

FROM ABORIGINALITY TO GOVERNMENTALITY:  
THE MEANING OF SECTION 35(1) AND THE POWER OF LEGAL DISCOURSE

by

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## ABSTRACT

This thesis examines recent doctrinal developments regarding the aboriginal and treaty rights which are recognised and affirmed in s.35(1) of the *Constitution Act, 1982*. Specifically, it explores how the meaning of such rights is being constituted by diverse relations of power operating within specific 'sites' of struggle.

Chapter I is a brief introduction to recent transformations in the legal discourse of the Supreme Court and an overview of the methodologies being employed in this thesis. In this regard, the author undertakes an interdisciplinary approach to discourse analysis.

Chapter II draws upon the writings of Michel Foucault to make the argument for the analytical framework being utilised; namely, the study of 'law' within a 'sovereign-discipline-government' society.

Chapter III examines the relationship between the *productive* power of the disciplines and the legal discourse constituting the content of aboriginal rights; the purpose being to explore to what extent law 'operates as a norm' within this area. Additionally, it provides a lead into the discussion of 'government' by outlining the rationality underpinning the test for the justified *governmental* infringement of aboriginal and treaty rights.

Chapter IV, examines the relationship between the *regulatory* power of 'government' and the legal discourse around current treaty negotiations. Specifically, it explores the inter-dependency between rationalities of self-government and the governmental technologies associated with 'advanced' liberalism. In doing so, it focuses on an emerging treaty from British Columbia to assess the extent to which law is being used as 'a tactic of government'.

Chapter V, examines the relationship between the *deductive* power of 'sovereignty' and the legal discourse constituting the content of Aboriginal title. It argues that recent

developments require the Court to deal with the issue of legal pluralism. And to do so, in a way that lays a more successful foundation in law for the legitimate reconciling of the pre-existence of First Nations societies and the sovereignty of the Crown.

Chapter VI provides some concluding comments about the insights gained from the proceeding analysis. In doing so, it offers a brief discussion of how the proceeding specific analysis may relate to some recent work in post-colonial studies.

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## I. Introduction and Methodology

[T]he aboriginal rights recognised and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.<sup>1</sup>

[W]e need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government; in reality one has a triangle, sovereignty-discipline-government...<sup>2</sup>

As the above quotes may indicate, this thesis is underpinned by an attempt to construct a dialogue between Foucault's theorising about relations of power on the one hand, and legal discourse on the other. More specifically, my focus is upon the meaning of the aboriginal and treaty rights which are recognised and affirmed in s.35(1) of the *Constitution Act, 1982*<sup>3</sup>. In particular, those aboriginal and treaty rights that arise in the context of what is now known as British Columbia.

In terms of the dialogue I am attempting to construct, it is my belief that the work of Foucault can shed light upon the various relations of power which are involved in constituting the meaning of s.35(1) rights. And similarly, I believe that an analysis of s.35(1) rights can shed light upon Foucault's articulation of sovereign, disciplinary and

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<sup>1</sup> R. v. *Vanderpeet*, [1996] 2 S.C.R. 507 at 539, Lamer C.J.

<sup>2</sup> M. Foucault, "Governmentality" in G. Burchell, C. Gordon and P. Miller, eds., *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991) 87 at 102.

<sup>3</sup> *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35(1) provides "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby



governmental relations of power as they operate in society generally and within law specifically.<sup>4</sup> In this regard, it is worth recalling Goodrich's observation that:

[A] critically adequate reading of the law should take account of the various levels of law as social discourse, as a series of institutional functions and rhetorical effects, a project which requires reading within the legal text precisely those facets or meanings of legal *regulation* and *discipline* which its self-protective doctrines of unity, coherence and univocality have traditionally endeavoured to exclude.<sup>5</sup>

By reading the legal texts on s.35(1) as specific 'cites' of struggle over meaning, I will explore three differing relations of power at work in such 'cites'. My thesis is, I think, a modest one. Simply put, I argue that the legal discourse which constitutes the meaning of s.35(1) aboriginal and treaty rights, can usefully be understood and analysed with regard to the relations of power that exist within what Foucault came to call a 'sovereign-discipline-government' society.

At this stage, to bring this analytical framework into clearer focus, I will now provide a brief and general account of how I view recent doctrinal developments regarding s.35(1) and the specific 'cites' of struggle over meaning that are emerging.

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recognized and affirmed." For a background discussion of aboriginal rights, see B. Slattery, "Understanding Aboriginal Rights" (1987) 66 The Canadian Bar Review 727.

<sup>4</sup> It should be noted that although I use the term 'law' here, I do not subscribe to the view that law is a unified entity. Rather, I see part of the 'power of law' to present itself as such. However, I will continue to use the term law for convenience. For an elaboration of how law presents itself as a unified entity and denies its contradictory existence, see C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989) and P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

<sup>5</sup> P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (New York: St. Martin's Press, 1987) at 206. [my emphasis].

### **A. s.35(1) and Recent Doctrinal Developments**

In Canada, the aboriginal and treaty rights which are recognised and affirmed in s.35(1) have been constitutionalized since 1982. The Supreme Court of Canada, in *R. v. Sparrow*<sup>6</sup>, considered the meaning of s.35(1) and outlined the following interpretative model for courts deciding s.35(1) claims:

- (i) determine whether the applicant has demonstrated that they were acting pursuant to an aboriginal right;
- (ii) determine if the aboriginal right has been extinguished;
- (iii) if not extinguished, determine whether the right has been infringed; and
- (iv) if infringed, determine whether such infringement is justified.<sup>7</sup>

However, what the Court didn't do in *Sparrow* was to make explicit how the content of such rights should be determined at first instance. In this thesis, it is the subsequent transformations in the legal discourse of the Court regarding the determination of 'content' that I will be analysing; in particular, the doctrinal developments outlined in *R. v. Vanderpeet*<sup>8</sup> and *Delgamuukw v. British Columbia*<sup>9</sup>.

It seems to me, that the constitutionalization of aboriginal and treaty rights has resulted in three distinctive developments within this area of law. And in the following chapters I

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<sup>6</sup> [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

<sup>7</sup> *Ibid.* For a discussion of *Sparrow* and how the British Columbia Court of Appeal has unduly restricted the potential of this judgment, see A. Bowker, "*Sparrow's* Promise: Aboriginal Rights in the B.C. Court of Appeal" (1995) 53 Toronto, Faculty of Law Review 1.

<sup>8</sup> [1996] 2 S.C.R. 507. [hereinafter *Vanderpeet*].

will be analysing these developments and the transformations in legal discourse in more detail. For now however, I merely want to indicate in general terms how I read the current theoretical underpinnings of this area of law. As such, I would group recent changes as follows:

### **Sovereign relations**

Transformations in legal discourse include:

- (a) the purpose of s.35(1) has been stated as the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown<sup>10</sup>; and
- (b) it has been stated that Aboriginal title survives the assertion of sovereignty by the Crown and is capable of legal recognition<sup>11</sup>.

### **Disciplinary Relations**

Transformations in legal discourse include:

- (a) the content of aboriginal rights, as distinct from Aboriginal title, is to be determined in accordance with the Court's recently developed test for producing the historical (*pre-contact*) norms that are thought to capture such 'aboriginal' rights<sup>12</sup>.

### **Governmental relations**

Transformations in legal discourse include:

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<sup>9</sup> [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

<sup>10</sup> *Vanderpeet*, *supra* note 8.

<sup>11</sup> *Delgamuukw*, *supra* note 9.

- (a) the regulated infringement of s.35(1) rights can be justified on the basis of an increasing range of governmental objectives concerning the non-aboriginal population<sup>13</sup>; and
- (b) treaties emerging from negotiations in British Columbia which are based around rationalities of self-government are to be constitutionalized as s.35(1) rights.<sup>14</sup>

In sum, given the recent developments (sovereign-discipline-government relations) in this area of law, I suggest that if we are to analyse the way meaning is constituted then this requires a particular understanding of the different relations of power involved in each 'cite'.

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<sup>12</sup> *Vanderpeet*, *supra* note 8.

<sup>13</sup> As initially formulated in *Sparrow* and later elaborated on in *Vanderpeet*; *R. v. Gladstone*, [1996] 2 S.C.R. 723 [hereinafter *Gladstone*]; and *Delgamuukw*. Additionally, as these cases note, such a test for justified infringement must take account of the Crown's fiduciary duty towards First Nations people. On the Crown's fiduciary duty, see *Guerin v. The Queen*, [1984] 2 S.C.R. 335. [hereinafter *Guerin*]. For a comparative discussion of the scope of the Fiduciary Duty, see D. Elliott, "Aboriginal Peoples in Canada and the United States and the Scope of the Fiduciary Relationship" [1996-1997] 24 *Manitoba Law Journal* 137. More generally in the Canadian context, see L. I. Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

<sup>14</sup> On the treaty negotiations generally, see C. McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver, University of British Columbia, 1996). For a specific example of what is emerging, see the *Nisga'a Final Agreement* (1998) [[http://www.aaf.gov.bc.ca/aaf/treaty/nisga/docs/nisga\\_agreement.html](http://www.aaf.gov.bc.ca/aaf/treaty/nisga/docs/nisga_agreement.html)] which involves the Nisga'a Nation, the province of British Columbia and the Government of Canada. [hereinafter *Final Agreement*]. Please note, the *Final Agreement* came out as this thesis was being completed. And although it differs slightly in detail from *The Nisga'a Agreement in Principle* (Issued Jointly by the Government of Canada, the Province of British Columbia and the Nisga'a Tribal Council, 1996), [hereinafter *Nisga'a AIP*], in substance it is similar. In chapter V, where I consider the emerging Nisga'a Treaty, I have focused upon the materials that are behind such an outcome and consequently make detailed reference to the *Nisga'a AIP* rather than the *Final Agreement*. I don't anticipate this effecting the substance of my analysis given that its focus is on the background materials. Also, it should be pointed out that the *Final Agreement* has yet to be ratified.

## **B. Outline of Thesis**

I propose to support the argument for my thesis (that the legal discourse constituting the meaning of section 35(1) aboriginal and treaty rights can usefully be understood and analysed with regard to the relations of power that exist in a 'sovereign-discipline-government' society) by dividing my thesis into two parts. In the first part of this thesis, I will be making the argument that Foucault's writings support an analytical framework which would see law (or more specifically, the 'power of legal discourse') situated within a 'sovereign-discipline-government' society. And in the second part of this thesis, I will be utilising such an analytical framework to undertake a specific analysis of the power of legal discourse which constitutes the meaning of s.35(1) aboriginal and treaty rights.

I realise the idea of using an analytical framework based upon French philosophical thought to examine aboriginal and treaty rights may appear more than a little Eurocentric. However, as I hope to make apparent, I think that the legal discourse around aboriginal and treaty rights tends to tell us more about the *limits* of Western legal power and knowledge than it does about such rights. And it is upon that premise, I view the legal discourse of the Supreme Court as my primary object of analysis.

One consequence of dividing my thesis into two parts is that even if it were considered that Foucault's writings don't support such an analytical framework, the validity of the specific analysis of section 35(1) can stand on its own. And furthermore, if that were considered the case, then I would argue that the analysis of the power of legal discourse

as it relates to the meaning of s.35(1) is itself demonstrative of the utility of analysing this area of law within a 'sovereign-discipline-government' framework.

That said, the internal structure of my thesis is as follows: In chapter II, I will draw upon the writings of Michel Foucault to make the argument for the analytical framework being proposed; namely, the study of 'law' within a 'sovereign-discipline-government' society. The writings of Michel Foucault will be my primary focus of analysis.

In chapter III, I will examine the relationship between the *productive* power of the disciplines and the legal discourse around the content of aboriginal rights; my purpose being to explore to what extent law 'operates as a norm' within this area. And in anticipation of my discussion of 'government', I will also comment upon the emergence of the test for justified infringement in this chapter. The Court's decision in *Vanderpeet* will be the primary focus of my analysis.

In chapter IV, I will examine the relationship between the *regulatory* power of 'government' and the legal discourse around the content of emerging treaties in British Columbia; my purpose being to explore the extent to which law is being used as 'a tactic of government'. *Gathering Strength: Canada's Aboriginal Action Plan*<sup>15</sup> and the Nisga'a negotiations will be the primary focus of my analysis.

In chapter V, I will examine the relationship between the *deductive* power of 'sovereignty' and the legal discourse constituting the content of aboriginal title. In doing so, I will argue that recent developments require the Court to deal with the issue of legal pluralism. Furthermore, I argue that this will need to be done in a way that lays a more successful foundation in law for the legitimate reconciling of the pre-existence of First Nations societies and the sovereignty of the Crown. The Court's decision in *Delgamuukw* will be the primary focus of my analysis.

In chapter VI, I will offer some concluding comments about the insights gained from the proceeding analysis. In doing so, I will discuss how the proceeding analysis may relate to some recent work in post-colonial studies.

### **C. Methodologies of a 'hobbler'**

My great grandfather, Jack 'Yaller' Byrne, spent most of his years as a dockside worker around the Dublin quays in Ireland. He worked as a 'hobbler'; a term and a line of work that until recently were unbeknown to me. However, Christy Sands, who is my mother's first cousin, has explained the work of my Great Grandfather as follows:

This job entailed using his rowing skills to be first out to any incoming ship to take their rope and line, then secure it to their appointed berthing place so the ship could be correctly and swiftly secured. His son Michael was his helper who also kept watch for ships movements so they would have been on

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<sup>15</sup> Canada, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Minister of Indian Affairs and Northern Development, 1997) [hereinafter *Canada's Aboriginal Action Plan*].

the alert early, gaining work in what was a very competitive business, long before radio or wireless communications made this work somewhat easier.

As well as being very competitive, the life of a hobbler could also be very dangerous, as in their rush to secure incoming ship's business, many fatal accidents had occurred. There were the more straight forward dangers such as drowning if their rowboat capsized (many seamen and dockside workers followed the old advice that they should not learn to swim as drowning would then occur faster and with less pain), also in their race to keep ahead of the competition many rowers were venturing out much further than their boats had been intended for. This gave rise to further accidents out in rougher water and worst of all, in their haste to be first out, some rowers had been caught in the path of the fast moving ships and smashed to fragments.<sup>16</sup>

Beginning work on my thesis as a graduate student of law, I looked out upon the legal horizon from the University of British Columbia and my attention was drawn to a particular discursive 'vessel'. Perhaps it was the current political climate that drew my attention to this vessel - I'm not sure. For whatever reasons, the vessel that caught my attention and became the basis of my thesis, is one that contains a variety of often contradictory and competing material about the meaning of 'aboriginal and treaty rights'. It is my aim in this thesis, to re-direct the discursive vessel of aboriginal and treaty rights from the legal horizon into a birth which forms the gateway to a broader territory of understanding. The territory to which I refer, and in which I will locate the birth of this analysis, is the 'sovereign-discipline-government' territory mentioned by Foucault at the beginning of this chapter. And, as I will argue, it is precisely within this territory of understanding that some light can be shed on the relations of power involved in the attempted 'transformation of societies into society'.

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<sup>16</sup> C. Sands, *Jim Larkin and a Liffey Rescue 1911*. (Yaller Byrne) (1996) [unpublished]. A copy of this paper is on file with the author. [A shortened version of this piece was read by Sands on Sunday Miscellany, RTE Radio One, at 09:30 on 10 November, 1996 under the title 'A Liffey Rescue 1911'.]



In undertaking the task of analysing the discursive material that constitutes the meaning of aboriginal and treaty rights, I sensed that I was involved in a kind of mapping or a process of locating the current co-ordinates of 'law'. As such, I have decided to explicitly theorise that experience or process. To that end, the internal structure of my thesis now contains a chapter discussing Foucault and what I see as being the present relationship between 'law' and 'society'. This chapter, has been placed at the beginning of my thesis to provide an account of the theoretical framework that emerged from my analysis but also to be up front about the limitations of the analysis that follows. In this regard, although it is predominantly relations of power in what is now named 'British Columbia' that provides the backdrop for both the 'law' and the 'society' in my thesis, my comments on law's relationship to colonialism/post-colonialism are left until the final chapter. In doing so, I hope to be in a better position to reflect upon how the preceding analysis of specific 'sites' of struggle may relate to more general theorising in post-colonial studies.

While I recognise the limitations of the framework in which I situate myself and the knowledge I bring to this topic, I remain a strong advocate of this framework. This is because I believe it to be insightful about the differing but interconnected relations of power that are operating in this area of law. In part, this is due to my opinion that the discursive vessel in question takes us beyond the doctrinal framework associated with aboriginal rights to date. Perhaps more significantly though, I would suggest that beyond the specifics of my own thesis, the theoretical framework developed can more generally be of assistance as a starting point for understanding the present 'power of legal

discourse' and how it operates within what Foucault termed a 'sovereign-discipline-government' society. In sum, I envisage the development of such a framework as contributing to one of the tasks of legal theory outlined by Cotterrell:

The theoretical analysis of law reveals many forms of power at work through law, or related to it in intricate ways. Indeed, one of the most important tasks of legal theory is to reveal and explain the characteristics and limitations of law's power as a means of defining and guaranteeing justice and order.<sup>17</sup>

In the remaining part of this chapter I will elaborate upon the choice of other methodologies utilised in this thesis. Additionally, I will explain the choice of material which forms the textual domain of my analysis and briefly define some of the terminology being used.

#### ***D. Discourse Analysis and an Interdisciplinary Approach***

As was mentioned earlier, the working days of a hobbler involved being confronted with risk, competition and the danger of being smashed into fragments. In terms of trying to understand one's own working environment today, it probably doesn't take much more than a glance through any major academic journal to be confronted by the proliferation in risk discourses, the prevalence of market competition and the predisposition that many a writer has for apocalyptic warnings about postmodern fragmentation. Like the hobbler then, we require the means to enable us to survive our journey through what are the current trends in risk, competition and fragmentation. My own attempts at attaining such

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<sup>17</sup> R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Clarendon Press, 1995) at 6.

means has involved travelling outside the discipline of law. This is because not long after my initial attempt at understanding the doctrinal developments that were taking place on the legal horizon, I found myself beyond the boundaries of law and in 'foreign' theoretical waters. It was at that stage I decided to reassess the theoretical means most appropriate for the journey ahead. Fortunately, if there is one distinctive feature of theory today, it is that it travels. How well it travels is certainly debatable, whether it should travel at all is perhaps questionable, but the fact remains that 'travelling theory' can and is readily found beyond the limits of any one discipline.<sup>18</sup> However, as Gregory has insightfully pointed out, the "origins of 'travelling theory' need to be scrupulously acknowledged because it will always be freighted with a host of assumptions, often derived from different and even radically incommensurable sites, which may not - and sometimes should not - survive the journey intact."<sup>19</sup> With that warning in mind, the particular travelling theory that informs my own thesis is the result of my engagement with contemporary legal and social theory. And much of the theoretical material I engage with has, in turn, been largely inspired by the work of Michel Foucault. Consequently, Foucault's own work (and its limitations for my thesis<sup>20</sup>) will be examined more closely in chapter II.<sup>21</sup>

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<sup>18</sup> For a recent discussion of 'travelling theory', see D. Gregory, *Geographical Imaginations* (Oxford: Blackwell, 1994) at 9, who borrows the phrase from Edward Said.

<sup>19</sup> D. Gregory, "Interventions in the Historical Geography of Modernity: Social theory, spatiality and the politics of representation" in J. Duncan and D. Ley, eds., *place/culture/representation* (London: Routledge, 1993) at 227.

<sup>20</sup> To signpost this issue here, I will be addressing the limitations of Foucault's own work in failing to develop an analysis that explored in more detail the present relationship between sovereignty and law. I will attempt to make up for this by drawing upon the later work of Jaques Derrida. Specifically, J. Derrida, "Force of Law: The 'Mystical Foundation of Authority'" in D. Cornell, et al, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3 and the insightful development of this work by D.

That said, the general methodology utilised in this thesis is qualitative and one of discourse analysis. Ericson and Haggerty have provided the following definition of discourse:

Discourse is the institutional construction of knowledge, which takes place within a social organisation of territories, material objects, people, rules, formats, and technologies. What are constructed are representational frameworks: classifications and categories that stand for objects, events, processes, and states of affairs in the world. These frameworks provide the basis for shared understanding, including an understanding of what knowledge is required to enhance, modify, or deny the representation. Knowledge is that which is objectified in institutional representations, a property and resource that provides a capacity for action.<sup>22</sup>

And as Nancy Fraser has noted, it is the concept of discourse which “links the study of language to the study of society.”<sup>23</sup> Furthermore, the approach being adopted in this thesis understands the legal text as a discourse which is “comprised of the network of its relations to other discourses, its dialogic, intertextual, functions and effects.”<sup>24</sup> Consequently, since the theoretical framework that informs this thesis is inspired by and derived from contemporary legal and social theory, I would characterise my approach to the study of legal discourse as being interdisciplinary. As Goodrich has stated, the

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Cornell, *The Philosophy of the Limit* (New York: Routledge, 1992) and M. Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (London: Pluto Press, 1996).

<sup>21</sup> In doing so, I aim to offer a corrective to the view of Foucault's relationship to law that was put forward by Hunt and Wickham in A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994).

<sup>22</sup> R. Ericson and K. Haggerty, *Policing the Risk Society* (Toronto: Toronto University Press, 1997). For a general background discussion of discourse analysis, see D. Macdonell, *Theories of Discourse: An Introduction* (Oxford: Basil Blackwell, 1986).

<sup>23</sup> N. Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (London: Routledge, 1997) at 160.

<sup>24</sup> Goodrich, *supra* note 5 at 212.

“interdisciplinary study of law is the correlate of a conception of legal expertise and practice which aligns and articulates specialism in legal discourse with knowledge and experience of other disciplines and practices.”<sup>25</sup>

In elaborating on the interdisciplinary study of law, Goodrich goes on to state that the purpose of interdisciplinary study would not be “that of juxtaposing legal knowledge with that of other, essentially separate, knowledges (pluridisciplinary), nor would it be that of absorbing other disciplines or sciences into legal expertise (transdisciplinary) for the purposes of providing a further technical dimension of legitimation to legal discourse.”<sup>26</sup>

Rather, the interdisciplinary study of law is aimed at:

[B]reaking down the closure of legal discourse and at critically articulating the internal relationships it constructs with other discourses. An interdisciplinary philosophy of law does not exist to make the legal text speak in a monologic and univocal way, it exists to analyse the interdiscursive status of legal texts and to conduct a critical and constructive dialogue with law.<sup>27</sup>

Given that I am taking an interdisciplinary approach to discourse analysis, what is it I hope to achieve from choosing such a methodology? In general terms, it seems to me that discourse analysis can be of assistance in a number of ways; four of which Fraser outlined as follows:

First, it can help us understand how people’s social identities are fashioned and altered over time. Second, it can help us understand how, under conditions of inequality, social groups in the sense of collective agents are formed and unformed. Third, a conception of discourse can illuminate how the cultural hegemony of dominant groups in society is secured and contested.

