range of American Supreme Court opinion and the later narrowing of this jurisprudence.[9] This approach effectively re-emphasizes the selective adoption of the Marshall jurisprudence and narrowed view of indigenous legal interests embedded within the Canadian Aboriginal title doctrine.

In Chapter Two, Hoehn argues that a sovereignty paradigm has begun to emerge. He bases this claim on a review of recent Supreme Court cases and academic commentary regarding a shift apparent in consultation cases.[10] Scholars such as Brian Slattery and Mark Walters have noted the significance of the shift in the structure of Aboriginal rights jurisprudence and language

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of Peoples" (1993) 45 Stan L Rev 1311; Robert J Miller, "American Indians, The Doctrine of Discovery, and Manifest Destiny" (2011) 11 Wyo L Rev 329; and "Conference Report from the International Seminar on the Doctrine of Discovery" (Kamloops: Shuswap Nation Tribal Council and Thompson Rivers University, 20-21 September 2012) online: <https://sites.google.com/site/dofdseminar/home>.

5 Felix Hoehn, *Reconciling Sovereignties. Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012) at 6-7 [Hoehn].

6 *Ibid* at 32.

7 *Ibid* at 22. The legality of the native title interest and status of Aboriginal polities in the 19th century has attracted debate in the last decade: see, *e.g.* Paul G McHugh, *Aboriginal Societies and the Common Law. A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), Ch 3 especially, and Mark D Walters, "Histories of Colonialism, Legality and Aboriginality" (2007) 57 UTLJ 819.

8 *Johnson v M'Intosh,* 21 US 543 (1823), 5 L Ed 681; *Cherokee Nation v Georgia,* 30 US 1 (1831), 8 L Ed 25; and *Worcester v Georgia*, 31 US 515 (1832), 8 L Ed 483.

9 Hoehn, *supra* note 5 at 15-20.

10 *Supra* notes 2 and 3, as well as *Mikisew Cree First Nation v Canada (Minister of Heritage)*, 2005 SCC 69, [2005] 3 SCR 388 [*Mikisew Cree*], *Beckman v Little Salmon/Carmacks First Nation,* 2010 SCC 53, [2010] 3 SCR 103 [*Little Salmon/Carmacks*] and *Rio Tinto Alcan v Carrier Sekani Tribal Council*, 2010 SCC 43, [2010] 2 SCR 650 [*Rio Tinto Alcan*].

around sovereignty apparent in key duty to consult cases.[11] Many scholars have also emphasized the importance of recognizing Aboriginal sovereignty to the project of reconciliation.[12] Hoehn builds on these arguments by shifting the emphasis to Crown sovereignty and in particular, the conceptual space to consider its legitimacy within the present constitutional framework and cases. Instead of emphasizing the nature of Aboriginal sovereignties and their potential incompatibilities with Crown sovereignty, the cornerstone of Hoehn's argument is his careful exploration of the recognition of indigenous sovereignty implicit in the Supreme Court's description of Crown sovereignty as *de facto* until Aboriginal and Crown sovereignty are reconciled through a treaty.[13]

Hoehn's argument first establishes that recognizing indigenous sovereignty does not displace or threaten the sovereignty of the Canadian Crown. This argument rests on the difference between *de jure* and *de facto* sovereignty, which he asserts allows for questioning the legitimacy of Crown sovereignty. He further argues that section 35 of the *Constitution Act, 1982* demands such questioning. His approach involves a persuasive account of how the Act of State doctrine precludes supplanting the effectiveness of the Crown's *de facto* sovereignty, yet does not preclude arguments about the legitimacy (or *de jure* status) of Crown sovereignty in domestic courts. Hoehn accepts the long-established limitation on the ability of domestic courts to question the Crown's acquisition of territory but also argues that the doctrine "cannot be used to shield the Crown from claims that do not seek to dismantle Canada but rather unite it by furthering the reconciliation sought by section 35."[14] Particularly effective is Hoehn's use of the *Quebec Secession Reference*[15] and other constitutional cases stemming from disputes outside of the Crown-Aboriginal relationship to delineate the line between permissible, domestic constitutional questions and political or international legal questions that are beyond the competence of domestic courts.