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<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*

<sup>27</sup> *Ibid.*

Fourth and finally, it can shed light on the prospects for emancipatory social change and political practice.<sup>28</sup>

It is perhaps a lack of engagement with this final element of discourse analysis which has come to be associated with those theorising about the supposedly present collective 'postmodern' condition.<sup>29</sup> I say this, not to enter into old polemical battlefields. Rather, it is as an attempt to distance myself from such debates and move to different ground. This is partly because on the one hand, I think one's choice of subject matter can itself be a 'political practice' even if it is to be analysed within a postmodern framework - however that might be understood. And on the other hand, I certainly don't want to dismiss genuine anxiety associated with a term like 'emancipatory social change', rather I think it understandable given the unknown consequences involved in any change. To paraphrase Foucault, it is not to say that every change is bad but that every change is dangerous. And while I feel a reluctance to situate myself under such a label as 'postmodernist', this is not because I reject out of hand all the theoretical insights of those that pass under that label.<sup>30</sup> Rather, my reluctance is much more basic; I question the usefulness of a word that has, it seems to me, become associated with a 'grander theory'

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<sup>28</sup> Fraser, *supra* note 23 at 152.

<sup>29</sup> See, J.-F. Lyotard, *The Postmodern Condition: A Report on Knowledge* (Manchester: Manchester University Press, 1984). For a discussion of its possible relation to law specifically, see A. Hunt, "The Big Fear: Law Confronts Postmodernism" (1990) 35 McGill Law Journal 507.

<sup>30</sup> For an interesting discussion of the utility of postmodernism for analyzing aboriginal rights, see P. Kainthaje, *The Intersection of Aboriginal Law and Aboriginal Rights in the Common Law Frameworks of Canada and Australia* (LL. M. thesis, University of British Columbia, 1996).

than modernism and now signifies almost everything but tends to affirm little if anything.<sup>31</sup>

Consequently, I see my thesis as being a collection of more specific interventions, ranging from attempts to clear some theoretical ground, expose flaws in legal reasoning, provide a diagnosis of present political rationalities of self-government and offer a critique of current legal limits. In that sense, this thesis is perhaps closer in its aims to the more recent work of critical legal studies which seeks to assume some of the “responsibility for the making, remaking and transmitting of law.”<sup>32</sup> As it has been put:

The third phase of critical legal studies, occasionally and variously termed deconstructionist, textualist, poststructural, postmarxist, postmodern or simply pluralist, is concerned both with the role and the possibilities of critical scholarship in the reproduction of doctrine and of law in the academy. A critical apprehension of legal knowledge, it is argued, should pay direct and scrupulous attention to the moment and the means of transmitting law as law. The concern with the textuality of law is both political and ethical.<sup>33</sup>

In sum, it seems to me, that to view things uncritically is, in general terms, ultimately passive consent for the current world order of things. More specifically, to not question

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<sup>31</sup> For example, this is precisely what cultural critic Dick Hebdige warned about in D. Hebdige, *Hiding in the Light* (London: Routledge, 1988) at 182. Although at that stage he obviously felt the term could still be useful and so was willing to affirm a meaning for it. For example ‘if, in a word, it enhances our collective (and democratic) sense of possibility, then I for one am a postmodernist.’ at 226. I should also add that there is now a much stronger affirmative postmodernism emerging that has been influenced by the later work of Jaques Derrida. See for example the work in law by Cornell: D. Cornell, *The Philosophy of the Limit* (New York, Routledge, 1992); D. Cornell, *Transformations: Recollective Imagination and Sexual Difference* (New York: Routledge, 1993); and D. Cornell, *The Imaginary Domain: Abortion, Pornography & Sexual Harassment* (New York: Routledge, 1995).

<sup>32</sup> C. Douzinas, P. Goodrich and Y. Hachamovitch, eds., *Politics, Postmodernity and Critical Legal Studies: The Legality of the Contingent* (New York: Routledge, 1994) at 14. For me this includes writing about law and cases in a style that is less restricting than the norms of formal ‘legal writing’ or ‘case commentaries’. Also, my (over?)use of quotations at the begining of each chapter is part of a conscious attempt to frame the dialogue that needs to be constructed between legal discourse and other discourses.

the current 'limits of law', is to run the risk of overlooking their contingency and of what may lie beyond them. As Bakan has recently noted, the "purpose of criticism is not to prove that nothing is possible, but rather to understand what is."<sup>34</sup>

### **E. Textual Domain and Terminology**

The materials chosen for analysis are, perhaps not surprisingly, the result of a subjective selection process. This selection process has been based upon the following premises. Firstly, that the *Report of the Royal Commission on Aboriginal Peoples*<sup>35</sup> and the submissions made to it, provide us with a new body of knowledge - or vantage point - from which to view First Nations issues. And secondly, the recent book by Hunt and Wickham on the relationship between *Foucault and Law*<sup>36</sup> provides an overview of Foucault's writings and their relevancy to legal studies. Thus, rather than go over issues covered in that material, I have attempted to address certain aspects which I see as developing the insights of that work. In the case of the *RCAP*, I have attempted to address issues arising from subsequent doctrinal developments in s.35(1) aboriginal and

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<sup>33</sup> *Ibid.*

<sup>34</sup> J. Bakan, *Just Words: Constitutional Rights and Social Rights* (Toronto: University of Toronto Press, 1997) at 11.

<sup>35</sup> Canada, Royal Commission on Aboriginal Peoples, *The Report of the Royal Commission on Aboriginal Peoples*, Vol. 1. *Looking Forward, Looking Back*, Vol. 2. *Restructuring the Relationship*, Vol. 3. *Gathering Strength*, Vol. 4. *Perspectives and Realities*, Vol. 5. *Renewal, A Twenty-Year Commitment* (Ottawa: The Commission, 1996) [hereinafter *RCAP*].

<sup>36</sup> Hunt and Wickham, *supra* note 21.



treaty rights. In the case of *Foucault and Law*, I have decided to 're-view' its claims concerning Foucault's alleged 'expulsion of law'.<sup>37</sup>

As is probably clear by now, the time frame of my thesis is very much the present. In this regard, I will be examining recent legal discourse on s.35(1) aboriginal and treaty rights in light of the stated purpose of s.35(1).<sup>38</sup> However, my focus on the present isn't meant to 'dispose' of history. Rather, it is meant to contribute to writing the 'history of the present'.<sup>39</sup> And to relate this history of the present to studies concerned with the historical role played by law in British Columbia, it is worth recalling Loo's conclusion that:

The power of history lies in its particularity; in taking each case on its own merits, as it were, and making visible the opportunities for subversion and people's ongoing efforts at exploiting them, as well as highlighting the contradictions and ambiguities inherent in the exercise of power. In doing so we not only come to understand how change comes about and the terms under which it is possible, but also keep historical agents - people - in the foreground of making it.<sup>40</sup>

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<sup>37</sup> In chapter II, I will offer an alternative to Hunt and Wickham's conclusions by re-viewing some of Foucault's writings and propose what I consider a stronger case for the study of 'law' within what Foucault called a 'sovereign-discipline-government' society. See, Hunt and Wickham, *Ibid.* And also, A. Hunt, "Foucault's Expulsion of Law: Towards a Retrieval" 17 *Law and Social Inquiry* (1992) reprinted in A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993) Chapter 12.

<sup>38</sup> Vanderpeet, *supra* note 1.

<sup>39</sup> See, A. Barry, T. Osborne and N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-Liberalism and Rationalities of Government* (Chicago: The University of Chicago Press, 1996). As opposed to 'Grand Theory' this approach to writing a history of the present utilizes a range of more local conceptual devices which "do not serve to sum up the present historical 'conjuncture'; rather they are tools for understanding some of the contingencies of the systems of power that we inhabit - and which inhabit us - today." at 4.

<sup>40</sup> T. Loo, *Making Law, Order, and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994) at 162.

I suggest that this *particularity* is equally important to writing the history of the present and to understanding the diverse relations of power currently at work in each case or 'cite' of struggle.<sup>41</sup> In that regard, the 'cites' of my analysis are as follows: In chapter III, I will be analysing the limitations of recent doctrinal developments in *Vanderpeet*; in chapter IV, I will be offering a diagnosis of present political rationalities of self-government by analysing *Canada's Aboriginal Action Plan* and the emerging Nisga'a treaty; in chapter V, I will focus upon the conclusions that would seem to flow implicitly from the decision in *Delgamuukw* and explore the ramifications this may have for the legitimate reconciliation of the pre-existence of First Nations societies and the sovereignty of the Crown.

Finally, I want to provide a definition of the terminology that I will be using. Unless making reference to the legal discourse of the Court or quoting from other authors, I will

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<sup>41</sup> In trying to understand the "present British Columbia" in light of past relations of power, I have found the following work to be particularly insightful: *A Special Double Issue: Native Peoples and Colonialism*, (1997/1998) 115 & 116 B.C. Studies; Harris, C., *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: UBC Press, 1997); Dickason, O.P., *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 2nd ed., (Toronto: McClelland and Stewart, 1997); Barman, J., *The West Beyond the West: A History of British Columbia*, revised ed., (Toronto: University of Toronto Press, 1996); Foster, H., "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927" in H. Foster and J. McLaren, eds., *Essays in the History of Canadian Law: Volume VI, British Columbia and the Yukon* (Toronto: University of Toronto Press, 1995); Newell, D., *Tangled Webs of History: Indians and the Law in Canada's Pacific Coast Fisheries* (Toronto: University of Toronto Press, 1993); Boldt, M., *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993); Tennant, P., *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1992); Fisher, R., *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2d ed. (Vancouver, University of British Columbia Press, 1992); Jensen, D. and Brooks, C., eds., *In Celebration of Our Survival: The First Nations of British Columbia* (Vancouver: UBC Press, 1991); Brody, H., *Maps and Dreams: Indians and the British Columbia Frontier* (Vancouver: Douglas and McIntyre, 1988); Maud, R., *A Guide to B.C. Indian Myth and Legend* (Vancouver: Talon Books, 1982).

be using the *descriptor*: 'First Nations people' to refer to the holders of the aboriginal and treaty rights being discussed in this thesis. As Muckle recently notes:

Proponents of the descriptor 'First Nation' cite several benefits. First, it alleviates the derogatory and primitive connotations often associated with such terms as natives, aboriginals, and indigenous. Second, it corrects the misnomer of 'Indians,' which resulted from the mistaken belief that Christopher Columbus had reached India. Third, it emphasises that the ancestors of today's First Nations were in the region prior to the arrival of Europeans. The term 'nation' reflects original sovereignty, and its plural, 'nations,' accentuates the multitude of distinct groups.<sup>42</sup>

I will now proceed to chapter II and my attempt to outline an analytical framework for the study of 'law' within, what Foucault termed, a 'sovereign-discipline-government' society. In doing so I intend to lay the groundwork for what I hope will be an original contribution to the literature in this area of law.

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<sup>42</sup> R.J. Muckle, *The First Nations of British Columbia: An Anthropological Survey* (Vancouver: University of British Columbia Press, 1998) at 2. This book also provides a general background for understanding many of the issues that the courts are still struggling with as they attempt to come to terms with the meaning of 'aboriginal and treaty rights'.

## II. Re-viewing 'Foucault and Law': Towards an Analysis of Legal Discourse in a 'sovereign-discipline-government' Society

It is important to acknowledge that the usage of the term 'law' operates as a claim to power in that it embodies a claim to a superior and unified field of knowledge which concedes little to other competing discourses which by comparison fail to promote such a *unified appearance*.<sup>1</sup>

One needs to be nominalistic, no doubt: power is not an institution, and not a structure; neither is it a certain strength we are endowed with; it is the name that one attributes to a complex strategical situation in a particular society.<sup>2</sup>

Like Smart, I will continue using the word 'law' in this thesis because "this power to define (itself and other discourses) is part of the power of law that I wish to explore."<sup>3</sup> However, unlike Smart's early work relating to Foucault, I will be moving beyond a consideration of law's relationship to discipline in order to also account for its relationship to government.<sup>4</sup> In doing so, I hope to build upon her work and clarify the relationship of law to sovereign power generally and juridical legitimation specifically.

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<sup>1</sup> C. Smart, *Feminism and the Power of Law* (New York: Routledge, 1989) at 4. [my emphasis].

<sup>2</sup> M. Foucault, *The History of Sexuality: Volume One* (London: Penguin Books, 1990) at 93. [hereinafter *History of Sexuality*].

<sup>3</sup> Smart, *supra* note 1 at 4.

<sup>4</sup> While I have found Smart's work to be insightful with regard to the interconnected relationship between law and the disciplines in the context of specific cases, I think her analysis of the potential of Foucault's work is limited by the fact that she doesn't consider the relationship of law to 'government'.

More recently, legal theorists Alan Hunt and Gary Wickham have asserted that Foucault undertook an 'expulsion of law' in his writings.<sup>5</sup> Somewhat contradictory, it seems to me, the authors asserting such a position then use Foucault's own work to undertake a 'retrieval of law' for their project of developing a sociology of law as governance.<sup>6</sup> While Smart fails to consider the role of government in relation to law, Hunt and Wickham diminish law's interconnectedness with the relations of power that derive from sovereignty and the disciplines in their account of law as governance. Rather than proceeding via a direct engagement with the allegation of Foucault's expulsion of law and then attempting to refute that allegation, I will take a different approach. I propose to draw upon the work of Foucault himself to present an argument for situating the analysis of 'law' within what Foucault came to call a 'sovereign-discipline-government' society. Having done so, I will then reflect upon Foucault's alleged 'expulsion of law' and explain how such an allegation is misconceived.

In taking this approach, I should make it clear that I am not attempting to offer a summary of Foucault's general work or trying to develop a Foucauldian 'theory of law'. Rather I am trying to survey the relations of power that Foucault suggested went into constituting society. In sum, I am merely trying to use his work as a tool to indicate three landmark relations of power that are relevant for a mapping of law in the present. To do

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<sup>5</sup> See, A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (London: Pluto Press, 1994) at 55. For another account of this alleged 'expulsion of law' see, A. Hunt, "Foucault's Expulsion of Law: Towards a Retrieval" 17 *Law and Social Inquiry* (1992) reprinted as chapter 12 in A. Hunt, *Explorations in Law and Society: Toward a Constitutive Theory of Law* (New York: Routledge, 1993) [hereinafter *Explorations in Law and Society*]

<sup>6</sup> *Ibid.* Hunt and Wickham, at 99.

so, I will firstly set out Foucault's arguments for analysing relations of power within a 'sovereign-discipline-government' society. Then, secondly I will make the argument for situating law within such an analytical framework. And finally, I will indicate the relevancy of such an approach for understanding how various relations of power are involved in the legal discourse which produces the meaning of s.35(1) aboriginal and treaty rights.

#### **A. *Locating Landmark Relations of power***

Although there is an industry in secondary materials on the work of Michel Foucault, it seems to me, that when it comes to understanding 'relations of power' and how they interact with law, the best reflection and summation of Foucault's work comes from himself. Consequently, I will largely focus upon primary sources to make my argument. In terms of reflecting upon the significance of his work and how he came to see society, I place great significance on the quote with which I began this thesis. That is:

[W]e need to see things not in terms of the replacement of a society of sovereignty by a disciplinary society and the subsequent replacement of a disciplinary society by a society of government; in reality one has a triangle, sovereignty-discipline-government...<sup>7</sup>

In order to understand what Foucault means when he talks of sovereignty, discipline and government we need to understand that Foucault was referring to 'relations of power'. That is, there are sovereign relations, disciplinary relations and governmental

relations of power. And if our purpose is to engage in an analysis of the power relations in 'law and society' then we need to take account of each of these. And in doing so, we should pay attention to the way "law constitutes or participates in the constitution of a terrain or field within which social relations are generated, reproduced, disputed and struggled over."<sup>8</sup> In other words, we need to account for the way law itself is both constituted by, and constitutes, this 'sovereign-discipline-government' society.

In his own investigations, what Foucault noted was that the only models available for thinking about power, were either particular types of legal models or institutional models. That is, the kind of legal models that addressed such questions as, What legitimates power? And the kind of institutional models that asked questions such as, What is the state? Such models were too limiting for Foucault because they basically only focus upon legitimate sovereign relations. Consequently, he sought to explore how power operates in other more specific situations.<sup>9</sup> This led him to firstly explore disciplinary power - where power is least legal - in *Discipline and Punish*.<sup>10</sup> And then, to explore the bio-power of 'government' - where power is concerned with the regulation of the population - in *The History of Sexuality*. Additionally, his work on *Governmentality* can be considered as a

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<sup>7</sup> M. Foucault, "Governmentality" in G. Burchell, C. Gordon and P. Miller, eds., *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991) 87-102. [hereinafter "Governmentality"].

<sup>8</sup> See, *Explorations in Law and Society*, *supra* note 5 at 293.

<sup>9</sup> See M. Foucault, "The Subject and Power" in H.L. Dreyfus and P. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, 2d ed., (Chicago: Chicago University Press, 1983) 208 at 209. [hereinafter "Subject and Power"]. Interestingly, these reflections by Foucault indicate how modes of objectification are intricately connected with different relations of power. In that regard, I found this particularly useful for my own understanding of the modes of objectification that attempt to make up the 'aboriginal' subject of law.

development of these lines of enquiry and an overall reflection on the diverse ways in which relations of power operate in society. Thus, what I think is so significant about the above 'sovereign-discipline-government' quote is that it acknowledges that 'relations of power' need to be understood as presently operating together in society and not just in an isolated moment at some given point in history. For Foucault then, each of these words (sovereignty, discipline, government) is being used in a very specific way. I will now explain in a little more detail what Foucault meant by each of these relations of power by concentrating on his work for its analytical, rather than historical, distinctions. I think this is warranted given how Foucault came to view society; that is, as a place where each of these relations of power are present and has their own genealogy.

Interestingly, Foucault discusses all three of these relations of power and their genealogies in the *History of Sexuality*. And it is here that he offers what is perhaps his most clear articulation of sovereign power and how it was to be distinguished from, but still interconnected with, two other forms of power that later emerged in society.

### **1. Sovereign power/the juridical**

Let me begin by quoting what Foucault says about the consequences of the shift in sovereign power from an absolute and unconditional right to one limited to situations where the existence of the sovereign was under threat:

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<sup>10</sup> M. Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin Books, 1991). [hereinafter *Discipline and Punish*].



The sovereign exercised his right of life only by exercising his right to kill, or by refraining from killing; he evidenced his power over life only through the death he was capable of requiring. The right which was formulated as the 'power of life and death' was in reality the right to *take* life or *let* live.<sup>11</sup>

Foucault then goes on to make what I think is a crucial point about this right or legitimate exercise of power by the sovereign - what he terms 'juridical'. As Foucault explains, the description of juridical actually refers to a way of understanding or analysing a form of power that can be characterised as 'deduction'. The use of 'deduction' here is not a reference to deductive logic but rather is used to capture the sovereign processes of appropriation. Thus, Foucault states, that perhaps "this juridical form must be referred to a historical type of society in which power is exercised mainly as a means of deduction ... a subtraction mechanism, a right to appropriate a portion of the wealth, a tax of products, goods and services, labour and blood, levied on the subjects."<sup>12</sup> Furthermore, sovereign power was "essentially a right of seizure: of things, time, bodies, and ultimately life itself."<sup>13</sup> In other words, the juridical refers to the legitimisation of the 'deductive' exercise of power by the sovereign which at its most extreme is the right to take away (or extinguish) life. As we shall see, there is a need to avoid conflating this form of power with 'law' more generally. Instead, we should treat the juridical as one model of analysis that exists within 'law'. In other words, while 'law' may still be associated with the juridical form of power, we must be careful not to reduce law to the juridical. I will

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<sup>11</sup> *History of Sexuality*, *supra* note 2 at 136.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

elaborate upon this shortly when I attempt to 'situate' law within the analytical framework being developed.

Foucault proceeds with his discussion of the different forms of power by noting that there has been a transformation of those mechanisms of power that operated around the sovereign right to 'take life and let live'. The result of this transformation is the emergence of 'power over life'. As Foucault states, "starting in the seventeenth century, this power over life evolved in two basic forms; these forms were not antithetical, however; they constituted rather two poles of development linked together by a whole intermediary cluster of relations."<sup>14</sup> These two poles were constituted by disciplinary power and what he calls bio-power or bio-politics (later to be the basis of his theorising about 'government').

## 2. Disciplinary power

Foucault goes on to explain that one of these poles:

[T]he first to be formed, ... centred on the body as a machine: its disciplining, the optimisation of its capabilities, the extortion of its forces, the parallel increase of its usefulness and its docility, its integration into systems of efficient and economic controls, all this was ensured by the procedures of power that characterised the *disciplines: an anatomo-politics of the human body*.<sup>15</sup>

It is of course, this disciplinary power that Foucault explored in *Discipline and Punish*. A type of power that he contrasts quite dramatically with sovereign power in that book and

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<sup>14</sup> *Ibid.* at 139.

later explains in more detail in “Two Lectures”.<sup>16</sup> In addition, Foucault’s use of the word ‘disciplines’ relates not only to practices centred on the body but also directs attention towards the knowledges that are produced in the ‘disciplines’ for representing what is normal and abnormal. As, During puts it:

The pun on “disciplines” in that sentence points to the way in which practices on the body combine with the disciplined production of knowledge about the “human” in the human sciences. The various methods and paradigms which order those sciences - norms, conflicts, systems, but especially norms - are developed both on disciplined bodies ...and on the population considered as a productive resource.<sup>17</sup>

It is also interesting to note that in discussing disciplinary power, Foucault, in a footnote, makes the point that although his examples are chosen from “military, medical, educational and industrial institutions. Other examples might have been taken from *colonisation*, slavery and child rearing.”<sup>18</sup> Of relevancy to the later explorations of this thesis, is how Foucault’s work has been developed by Edward Said in the colonial

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<sup>15</sup> *Ibid.*

<sup>16</sup> For a discussion of this by Foucault, see M. Foucault, “Two Lectures” in C. Gordon, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (London: Harvester Wheatsheaf, 1980) 78. [hereinafter “Two Lectures”]. And for an insightful discussion of how the two relate in the context of specific legal decisions, see Smart, *supra* note 1.

<sup>17</sup> S. During, *Foucault and Literature* (New York: Routledge, 1992) at 152, who goes on to note: “In a loop mechanism, these methods and paradigms produce social norms and stereotypes that strengthen discipline and increase production”. For a recent discussion within the discipline of legal studies regarding ‘law’s hold over the body’, see P. Cheah, D. Fraser and J. Grbich, eds., *Thinking Through the Body of the Law* (St. Leonards: Allen and Unwin, 1996).

<sup>18</sup> *Discipline and Punish*, *supra* note 10 at 314 ( footnote 1). [my emphasis]. For a discussion of the educational institution within the colonial context see, Miller, J.R., *Shingwauk’s Vision: A History of Native Residential Schools* (Toronto: Toronto University Press, 1996). And for a specific discussion of how Foucault’s *History of Sexuality* relates to the colonial context see, A.L. Stoler, *Race and the Education of Desire: Foucault’s History of Sexuality and the Colonial Order of Things* (London: Duke University Press, 1995). I will be examining the Canadian ‘colonial order of things’ and its legal foundation in Chapter V.

context.<sup>19</sup> Said has argued that the European construction of knowledge is intricately involved in the production of certain representations of other cultures; representations which then come to form the basis for understanding such a culture and ruling over it.<sup>20</sup> One aspect of Said's work that I will later explore is the connection that exists between the experts within academic 'disciplines' and the institutions of rule in the colonial context.<sup>21</sup> In doing so, I want to focus on how contemporary representations within the legal process, while not explicit about their 'savage' underpinnings<sup>22</sup>, still tend to reinscribe 'Aboriginality' within what might be thought of as sympathetic liberal 'authentic' representations.<sup>23</sup> In relation to this, Thomas has also argued that:

Said's imputation that discourses of cultural difference - whether manifested in fiction, travel-writing, anthropology or other scholarly work - always ultimately involve 'hostility and aggression' is unproductive. There are too many forms of colonial representation which are, at least on one level, sympathetic, idealising, relativistic and critical of the producers' home societies. If the critic assumes that the problem with Orientalist and kindred

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<sup>19</sup> See particularly, E. Said, *Orientalism* (London: Penguin Books, 1985); E. Said, "Orientalism reconsidered" (1985) 1 *Cultural Critique* 89; and more recently, E. Said, *Imperialism and Culture* (London: Vintage, 1993).

<sup>20</sup> For a critique of Said's work, see Young's "Disorientating Orientalism" in R. Young, *White Mythologies: Writing History and the West* (New York: Routledge, 1990) 119.

<sup>21</sup> In chapter III, I will be making use of recent work drawing upon both the writings of Foucault and Said. Specifically, Attwood, et al, who have undertaken research around what they have termed 'Aboriginalism'. See, B. Attwood and J. Arnold, eds., *Power, Knowledge and Aborigines* (Victoria: La Trobe University Press, 1992).

<sup>22</sup> For a general discussion of past representations of First Nations people in Canada, see D. Francis, *The Imaginary Indian: The image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992). And in British Columbia specifically, see R. Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890*, 2d ed. (Vancouver, University of British Columbia Press, 1992) at 73 "The Image of the Indian". In terms of the complexities of such representations and how they interplay with the colonial identity in a specific case, see T. Loo, *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: University of Toronto Press, 1994) at 134 "Bute Inlet Stories: Crime, Law, and Colonial Identity". For a more general discussion in relation to legal discourse and its treatment of First Nations as 'being inferior', see R.A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University, 1989).

<sup>23</sup> See, G. Griffiths, "The Myth of Authenticity: Representation, Discourse and Social Practice" in C. Tiffin and A. Lawson, eds., *De-Scribing Empire: Post-colonialism and Textuality* (London: Routledge, 1994) 70 at 70.

discourses [such as Aboriginalism] is that they are negative, he or she is distracted from representations which are manifestly not aggressive, but which may through exoticism or primitivism nevertheless become *legislative*, by privileging certain identities and stigmatising others as inauthentic.<sup>24</sup>

As I will be arguing in chapter III, the consequence of this is “the persistence of primitivist constructions of Aboriginality in a liberal culture that likes to think that its colonial and racist roots have been rejected.”<sup>25</sup>

### 3. Bio-power

Foucault explains the other pole (which it should be remembered is linked to disciplinary power) around which bio-power developed as follows:

The second, formed somewhat later, focused on the species body, the body imbued with the mechanisms of life and serving as the basis of the biological processes: propagation, births and mortality, the level of health, life expectancy and longevity, with all the conditions that can cause these to vary. Their supervision was effected through an entire series of interventions and regulatory controls: a bio-politics of the population.<sup>26</sup>

When Foucault talks of bio-politics here, he has in mind not simply governing from the perspective of the state. Rather, the regulation of the population involves all those authorities that are interconnected with the state in the ‘conduct of conduct’.<sup>27</sup>

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<sup>24</sup> N. Thomas, *Colonialism's Culture: Anthropology, Travel and Government* (Victoria: Melbourne University Press, 1994) at 26. [my emphasis].

<sup>25</sup> *Ibid.* at 30.

<sup>26</sup> *Ibid.*

<sup>27</sup> For an example of the complex operations of bio-power in the context of First Nations people, one might consider the regulatory mechanism of the *Indian Act* and the network of authorities concerned in governing the ‘Indian population’; including those that range from the missionaries, teachers, Indian agents, health officials and social welfare workers, to those like the band council, elders and traditional systems of governance. For a general discussion of regulatory mechanisms that sought to make up the population in

To summarise the basic characteristics of these three 'relations of power', we can say that: sovereign relations involve the exercise of *deductive* (or what at other times is termed repressive or finite) power with regard to its right to take from its subjects; disciplinary relations involve the exercise of *productive* power with regard to its processes of normalising the individual; and governmental relations involve the exercise of bio-power with regard to its *regulation* of the population. Hopefully, this clarifies the analytical distinctions that need to be borne in mind when thinking of the 'relations of power' that Foucault wants to analyse in terms of a 'sovereign-discipline-government' society.

### **B.     *Situating 'Law'***

One remains attached to a certain *image* of power-law, of power-sovereignty, which was traced out by the theoreticians of right and the monarchic institution. It is this image that we must break free of, that is, of the theoretical privilege of law and sovereignty, if we wish to analyse power within the concrete and historical framework of its operation.<sup>28</sup>

What this quote draws attention to, is that Foucault is arguing against the privilege accorded to the united 'law-sovereignty' *image* when it comes to analysing relations of power. I suggest that what Foucault was getting at here was the need to adopt a theoretical framework for analysing relations of power that does not begin by privileging,

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Canada from 1867-1939, see C. Strange and T. Loo, *Making Good: Law and Moral Regulation in Canada, 1867-1939* (Toronto: University of Toronto, 1997).

<sup>28</sup> *History of Sexuality*, *supra* note 2 at 90. [my emphasis].

or by assuming as its starting point, a model of analysing power in terms of its juridical legitimacy. And although he makes the association between 'law and sovereignty', he does so by reference to *image*. Furthermore, it should be pointed out that this image is no doubt stronger in the case of a codified civil system than in a common law system. Still, this raises two issues for our situating of law; firstly the theoretical privilege and secondly the united image or conflation of 'law and sovereignty'.

In what follows, I want to focus upon the second issue and elaborate upon what is involved in challenging this image. As such, I will make an analytical distinction between sovereign/juridical power and 'law'; thus distancing law from the sovereign. Having done so, I will then present an argument for how law should be situated with regard to the two other relations of power (namely, disciplinary power and bio-power) when viewed within a 'sovereign-discipline-government' society.

### **1. The distinction between the 'sovereign/juridical' and 'law'**

What we need to distinguish, are three things, (i) the sovereign exercise of power (ii) the juridical model for analysing its legitimacy, and (iii) law. In making these distinctions, the juridical model or system should, I argue, be viewed as a subset of 'law', rather than one and the same. I will now attempt to illustrate why we need to make such an analytical distinction between the sovereign/juridical and 'law'.

Consider the following 'hypothetical'. If there existed a practice by a sovereign state that involved appropriating First Nations lands and resources (including laws and jurisdiction) in British Columbia despite the absence of legal treaties, then in analysing the relations of power involved, we might consider this exercise of power according to a juridical model of legitimation. And, if we did, then according to this *model of analysis* it would still be considered either a legitimate or illegitimate exercise of sovereign power whether it was 'within the law' or 'outside the law'. For example, it is this model of analysis that has been the tool used for disagreeing with a legal decision because of its ideological underpinnings or why in utilising such a model a particular judge can dissent on the issue of whether the Crown's exercise of power was intra or ultra vires. As I will explain, while the juridical and the law are intricately connected in this 'hypothetical', they shouldn't be considered one and the same. Yet, this conflation of the two often happens. This is because we tend to analyse the sovereign exercise of power by using a model of law, i.e., juridical legitimation. And, to put it crudely, if we were judging in court, then our analysis of such an exercise of power would be articulated through legal discourse and constituted as being legitimate or not by a decision of 'law'. However, if we make our analysis in terms of juridical legitimation and it isn't constituted as a decision of 'law', then what is its status? Perhaps we would say it was just an opinion - even a legal opinion - but it wouldn't be 'law'. In fact, what the 'status' of the analysis is, isn't important for the point at hand; what is important however, is that by being constituted as 'not-law', it allows us to make an analytical distinction between the following: the exercise of power by the sovereign; the analysis of its legitimacy as juridical; and, the decision of 'law'.



In sum, one reason that law cannot be reduced to the juridical is because 'law' itself gets to decide which analyses concerning the legitimate exercise of power are decisions of law and which aren't. This, you will recall was also the point made by Smart who decided to continue using the term 'law' because it signified the power to decide what was and what was not law. If this is the case, then what is this power to decide what is and what is not law? I will explore some possible answers to this question in various parts of this thesis. In particular, by focusing on the Court's '*juris-diction*' and how it relates to the work of Fitzpatrick on the mythology of modern law<sup>29</sup>, Derrida on the mystical foundation of authority<sup>30</sup> and, Davies on the paradoxical nature of legal decisions which at their limits are both law and non-law.<sup>31</sup> My exploration of the Court's '*juris-diction*' is undertaken to draw attention to the human decision making that remains 'central' to law. In other words, '*juris-diction*' is being used here to shift attention from the idea of passively reading the 'letter of the law' to highlight the performative aspect of 'laying down the law'. This is important because as Sugarman notes:

For many students and teachers of law, the assumptions, classifications and pedagogy of the 'black letter' tradition possess a reified logic or inevitability. It is as if the logic and categories of the law make the choices for us. This de-emphasises that they are human constructs embodying political and moral choices. This in turn inhibits attempts to explore alternatives, and even an awareness of the values and assumptions of the 'black letter' tradition. Transcending the 'black letter' tradition requires that we become conscious of the choices that are made for us by its reified logic and categories; that such

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<sup>29</sup> P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

<sup>30</sup> J. Derrida, "Force of Law: The 'Mystical Foundations of Authority'" in D. Cornell, et al, eds., *Deconstruction and the Possibility of Justice* (New York: Routledge, 1992) 3.

<sup>31</sup> See, M. Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (London: Pluto Press, 1996).

decisions are inherent in all spheres of human conduct, and that we are capable of making conscious selections without the illusion that those sometimes difficult choices are simply the product of concrete legal rules or categories.<sup>32</sup>

Returning to the analytical distinction between 'the juridical' and 'law', we find that such a distinction finds support in the work of Ewald, who offered this insight into Foucault's writings: "The norm, then, is opposed not to law itself but to what Foucault would call 'the juridical': the institution of law as the expression of a sovereign's power."<sup>33</sup> And while Foucault spoke of law in the context of the French codified legal system, another more obvious reason for not reducing law to the juridical, is that not all 'law' derives from, or is codified by, the 'sovereign state', e.g. the common law and customary law.<sup>34</sup> Admittedly, Foucault doesn't make these distinctions explicit in the quote on the image of 'law and sovereignty', however, I think they can now be read as implicit when we view such a quote alongside what he has to say about the two other forms of power and their relationship to both the 'juridical' and 'law'.

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<sup>32</sup> See, D. Sugarman, "'A Hatred of Disorder': Legal Science, Liberalism and Imperialism" in P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Duke University Press, 1991) 34 at 64.

<sup>33</sup> F. Ewald, "Norms, Discipline and the Law" in R. Post, ed., *Law and the Order of Culture* (Berkeley: University of California Press, 1991) 138 at 138. See also, J. Palmer and F. Pearce, "Legal Discourse and State Power: Foucault and the Juridical Relation" (1983) 11 *International Journal of the Sociology of Law* 361, for a discussion of the relationship between the juridical subject and the disciplinary subject. It should also be noted that Hunt and Wickham do make reference to both these pieces of work. See Hunt and Wickham, *supra* note 5 at 62. However they say that don't find the arguments persuasive and suggest that their own "suggestion is not only simpler, but more direct and to the point; it is to recognize that the strict association which Foucault makes between sovereignty and law is at best unhelpful and at worst simply perverse in denying the self-evident truth of the intimate connection between modern forms of power and legal mechanisms". While their suggestion may be simpler, direct and to the point, one may ask of it if it is an accurate description of Foucault's writings. My own suggestion is that it is not. In fact, it is the authors who, in overlooking the complexities of Foucault's writings in their attempts at simplification, are the ones making the 'strict' association themselves between law and sovereignty.

## 2. Law : de-faced and re-placed

So, while on the face of things 'law and sovereignty' may appear unified, this is not the case on closer examination. And once this unified image of 'law and sovereignty' is de-faced, it allows us to re-place 'law' within the framework of a 'sovereign-discipline-government' society. To that end, Foucault has noted that a consequence of the "development of bio-power was the growing importance assumed by the action of the norm, at the expense of the juridical system (of the law)."<sup>35</sup> To clarify what he means by this, he himself actually situates 'law and the *judicial* system' - not the 'juridical system' - in relation to disciplinary power (organised around the norm) and to bio-power (organised around the regulation of the population). Thus, he states "I do not mean to say that the *law* fades into the background or that the *institutions of justice* tend to disappear, but rather that the *law* operates more and more as a norm, and that the *judicial institution* is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory."<sup>36</sup> Note, it is the *law* that operates more and more as a norm, not the 'juridical' system. And it is the *judicial* institution that is incorporated into a continuum of regulatory apparatuses, not the 'juridical' system. Thus, according to Foucault we should expect to see two events; 'law' operating more as a norm and 'law' being incorporated as a regulatory apparatus.

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<sup>34</sup> Also, for a fuller account of the complex network of power relations that have been historically involved in 'law', see D. Hay, "Property, Authority and the Criminal Law" in D. Hay, et al., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London: Allen Lane, 1975).

<sup>35</sup> *History of Sexuality*, supra note 2 at 144. [my brackets].

In fact, if there were any doubt, Foucault then continues by stating that we “have entered a phase of juridical regression”.<sup>37</sup> Note, ‘juridical’ regression - not law’s regression or the judicial institution’s regression. And moreover, regression - not disappearance or replacement - of the ‘juridical’. Thus, there is a need to be aware of the ‘sovereign/juridical system’ and how it operates within ‘law’ alongside the norm and regulation.

### 3. Legal discourse and specific ‘cites’ of struggle

I suggest that to be able to account for the juridical, norm and regulatory aspects which interconnect within law, we need to undertake a specific analysis of legal discourse within specific ‘cites’ of struggle. This is because it is in legal discourse that “*power and knowledge are joined together*. And for this very reason, we must conceive discourse as a series of discontinuous segments whose tactical function is neither uniform nor stable.”<sup>38</sup> I think by adopting such an approach we can also make sense of what Foucault meant when he said that the analysis made in terms of power “must not assume that the sovereignty of the state, the form of the law, or the over-all unity of domination are given at the outset; rather, these are only the terminal forms power takes.”<sup>39</sup> Accordingly, power needs to be understood:

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<sup>36</sup> *Ibid.* [my emphasis].

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* at 100. [my emphasis].

<sup>39</sup> *Ibid.* at 92.

[I]n the first instance as the multiplicity of force relations immanent in the sphere in which they operate and which constitute their own organisation; as the process which, through ceaseless struggles and confrontations, transforms, strengthens, or reverses them; as the support which these force relations find in one another, thus forming a chain or a system, or on the contrary, the disjunctions and contradictions which isolate them from one another; and lastly, as the strategies in which they take effect, whose general design or institutional crystallisation is embodied in the state apparatus, in the formulation of the law, in the various social hegemonies.<sup>40</sup>

In terms of undertaking an analysis of a particular 'area of law', this seems to suggest that if we are to examine legal discourse within specific 'cites' of struggle, we need to be open to the possibilities of power relations taking us beyond the contingency of 'legal limits'. That is, while our analysis may begin its journey within a particular 'area of law', we must be active in tracing power to its 'operations within the capillaries' - where it is least legal (disciplinary/normalisation). Similarly, we must also be active in our observations about what part(s) of this 'area of law' are being used as 'a tactic for regulating' the population (governmental bio-power/regulation). And finally, we must be active in making explicit 'upon what grounds' this 'area of law' is surviving - what has it appropriated in order for it to continue existing in the day to day lives of certain peoples (sovereignty/juridical legitimisation).

As I will be utilising this concept of legal discourse, it should be noted that Goodrich has made the important observation that the concept of legal discourse, is itself, "not, and should not attempt to be, a theory of law, but is rather concerned with the preconstruction

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<sup>40</sup> *Ibid.*

and production of legal meaning.”<sup>41</sup> It is for that reason that this thesis will examine how various relations of power are involved in the legal discourse which produces the meaning of aboriginal and treaty rights. However, what should be stressed about legal discourse is that it is both ‘an effect and an instrument’ of these diverse relations of power.<sup>42</sup> And while the meaning of s.35(1) is an effect of the struggles over meaning in specific ‘cites’, the meaning of s.35(1) is also a potential instrument for either the re-inscription of the dominant social order or the de-scription and legitimization of an alternative social order.

Before I conclude with some comments on the relevancy of the preceding discussion for what follows in this thesis, I will firstly deal with the issue of Foucault’s alleged ‘expulsion of law’.

#### **4. Foucault’s alleged expulsion of law: a defence**

In contrast to the reading of Foucault’s work that I have offered, Hunt and Wickham have argued that Foucault was involved in an ‘expulsion of law’. They use this phrase firstly because they think it an ‘apt summary’ of Foucault’s expulsion of law from modernity.<sup>43</sup> Having made such an allegation, the authors continue by stating that “[t]his

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<sup>41</sup> P. Goodrich, *Legal Discourse: Studies in Linguistics, Rhetoric and Legal Analysis* (New York: St. Martin’s Press, 1987) at 185.

<sup>42</sup> *History of Sexuality*, *supra* note 2 at 101. As Foucault notes, “We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy.”

<sup>43</sup> Hunt and Wickham, *supra* note 5 at 56.

'expulsion of law' is found in his metahistorical thesis that law constituted the primary form of power in the classical or pre-modern era and in his point that law lingers on in the doctrine of sovereignty which continues to play a significant ideological role in political discourse."<sup>44</sup> However, even on its own terms this is not logically consistent with an 'expulsion of law' thesis. This is because in the first part they are saying that law constituted such and such in the classical or pre-modern era and in the second part they are saying that law lingers on in such and such a way that continues to play such and such a role in [presumably, current] political discourse. Thus, what the sentence stands for at most is a 'contrast of law's role'. The source of this logical confusion is revealed when the authors state that Foucault's expulsion of law is "explicit in one of his most distinctive formulations."<sup>45</sup> The authors then quote the following passage (where importantly he doesn't talk of law but of the juridical) from Foucault's work in "Two Lectures":

We must eschew the model of Leviathan in the study of power. We must escape from the limited field of *juridical* sovereignty and state institutions, and instead base our analysis of power on the study of the techniques and tactics of domination.<sup>46</sup>

Interestingly, the context for the extract the authors quote is an occasion when Foucault's concern is to contrast sovereign power and disciplinary power. And in doing so, even in 'Two Lectures' he clarifies that the latter doesn't replace the former:

The juridical systems - and this applies both to their codification and to their theorisation - have enabled sovereignty to be democratised through the

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<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* quote from "Two Lectures", supra note 16 at 102. [my emphasis].

constitution of a public right articulated upon collective sovereignty, while at the same time this democratisation of sovereignty was fundamentally determined by and grounded in mechanisms of disciplinary coercion.<sup>47</sup>

Thus, even if one doesn't accept the distinction between the juridical and 'law', the above shows how Foucault was actually of the opinion that the juridical (or 'law' for Hunt and Wickham) continued in relevance and was in fact what made disciplinary power possible! To this end, it is hard to imagine if Foucault could have put it any clearer:

To put this in more rigorous terms, one might say that once it became necessary for disciplinary constraints to be exercised through mechanism of domination and yet at the same time for their effective exercise of power to be disguised, a theory of sovereignty was required to make an appearance at the level of the legal apparatus, and to re-emerge in its codes.<sup>48</sup>

Thus, Hunt and Wickham's position is not supported by way of an analytical expulsion, nor I would add by 'periodization expulsion'; that is, law's expulsion from 'modernity'. Foucault is also quite clear about this in the very same lecture.<sup>49</sup> Consider the following where he is still contrasting what he understood to be the relation between sovereign/juridical (or sovereign/juridical/law for Hunt and Wickham) power and disciplinary power:

The powers of *modern society* are exercised through, on the basis of, and by virtue of, this very heterogeneity between a public right of sovereignty and a polymorphous disciplinary mechanism. ... The disciplines may well be the

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<sup>47</sup> "Two Lectures", *supra* note 16 at 105.

<sup>48</sup> *Ibid.*

<sup>49</sup> As an important aside, it should be remembered that at this stage Foucault had not developed the vocabulary around a third formulation of power; i.e., bio-power and government. After all, it is this later work or formulation that the authors use (in somewhat of a contradiction to their earlier allegation) as the basis for their own 'retrieval of law'. In turn, this underscores the importance of his later work and the need to avoid over-interpreting his view of law on the basis of what he said in *Discipline and Punish* and "Two Lectures".



carriers of a discourse that speaks of a rule, but this is not the juridical rule deriving from sovereignty, but a natural rule, a norm.<sup>50</sup>

Consequently, if we accept (i) the analytical distinction between the juridical and 'law' that I have been at pains to emphasise, and/or (ii) the way Foucault himself says 'law' comes to operate in modern society, then I think it fair to say that the original passage the authors quote (about eschewing the model associated with the Leviathan) is in fact consistent with the view I have put forward. A view which I have supported by drawing upon Foucault's other writings to reflect upon the 'situating of law'. That is, law's place needs to be determined with regard to relations of power within a 'sovereign-discipline-government' society and in terms of its own *juris-diction*. And contra the authors' thesis, I have been suggesting that all operations of law are not simply reducible to 'an instance of governance'<sup>51</sup>. That being the case, I would submit that Foucault is innocent of the charge that he undertook an 'expulsion of law' from modernity. For, on the above alone, it is clear that there was no 'expulsion of law' by Foucault. At best, he de-faced law by questioning its unified image.