11 Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470 at 513-518 and Brian Slattery, "Aboriginal Rights and the Honour of the Crown" (2005) 29 SCLR (2d) 433.

12 See e.g. Walters, *ibid*, Borrows 2010, *supra* note 4. For discussions of the different approaches to reconciliation in the jurisprudence, see Kent McNeil, "Reconciliation and the Supreme Court. The Opposing Views of Chief Justices Lamer and McLachlin" (2003) 2 Indigenous LJ 1 and Dwight G Newman, "Reconciliation. Legal Conception(s) and Faces of Justice" in John D Whyte, ed, *Moving Toward Justice. Legal Traditions and Aboriginal Justice* (Saskatoon: Purich Publishing Ltd & Saskatchewan Institute of Public Policy, 2008) 80.

13 *Haida Nation, supra* note 2 at para 32; *Taku River, supra* note 3 at para 42.

14 Hoehn, *supra* note 5 at 39.

15 [1998] 2 SCR 217, 161 DLR (4th) 385.

The next step in Hoehn's argument describes the scope and importance of the Crown's *de facto* authority. Drawing again on constitutional jurisprudence outside of Aboriginal law, and in particular the *Manitoba Language Rights Reference*,[16] Hoehn highlights how *de facto* authority supports the rule of law and convincingly demonstrates how, in a sovereignty paradigm, the *de facto* doctrine might be "enlarged" in connection with the doctrine of necessity to support the continuing governance authority of the Crown in the absence of reconciliation and *de jure* Crown authority.[17] This insightful analysis explains the duty to consult as a limitation of the Crown's *de facto* governance authority — potentially displacing the reliance on the honour of the Crown as the source of consultation obligations in the jurisprudence — and suggests potential avenues for expanded remedies and further limits on Crown authority prior to reconciliation.

In building his case for an emerging sovereignty paradigm, Hoehn also discusses recent Aboriginal rights cases, including *Marshall/Bernard,*[18] *Sappier/Gray*,[19] and *Lax Kw'alaams*,[20] as further evidence of the emerging sovereignty paradigm — a review that is, in my view, more hopeful than balanced in its assessment of those decisions. The review of the consultation decisions is similarly selective. His theorizing of the sovereignty paradigm is premised strongly on the existence of the duty to consult, with little attention to the structure of the duty expressed in the elements that define its trigger and scope. These elements, however, limit the impact of the duty and have led to critiques of the duty as engendering an assimilative dynamic, particularly in the jurisprudential emphasis on procedural over substantive remedies (accommodation) and the lack of a requirement for Aboriginal consent in most cases.[21] Hoehn addresses this latter point in the final chapter, in which he advocates for a consent-based consultation obligation and thus treats such critical concerns as evidence of the emerging and incomplete nature of the sovereignty paradigm. However, his inattention to the many ways the consultation and rights jurisprudence might be characterized as undermining rather than supporting a

16 [1985] 1 SCR 721, 19 DLR (4th) 1.

17 Hoehn, *supra* note 5 at 48-52.

18 *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall/Bernard*].

19 *R v Sappier; R v Gray,* 2006 SCC 54, [2006] 2 SCR 686 [*Sappier/Gray*].

20 *Lax Kw'alaams Indian Band v Canada (Attorney General),* 2011 SCC 56, [2011] 3 SCR 535 [*Lax Kw'alaams*].

21 See *e.g.* Gordon Christie, "Developing Case Law: The Future of Consultation and Accommodation" (2006) 39 UBC L Rev 139 [Christie]; E Ria Tzimas, "To What End the Dialogue?" (2011) 54 SCLR (2d) 493; and Veronica Potes, "The Duty to Accommodate Aboriginal Peoples Rights: Substantive Consultation?" (2006) 17 J Envtl L & Prac 27.

sovereignty paradigm renders it more difficult to agree that this new paradigm has taken root.