### **C. Co-ordinating an analysis of s.35(1)**

In sum, Foucault's work seems suggestive of an analytical framework that would situate law within a 'sovereign-discipline-government' society. Furthermore, in terms of understanding the power of legal discourse, I have also suggested a need to account for

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<sup>50</sup> "Two Lectures", *supra* note 16 at 106. [my emphasis].

law's own *juris-diction*. As such, I will be exploring to what extent we can understand the legal discourse on aboriginal and treaty rights as a discursive vessel which has to date journeyed within such co-ordinates.

With that in mind, I will now proceed to my specific analysis of the legal discourse which constitutes the meaning of aboriginal and treaty rights by utilising such an analytical framework. And bearing in mind Foucault's earlier warning about the theoretical privileging of the model based on juridical legitimacy, I will proceed by examining the *Vanderpeet* case in order to take on board the 'least legal' relations of power that are operating in that specific 'cite' of struggle.

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<sup>51</sup> Hunt and Wickham, *supra* note 5 at 99. "We thereby assert that all operations of law are distinctive instances of governance."

### III. Disciplining Law: How the 'Aboriginal' is Captured in Vanderpeet's Limitations

The Court must define the scope of s.35(1) in a way which *captures* both the aboriginal and the rights in aboriginal rights.<sup>1</sup>

And I believe that in our times power is exercised simultaneously through this right and these techniques and that these techniques and these discourses, to which the disciplines give rise, invade the area of right so that the procedures of normalisation come to be ever more constantly engaged in the colonisation of those of law.<sup>2</sup>

In what follows, I will examine the *R. v. Vanderpeet*<sup>3</sup> case to unpack the processes of normalisation that are involved in determining the content of aboriginal rights. Specifically, I am concerned with how the 'disciplining of law' gives rise to techniques and a discourse which contributes to what Attwood, et al, termed 'Aboriginalism'.<sup>4</sup> As is noted above, the Court adopts a technique for determining the content of aboriginal rights by attempting to capture both the 'aboriginal' and the 'right'. In this regard, I will argue that the 'aboriginal right' is overly limited because the legal interpretation of the 'aboriginal' relies on a framework that is constituted in accordance with law's own

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<sup>1</sup> Lamer C.J. in *R. v. Vanderpeet* [1996] 2 S.C.R. 507 at para. 20. [my emphasis]. [*Please note, that in reference to this case I will be adopting Lamer C.J.'s practice of citing to specific paragraph numbers rather than page numbers.*]

<sup>2</sup> M. Foucault, "Two Lectures" in C. Gordon, *Power/Knowledge: Selected Interviews and Other Writings 1972-1977* (London: Harvester Wheatsheaf, 1980) 78 at 107. [hereinafter "Two Lectures"].

<sup>3</sup> [1996] 2 S.C.R. 507. [hereinafter *Vanderpeet*].

<sup>4</sup> See, B. Attwood and J. Arnold, eds. *Power, Knowledge and Aborigines* (Victoria: La Trobe University Press, 1992). Attwood defines Aboriginalism as a mode of discourse which "produces authoritative and essentialist 'truths' about indigenes, and which is characterised by a mutually supporting relationship between power and knowledge, as well as other forms of knowledge characterised by non-oppressive discursive practices...[called] post-Aboriginalist." at i.

mythical norms; that is, a test which has its foundations in one particular perspective from law's own discipline - the jurisprudence of H.L.A. Hart.

As I will explain, the result of this new test is that its contribution to a discourse of 'Aboriginalism' is as follows: (a) despite the role now given to oral tradition, the process remains one which largely represents First Nations societies through European disciplines and their experts; (b) essentialist pre-contact norms are produced by the Court for the 'testing' of contemporary First Nations activities in a way that over-determines the 'aboriginal' and displaces the legal practices of First Nations, and (c) the subsequent limited 'truths' that are produced about contemporary activities are authorised by legal institutions for the continued ruling over of First Nations people. Consequently, the aboriginal rights which are recognised and affirmed in s.35(1) are being constituted in a manner which circumscribes their meaning, not in terms of "relations of sovereignty, but, of domination."<sup>5</sup> And thus, contrary to the stated purpose of s.35(1).

To explore this in more detail, I will proceed as follows: (i) provide some background to the trial involving Dorothy Van der Peet and demonstrate the influential role of the disciplines in constructing knowledge about the past practices of Sto:lo society; (ii) examine the Supreme Court's newly formulated test for determining the content of aboriginal rights and explore the assumptions underpinning its attempts at capturing

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<sup>5</sup> "Two Lectures", *supra* note 2 at 96.

Aboriginality, and, (iii) comment upon the rationality that informs the emerging test for subsequently justifying the governmental infringement of these already limited rights.

**A. *Being Caught Up in More Than She Bargained For...***

Power is employed and exercised through a net-like organisation.<sup>6</sup>

Dorothy Van der Peet is a Sto:lo woman who, in selling ten fish, got caught up in a lot more than she bargained for. As a result of her actions she was charged under the Fisheries Act, R.S.C. 1970, c. F-14, s. 61(1). More specifically, she was charged with selling 10 salmon caught under the authority of an Indian food fish licence<sup>7</sup> - an activity that was contrary to s. 27 (5) of the British Columbia Fishery (General) Regulations, SOR/84-248, which states that: "No person shall sell, barter or offer to sell or barter any fish caught under the authority of an Indian food fish licence." When her case went to trial<sup>8</sup> in the British Columbia Provincial Court before Justice Scarlett on October 29, 1990, it was decided that her actions contravened the conditions of the licence granted under the Act and she was fined \$50.

I will now outline the court's reliance upon the disciplines and the extent to which legal decision making is necessitated to travel into the "minor court that seems to sit permanently in the buildings of discipline, and which sometimes assumes the theatrical

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<sup>6</sup> *Ibid.* at 98.

<sup>7</sup> The fish were actually caught by Charles Robert Jimmie who lives with Dorothy Van der Peet and was the holder of a valid Indian Food Fish Licence.

form of the great legal apparatus".<sup>9</sup> I suggest that what was ultimately at issue in this case was not the prohibition on selling fish but the *production of a past standard of Aboriginality* which Dorothy Van der Peet had to subsequently live up to.

The facts of the case take us along the Fraser River and into Sto:lo society. In examining these facts, we discover how certain practices which were being carried out by individuals within that society became intricately connected to relations of power that extend beyond such practices. At trial, the question that the court was attempting to address via various witnesses and experts revolved around whether it was a normal practice for a member of the Sto:lo to sell fish.<sup>10</sup> It turns out, that long before the trial, the Sto:lo, among others, were under surveillance by officers from the Department of Fisheries and Oceans. That information was told to the court by the Crown witness Floyd McKee, a Fisheries officer with the federal Department of Fisheries and Oceans in charge of the Chilliwack office in the Upper Fraser Valley. He told how "surveillance teams after investigations seized ten to eleven tons of Sockeye and had laid *one hundred and ninety charges* related to the illegal purchase and sale of Indian food fish."<sup>11</sup> This

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<sup>8</sup> See, *R. v. Vanderpeet* (1991) 3 C.N.L.R. 155.

<sup>9</sup> As Foucault goes on to note it is not punishment that is its concern but rather the mechanisms of normalising judgment. Or as Foucault puts it, the "power of the Norm appears through the disciplines". See, M. Foucault, *Discipline and Punish: The Birth of the Prison* (London: Penguin Books, 1991) at 184. [hereinafter *Discipline and Punish*].

<sup>10</sup> As we will see later, what constitutes a legal 'norm' becomes a little more layered and subject to another level of interpretation. It also involves a different view of the role that oral traditions are to play. However, I will leave that discussion for when I analyse the test formulated by the Supreme Court. For the moment, I want to convey the extent of involvement by 'experts' in the trial and the reliance of the judge on their 'knowledge' of Sto:lo practices.

<sup>11</sup> Scarlett, J., *supra* note 8 at 156. [my emphasis]. Given the extent of the licensing scheme and the resulting charges under the Act, this also indicates how law is being used as a 'tactic of government' to regulate a specific section of the population.

surveillance operation included undercover officers, like Gary Kirkpatrick, who gave evidence “of posing as a fish buyer from Alberta and purchasing nineteen thousand Sockeye weighing approximately a hundred and five thousand pounds.”<sup>12</sup> Obviously then, from the perspective of the Department of Fisheries and Oceans there was a presumption that the Sto:lo did not have a right to sell such fish.

At trial a large number of people gave evidence in relation to the Sto:lo and their past practices. The following overview of those giving evidence about Sto:lo practices should convey the extent to which the operations of law are tied up with those of the disciplines and the observations of their experts. Such experts included: The aptly named Fredrick Fraser, the area manager for the Fraser River, who was “tendered and accepted as an expert witness having special skills and knowledge in fish management.”<sup>13</sup>; Dr. Richard Daly, who was “accepted as an expert in the field of social, cultural anthropology, qualified to give opinion evidence as to the social structure of the Sto:lo and their culture. Culture was defined to include philosophy, morality, spirituality and rules of law.”<sup>14</sup>; Mr. Jamie Morton, “was called as a historian for the defence. He described the historical records as they relate to Fort Langley in the Sto:lo area during the period 1824-88.”<sup>15</sup>; John Dewhurst, who was “an anthropologist and ethno-historian, having knowledge of aboriginal trade and exchange of salmon by the Sto:lo people.”<sup>16</sup>; and, Dr. Arnoud Stryd

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<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.* at 158.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.* at 159.

who was "accepted as an expert in the fields of archaeology and anthropology. [And who, according to Scarlett, J.] ...was clearly a most knowledgeable witness and his evidence was entitled to considerable weight."<sup>17</sup>

In reaching his decision, the judge determined that "the Sto:lo aboriginal right to fish for food and ceremonial purposes does not include the right to sell such fish."<sup>18</sup> Of great significance in reaching that decision was the judge's deference to certain disciplinary authorities and accepting "the evidence of Dr. Stryd and John Dewhurst in preference to Dr. Daly"<sup>19</sup>. In doing so, the court accorded a privilege to their knowledge and representations of Sto:lo society. In the process, less respect was paid not only to the evidence of other experts but also to 'non-expert witnesses', including: Mrs. Tilly Guitterez who gave "oral history of the Sto:lo as she heard it from her, 'Gran.'"<sup>20</sup>; Francis Phillips, who gave evidence which "dealt primarily with his life experiences in fishing at Yale for salmon."<sup>21</sup>; and, Mrs. Edna Douglas, who "gave evidence of the trading in dried fish, other seafood and trade goods that took place at Chilliwack each year at the time of the hop harvest, that is in recent times after European settlement of the Fraser Valley."<sup>22</sup>

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<sup>17</sup> *Ibid.*

<sup>18</sup> *Ibid.* at 160.

<sup>19</sup> *Ibid.* In devaluing the evidence of Dr. Daly, the court suggests it was relying on the evidence of Annie York, who stated "Today there's money. When its just for money and greed that's not the Indian way, but most of the time it's like someone gives fish. The other person gives money. Later that guy or lady gives something and you give money, if it's like this it's okay. Even those who sell, they take only enough for their needs. They don't waste anything. That's the Indian way." Unfortunately, there was no argument about why this may have been conclusive of there not being an aboriginal right to sell fish.

<sup>20</sup> *Ibid.* at 157.

<sup>21</sup> *Ibid.*



In the end, the practices of Dorothy Van der Peet were considered outside the past norms of the Sto:lo society.<sup>23</sup> In effect, what this turned on, is not the right to take fish from the river but her right to dispose of the fish in a certain manner. It is her individual actions in this regard that are the basis of the corresponding actions taken against her by the Department of Fisheries and Oceans. Ultimately, Scarlett, J. decided that what Dorothy Van der Peet did on September 11, 1987 was not normal behaviour for a member of the Sto:lo society and therefore could not be considered an aboriginal right protected under s.35(1). Interestingly, it is ultimately the Court and not the disciplines that have the final word on 'capturing the aboriginal'.<sup>24</sup> Arguably this is because the disciplines and their 'limited regimes of truth' don't speak with the uniformity that a single trial judge is capable of. Also, in theory, the aim of the disciplines is to remain open to new information and be willing to revise their judgments accordingly.<sup>25</sup>

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<sup>22</sup> *Ibid.* at 158.

<sup>23</sup> In fact the judge at trial required the evidence to show that the Sto:lo were suppliers of a market. As Scarlett, J. noted: "Clearly, the Sto:lo fish for food and ceremonial purposes. Evidence presented did not establish a regularised market system in the exchange of fish. ... Natives did not fish to supply a market..." See, Scarlett, *supra* note 8 at 160.

<sup>24</sup> For an interesting discussion about the problematics of representation for the academic expert, see S. Muecke, "Lonely Representations: Aboriginality and Cultural Studies" in Attwood and Arnold, *supra* note 4 at 32. Muecke suggests that "Cultural Studies can handle more 'thick descriptions' and it can avoid what Noel King is calling the 'anxiety of the cultural critic', the worry that the description will never be of any use to the Others one is describing, that the academicism is a betrayal of their cause, or whatever. I think the academic situation is too precarious at the moment to suffer global attacks on its very being. It has to assert its limited regimes of truth and see how they match up to challenges. The field delineated by the conjunction of Aboriginality and Cultural Studies is for me one of the most challenged and challenging, theoretically and practically..." at 43.

<sup>25</sup> In fact, what we will see at the Supreme Court level is that it is the modern discipline of law and its mythology that attempts closure on the activities of the past. It does so by producing a pre-contact norm with which to compare present activities. A process, that not only denies the agency of Dorothy Van der Peet to adapt to changing circumstances but also denies the Sto:lo society the ability to use its own legal practices to determine whether one of its members has the 'right' in question.

From this trial decision, there followed a number of appeals. However, for the purpose of elaborating upon my discussion of disciplinary power and its relation to law, I will be focusing on the eventual test that was formulated by the Supreme Court for determining the content of aboriginal rights. Consequently, I don't propose to go into the intricate legal details of each appeal. Yet, I do want to mention one aspect of the first appeal because it highlights the tension around the role of the disciplines and their relationship to law. In other words, how willing law is to defer to disciplinary power/knowledge and expert judgment over its own.

In the appeal to the British Columbia Supreme Court, this case was heard by Justice Selbie. He overturned the trial decision and found that the aboriginal right of the Sto:lo to fish includes the right to barter or sell such fish. In the course of his judgment, Justice Selbie referred to the 'experts' and their evidence at trial. He considered various statements and made the following point: "These quotes...typify the unsatisfactory state of the evidence on all sides on this issue - honest uncertainty brought about by insufficient hard evidence. Each attempts, through the eyes of their own expertise and study, to peer into the misty past of an aboriginal peoples and each only succeeds, in this area of trade, in educated, albeit shrewd opinion."<sup>26</sup> As a result, he was unwilling to defer to such expert 'knowledge' and instead resorts to 'legal principles' for authoritative guidance. He states, that "the evidence in this case, oral, historical, and opinion, looked at in the light of the principles of interpreting aboriginal rights...is more consistent with

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<sup>26</sup> See, *R. v. Vanderpeet* (1991) 3 C.N.L.R. 161 at 165.

the aboriginal right to fish including the right to sell, barter or exchange than otherwise and must be found so.”<sup>27</sup> It seems to me, that this highlights quite well the tension between the authority of the disciplines and that of law. As such it sets the stage for the subsequent attempt by the Supreme Court to resolve their interconnectedness through its own technique for determining the content of aboriginal rights.

Before the case reached the Supreme Court, the Crown appealed and the case was heard in the British Columbia Court of Appeal in March 1992 and a decision was handed down on June 25, 1993.<sup>28</sup> The appeal by the Crown was allowed by MacFarlane, Taggart, and Wallace J.J.A. with Lambert and Hutcheon J.J.A. in dissent. Finally, on a further appeal by Dorothy Van der Peet, the case came before the Supreme Court of Canada and was heard by Lamer C.J. and La Forest, L’Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major J.J., who handed down their decision on August 21, 1996. The Court held (with L’Heureux-Dubé and McLachlin J.J. dissenting) that the appeal should be dismissed.<sup>29</sup>

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<sup>27</sup> *Ibid.*

<sup>28</sup> See, *R. v. Vanderpeet* (1993), 80 B.C.L.R. (2d) 75.

<sup>29</sup> *Vanderpeet*, supra note 3. For the purposes of this chapter I will focus upon the judgment of Lamer C.J.

### **B. Dividing Practices: A Time For Splitting the Difference**

At the Supreme Court, it was noted the although the Court had previously dealt with the aboriginal right to fish<sup>30</sup>, it had yet to formulate a test for determining the scope of aboriginal rights. Consequently, the following test was formulated for determining the content of aboriginal rights:

[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.<sup>31</sup>

In order to be integral a practice, custom or tradition must be of central significance to the aboriginal society in question.<sup>32</sup>

The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies.<sup>33</sup>

It should be made clear that the above test was formulated for determining the *content of such rights as they relate to aboriginal activities*, as opposed to the content of aboriginal title.<sup>34</sup> And while this test was articulated as a result of various 'transgressions' by the appellant, Dorothy Van der Peet, it is interesting to note that under

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<sup>30</sup> *Ibid.* The most relevant Canadian case referred to was *R v. Sparrow*, [1990] 1 S.C.R. 1075. [hereinafter *Sparrow*]. As Lamer C.J. noted "In *Sparrow*, ... this Court did not have to address the scope of the aboriginal rights protected by s. 35 (1)."

<sup>31</sup> *Ibid.* at para. 47.

<sup>32</sup> *Ibid.* at para. 55. And as was stated at para. 49: "In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right."

<sup>33</sup> *Ibid.* at para. 60.

<sup>34</sup> The test for determining the *content of aboriginal rights as they relate to aboriginal title*, was more recently formulated in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010. [hereinafter *Delgamuukw*] as per Lamer C.J. at para. 117 : "...the content of aboriginal title can be summarised by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must

this test the right of Dorothy Van der Peet to sell 10 fish went unrecognised by the Supreme Court not because she didn't necessarily 'possess' the right but rather because she failed to meet the (ab)normal standards of proof required to be a right-holder under the test set by the Court.<sup>35</sup> Furthermore, while I now want to examine more closely the reasoning behind this test, it is important to keep in mind what the Court has done here. It has basically invented a technique to determine whether a particular contemporary action by a First Nations person is an activity that was central to the society in question in a period prior to contact with European societies (and thus well prior to the assertion of sovereignty by the Crown of a particular society). Yet, in doing so, the Court offers no argument for why this approach should be adopted over other alternatives.<sup>36</sup>

### 1. Normalising gazes

At one level, the court has formulated a test which requires First Nations people to prove the existence of a right which is deemed not to be something inherent or derived solely from their own legal systems, but rather as an activity which is infused with

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not be irreconcilable with the nature of the group's attachment to that land." In chapter V, I will discuss how tenable the distinction is between the two tests and whether or not they can be reconciled.

<sup>35</sup> For a commentary on recent developments and how such changes in the onus of proof may in themselves be unconstitutional, see P. Blair, "Prosecuting the Fishery: The Supreme Court of Canada and the Onus of Proof in Aboriginal Fishing Cases" (1997) 20 Dalhousie Law Journal 17.

<sup>36</sup> *Vanderpeet*, *supra* note 3 at para. 60. As Lamer C.J. goes on to state: "Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown." Not surprisingly this has attracted much criticism. For example, see John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (forthcoming in Vol. 22, No. 1 of the American Indian Law Review) and

'Aboriginality' from a pre-contact period. Thus, the production of such norms of 'Aboriginality' will once again require First Nations societies to become the object of hierarchical observation, normalising judgment and further examination.<sup>37</sup> This is because such norms will still no doubt require determination, at least in part, by deference to the 'observations' of disciplines such as history, anthropology, linguistics, archaeology, genealogy, ethno-archaeology, paleobotany, geography and geomorphology but to name a few. And thus, judges will still have to journey into the 'minor courts of the disciplines' and engage with their debates and disputes over methodology if, and when, they sit in judgment over such work with First Nations societies.<sup>38</sup>

Also, the court, in taking account of the aboriginal perspective, will now consider oral traditions as an evidentiary discourse to be given proper independent weight.<sup>39</sup> However, presumably such First Nations knowledges will still have to be weighed against the confirmations and contradictions of other disciplinary knowledge. Consequently, at this level, it could be said that little has changed from the situation at trial: the battle of elders and other expert evidence against the Crown and its expert evidence. The outcome being that a right can be said to exist on the basis of proving that a particular activity was,

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R.L. Barsh and J.Y. Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993.

<sup>37</sup> See, *Discipline and Punishment*, *supra* note 9 at 170, for a description of how these 'technologies' are put to use by disciplinary power.

<sup>38</sup> For a discussion of the kind of issues involved in this process, see, *A theme Issue: Anthropology and History in the Courts* (1992) 95 B.C. Studies.

<sup>39</sup> *Vanderpeet*, *supra* note 3 at para 68. As Lamer C.J. states: "The courts must not undervalue the evidence presented by aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case."

according to certain disciplinary norms, infused with the required standard of 'Aboriginality'.

## 2. Getting to the 'Hart' of the matter

However, at another level, the Court is not completely deferring to 'outside' disciplines and their methodological ordering of things, rather it is caught up in its own normalising concept; legal centrality. I suggest that the problematic nature of this 'concept' can be drawn out with reference to law's own discipline; namely the jurisprudential perspective of H.L.A. Hart and the extensive critique offered by such authors as Peter Fitzpatrick.<sup>40</sup> Without going over that theoretical terrain, which unfortunately is beyond the scope of this thesis, I will however attempt to apply certain theoretical insights from such work to the issue at hand.

As the test outlined suggests, Lamer C.J.'s concept of aboriginal rights is being informed by a set of rules directed at enlightening us to the *legal essence* of 'aboriginal' societies. As such, the resulting *authorised view* of 'aboriginal' societies can be understood as being theoretically underpinned by H.L.A. Hart's, *The Concept of Law*<sup>41</sup>, which, among other things, argues that legal rules have a core of certainty and a

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<sup>40</sup> For a detailed and convincing critique of Hart's jurisprudential perspective and an overview of the extensive writings on Hart's jurisprudential perspective, see, P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992).

<sup>41</sup> See H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

penumbra of doubt.<sup>42</sup> I suggest that it is this view from the discipline of law, which helps explains the Court's normalisation of 'aboriginal' societies around a concept which sees particular activities (which the Court is certain are authentic) being accorded central significance while other activities (the authenticity of which the Court is doubtful about) being accorded incidental significance.

Yet, if we go through Lamer's technique for determining content, we find that when it comes to identifying what lies at the centre of 'aboriginal' societies, he is not so forthcoming. Rather, he suggests that to be a central and significant part of the society's distinctive culture, the practice, custom or tradition must have been "one of the things which made the culture of the society distinctive - that it was one of the things that truly made the society what it was."<sup>43</sup> In searching for what '*truly* made the society what it was', Lamer C.J. is caught up in over-determining 'Aboriginality'. That is, he searches in the 'misty past' for some truly 'authentic' representation that he is satisfied existed. Yet, in doing so, he limits or denies not only the past but the ongoing complexities of First Nations societies and their survival. Perhaps more to the point, it is evident here that Lamer C.J. is having difficulty gaining access to the central content of 'aboriginal' rights. In fact, what he seems to be doing is deferring to a different criteria, this time 'distinctive'. And what does it mean for a society to be distinctive? Interestingly, Lamer

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<sup>42</sup> For an elaborate and in depth critique of Hart's *The Concept of Law* and the theoretical problem of distinguishing between the core and penumbra, see Fitzpatrick, *supra* note 40

<sup>43</sup> *Vanderpeet*, *supra* note 3 at para 55.



C.J. approaches this not through a positive definition but rather through a negative formulation. He continues the search for meaning as follows:

The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question.<sup>44</sup>

Interestingly, the rationality which searches for what is presumably only 'true of aboriginal societies' is taking us a long way from the familiar territory of rights discourse. And although Lamer says that this process must take us back to 'the defining and central attributes', he doesn't mean that the society in question is going to be doing the defining or deciding of what attributes are central. It would seem that such a process of deferral would prove too disruptive for his over-determined representation of what he has in mind as being essentially 'aboriginal'. In fact, in this context, it appears to be the circular reasoning of his Lordship that circumscribes the centre of 'aboriginal' societies.

Moreover, a further problem with the technique being used by the Court, is that by reducing the notion of integral to that which was central prior to contact, the Court has kept the disciplines of law, history and anthropology, etc., at the centre of defining those past 'aboriginal' societies and governing the future meaning of their rights. I say this because while the Court has stated that 'oral traditions' are to be given proper weight in terms of evidentiary matters, I would question the ramifications of such a proposition. Not just because oral traditions will still have to be weighed against other supporting or

contradictory evidence, but because of what this does to the role of 'oral tradition' itself. For it seems to me, that the effect is the marginalization of the legal role and significance of such 'First Nations laws/oral traditions'. In other words, the Court has attempted to 'accommodate' what are the *legal* practices of the society in question within the factual realm, rather than deferring to such practices as matters of 'law'.<sup>45</sup> In the end, such an approach not only over-determines the 'aboriginal' but it continues to undervalue the contemporary legal 'perspective of the aboriginal people' when it comes to determining what is integral to their distinctive societies. Thus, at a basic level, it fails to address the First Nations legal practices that may be relevant to the rights which arise in the everyday lives of their holders. This legal slippage is significant because it seems to me that it can be best understood as a continuation of the Western mythology of modern law.<sup>46</sup>

### **3. Building on law's mythical foundations**

In his informative book on the mythology of modern law, Fitzpatrick observed that:

In myth, validity is conferred only on that which comes from the centre.<sup>47</sup>

Recalling that Fitzpatrick's basic argument is that only when law is understood as myth can its contradictory existences be reconciled with the notion of law as a unified entity.

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<sup>44</sup> *Ibid.* at para 56.

<sup>45</sup> Jo-anne Fiske has recently traced the legal slippage of how customary laws became transformed into oral traditions within legal discourse in British Columbia. See J. Fiske, "From Customary Law to Oral Traditions: Discursive Formation of Plural Legalisms in Northern Columbia, 1857-1993" (1997-8) 115/116 B.C. Studies 267.

<sup>46</sup> See Fitzpatrick, *supra* note 40.

<sup>47</sup> *Ibid.* at 145.

Equally suggestive for this discussion, is Fitzpatrick's elaboration on the role that imperialism played in constituting modern law in terms of what it was not; that is, as a universal negation of 'primitive' and 'chaotic' native societies and their myths. In turn, I am suggesting here, that when confronted with the possible existence of First Nations legal practices, there is a similar 'negation' underpinning Lamer C.J.'s test. So much so, that it seems to have manifested itself in denial.<sup>48</sup>

The result, is the adoption of a technique which attempts to (a) re-unite differing disciplinary knowledges and oral traditions around a concept of centrality, and (b) keep a clear division between 'aboriginal' subjects and their activities on the one hand, and Europeans and their laws on the other. For Lamer, this can be achieved through the assumptions that underpin the temporal aspect of the test - the pre-contact period. It seems that there is an assumption here that borders on the idea that First Nations societies in their pre-contact 'primitive' or 'chaotic' state only developed because of contact with a 'progressive' modern European society and its law. However, if we are to understand this in terms of a continuation of the mythology of modern law, then it seems to me that we need to supplement Fitzpatrick's thesis. This is because rather than constituting the whole of First Nations societies as the 'primitive' and 'chaotic' Other, the Court instead seeks to re-view these societies by imposing a limited legal order on what it now sees as

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<sup>48</sup> It has been noted by John Borrows that in this case and other related cases that the Chief Justice didn't consult or apply Sto:lo, Nu-Chan-Nulth, Heiltsuk or Ojibway law even though these "communities have laws relating to selling fish and gambling that the Court could receive and consider in developing its sui generis Aboriginal rights jurisprudence." See John Borrows, "The Trickster: Integral to a Distinctive Culture" (1997) 8 Constitutional Forum 27, at 31. On this topic more generally, see John Borrows, "With or Without You: First Nations Law in Canada" (1996) 41 McGill L.J. 629.

the essence of a particular 'aboriginal' society. Thus, in terms of Fitzpatrick's thesis regarding the mythology of modern law, I suggest that we can understand this as an attempt to view First Nations societies through a mode of objectification which we may diagnose as 'double di-vision'. That is, First Nations are seen as 'Other' than European and not as legally significant in their 'own margins'. As such we might rephrase Fitzpatrick observation to read: In myth validity is conferred on that which comes from the centre and that which goes to the centre.

In sum, the result of this process is that the Court produces abstract notions of core and penumbra against which the 'facts' are then compared. This is in contrast to an approach which would see the meaning of rights being determined through the specific context and use of a given society. The result is that the current process not only limits 'aboriginal rights' but also virtually erases First Nations legal practices.

#### **4. The need to go beyond 'Aboriginality'**

Given the problems associated with Lamer's approach, it would seem that there is a need to be aware that:

Aboriginal peoples are not racial groups; they are organic political and cultural entities. Although contemporary Aboriginal peoples stem historically from the original peoples of North America, they often have mixed genetic heritages and include individuals of varied ancestries. As organic political

entities, they have the capacity to evolve over time and change in their internal composition.<sup>49</sup>

In contrast to this, the legal discourse of the Court has, to date, situated the 'aboriginal' subject in a space devoid of its own legal practices and internal governing structures. In this regard, it is worth noting that despite the Court's acknowledgement that 'aboriginal' rights are *sui generis*, its focus remains upon emphasising what it understands as constituting 'Aboriginality'. As Borrows and Rotman note:

The Supreme Court's narrow focus on what constitutes a unique culture removes its attention from *sui generis* formulations that consistently had their basis in the continued existence of prior legal systems within Canada and the contemporary legal conceptions these generate. As such, the Court has departed from exploring how Aboriginal rights have come to exist within the common law and, instead, overly concentrated on who holds the right as grounding their existence. They have founded the existence of Aboriginal rights in Aboriginality.<sup>50</sup>

As such, it has been suggested that the Court ends up being governed by a rationality that is based upon a caricature of First Nations people. Such a caricature is the result of what Borrows and Rotman call a 'displaced focus on Aboriginality' which has resulted from a test which they say is based on 'what was, once upon a time, integral' to First Nations cultures. As the authors explain:

In the process the test draws on inappropriate racialized stereotypes of Aboriginal peoples by attempting to distil the essence of Aboriginality by reference to their pre-contact activities. This caricature presupposes that

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<sup>49</sup> Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2:1 *Restructuring the Relationship* (Ottawa: The Commission, 1996) at 166. [hereinafter *RCAP*].

<sup>50</sup> J. Borrows and L.I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 *Alberta Law Review* 9 at 36.

Aboriginal peoples and their legal systems did not develop in response to European influences, and it freezes them at the point of contact.<sup>51</sup>

As it now stands, the *Vanderpeet* test puts in place a process for the production of *normalised* 'aboriginal' rights on the basis of misguided dividing practices which seek to capture not just the 'aboriginal' but some kind of past authentic or essential 'aboriginal'. Consequently, I would argue that the *Vanderpeet* test and its representation of the 'aboriginal' needs to be understood as part of a discourse that has been termed 'Aboriginalism' - a term I'll now elaborate on.

Recent writing on cultural difference and First Nations people has put forward the contention that "power, knowledge and Aborigines are mutually constitutive - that they produce and maintain one another through discursive practices which can be known as Aboriginalism."<sup>52</sup> In drawing upon Edward Said's *Orientalism*, Attwood has noted that Aboriginalism can be said to exist in at least *three* interdependent forms:

[F]irst, as 'Aboriginal Studies' - the teaching, research or display of scholarly knowledge about indigenes by European scholars who claim that the indigenous peoples cannot represent themselves and must therefore be represented by experts who know more about Aborigines than they know about themselves.<sup>53</sup>

In relation to this, consider the prominent role that the disciplines (including the discipline of law) still play in constructing knowledge about First Nations people and representing them and their societies. Significantly, it seems that largely due to the

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<sup>51</sup> *Ibid.*

<sup>52</sup> Attwood and Arnold, *supra* note 4 at ii.

<sup>53</sup> *Ibid.* at i.

Court's own legal process which doesn't defer to First Nations legal practices, this is the case whether the experts are *representing* First Nations people at their request or on behalf of the Crown.

[S]econd, as a style of thought which is based upon an epistemological and ontological distinction between 'Them' and 'Us' - in this form Europeans imagine 'the Aborigines' as their 'Other', as being radically different from themselves.<sup>54</sup>

In this regard, consider the assumed distinctions about First Nations societies and European society that underpin the temporal aspect of the test. Distinctions that are maintained on the basis of a misguided focus on Aboriginality which, in turn, over-determines the 'aboriginal' and fails to deal with complexities of First Nations societies, people and their legal practices.

[T]hird, as a corporate institution for exercising authority over Aborigines by making statements about them, authorising views of them, and ruling over them.<sup>55</sup>

In the preceding analysis, I think it is apparent how the dividing practices of law are utilised to produce authoritative and essentialist 'truths' about First Nations people. Furthermore, the *Vanderpeet* test legitimates a 'system of rule' that displaces First Nations legal practices. However, as I hope to demonstrate in chapter V, the contingency of this state of affairs is very much open to future strategical challenge from discourses which attempt to 're-place' First Nations legal practices. This is because:

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<sup>54</sup> *Ibid.*

<sup>55</sup> *Ibid.*

Discourses are not once and for all subservient to power or raised up against it, any more than silences are. We must make allowance for the complex and unstable process whereby discourse can be both an instrument and an effect of power, but also a hindrance, a stumbling block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it.<sup>56</sup>

### **C. Between Norms and Regulation: Justifying Governmental Infringement**

In addition to the newly formulated test of the Court for disciplining and determining the content of rights, there is another significant development that I want to mention. This is the shift in *rationality* when it comes to the infringement of these already limited rights. The Court no longer defers to the Crown's ability to *extinguish* aboriginal rights but instead defers to the Government's ability to *infringe* existing aboriginal rights. As has been stated:

At common law aboriginal rights did not, of course, have constitutional status, with the result that Parliament could, at any time, extinguish or regulate those rights. ...Subsequent to s.35(1) aboriginal rights cannot be extinguished and can only be regulated or infringed consistent with the justificatory test laid out by this Court in *Sparrow*.<sup>57</sup>

Thus, the constitutional recognition and affirmation of aboriginal rights creates a new problem for the Court; justifying post-contact regulation and infringement. As was observed, the Court has been reluctant to defer to First Nations legal practices as they relate to governing the meaning and content of aboriginal rights. Yet, the Court will justify the *governmental* infringement of aboriginal rights by regulation through

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<sup>56</sup> M. Foucault, *The History of Sexuality: Volume One* (London: Penguin Books, 1990) at 100.



deference to non-First Nations objectives. This infringement is justified on the basis of objectives which currently include:

[T]he development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement...<sup>58</sup>

What we see here are objectives that relate to the population at large (bio-politics) taking preference over 'aboriginal rights' despite the fact that these rights, unlike other Charter rights, are not subject to a s.1 analysis.<sup>59</sup> I want to suggest that this shift from the Crown's right to extinguish aboriginal rights to the justified *governmental* regulation of such rights, is characteristic of a more general shift in political rationality and the exercise of political power. And it is this shift, in what Foucault has termed *governmentality*, that I will be considering and elaborating upon it in the next chapter.

### **Conclusion: The net result...**

To sum up, these recent transformations in legal discourse seem to suggest two significant shifts in 'legal power and knowledge'. Firstly, the *authorised view* of

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<sup>57</sup> *Vanderpeet*, *supra* note 3 at para. 28.

<sup>58</sup> *Delgamuukw* *supra* note 34 at para. 165. It should be noted that such justified infringement is subject to the Crown's fiduciary duty - the standard of scrutiny and particular form that duty will take will be a function of the Aboriginal right or title. Such a duty will likely involve consultation in good faith and may amount to full consent of an Aboriginal nation, as well as fair compensation. See para. 166-169.

<sup>59</sup> That is, such rights are not subject to restriction on the basis of what is demonstrably justifiable in a free and democratic society. For a discussion of the problematic nature of this alternative justificatory test as it relates to aboriginal and treaty rights, see L.I. Rotman, "Defining Parameters: Aboriginal Rights, Treaty Rights, and the Sparrow Justificatory Test" (1997) 36 *Alberta L.R.* 149.

'aboriginal' societies has the consequence of virtually erasing First Nations legal practices of their contemporary legal significance. And secondly, the continued *ruling over* of the 'aboriginal' subject and his or her rights is further compounded by the Court's willingness to defer to non-First Nations *governmental* objectives.

Consequently, I suggest that these doctrinal developments need to be understood not through reconciling 'relations of sovereignty', but rather through the disciplinary 'relations of domination' that contribute to the discourse of Aboriginalism. Moreover, these 'relations of domination' remain forcefully embedded within legal discursive practices directed at limiting the meaning and content of aboriginal rights to a time and space that is not even subject to the Crown's Sovereignty! The net result, is a normalising process which captures 'aboriginal' rights in a mythically informed pre-contact period.

#### IV. Law as a Tactic of Government: 'Advanced' Liberalism and the Nisga'a Negotiations

The existing system is one that was imposed upon our societies as a way of destroying the existing political system, and as a way of controlling our people. Contrary to our traditional systems, the *Indian Act* system provides a political voice only to the elected chiefs and councillors normally resident on reserves, and usually male. The *Indian Act* system silences the voice of elders, women, youth and off-reserve citizens of First Nations.<sup>1</sup>

[W]ith government it is a question not of imposing law on men, but of disposing things: that is to say, of employing tactics rather than laws, and even of using laws themselves as tactics - to arrange things in such a way that, through a certain number of means, such and such ends may be achieved.<sup>2</sup>

To what extent are we witnessing a shift from the imposition of law to the use of law as a tactic of 'government'? More specifically, against the historical imposition of the *Indian Act* system, how are laws being used as tactics of 'government' in the present search to "find ways in which Aboriginal people can participate fully in the economic, political, cultural and social life of Canada in a manner which preserves and enhances the collective identities of Aboriginal communities"<sup>3</sup>?

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<sup>1</sup> Marilyn Fontaine, Aboriginal Women's Unity Coalition, Winnipeg, Manitoba, 23 April 1992, quoted in Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2:1 *Restructuring the Relationship* (Ottawa: The Commission, 1996) at 124. [hereinafter *RCAP*].

<sup>2</sup> M. Foucault, "Governmentality" in G. Burchell, C. Gordon and P. Miller, eds., *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991) at 95. [hereinafter "Governmentality"].

<sup>3</sup> Canada, "Statement of Reconciliation: Learning from the Past" in Canada, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: Minister of Indian Affairs and Northern Development, 1997) [hereinafter *Canada's Aboriginal Action Plan*].

In the context of British Columbia this search to find 'new ways' has led many to the process of negotiating modern treaties based upon the right to self-government.<sup>4</sup> It is envisaged that the contents of such treaties, when ratified, will be protected as part of the aboriginal and treaty rights recognised and affirmed in s.35(1). Although, it should be noted that there has been some recent debate about whether this requires a constitutional amendment or not. Putting that aside, if we bear in mind the above criticisms of the current *Indian Act* regime, the recommendations of the *RCAP*, the aims of *Canada's Aboriginal Action Plan*, as well as, the Court's rationale for justifying the governmental infringement of aboriginal rights<sup>5</sup>, it is perhaps not surprising that political rationalities of self-government have become the driving force behind such treaty negotiations. But are the rationalities of self-government part of a wider shift in political thought that has been identified within the governmentality literature<sup>6</sup>? Specifically, how do they relate to the

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<sup>4</sup> For a general background to treaties in North America, see M. Jackson, *A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements: A Report Prepared for the Royal Commission on Aboriginal Peoples* (September, 1994) [unpublished]. In the context of the specific treaty process in British Columbia, see Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: UBC Press, 1996). Of course it should not be forgotten that not all First Nations people are enamoured with the current treaty process; "Approximately 30 percent of 'registered' First Nations people in British Columbia are not represented in the treaty-making process. Leadership of some First Nations has expressed no interest in participating in the negotiations using the existing framework - the six-stage process involving representatives of both the federal and provincial governments - but remains determined to assert aboriginal rights." See, R. J. Muckle, *The First Nations of British Columbia* (Vancouver: University of British Columbia, 1998) at 85. Hence, the relevancy of my discussion of the current doctrinal limits on rights in Chapter V.

<sup>5</sup> See the preceding discussion in Chapter III.

<sup>6</sup> Much of the historical development and the debates around this work on governmentality can be traced through the issues of the *Economy and Society* Journal. For a more recent collection of essays, see A. Barry, T. Osborne and N. Rose, eds., *Foucault and Political Reason: Liberalism, Neo-liberalism and Rationalities of Government* (Chicago: The University of Chicago Press, 1996). [hereinafter *Foucault and Political Reason*]. As Hunt has noted, "What is distinctive about this line of thought is that it self-consciously avoids discussing liberalism as either a political philosophy or as a constitutional configuration." Rather, liberalism is approached as a form of governmental rationality. See, A. Hunt, "Governing the City: Liberalism and early modern modes of governance." in *Foucault and Political Reason* at 167. Also, see A. Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law*

transformation in governing practices which are characteristic of 'advanced' liberal democracies.<sup>7</sup> It is this issue which I propose to address in the first part of this chapter.

In the second part of this chapter I will address a more specific issue that concerns the treaties emerging out of negotiations in British Columbia. McKee, in his work on the current treaty process in British Columbia, has offered some thoughts on a number of issues which he sees forming the basis of future debate.<sup>8</sup> These include questions such as: Who will benefit from treaty settlements?; How will it be determined whether the treaties have met their goals?; How will treaty-related grievances be addressed?<sup>9</sup> To these questions we can add what has now become a well rehearsed debate between those that are either for or against the *Nisga'a Final Agreement*.<sup>10</sup> With those against it, divided in opinion on whether it goes too far or not far enough. And while I think the questions McKee raises and the debate around the *Final Agreement* are important, my focus is somewhat different. That is, I will take a specific look at the emerging Nisga'a treaty and

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(New York: St. Martin's Press, 1996) where he provides a convincing critique of Foucault's historical shortcomings with regard to pre-modern governing practices and the role of law.

<sup>7</sup> See particularly N. Rose, "Governing 'advanced' liberal democracies" in *Foucault and Political Reason*. *Ibid.* [hereinafter "Governing 'advanced' liberal democracies"].

<sup>8</sup> McKee, *supra* note 4 at 81.

<sup>9</sup> *Ibid.* at 81-87.

<sup>10</sup> The *Nisga'a Final Agreement* (1998) [[http://www.aaf.gov.bc.ca/aaf/treaty/nisgaa/docs/nisga\\_agreement.html](http://www.aaf.gov.bc.ca/aaf/treaty/nisgaa/docs/nisga_agreement.html)]. [hereinafter *Final Agreement*]. Although differing in some details, the substance of the *Final Agreement* is drawn from the *Nisga'a Treaty Negotiations Agreement in Principle* (Issued jointly by the Government of Canada, the Province of British Columbia and the Nisga'a Tribal Council: February 15, 1996). [henceforth *Nisga'a AIP*]. It should also be noted that this treaty is being negotiated outside the British Columbia Treaty Commission and has still to be ratified.

undertake what Rose and Miller have referred to as “an analysis of the intricate inter-dependency between political rationalities and governmental technologies”.<sup>11</sup>

With those aims in mind, I propose to proceed in the following manner: (i) I will provide an account of some of the major themes in recent work which advocates a new approach to the analysis of political power; it is an approach concerned with the ‘means, techniques and relations’ through which political power is exercised in an ‘advanced’ liberal society.<sup>12</sup> In relating key aspects of such work to *Canada’s Aboriginal Action Plan*, I seek to develop an analytical framework that can account for the political rationalities informing a “new relationship between strategies for the government of others and techniques for the government of the self”.<sup>13</sup> And, (ii) In utilising such a framework, I will explore the materials behind the Nisga’a negotiations to illustrate how the struggle over self-government is being played out. In doing so, I will assess the extent to which the rationalities of self-government informing such an agreement are inter-dependent on the technologies of government associated with “advanced” liberalism. In doing so however, I will firstly take account of some recent criticisms of the governmentality literature; specifically, the need to move beyond the understanding of

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<sup>11</sup> N. Rose and P. Miller, “Political Power Beyond the State: Problematics of Government” (1992) 43 *Economy and Society* 173 at 175.

<sup>12</sup> *Ibid.* at 177. As Rose and Miller have explained: “Our studies of government eschew sociological realism and its burdens of explanation and causation. We do not try to characterise how social life really was and why. We do not seek to penetrate the surfaces of what people said to discover what they meant, what their real motives or interests were. Rather, we attend to the ways in which authorities in the past have posed themselves these questions: what is our power; to what ends should it be exercised; what effects has it produced; how can we know what we need to know, and do what we need to do in order to govern.”