In the penultimate chapter, Hoehn broadens the scope of his sovereignty paradigm, bravely (and briefly) imagining the implications of this paradigm for treaty contexts, third parties, fiduciary obligations, and other thorny aspects of present Aboriginal-Crown relationships. He aligns the application of the sovereignty paradigm in the historical treaty contexts with indigenous and scholarly arguments that historic treaties implemented a shared sovereignty rather than a surrender of Aboriginal sovereignty in favour of the Crown's authority.[22] This and other discussions in the chapter highlight Hoehn's view of the sovereignty paradigm as resulting in shared sovereignty, which requires recognizing Aboriginal jurisdictions and reconciling them with federal and provincial jurisdictions through negotiations. His approach also emphasizes the proper place of Aboriginal governments in Canadian federalism, echoing related observations of other scholars.[23] Consequently, a key consideration in this chapter is the ongoing place of freestanding rights in advancing the sovereignty model. Hoehn suggests that the transition to the sovereignty model could take time and calls for a consent-based consultation regime strictly limiting government while its authority remains *de facto* rather than *de jure*. He also suggests that during this transition the courts' role in determining freestanding rights should be decided in a manner that advances the sovereignty model. In making this argument, he draws on Brian Slattery's discussion of the courts' role as protecting historical rights from further erosion and providing a baseline for negotiation of modern rights and jurisdictions.[24] Finally, Hoehn envisions an evolution in the fiduciary relationship to a partnership of equals, more akin to a business relationship, than the past colonial hierarchies.[25]

There are, of course, gaps in Hoehn's discussion and ideas that deserve further exploration. For example, the emphasis on the *de facto* nature of the Crown's authority as the source of limitations in Crown-Aboriginal relationships departs from the Court's recent emphasis on the honour of the Crown

22 Hoehn, *supra* note 5 at 119-122.

23 See e.g. Dwight G Newman, "Aboriginal 'Rights' as Powers: Section 35 and Federalism Theory" (2007) 37 SCLR (2d) 163; Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (West Vancouver: Centre for First Nations Governance, 2007), online: <http://fngovernance.org/pdg/Jurisdiction_of_Inherent_Rights.pdf>; and Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31 Queen's LJ 521.

24 Hoehn, *supra* note 5 at 141-2, drawing on Brian Slattery, "The Metamorphosis of Aboriginal Title" (2007) 85 Can Bar Rev 255.

25 Hoehn, *ibid* at 147.

— an interesting and potentially productive departure that deserves further attention. Since the publication of this work, the Supreme Court has continued to emphasize the honour of the Crown as a source of obligations and limitations on Crown authority specific to Aboriginal peoples, which the Court now identifies as originating in the Royal Proclamation.[26] By contrast, Hoehn emphasizes the limited nature of Crown authority in the absence of *de jure* sovereignty, a limitation that is not unique to Aboriginal contexts. While he acknowledges that the honour of the Crown also conditions limitations on the Crown's *de facto* authority,[27] he views the honour of the Crown as part of the fiduciary relationship that must evolve to be compatible with a relationship between equals.[28] A welcome addition to Hohen's work would be further exploration of this evolution, particularly the implications of these directions for the current role of the honour of the Crown in the jurisprudence and whether the relationship between the Crown and Aboriginal peoples would retain its distinctiveness.