<sup>13</sup> N. Rose, “The Death of the Social?: Re-figuring the Territory of Government” (1996) 25 *Economy and Society* 327 at 331. [hereinafter “The Death of the Social?”].

resistance as programme failure and to account for the constitutive role of resistance in modes of governing. At that stage I will also reflect upon the significance of Scott's tentative 'notes' regarding Colonial governmentality.<sup>14</sup>

I think it important to stress at the outset that the purpose of my analysis is not to explicitly argue for or against the emerging Nisga'a treaty. However, if ratified, such a treaty can be considered an exercise of the Nisga'a's right to self-determination - which, for me, in and of itself, speaks volumes.<sup>15</sup> More to the point though, it should be recalled that my main purpose in this chapter is to explore the wider question of how laws (section 35(1) treaties) are being used as a 'tactic of government'.

#### **A. Political Power and the Changing Role of the State**

Political power is exercised today through a profusion of shifting alliances between diverse authorities in projects to govern a multitude of facets of economic activity, social life and individual conduct. Power is not so much a matter of imposing constraints upon citizens as of 'making up' citizens capable of bearing a kind of regulated freedom.<sup>16</sup>

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<sup>14</sup> On resistance, see P. O'Malley, "Indigenous Governance" (1996) 25 *Economy and Society* 310. For other recent criticisms, see, D. Garland, "'Governmentality' and the problem of crime: Foucault, Criminology, Sociology" (1997) 1 *Theoretical Criminology* 173. And on Colonial governmentality, see D. Scott, "Colonial Governmentality" (1995) 43 *Social Text* 191, who initially stated at 191 that: "In these notes (and they are 'notes' inasmuch as they are, in many ways, only the tentative explorations of a working paper)" he was concerned with the problematic which takes as its object what he calls "the political rationalities of colonial power." at 193.

<sup>15</sup> For example consider the statement made by the Nisga'a in their ownership statement: "Since time immemorial, we have lived in the Naas as members of an elaborate and complex society with our own cultural traditions, language, territorial boundaries and systems of government and law. Despite the arrival of Europeans and the introduction of their traditions, we remain a distinct people with inherent rights of self-determination." See *Lock, Stock and Barrel: Nisga'a Ownership Statement*. (No information on publisher or date) at 5. [hereinafter *Lock Stock and Barrel*].

In their work on political power, Rose and Miller have been at the forefront of a line of research that offers timely insights into understanding our present. Such work, draws upon, and develops, Foucault's initial research in the area of bio-power and governmentality.<sup>17</sup> In doing so, they have been attempting to comprehend the present through an analysis of political power that "re-locates 'the State' within an investigation of problematics of government."<sup>18</sup> In general terms, the approach being argued for, involves a shift in focus from 'the State' to 'the governmentalization of the state'.<sup>19</sup> And as such, it is accompanied by a shift of focus from 'who holds power' to the 'means, techniques and relations' through which power is exercised.<sup>20</sup> Thus, the state doesn't disappear but rather becomes one entity of government. In using the term 'government' in this way, it is understood as:

[T]he historically constituted matrix within which are articulated all those dreams, schemes, strategies and manoeuvres of authorities that seek to shape the beliefs and conduct of others in desired directions by acting upon their will, their circumstances or their environment. It is in relation to this grid of government that specifically political forms of rule in the modern West define, delimit and relate themselves.<sup>21</sup>

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<sup>16</sup> Rose & Miller, *supra* note 11 at 174.

<sup>17</sup> See, "Governmentality", *supra* note 2.

<sup>18</sup> Rose and Miller, *supra* note 11 at 174.

<sup>19</sup> This approach is developed from Foucault's protestations against the excessive value that is attributed to the problem of the state. Foucault's sums up his position thus: "But the state, no more probably today than at any other time in its history, does not have this unity, this individuality, this rigorous functionality, nor, to speak frankly, this importance; maybe, after all, the state is no more than a composite reality and a mythicized abstraction, whose importance is a lot more limited than many of us think. Maybe what is really important for our modernity - that is, for our present - is not so much the *étatisation* of society, as the 'governmentalization' of the state." See, "Governmentality", *supra* note 2 at 103.

<sup>20</sup> I am here drawing upon N. Rose, "Governing Liberty", (A paper presented at the 'Governing Modern Societies' series held at Green College, University of British Columbia, 16 September, 1997). [unpublished]. [hereinafter "Governing Liberty"].

<sup>21</sup> Rose and Miller, *supra* note 11 at 175. I think this approach is particularly suggestive for investigations which seek to move beyond the state and its policies to examine the continuities of government that exist between the state and other authorities involved in practices of First Nations governance. For example consider the historical complexities of 'government' that have arisen in the past from the interplay between



## 1. Promlematics of government

In terms of the changing role of 'the State' in this wider scheme of 'government', it has been suggested that one can be nominalistic about the state, in the sense that it doesn't have an essential necessity or even functionality. Rather, we can see the state as "a specific way in which the problem of government is discursively codified, a way of dividing a 'political sphere', with its particular characteristics of rule, from other 'non-political spheres' to which it must be related."<sup>22</sup> And additionally as "a way in which certain technologies of government are given a temporary institutional durability and brought into particular kinds of relations with one another."<sup>23</sup> In other words, the attention shifts to the constitution of 'problems' and how such 'problems' become the subject of various governmental practices and programmes.<sup>24</sup> And it is in this context that we can talk of 'the state' as being but one of many authorities involved in addressing such problems or problematics of government.<sup>25</sup> Importantly then, as will be apparent in the

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the practices of such authorities as hereditary chiefs, the band council, Indian agent, Minister, Missionaries and Residential schools.

<sup>22</sup> *Ibid.* at 177.

<sup>23</sup> *Ibid.* The authors continue by stressing that: "Posed from this perspective, the question is no longer one of accounting for government in terms of 'the power of the State', but of ascertaining how, and to what extent, the state is articulated into the activity of government: what relations are established between political and other authorities; what funds, forces, persons, knowledge or legitimacy are utilised; and by means of what devices and techniques are these different tactics made operable."

<sup>24</sup> *Ibid.* at 183. Rose and Miller go on to note that: "Programmes presuppose that the real is programmable, that it is a domain subject to certain determinants, rules, norms and processes that can be acted upon and improved by authorities. They make the objects of government thinkable in such a way that their ills appear susceptible to diagnosis, prescription and cure by calculating and normalising intervention."

<sup>25</sup> Once again, consider the discursive transformation of First Nations people into the 'Indian problem' and how this newly constituted 'problem' became the subject of various governing programmes and practices. For a specific overview of past practices of government and their changing 'Indian policy', see J.L.

emerging treaties on self-government, such treaties are being constituted in a manner which doesn't do away with the state but rather requires an active state for the envisaged success of addressing a particular 'problematic of government'.

Given this change in focus, the task becomes one of writing a 'history of the present'.<sup>26</sup> And this task involves the problematics of government being analysed in terms of the inter-dependency between political rationalities and their governmental technologies. I will now explain what is meant by these terms and how they relate to one another in the context of 'advanced' liberal modes of governing. In doing so, I will draw upon Canada's new governmental programme - *Canada's Aboriginal Action Plan* - to illustrate the relevancy of this framework for analysing the current shift in modes of governing First Nations populations. And it seems to me, that in the context of comprehending how the emerging programmes of self-government relate to the current problematic of government, there is a need to take account of (i) the failure of past policies<sup>27</sup>, and (ii) the

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Tobias, "Protection, Civilisation, Assimilation: An Outline History of Canada's Indian Policy" (1976) 6 *Western Canadian Journal of Anthropology* 13.

<sup>26</sup> For a discussion of what has broadly become known as 'writing a history of the present' see "Introduction" in *Foucault and Political Reason*, *supra* note 6 at 2-7. In sum, it is an approach which moves away from the grand theories of modernity or colonialism and the 'repertoire of supplements' which characterise our difference, e.g. postmodernism or postcolonialism. Instead of the generalities of such grand theories and their 'supplements', theorising is allocated "a more modest role; concepts are deployed to demonstrate the negotiations, tensions and accidents that have contributed to the fashioning of various aspects of our present." at 4.

<sup>27</sup> It should be noted that Miller and Rose have made the point that the "real always insists in the form of resistance to programming; and the programmer's world is one of constant experiment, invention, failure, critique and adjustment." in P. Miller and N. Rose, "Governing Economic Life" (1990) 19 *Economy and Society* 1 at 14. [hereinafter "Governing Economic Life"].

constitutive role played by First Nations peoples in the negotiations and implementation of self-government.<sup>28</sup>

## 2. Political rationalities and governmental technologies

Political rationalities in this context refer to:

[T]he changing discursive fields within which the exercise of power is conceptualised, the moral justifications for particular ways of exercising power by diverse authorities, notions of the appropriate forms, objects and limits of politics, and conceptions of the proper distribution of such tasks among secular, spiritual, military and familial sectors.<sup>29</sup>

Perhaps most influential in changing the mainstream discursive field of politics to one of First Nations self-government was the *Penner Report*.<sup>30</sup> More recently, *Canada's Aboriginal Action Plan*, in drawing upon the *RCAP* and adopting the rationality of self-government, has formulated its 'vision of a shared future'. Its vision is based around four key objectives for action: Renewing the Partnerships<sup>31</sup>; Strengthening Aboriginal Governance<sup>32</sup>; Developing a New Fiscal Relationship<sup>33</sup>; Supporting Strong Communities,

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<sup>28</sup> In formulating the 'problematic of government' in this way, I am attempting to flag a potential criticism of the governmentality literature - that is, it seems to play down the constitutive role of resistance. I will discuss this later in relation to the specifics of the emerging Nisga'a treaty.

<sup>29</sup> Rose and Miller, *supra* note 11 at 175.

<sup>30</sup> Canada, House of Commons, *Indian Self-Government in Canada: Report of the Special Committee*, (Ottawa: 1983).

<sup>31</sup> *Canada's Aboriginal Action Plan*, *supra* note 3 at 2. This aims is to bring about "meaningful and lasting change in our relationships with Aboriginal people."

<sup>32</sup> *Ibid.* This aims is to support "Aboriginal people in their efforts to create effective and accountable governments, affirming treaty relationships, and negotiating fair solutions to Aboriginal land claims."

<sup>33</sup> *Ibid.* This aims to arrive at "financial arrangements with Aboriginal governments and organisations which are stable, predictable, and accountable and will help foster self-reliance."

People and Economies<sup>34</sup>. I think it is worth noting that the language alone here is indicative of the changing role of the state to which I early referred.

Governmental technologies, on the other hand, refers to “the complex of mundane programmes, calculations, techniques, apparatuses, documents and procedures through which authorities seek to embody and give effect to governmental ambitions.”<sup>35</sup> Not surprising, much of the material submitted to the Royal Commission contains information on past technologies and how they were utilised in giving effect to policy at that time. In terms of ‘the present’, I would suggest that it will be as a result of the current treaty negotiations over such diverse things as lands, resources, elections, internal constitutional frameworks, fiscal policy, fisheries, wildlife, child welfare, economic development, environment, taxation, the administration of justice, etc., that such new technologies of government will be made transparent. I will be exploring the inter-dependency of the rationalities of self-government and governmental technologies in more detail when I focus upon the Nisga’a Nation and its newly proposed mode of governing. Suffice to say though, it is through “an analysis of the intricate inter-dependencies between political rationalities and governmental technologies,” that it will be possible to “understand the multiple and delicate networks that connect the lives of individuals, groups and

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<sup>34</sup> *Ibid.* This aims to focus on “improving health and public safety, investing in people, and strengthening Aboriginal economic development.”

<sup>35</sup> Rose and Miller, *supra* note 11 at 175.

organisations to the aspirations of authorities” involved in the problematics of government.<sup>36</sup>

A constant theme of the governmentality literature involves close attention being paid to the way liberal government has historically been attracted to “technologies of rule which distance the processes of regulation from the forms or images of coercion”.<sup>37</sup> And in the context of ‘advanced’ liberal democracies, Rose has noted that these strategies of ‘government at a distance’ can “be observed in national contexts from Finland to Australia, advocated by political regimes from left and right, and in relation to problem domains from crime control to health.”<sup>38</sup> What such strategies seek are techniques that “create a distance between the decisions of formal political institutions and other social actors, conceive of these actors in new ways as subjects of responsibility, autonomy and choice, and seek to act upon them through shaping and utilising their freedom.”<sup>39</sup> To relate this to *Canada’s Aboriginal Action Plan*; it states that there needs to be a series of alliances made which “should include Aboriginal people and organisations, the Government of Canada, other levels of government, the private sector - indeed, all

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<sup>36</sup> *Ibid.* at 175-176.

<sup>37</sup> O’Malley, *supra* note 14 at 313. Indeed, it was arguably such a technique of rule that in the colonial context of British Columbia ultimately saw the use of band councils being promoted over the repression of the potlatch. Of course in saying this I don’t mean to minimise the devastating effects of making the potlatch illegal. What is striking though about these early attempts is the difficulty the state had in comprehending what it was supposedly repressing. Whereas with the band council it was its own programme that was being put in place. For a recent discussion of the potlatch as a colonial case study see, C. Bracken, *The Potlatch Papers: A Colonial Case History* (Chicago: University of Chicago Press, 1997).

<sup>38</sup> “Governing ‘Advanced’ Liberal Democracies”, *supra* note 7 at 53.

<sup>39</sup> *Ibid.* Of course these techniques may find their passage into programmes of government much easier when the parties involved in such programmes share similar rationalities and/or objectives.

Canadians.”<sup>40</sup> Thus, *self*-government is to involve *all* Canadians and be achieved by ‘working together’. According to *Canada’s Aboriginal Action Plan* this is because by working together “we can address the needs of Aboriginal people and communities. Working together, we can make the promise of a renewed partnership a reality.”<sup>41</sup> In promoting ‘choice’ through treaty negotiations, the ‘program of partnering’ is but one example of the techniques which would both distance formal political institutions while simultaneously ‘autonomizing and responsabilizing’ First Nations.

I think this example provides us with an insight into how the state is indeed becoming but one player in the ‘network of government’. And it seems to me, that the implementation of this new network of government is a process which we might describe as ‘putting flesh on the bones of these dreams.’<sup>42</sup> Furthermore, *Canada’s Aboriginal Action Plan* (or mission statement?) also highlights the difficulty in being for or against the inter-dependency of certain political rationalities and governmental techniques without having a better diagnosis of how they relate to the “capacity of individuals and collectivities to shape the knowledges, contest the authorities and configure the practices that will govern them in the name of their freedoms and commitments.”<sup>43</sup>

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<sup>40</sup> *Canada’s Aboriginal Action Plan*, *supra* note 3 at 3.

<sup>41</sup> *Ibid.*

<sup>42</sup> I have appropriated this phrase from the lyrics of “Flesh”, a song found on David Gray, *Flesh* (Virgin Records, 1994).

<sup>43</sup> “The Death of the Social?”, *supra* note 13 at 353.

## **B. 'Advanced' Liberalism and the De-socialising of Government**

In an attempt to move beyond the overblown celebrations or condemnations of recent Neo-liberal conservative regimes like that of Thatcherism, the point has been made that "it is none the less possible to identify a more modest yet more durable transformation in rationalities and technologies of government."<sup>44</sup> It is this 'more durable transformation' that has become characteristic of 'advanced liberalism' and 'government at a distance'. In this regard, such a transformation cannot be reduced to the effects of a single political ideology, Neo-liberalism for example.<sup>45</sup> And it seems to me that it is this distinction, more than any other, which is most suggestive of the need to move out from the shelters constructed in times of ideological warfare and utilise new analytical tools for comprehending, engaging with and contesting the ways in which political power is presently being exercised.

Rose has suggested that there are three shifts which are characteristic of 'advanced' liberal modes of governing: A new relation between expertise and politics<sup>46</sup>; A new pluralization of 'social' technologies<sup>47</sup>; A new specification of the subject of government.<sup>48</sup> To allow me to elaborate on what is meant by the term 'advanced' liberalism and its significance for our understanding of the emerging programmes of self-government, I propose to focus upon the shift that Rose characterises as "a new

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<sup>44</sup> "Governing 'Advanced' Liberal Democracies" *supra* note 7 at 53.

<sup>45</sup> *Ibid.*

<sup>46</sup> *Ibid.* at 54.

<sup>47</sup> *Ibid.* at 56.

<sup>48</sup> *Ibid.* at 57.

pluralization of 'social' technologies." To that end, the contemporary shift in rationality that involves 'individuals who are to be active in their own government' has had profound effects on the practice of governing through 'the social'.<sup>49</sup> And while, some people may be experiencing increased suffering, injustice and disadvantage as a result, it should be noted that this 'de-socialising of government' seems to have been the result of a shift in the political rationalities of a variety of diverse political organisations and parties.

As has been observed:

Over the last decades, this 'social' mentality of government has come under challenge from all sides of the political spectrum. Those on the left doubt the efficacy of the social state in maximising equality and minimising poverty, insecurity and ill health. Civil libertarians questioned the extent to which the discretionary powers and professional authority of social government was compatible with rights. Neo-liberals...argued for the need to return from the excessive government that characterised state socialism, national socialism and social welfare to frugal government, which safeguarded the market mechanisms that would allow the natural operation of economic processes within the rule of law.<sup>50</sup>

Indeed we may add to this political spectrum those critical of the state and its policies that sought to address the 'Indian problem' through assimilating First Nations people into 'society'. In fact, it is recognition of this misguided approach and the resulting problems that has contributed to the new policy direction articulated in *Canada's Aboriginal Action*

*Plan*:

In renewing our partnership, we must ensure that the mistakes which marked our past relationship are not repeated. The Government of Canada recognises that policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country.<sup>51</sup>

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<sup>49</sup> "The Death of the Social?", *supra* note 13 at 330.

<sup>50</sup> "Governing Liberty", *supra* note 20.

<sup>51</sup> *Canada's Aboriginal Action Plan*, *supra* note 3. As an aside, I find this such an interesting statement. It seems to me, that what it is really saying - but doesn't want to make explicit - is: the policies that sought to



Returning to the diagnosis of the present found in the governmentality literature, we at least see why there is a need to try to comprehend the mentalities of government that are emerging from the various parts of the political spectrum.<sup>52</sup> And significantly, given that new treaties based upon rationalities of self-government seem to go hand in hand with the 'de-socialisation of society', one must be careful about assuming that everything is bad about such changes.

### 1. A third way

It seems to me, that many of the insights gained from the work of the governmentality literature have developed from not overlooking or simply dismissing the Neo-liberal 'will to govern'. This is because Neo-liberalism "maintains the view that failure of government to achieve its objectives is to be overcome by inventing *new strategies* of government that will succeed."<sup>53</sup> I mention this because it is important to note that the need to invent new strategies of government has become part of the widely held rationality that makes up 'advanced' liberal democracies and resonates with rationalities of self-government coming from First Nations, the Royal Commission, *Canada's Aboriginal Action Plan* and various other commentators. Thus, while there will always

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assimilate Aboriginal people were not the way to 'govern Aboriginal people'...but the programme of this new Action plan is. The slippage to 'building a strong country' seems to be an attempt to draw attention away from its new 'art of governing'.

<sup>52</sup> "Governing Liberty", *supra* note 20. Here, the author offers a refreshing look at, and draws attention to the possible dangers with calls for reform that are being advocated in the name of communitarianism.

<sup>53</sup> *Ibid.* [my emphasis]. And I suggest it is by focusing on these new strategies that we can understand how law is being used as a 'tactic of government'.

need to be critical scrutiny of any new strategies, it does seem that this 'need to invent new strategies of government' is finding a consensus in political thought and is motivated from all parts of the political spectrum.

For example, consider the new strategies of governing that are based upon political rationalities of community.<sup>54</sup> The political rationality of community is significant here, because for the most part it has been "the apparently 'a-moral' language of the market [which has] captured most attention in debates over changes in welfare - privatisation, competition, financial calculation and so forth."<sup>55</sup> In contrast, recent political rationalities of community take us beyond this 'language of the market' that was most characteristic of Neo-liberal strategies.<sup>56</sup> And as such, I suggest such a change in political rationalities is supportive of the argument that we require a new analytical framework for comprehending the changing role of the state and the workings of political power in 'advanced' liberal society.<sup>57</sup>

In commenting more recently on this shift in focus to 'community', Rose has observed:

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<sup>54</sup> Although taking a different approach, an interesting discussion on 'law and community' can be found in B. Yngvesson, *Virtuous Citizens, Disruptive Subjects: Order and Complaint in a New England Court* (New York: Routledge, 1993)

<sup>55</sup> "The Death of the Social?", *supra* note 13 at 331.

<sup>56</sup> Instead, such rationalities operate in terms of "another language which is just as important, which is highly morally invested and which intersects with markets, contracts and consumption in complex and surprising ways: 'community'." See, "The Death of the Social?", *supra* note 13 at 331.

<sup>57</sup> As Rose and Miller, expressed it "The language of political philosophy: state and civil society, freedom and constraint, sovereignty and democracy, public and private plays a key role in the organisation of modern political power. However, it cannot provide the intellectual tools for analysing the problematics of government in the present. Unless we adopt different ways of thinking about the exercise of political power, we will find contemporary forms of rule hard to understand. It will thus be difficult to make proper judgment of the alternatives on offer." See, Rose and Miller, *supra* note 11 at 201.

Although strategies of welfare sought to govern *through society*, 'advanced' liberal strategies of rule ask whether it is possible to govern without governing *society*, that is to say, to govern through the regulated and accountable choices of autonomous agents - citizens, consumers, parents, employees, managers, investors - and to govern through intensifying and acting upon their allegiance to particular "communities".<sup>58</sup>

Interestingly *Canada's Aboriginal Action Plan* is infused with this mentality and mode of governing. For example it states that "[s]upporting healthy, sustainable Aboriginal communities means finding new ways to empower individuals and their communities."<sup>59</sup>

And as was already mentioned the objective of self-government is to be partly achieved through alliances or partnerships with such communities. Yet there seems to be an ambiguity here in the way 'community' is being used. One gets both the sense that community exists and that it also has to be made up. For example, consider what *Canada's Aboriginal Action Plan* says with regard to building the governing capacity of First Nations:

The government is also prepared to work with Aboriginal people to explore the possible establishment of governance resource centres. These centres could help Aboriginal people develop models of governance, provide guidance on community consensus building and approaches to resolving disputes, and serve as a resource on best practices. It could assist Aboriginal people to identify the skills required. It could also play a role in supporting capacity development in the areas of administrative, financial and fiscal management.<sup>60</sup>

As such, it is these 'models of governance' that need to be analysed if we are to understand what technologies of government are going to emerge with them. In this

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<sup>58</sup> "Governing 'Advanced' Liberal Democracies", *supra* note 7 at 61.

<sup>59</sup> *Canada's Aboriginal Action Plan*, *supra* note 3 at 22.

<sup>60</sup> *Ibid.* at 15.

regard, Hindess has observed that in the discourse of liberal politics, the “figure of the community of autonomous individuals appears on the one hand as given reality, serving to identify the character and the limits of legitimate government. On the other hand, it appears as yet to be realised positivity, serving to define the objective for a variety of governmental projects.”<sup>61</sup> What is also worth noting is that although the Royal Commission posed its recommendations around a discourse of ‘the nation’ and a third order of government, *Canada’s Aboriginal Action Plan* is much more reliant upon ‘strengthening aboriginal governance’ through the discourse of community. In its Statement of Renewal (the changing discursive field within which the exercise of power is conceptualised) Canada’s vision of partnership was articulated as involving the celebration of ‘our diversity while sharing common goals’. In elaborating on this, *Canada’s Aboriginal Action Plan* states that this means:

[D]eveloping effective working relationships with Aboriginal organisations and communities. Above all, it means all levels of government, the private sector, and individuals working together with Aboriginal people on practical solutions to address their needs. Our common aim should be to help strengthen Aboriginal communities and economies, and to overcome the obstacles that have slowed progress in the past.<sup>62</sup>

My concern is not to be overly sceptical of this ‘progressive’ language, but rather to make sure that we do not lose sight of the changing governmental technologies that accompany it. For it will only be with an understanding of these that we will be able to offer a critical analysis of the present. And it seems to me, that what is interesting about

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<sup>61</sup> B. Hindess, “Liberalism, Socialism and Democracy: Variations on a Governmental Theme” in *Foucault and Political Reason*, *supra* note 6 at 66.

<sup>62</sup> *Canada’s Aboriginal Action Plan*, *supra* note 3 at 6.

this shift in focus is not the political discourse around community, which isn't new, rather it is the idea of 'governing through community'.<sup>63</sup> As mentioned, this process seems possible because of the ambiguity of community and the practices aimed at 're-forming' it. As has been noted:

[I]n these contemporary political rationalities, community is made calculable by a whole variety of reports, investigations and statistical enquiries, is the premise and objective of a range of governmental technologies and is to be acted upon in a multitude of authoritative practices and professional encounters. Community, that is to say, is to be governmentalized...<sup>64</sup>

In fact, if we reconsider the *RCAP* and its submissions we can begin to see the amount of research that was conducted around 'knowing' First Nations communities. Thus, we can also begin to comprehend just 'what is available' to be acted upon and how 'governing through community' might be made possible. And this is knowledge that is available to the state, other authorities and to the communities themselves. However, it should also be recalled that such research, according to the *RCAP*, was to be used for nation to nation relations. Once again though, the use of 'nation' by the *RCAP* has the same kind of ambiguity around its status ('natural' or 'artefact'?) as that of 'community'; the right of self-government is held by the nation but the nation has to be rebuilt or re-formed. As the *RCAP* noted, an Aboriginal Nation "should be defined as a sizeable body of Aboriginal people that possesses a shared sense of national identity and constitutes the

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<sup>63</sup> As Rose notes, "The term community, of course, has long been salient in political thought; it becomes governmental, however, when it is made technical. By the 1960s, community was already being invoked by sociologists as a possible antidote to the loneliness and isolation of the individual generated by 'mass society'. This idea of community as lost authenticity and common belonging was initially deployed in the social field as part of the language of critique and opposition directed against remote bureaucracy." See, "The Death of the Social?", *supra* note 13 at 332.

<sup>64</sup> *Ibid.* at 352.

predominant population in a certain territory or collection of territories. ...There are about 1,000 reserve and settlement communities in Canada, but there are 60 to 80 Aboriginal nations.”<sup>65</sup> Despite sharing this type of ambiguity, there does seem to be a tension between the discourse of nation (*RCAP*) and the discourse of community (*Canada's Aboriginal Action Plan*). Whether this is actually a retreat from nation to nation relations or simply a case of using the language of community to address a wider set of circumstances remains unclear.<sup>66</sup> However, one effect that seems to result from the discourse of ‘community’ and governing through ‘broad based partnerships’ is the depoliticizing of self-government. Thus, the emphasis of discussion is not on a third order of government in Canada but a third way to govern. How this will be played out in relation to the now quite extensive negotiations in British Columbia remains to be seen.<sup>67</sup> In the case of the Nisga’a, which I will now explore, it seems to have resulted in a shift to ‘governing through the nation *and* communities’.

### **C. Constituting the Nisga’a Nation**

Thus far, much of my discussion about ‘government’ has been what might be considered a privileging of ‘official discourses’. This has been done to show how

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<sup>65</sup> *RCAP, People to people*, *supra* note 1, at 25.

<sup>66</sup> Often times the distinction between the two is less than clear in the *Canada's Aboriginal Action Plan*, *supra* note 3. For example consider this statement at 13. “The Royal Commission took the view that the right of self-government is vested in Aboriginal nations and noted that the exercise of extensive jurisdictions by local communities may not always lead to effective or sustainable governments in the long term. The federal government supports the concept of self-government being exercised by Aboriginal nations or other larger groupings of Aboriginal people.” What is meant here by ‘other larger groupings’ is not explained.

programmes of government are to be implemented from such a perspective. However, I suggested earlier that new programmes of government need to be comprehended from both the perceived failure of an earlier programme and as a result of the demands of other parties; in this case, the Nisga'a Nation and its citizens. For the most part the early governmentality literature viewed new programmes as a result of failure. Yet, by doing so, it "puts the emphasis on the status of the collision from the programmer's viewpoint, and consequently reduces resistance to a negative externality."<sup>68</sup> O'Malley notes, as a consequence there is a difficulty in recognising "the imbrication of resistance and rule, the contradictions and tensions that this melding generates, and the subterranean practices of government consequently required to stabilise rule".<sup>69</sup> In offering a corrective to this, O'Malley has argued that the constitutive role of resistance be recognised. Otherwise, there is no space for "a productive and incorporative relationship with resistance - such as would exist where rule and resistance form each other reflexively."<sup>70</sup> It seems to me, that this is indeed important if we are to take account of the negotiated nature of emerging treaties and not to underestimate the constitutive role of First Nations people in achieving their objectives.

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<sup>67</sup> It should be noted that some parties to the negotiations are not nations but 'Aboriginal Groups'. See, McKee, *supra* note 4, at 38 and appendix B for a list of such parties.

<sup>68</sup> O'Malley, *supra* note 14 at 311. This criticism is part of a more general 'corrective' in relation to the governmentality work, see F. Pearce and M. Valverde, eds., *Special Issue: Conflict, Contradiction and Governance*, (1996) 25 *Economy and Society* 307. The general position being argued for is the need to "emphasise that individual and collective agents also can and do make sense of their situation, learn from their experience of being administered and develop *new tactics*, in accord with the overall strategies relevant to their situations." [my emphasis].

<sup>69</sup> *Ibid.* at 311.

<sup>70</sup> *Ibid.*

O'Malley has also drawn attention to the fact that a form of government that has become attractive in 'advanced' liberal society is "the appropriation of 'indigenous' governances - the forms of government that arise in, and are endemic to, the everyday lives of subjects."<sup>71</sup> This is because such forms of government carry with them the appearance of being the 'expression of individuals and groups rather than impositions from without.'<sup>72</sup> Yet, we must be careful about translating O'Malley's observations directly into the context of the Nisga'a negotiations. As I stated earlier, we should always keep in mind the negotiated or agonistic nature of the treaties and consider the objectives of all those whose aim it is to do away with the current system of governance imposed through the *Indian Act*. Also, we should take account of the impact that the *Indian Act* may have had on the traditional systems it sought to displace and to what extent it is desired by First Nations people, or even possible, to return to such systems. In doing so, we are certainly getting into more complex territory, and as such, I think it mistaken to see treaties as simply an 'expression or imposition' of one party's will. In the current context of negotiations, we may already be assuming too much about who is doing the imposing and who the expressing.<sup>73</sup> It is for this very reason and the fact that people bring different perspectives to the negotiating table that I have been using the language of *rationalities* of self-government in my discussion up until now.<sup>74</sup> It is also for this reason

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<sup>71</sup> *Ibid.* at 313.

<sup>72</sup> *Ibid.* at 313.

<sup>73</sup> In fairness to O'Malley he does make the point in concluding that "because the indigenous governances usually must be negotiated into their new alignments, all manner of concessions may be necessary to achieve the desired result, compromising the project from the outset." See O'Malley, *supra* note 11 at 323.

<sup>74</sup> Indeed in his later work discussing governing through community, Rose acknowledges that the 'contradictions of community establish a new and agonistic territory for the organisation of political and ethical conflicts.' See, "The Death of the Social?" *supra* note 13 at 337.



that when it comes to the 'history of the present', I am unable to embrace Scott's theorising of an approach to political rationalities and the exercise of power which in his own work tends to be pre-determined as purely a 'colonial' governmentality.<sup>75</sup>

In relating this to the Nisga'a Nation, I will now examine the 're-mixing' of technologies of government that have been put in place with regard to the Nisga'a Nation and the Nisga'a Nation's governing of its citizens. I think that I can best illustrate this 're-mixing' through the materials that lie behind what may become the realisation of self-government. Therefore, I will proceed by providing examples (or samples?) from (i) the *Nisga'a AIP*<sup>76</sup>, (ii) the Nisga'a Statement of Ownership<sup>77</sup>, and (iii) the program for the Nisga'a's recent *41st Annual Convention*.<sup>78</sup> Such sources have been chosen because I think they provide a compelling record of how the Nisga'a made it to where they are in the negotiating process.

### 1. 'Putting flesh on the bones of these dreams'

Some of us are awake and up and doing; others seem to be asleep, lying down and doing nothing. By and by when the happy day comes, and we who have laboured are rejoicing in the fruits of victory, those sleepers will wake up and

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<sup>75</sup> See Scott, *supra* note 14. Of course it should be noted that Scott's concern is with past colonial projects. However, another problem with Scott's work is that unfortunately he fails to address the now quite extensive governmentality literature that has developed Foucault's work in this area of study.

<sup>76</sup> I would like to acknowledge the insight I gained from the explanatory lectures on the *Nisga'a AIP*, *supra* note 10, given at the Faculty of Law, UBC, by Jim Aldridge, Legal Counsel for the Nisga'a Nation, in the course taught by himself and Prof. Michael Jackson, Aboriginal and Treaty Rights.

<sup>77</sup> *Lock, Stock and Barrel*, *supra* note 15.

<sup>78</sup> In this regard I will be drawing from the document published for the proceedings of the *41st Annual Convention*, April 27-May 1, 1998, New Aiyansh, B.C. which contains a large number of reports as well as the agenda for the conference. [hereinafter *Nisga'a Conference Program*.].

claim to have a share in the harvest. If those people want to share in the good things coming, let them join with us in the work.

Timothy Derrick, Sim'oogit K'eexkw, (August, 1919)<sup>79</sup>

How will we manage and develop our lands to preserve the legacy of our ancestors for our future generations? What approaches will be taken in the areas of fisheries to continue the historic relationship between our people and this important resource? What will we do to promote our language and culture? How should we manage our forests? Much of the work of our negotiators has been to address these questions to allow us to have a say in these areas. Our treaty and constitution need you to have the final word.

Edward Allen, Chief Executive Officer, Nisga'a Tribal Council, (April, 1998)<sup>80</sup>

The language in the above quotes from the Sim'oogit K'eexkw and Chief Executive Officer is interesting because it highlights the ongoing concern by the Nisga'a with their *self-government* or 'conduct of conduct'. Before I explore this in more detail, I will firstly provide some background information about the Nisga'a Nation.

The Nisga'a population has been estimated at approximately 6,000.<sup>81</sup> With a population of that size, one should not be surprised to find a diversity of members. As has been explained, for more than 10,000 years, the Nisga'a have thrived in their land, organising themselves into four clans - Gisk'aast (Killer whale), Laxgibuu (Wolf), Ganada (Raven) and Laxsgiik (Eagle). And while they still hunt, fish and trap, it is equally important to be aware that Nisga'a people are also "lawyers, administrators,

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<sup>79</sup> Quoted in *Lock, Stock and Barrel*, *supra* note 15, "preface".

<sup>80</sup> From the "Chief Executive Officer's Annual Report", in *Nisga'a Conference Program*, *supra* note 78 at 29.

<sup>81</sup> *Lock, Stock and Barrel*, *supra* note 15 at 6. "Approximately 2,500 people live in the Nisga'a villages of Gingolx (Kincolith), Lakalzap (Greenville), Gitwinksihlkw (Canyon City) and Gitlakdamiks (New Aiyansh). Another 3,500 live elsewhere in Canada and around the world."

politicians, priests, teachers, linguists, loggers, commercial fishermen, carvers, dancers, nurses, architects, technicians and business people.”<sup>82</sup>

While the Nisga’a are now close to ratifying a treaty, it should be recalled that to date there has never been a treaty between the Nisga’a Nation and Canada or the province of British Columbia. From the perspective of the Nisga’a Nation, this was not for want of trying to reach a just and equitable settlement of the land question. In fact, as early as 1913 they sent a Nisga’a Petition to His Majesty’s Privy Council. In addition, the Nisga’a Nation was also involved in litigation which culminated in the 1973 Supreme Court of Canada case of *Calder v. The Attorney-General of British Columbia*.<sup>83</sup> Thus, it is against this background that we must view what may emerge out of the current negotiations.<sup>84</sup>

## **2. Governing through the nation and communities**

The Nisga’a treaty will be a comprehensive and complex document. It will cover a wide range of issues that are based around Nisga’a self-government. In what follows I want to avoid concentrating solely upon the new formal governing mechanisms which will be incorporated into the Nisga’a Nation and continue the wider investigation of the changing modes of government in ‘advanced’ liberal democracies. Yet, in terms of the

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<sup>82</sup> *Ibid.*

<sup>83</sup> [1973] S.C.R. 313.

<sup>84</sup> This series of events have been acknowledged in the Preamble to the *Nisga’a AIP*. For a more detailed history of the Nisga’a Nation, see Nisga’a Tribal Council, *Nisga’a: People of the Nass River* (Vancouver: Douglas and McIntyre and Nisga’a Tribal Council, 1993) and D. Raunet, *Without Surrender, Without Consent: A History of the Nisga’a Land Claims*, Rev. ed., (Vancouver: Douglas and McIntyre, 1996).

formal structure, it should be pointed out that the proposed treaty will put in place a central Nisga'a Lissims Government and four Village Governments. Thus, in the case of the new formal arrangements, the Nisga'a will be 'governing through the nation and communities'; the Nisga'a Lissims Government and four Village Governments will basically replace the Nisga'a Tribal Council and the band councils respectively.<sup>85</sup>

Under the new arrangements, the Nisga'a Lissims Government will have primary responsibility to make laws in respect to Nisga'a Government, Culture and Language and Nisga'a Lands and Assets. In such areas, if there is *inconsistency* between Nisga'a laws and provincial or federal laws then the Nisga'a laws will prevail. In addition the Nisga'a Lissims Government will be able to make laws in respect of a large number of matters which are subject in most cases to either of two criteria (or technologies); that is (i) they meet or improve upon existing provincial or federal *standards*, or (ii) if there is a *conflict* of laws, then the provincial or federal law prevails to the extent of the conflict. Such matters include: Public Order, Peace and Safety; Employment; Public works, buildings and other structures; Traffic and transportation; Solemnisation of marriages; Social services; Health services; Adoption; Child and family services; Pre-school to grade 12 education; Post-secondary education; Child custody; Gambling and gaming; Intoxicants; Wills and Estates; and other matters including the administration of justice [*which*

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<sup>85</sup> *Nisga'a Conference Program*, *supra* note 78 at 29. It should be noted that the use of the term Nisga'a Lissims Government is something which occurred after the *Nisga'a AIP*. However, it is the term to be used in the treaty, if ratified.

*provides for the setting up of a Nisga'a Court*], taxation, lands and resources, environmental assessment and protection, fisheries, wildlife and subsurface resources.<sup>86</sup>

The *Nisga'a AIP*, in laying the ground work for the realisation of self-government, changes the jurisdiction and authority in relation to many of the areas listed above. Additionally, such changes include the requirement of a Nisga'a Constitution which can be understood as being inter-dependent upon such a realisation. That is, the Nisga'a Constitution can be considered a general governmental technology. Accordingly, the Nisga'a Constitution will: provide for Government duties, composition and membership; provide for the division of powers; provide for the establishment of subordinate elected bodies and other institutions; provide privileges for elected members; provide for the role of Nisga'a elders; provide for the enactment of laws by Government; require accountability to Nisga'a citizens; require a system of financial administration that is comparable to standards accepted by governments in Canada through which there will be accountability to Nisga'a citizens; require conflict of interest rules; provide for the prior approval of any disposition of Nisga'a lands that could result in a change of ownership; recognise and protect rights and freedoms of Nisga'a citizens; provide for the entitlement of Canadians and permanent residents to be Nisga'a citizens; provide for the challenging of laws; provide for amendment; and be consistent with the final agreement.<sup>87</sup>

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<sup>86</sup> *Nisga'a AIP*, *supra* note 10. Sections 27-74 (Nisga'a Government Legislative Jurisdiction and Authority).

<sup>87</sup> *Ibid.* Sections 10 (Nisga'a Constitution).

From the perspective of the federal and provincial governments, the constitution can be considered a governmental technology which assists in the project of 'governing at a distance'. And from a Nisga'a citizen's perspective it may be considered as a technology which provides them with some accountability. While this may be the result of such formal changes in the governmental regime, I now want to consider some of the less formal changes arising from this 're-figuring of government' which may be characteristic of 'advanced' liberal democracies. And as Rose has noted, the 're-figuring of the territory of government' does give rise to some significant features; perhaps three of the most noticeable are the spatial, ethical and identification changes.<sup>88</sup> I will now briefly consider each of these in turn.

### 3. Re-figuring government: spaces, ethics and identity

With regard to Nisga'a Lands, they will be owned collectively and now consist of (i) approximately 1,930 square km, and (ii) a number of the Nisga'a Indian reserves which will no longer be reserves under the *Indian Act*.<sup>89</sup> This spatial re-organisation changes both the governing practices of Canada and British Columbia with regard to the 'use, possession, and management of Nisga'a lands'<sup>90</sup>, as well as, the historical claim to lands made by the Nisga'a.<sup>91</sup>

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<sup>88</sup> I am here drawing on Rose, "The Death of the Social?" *supra* note 13 at 333-334.

<sup>89</sup> *Nisga'a AIP*, *supra* note 10. Section 1-24 (Lands & Resources).

<sup>90</sup> *Ibid.* Section 31 (Nisga'a Government Legislative Jurisdiction and Authority).

<sup>91</sup> As noted in *Lock, Stock and Barrel*, *supra* note 15 at 5. "In Ayuukhl Nisga'a - our ancient oral code - there are many stories describing the river and its special places. Our homeland - all 24,862 square kilometres of it - straddles a spectacular route to Yukon and Alaska from Canada and northward to the

Intricately connected with this change in the spatial arrangements of governing is the ethical character of the Nisga'a Nation. While there is a certain codified ethical dimension to the required constitution, it is only one perspective on the new mode of governing. In fact, it seems to me, that the more significant ethical character can be illustrated by looking at the way the Nisga'a will address the relationship of its people to the resources available to them. In this regard, the Nisga'a Nation offers an alternative to not only the norms of 'advanced' liberalism but also to the underpinnings of Western capitalist societies. This alternative relationship is represented through the 'common bowl philosophy'. This philosophy is articulated in 'A Statement to Reinforce our Forefathers' Agreement to address the Nisga'a Land Question 'Collectively' rather than 'individually' in order to avoid dissension or friction among tribal members."<sup>92</sup> This philosophy, among other things, explains that the Nisga'a have followed certain tribal laws (amniigwootkw<sup>93</sup>; hagwin-yuu-wo'oskw<sup>94</sup>; yukw<sup>95</sup>; tribal ownership<sup>96</sup>) which mandate the sharing of their resources. Interestingly, this also makes clear how tribal

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glacier-fed lakes of Meziadin and Bowser. From the Skeena Mountains in the Northeast to the intersection of the Alaska Panhandle and the B.C. coast, this is Nisga'a land." [my emphasis].

<sup>92</sup> *Nisga'a Conference Program*, *supra* note 78 at 87.

<sup>93</sup> *Ibid.* The translation reads "a privilege granted to a son(s) by one's father, regarding temporary use of fathers' land, etc., a privilege which ceases automatically upon death of father". And significantly the following is added in brackets: "note: we are a matrilineal society".

<sup>94</sup> *Ibid.* The translation reads "a plot in land granted to the bride on her wedding day by one's maternal uncle/grandfather, the underlying message being, that her husband may have access to their land for the benefit of their children".

<sup>95</sup> *Ibid.* The translation reads "the feasting system which settles over the estate of a Chieftain and which entails the passing on of the Chieftainship, authority to land, entitlement story, etc. The key people in putting up such a feast is the immediate maternal family of the deceased, though others contribute as well in various way, namely (1) the extended family/clan; (2) spouses and children of the immediate family; and (3) in-laws".

<sup>96</sup> *Ibid.* The translation reads "the Nisga'a Tribe or Nation".

laws are intricately connected with an ethics of life and the right of citizens to use such laws in their newly proposed mode of government.

Additionally, and of important significance is that the change in jurisdiction and authority allows the Nisga'a Nation to make laws regarding Nisga'a citizenship, culture and language.<sup>97</sup> This once again highlights the shift in governing that is taking place away from the citizen of a unified national 'society' to people identifying themselves with smaller collectivities, such as 'the Nisga'a nation and communities'. It also reminds us that while there may be a shift in governing this doesn't mean the total erasure of the 'social' or the state - for example, consider the qualification on the ability of the Nisga'a to make laws regarding its own citizenship.<sup>98</sup>

I now want to consider in more detail some other changes that are taking place; that is, the changes regarding associations, knowledge and expertise that are involved in this attempt to put flesh on the bones of self-government.

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<sup>97</sup> *Nisga'a AIP*, *supra* note 10. Sections 29 and 30 (Nisga'a Government Legislative Jurisdiction and Authority).

<sup>98</sup> *Ibid.* Section 28 (Nisga'a Government Legislative Jurisdiction and Authority). This is subject to the qualification that "the conferring of Nisga'a citizenship will not confer or deny rights or benefits under any law of Canada or British Columbia, including rights of entry into Canada, Canadian citizenship, the right to be registered as an Indian under the *Indian Act*, or any of the rights or benefits conferred by the *Indian Act*".