Another point that deserves further attention is the argument around the scope for questioning the legitimacy of the Crown's sovereignty in a manner that is consistent with the Act of State doctrine. Hoehn's discussion raises questions of whether the sovereignty paradigm is sufficiently different from the diminished sovereignty recognized in the robust reading of the Marshall decisions to transcend the discovery paradigm and to satisfy indigenous parties. Relatedly, in Hoehn's discussion the concept of sovereignty must be taken as a given, with indigenous and Crown sovereignty being treated as conceptual equals. Although Hoehn's emphasis is on the nature of Crown sovereignty and this focus is productive, it remains important to consider the evolving nature of state sovereignty and indigenous conceptions of sovereignty (or governance) alongside such doctrinal discussions. For example, he briefly considers the jurisdiction to resolve issues of overlapping territories between Aboriginal nations and suggests that such issues would not be within the Canadian courts' or governments' authority but would rather be a matter for indigenous legal systems to resolve.[29] While this is a well-taken point, it also begs for further exploration. To illustrate, broadening the horizons of sovereignty and jurisdiction to include both personal and territorial authorities would add complexity around the notion of sovereignty within the western tradition.[30] This move in

26 *Manitoba Metis Federation Inc v Canada (Attorney General)*, 2013 SCC 14 at para 66.

27 Hoehn, *supra* note 5 at 116.

28 *Ibid* at 154.

29 Hoehn, *supra* note 5 at 113.

30 In the context of western concepts of sovereignty, see, *e.g.* Jean Leclair, "Federal Constitutionalism and Aboriginal Difference" (2006) 31 Queen's LJ 521 and, for a historical account, Lisa Ford, *Settler*

turn opens the door for a deeper consideration of indigenous law and notions of sovereignty and jurisdiction, in which geopolitical territorial boundaries may not be indicative of governance authority.[31] With this door opened, the potential constructions of the problem presented by "overlapping claims" are reconfigured, and in turn, the role of the Crown in creating, maintaining, or aggravating such claims may be reconsidered, raising questions about whether the Crown is so easily extracted from resolutions. Thus, in a discussion of reconciling sovereignties, the notion of sovereignty itself deserves critical attention.

Regardless of these gaps, it would be unfair to expect too much detail of this short and largely theoretical account of a sovereignty paradigm. Hoehn has made an important contribution by anticipating and suggesting the next steps in the discussion of reconciliation and the development of the section 35 jurisprudence. His work provides aspirational guidance in a manner that reflects the traditions of the Native Law Centre at the University of Saskatchewan College of Law[32] and helps takes that tradition into a new era in Aboriginal law.

Sovereignty. Jurisdiction and Indigenous People in American and Australia, 1788-1836 (Cambridge, Massachusetts: Harvard University Press, 2010).

31 See *e.g.* Brian Thom, "The Paradox of Boundaries in Coast Salish Territories" (2009) 16 Cultural Geographies 179 and Janna Promislow, "'It would only be just': A Study of Territoriality and Trading Posts along the Mackenzie River, 1800-27" in Lisa Ford & Tim Rowse, eds, *Between Indigenous and Settler Governance* (New York: Routledge, 2013) 35.

32 Directors of the Native Law Centre have included Brian Slattery, Kent McNeil, and James (Sákèj) Youngblood Henderson (present). Publications of the Centre include: Brian Slattery, *Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title* (Saskatoon: Native Law Centre, 1983); Kent McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001); and James (Sákèj) Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights. Defining the Just Society* (Saskatoon: Native Law Centre, 2006). Paul McHugh has described the tradition that emerged from the Centre and the University of Saskatchewan College of Law more generally in the 1970s and 1980s as "exhortative" and focused on "good rights-design," which viewed the role of law in achieving justice for aboriginal peoples optimistically; see Paul G McHugh, *Aboriginal Title. The Modern Jurisprudence of Tribal Land Rights* (Oxford: Oxford University Press, 2011), especially 85-88 and 186-188, and Paul G McHugh, "A History of the Modern Jurisprudence of Aboriginal Rights — Some Observations on the Journey So Far" in David Dyzenhaus, Murray Hunt & Grant Huscroft, eds, *A Simple Common Lawyer. Essays in Honour of Michael Taggart* (Oxford and Portland, Oregon: Hart Publishing, 2009) 209.