#### 4. Changing governmental technologies: associations, knowledge and experts

In a number of areas the Nisga'a Nation will operate in association with the Governmental regimes of British Columbia and Canada.<sup>99</sup> And in understanding the extent of such associations, it is perhaps useful to recall the role that the partnership is to play as a technique of rule in the vision outlined in *Canada's Aboriginal Action Plan*. This governmental technology necessitates that 'the nation and communities' become 'technical'. This is because such associations of governing or partnerships will operate in areas that include: a management plan for the backcountry recreation tenure<sup>100</sup>; protection of cultural and historical sites<sup>101</sup>; the naming and renaming of key geographic features<sup>102</sup>; management and planning for the Nisga'a Memorial Lava Bed Park and the Giigietl Creek Ecological Reserve<sup>103</sup>; Fisheries management<sup>104</sup>; Wildlife management<sup>105</sup>; Environmental assessment and protection<sup>106</sup>; Provision of public services and programs to Nisga'a citizens<sup>107</sup>; and Taxation<sup>108</sup>. In addition there have been alliances entered into with the private sector, including: Rosenbloom & Aldridge, Legal Counsel; LGL Limited, Fisheries and Wildlife consultants; Silva Ecosystem consultants; Price

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<sup>99</sup> The alliance being formed between the Nisga'a Nation, British Columbia and Canada can be considered part of the *associations* "formed between entities constituted as 'political' and the projects, plans and practices of those authorities - economic, legal, spiritual, medical, technical - who endeavour to administer the lives of others in the light of conceptions of what is good, healthy, normal, virtuous, efficient or profitable." See Rose and Miller, *supra* note 11 at 175.

<sup>100</sup> *Nisga'a AIP*, *supra* note 10. Sections 55-59 (Backcountry Recreation Tenure).

<sup>101</sup> *Ibid.* Section 60 (Protection of Historic Sites and Names of Key Geographic Features).

<sup>102</sup> *Ibid.* Section 61 (Protection of Historic Sites and Names of Key Geographic Features).

<sup>103</sup> *Ibid.* Sections 62-75 (Parks and Ecological Reserve).

<sup>104</sup> *Ibid.* Sections 62-77 (Fisheries Management).

<sup>105</sup> *Ibid.* Sections 27-52 (Wildlife Management).

<sup>106</sup> *Ibid.* Sections 1-29 (Environmental Assessment and Protection).

Waterhouse, Fiscal relations and taxation consultants; as well as, consultants in the area of mining, public education, lands and resources, Nisga'a highways, the Nisga'a constitution and dispute resolution.<sup>109</sup> How is it that the above schemes and alliances involve 'the nation and communities' being made technical? Simply put, for government to be made possible there must be a production of knowledge; a domain of cognition, comprehension, and calculation which allows for intervention, correction, experimentation and evaluation. Consequently, we see that the Nisga'a Nation has spent a significant amount of time, effort and money in research and preparation regarding these new areas of government. For example, consider the Nisga'a production of knowledge that is indicated by reports in the following areas of government: secretary-treasurer's annual report, executive chairman's annual report, constitution & laws working group annual report, chief executive officer's annual report, ambassador's annual report, resource negotiator's report, forester - IPM co-ordinator annual report, forestry - interim protection measures and Nisga'a highways, fisheries - commercial back country recreation and wildlife, ayuukhl Nisga'a report, eligibility and enrolment co-ordinator's annual report, Nisga'a child and services annual report, programs and services annual report, watershed restoration annual report, Nisga'a memorial lava bed park report, lands, access & environment annual report.<sup>110</sup>

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<sup>107</sup> *Ibid.* Sections 2-16 (Fiscal Financing Agreements).

<sup>108</sup> *Ibid.* Sections 1-41 (Taxation).

<sup>109</sup> See Nisga'a Tribal Council Directory, in *Nisga'a Conference Program*, *supra* note 78 at 101-107.

<sup>110</sup> All included in the *Nisga'a Convention Program*, *supra* note 78 at 21-71.

In sum, these reports act as inscription devices which in turn can be considered a governmental technique to make each of the areas susceptible to "evaluation, calculation and intervention."<sup>111</sup> And in some instances this is required if the Nisga'a are to take over a particular area of government; that is, the Nisga'a need to have their own '*centres of calculation*'.<sup>112</sup> In part, this is actually necessitated by other technologies of government (inconsistency, standards, conflicts) which are being inscribed into this new art of governing. For example, consider the 'standard' in the area of forestry; if the Nisga'a want to legislate in respect to forest practices then they must meet or exceed the standard that exists for Crown lands - such as *the Forest Practices Code of British Columbia Act*.<sup>113</sup> In other areas, reporting mechanisms are necessary to monitor the Nisga'a's allocated share of a resource. For example, in the area of salmon there is an entitlement regime based upon percentages of the total run returning to Canada. Specifically, a technology of government in the form of tables of calculation based upon 'targets' that will be used for monitoring the Nisga'a allocation of the fisheries harvest. This in turn involves the Nisga'a meeting certain monitoring requirements which are to be set out in the Nisga'a annual fishing plan.<sup>114</sup>

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<sup>111</sup> Rose and Miller, *supra* note 11 at 185.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Nisga'a AIP*, *supra* note 10. Section 90 (Transitional Provisions for Forest Resources).

<sup>114</sup> *Ibid.* Section 58 (Fisheries). This section goes on to state that such conditions may include: a) requirements for identification of those persons authorised to harvest Nisga'a entitlements; b) processes for catch monitoring which may include the establishment of designated landing sites and procedures for the transportation of harvests; c) reporting and accounting of the harvest and sale of Nisga'a entitlements by all persons; d) requirements for compilation and reporting of data to the Minister; and e) verification by the Minister of the monitoring processes.

So far, it certainly seems that the new associations with British Columbia and Canada, the use of consultants and the production of knowledge through reporting puts in place new governmental technologies which are characteristic of 'governing at a distance' and 'advanced' liberalism. Furthermore, this mode of governing is also indicative of the changing role of the 'expert' and their relationship to government. It has been noted that the activity of the expert plays an important role in modern forms of government; *not* by weaving an all-pervasive web of 'social control' but through attempts at "the calculated administration of diverse aspects of conduct through countless, often competing, local tactics of education, persuasion, inducement, management, incitement, motivation and encouragement."<sup>115</sup> Let me illustrate this by providing a range of quotations from various Nisga'a experts concerning the future of the Nisga'a Nation, its communities and citizens:

-We as Nisga'a must continue to stand firm and be united as we work to bring closure to our Nisga'a Treaty and to quote from a Nisga'a Chief, 'The only way our unity can be fractured is from within.'<sup>116</sup>

-You will all need to fill out an application form to enrol to participate under the benefits of the treaty and also to make decision on the treaty.<sup>117</sup>

-I encourage all of you to express your views since the constitution will become the rules we all agree to live by.<sup>118</sup>

-Nisga'a citizens have a responsibility and obligation to family, clan and community and this was emphasised for the ultimate purpose of traditional child rearing practice.<sup>119</sup>

-Our children will become strong and vibrant Nisga'a citizens. Self-determination is the ability to choose our experiences, whereas, we have only to make the choice.<sup>120</sup>

-As stated many times 'IT TAKES THE WHOLE COMMUNITY TO RAISE A CHILD'!<sup>121</sup>

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<sup>115</sup> Rose and Miller, *supra* note 11 at 175.

<sup>116</sup> *Nisga'a Conference Program*, *supra* note 78 at 25.

<sup>117</sup> *Ibid.* at 28.

<sup>118</sup> *Ibid.* at 29.

<sup>119</sup> *Ibid.* at 63.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.* at 75.

-The safety and well-being of everyone within the family structure is important and our role is to protect. The destruction or invasion of an individual is a violation of self.<sup>122</sup>

These quotations and the changing role of the expert are provided to underscore the idea that 'self-government' or the 'conduct of conduct' involves more than just a formal and central government, be that in the context of Canada, British Columbia or the Nisga'a Nation.

## **5. Implementation plan**

A more general strategy for the management of the implementation of the treaty has been developed. Accompanying the treaty will be an implementation plan (itself having no legal force). The implementation plan will cover three areas: (i) principles and values and how changing economic relations are to be filtered into Nisga'a lives, (ii) the Nisga'a internal relationship, and (iii) what will be left to the future of the Nisga'a Nation.<sup>123</sup> The implementation plan can be considered another technology of government which is inter-dependent on the rationalities of self-government. As such it has been described as a "detailed operational document outlining how we will set our Treaty into tangible processes *with the federal and provincial government policies*."<sup>124</sup> The plan will contain such things as activity sheets; these sheets will "identify the obligations within the Treaty and the specific clause(s) referring to the obligation. It will tell us who will manage the

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<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.* at 33.

<sup>124</sup> *Ibid.* at 32. [my emphasis].

activity and if there are any planning assumptions.”<sup>125</sup> In addition, it may well include “the monitoring process and the training plan.”<sup>126</sup> In terms of the financial provisions, these will be set out by way of a contract and will “describe the payment schedules, the initial budget, including start-up costs and the Terms and Conditions of payment.”<sup>127</sup> In fact, the Implementation Plan is an operational document drafted with federal and provincial governments and describes the working relationship of the Nisga’a with them.<sup>128</sup> As has been stated, it will be used to “initiate our own implementation processes through our Legislative procedures based on our Constitution and Village Charters.”<sup>129</sup> Included in the Implementation Plan is a five year fiscal plan, outlining what the Nisga’a have to do, and the timing of such requirements.<sup>130</sup>

How are the requirements attached to such fiscal arrangements to be monitored? Or for that matter how are other requirements that involve accountability to Nisga’a citizens or necessitate the meeting of ‘standards’ or ‘targets’ to be monitored? At this stage, this isn’t exactly spelt out but one widely used technology of government that has travelled out of the area of fiscal management and planning is the *audit*. In moving the audit into other areas, it has been pointed out that “the entities to be audited are transformed: they have to be ‘made auditable’, producing a new grid of visibilities for the conduct of

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<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.* It should be pointed out that the Nisga’a will, over a period of time, receive compensation payments amounting to \$190 million.

<sup>128</sup> *Ibid.* at 33.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

organisations and those who inhabit them.”<sup>131</sup> Certainly the Nisga’a are currently no strangers to this technology and already put it to use themselves.<sup>132</sup> Therefore, given the various mechanisms of accountability that have been put in place, it seems likely that there will be a more ‘auditable’ Nisga’a Nation in the future.

Of course, how all these new governmental technologies will impact upon the Nisga’a Nation, its communities and citizens is something which remains unpredictable at this stage. However, at least by comprehending how such changes and governmental technologies are being utilised in ‘advanced’ liberal democracies, I hope I have contributed to the groundwork for the task of critically analysing their future impact on the Nation, communities and citizens in question. To that end, I think the preceding analysis highlights that the technologies and mechanisms of control that are being written into the emerging treaty serve the purposes and functions of a variety of authorities that go beyond the unity that one might have expected to find in a single ‘apparatus of the State’. It is for this reason that Rose suggests:

As an array of *technologies of government*, governmentality is to be analysed in terms of the strategies, techniques and procedures through which different authorities seek to enact programmes of government in relation to the materials and forces to hand and the resistances and oppositions anticipated and encountered. Hence, this is not a matter of the implementation of idealised schema in the real by an act of will, but of the complex assemblage of diverse forces (legal, architectural, professional, administrative, financial, judgmental), techniques (notation, computation, calculation, examination and evaluation), devices (surveys and charts, systems of training, building forms)

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<sup>131</sup> “Governing ‘Advanced’ Liberal Democracies”, *supra* note at 55. Rose, is here drawing upon the work of Michael Power. See, generally, M. Power, *The Audit Society* (London: Demos, 1994).

<sup>132</sup> *Nisga’a Conference Program*, *supra* note 78 at 14.

that promise to regulate decisions and actions of individual, groups, organisations in relation to authoritative criteria.<sup>133</sup>

### **Conclusion: Foundations for a fairer future?**

In this chapter I have attempted to explore how 'law', in the form of modern day treaties, is being used as a tactic of 'government'. Accepting this Foucauldian understanding of 'government', I think the evidence is convincing that 'law' is being used as a tactic by all parties involved in these newly emerging programmes of 'government'.

In reaching this conclusion, I have provided an overview of the governmentality literature and its new approach to analysing political power. I then related such work to the programme of government articulated in *Canada's Aboriginal Action Plan*, noting certain ambiguities around the discourse of nation and community. In attempting to utilise the emerging analytical framework to account for the new relationship between strategies for the government of others and techniques for the government of the self, I drew attention to some of the possible shortcomings of the governmentality literature. In this regard, I sought to provide a perspective that would allow us to take account of the constitutive role that resistance plays in modes of governance arising from the treaty negotiations. I then examined some materials that lay behind the emerging Nisga'a treaty to assess the extent to which the rationalities of self-government informing such an agreement are inter-dependent on the technologies of government associated with "advanced" liberalism. While I think it fair to say that the emerging Nisga'a treaty looks

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<sup>133</sup> "Governing 'Advanced' Liberal Democracies", *supra* note 7 at 42. [my emphasis].



like it will embody many of the changes and technologies of 'advanced' liberalism, it also offers an alternative model to governing in Canada. One based upon a spatial re-figuring of government but intricately connected to an ethic of common ownership of lands and resources, as well as the promotion of Nisga'a citizenship, language and culture.

Finally, it seems to me that the wider political consequences of an outcome like that of a newly constituted Nisga'a Nation is something that will probably not be realised until well into the future. For now, the Nisga'a certainly don't seem to be under any misapprehension of what the outcome initially means for them:

Once the Village Governments and Nisga'a Lissims government are in place, important aspects of government will finally be in our hands. In areas where the treaty recognises our jurisdiction, we will have the final word on matters such as lands, culture, language, education, utilisation of our forestry resources, economic development and will have an important say on fisheries, wildlife, waters to name a few.<sup>134</sup>

...

We must all remember that today we have no control over Fisheries Management, nor will we get any other benefits until the treaty is signed and ratification begins.<sup>135</sup>

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<sup>134</sup> *Nisga'a Conference Program*, *supra* note 78 at 29.

<sup>135</sup> *Ibid.* at 50.

## V. The Inseparability of Law and Sovereignty?: Pluralism and

### Delgamuukw's Implications

Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve what I stated in *Van der Peet* ... to be a basic purpose of s.35(1) - "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown". Let us face it, we are all here to stay.<sup>1</sup>

I would say that, on the contrary, the problem of sovereignty was never posed with greater force than at this time, because it no longer involved ... an attempt to derive an art of government from a theory of sovereignty, but instead, given that such an art now existed and was spreading, involved an attempt to see what juridical and institutional form, what foundation in the law, could be given to the sovereignty that characterises a state.<sup>2</sup>

In light of the 'art of government' that is emerging from the treaty negotiations in British Columbia, I want to reflect upon 'what foundation in the law' is informing the reconciling of First Nations societies and the sovereignty of the Crown. In a sense, I am attempting to address the 'endings' of the decision in *Delgamuukw v. British Columbia*<sup>3</sup> in order to locate where 'here to stay' is. I propose to do so, by examining the judicial reasoning that underpins the doctrinal developments articulated within the legal narrative of *Delgamuukw*. Specifically, in this chapter, I will argue that the possible legal existence

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<sup>1</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186, Lamer C.J. [Please note, that in reference to this case I will be adopting Lamer C.J.'s practice of citing to paragraph numbers.]

<sup>2</sup> M. Foucault, "Governmentality" in G. Burchell, C. Gordon and P. Miller eds., *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991) at 101. [hereinafter "Governmentality"].

<sup>3</sup> [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*]. For the purpose of my discussion I will be focusing upon the judgment of Lamer C.J.

of Aboriginal title opens up the 'law' itself to more imaginative legal geographies.<sup>4</sup> So much so, that if pursued, these more imaginative legal geographies will lead the court into the current debates over legal pluralism<sup>5</sup> and to places governed by the legal practices of First Nations.<sup>6</sup> Furthermore, I suggest that in situations where the relationship between

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<sup>4</sup> As has been noted, "Space, like law, is not an empty or objective category, but has a direct bearing on the way power is deployed and social life constituted. The geographies of law are neither passive backdrops in the legal process, nor of random import; they can, in combination with their implied claims concerning social life, be problematic and even oppressive.", see N.K. Blomley and J.C. Bakan, "Spacing Out: Towards a Critical Geography of Law" (1992) 30 Osgoode Hall Law Journal 661 at 669. For a general background on the limited legal imagination relating to First Nations, see P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill Law Journal 383. And for discussion on the relationship between 'law' and 'geography', see the space devoted to issues of "law and geography" in the pages of the journal *Urban Geography*. For a recent discussion of the potential of this relationship, see W.W. Pue, "What is Law? Preliminary Thoughts on Geojurisprudential Perspectives" in G. Thompson, et al, *Geography, Environment, and American Law* (Colorado: University Press of Colorado, 1997) at 30; W.W. Pue, "Wrestling with Law: (Geographical) specificity vs. (legal) abstraction" (1990) 11 Urban Geography 566. In attempting to think of more imaginative legal geographies, I found that in addition to the work already cited, the following to be very thought provoking: N. Blomley, *Law, Space, and the Geographies of Power* (London: The Guilford Press, 1994); B. Santos, *Towards a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge: London, 1995); D. Gregory, *Geographical Imaginations* (Oxford: Blackwell, 1994). In particular, the latter discussion and development of Lefebvre's concepts of 'Spatial practices, Representations of space and Spaces of representation' at 403.

<sup>5</sup> For a recent discussion of legal pluralism, see the *Special Issue: Legal Pluralism* (1997) 12 Canadian Journal of Law and Society. As Belley notes: "The social reality of law is neither monist nor pluralist, in and of itself. Jurists, historians, sociologists, anthropologists and legal geographers are not born pluralists; they become pluralists by conscious choice. Seeing or not seeing the social diversity of law, being or not being legal pluralists are theoretical options with their own consequences." See J-G. Belley, "Law as *Terra Incognita*: Constructing Legal Pluralism" (1997) 12 Canadian Journal of Law and Society 17 at 17. Furthermore, recent theorising about 'critical legal pluralism' rejects "the supposition that law is a social fact. Instead, it presumes that knowledge is a *process of creating and maintaining myths about realities*. Subjects of knowledge are also its objects. Legal knowledge is the project of creating and maintaining self-understandings. A *critical* legal pluralism seeks neither a separation, nor an eventual hierarchical reconciliation, of multiple legal orders. Normative heterogeneity exists both between various normative regimes which inhabit the same intellectual space, and within the regimes themselves. How legal subjects recognise and react to relations within and between these regimes is contributive to their own recognition and self-understanding in any given time-space." See, M-M. Kleinhans and R. A. Macdonald, "What is *Critical Legal Pluralism*?" (1997) 12 Canadian Journal of Law and Society 25 at 39. [my emphasis].

<sup>6</sup> I use the term First Nations legal practices and places here as a way of distancing such legal practices and places from what I see as abstract legal spatial practices which produce Aboriginal rights in a supposedly inter-societal space. To pre-empt my argument and recalling my conclusions in chapter III, I am suggesting that it is primarily within the legal places of First Nations that there will be a 're-capturing' of their people, practices and rights in a way that makes them subject to their own laws and jurisdictions. For it seems to me, to speak of an inter-societal legal space makes no sense unless another society has its own legal practices in place. This also seems to necessitate rethinking an inter-societal legal space as one which is subject to co-jurisdiction.

the Crown and First Nations is not represented by a treaty<sup>7</sup>, there remains a question mark over the 'foundation' upon which these endings are to be legitimately reconciled with the sovereignty of the Crown - as per the stated purpose of s.35(1).<sup>8</sup>

Due to my concern with analysing sovereign relations of power and recent doctrinal developments rather than the specific case and its legal history, I will proceed as follows:

(i) provide a summary of those relevant doctrinal developments that were outlined by the Supreme Court in *Delgamuukw*; (ii) focus upon some of the implicit conclusions that would seem to flow from the decision and develop the argument for the continued existence of a plurality of legal systems; and (iii) in recalling the stated purpose of s.35(1), I will explore how First Nations and their legal systems may be legitimately reconciled with the sovereignty of the Crown.<sup>9</sup>

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<sup>7</sup> While there were 14 treaties on Vancouver Island (the Douglas treaties) and also Treaty 8 which covered part of the Northeastern mainland of British Columbia, the rest of mainland British Columbia is, to this day, not covered by any treaties. For a discussion of the historical events that led to this state of affairs, see P. Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: University of British Columbia Press, 1992). For a more recent historical overview of some of these events see, H. Foster, "Letting Go the Bone: The Idea of Indian Title in British Columbia, 1849-1927" in H. Foster and J. McLaren, eds., *Essays in the History of Canadian Law: Volume VI, British Columbia and the Yukon* (Toronto: University of Toronto Press, 1995) at 28.

<sup>8</sup> I suggest this discussion is important if we recall that: "Approximately 30 percent of 'registered' First Nations people in British Columbia are not represented in the treaty-making process. Leadership of some First Nations has expressed no interest in participating in the negotiations using the existing framework - the six-stage process involving representatives of both the federal and provincial governments - but remains determined to assert aboriginal rights." See, R. J. Muckle, *The First Nations of British Columbia* (Vancouver: University of British Columbia, 1998) at 85.

<sup>9</sup> *R. v. Vanderpeet* [1996] 2 S.C.R. 507 at 539, Lamer C.J. notes that "the aboriginal rights recognised and affirmed by s.35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown." [hereinafter *Vanderpeet*].

## **A. Delgamuukw: A Case of Trial and Error**

Originally, 51 Chiefs of the Gitksan and Wet'suwet'en nations advanced 51 claims on behalf of themselves and their houses for 'ownership' and 'jurisdiction' over 133 distinct territories. These territories comprise 58,000 square kilometres of northwestern British Columbia. On appeal to the Supreme Court, the pleadings were firstly altered from claims of 'ownership' and 'jurisdiction' to claims for 'aboriginal title' and the 'right to self-government'. And secondly, the 51 individual claims were amalgamated into two communal claims on behalf of the Gitksan nation and the Wet'suwet'en nation. However, because no amendment was made with regard to the two communal claims, the Supreme Court held that the province of British Columbia suffered prejudice because the collective claims were not in issue at trial. Consequently, because of this error and in order that the province could know the Gitksan and Wet'suwet'en case a new trial was ordered. Due to the importance of the case and the general relevancy of the evidence already considered at trial to the future issues, the Court proceeded to comment upon Aboriginal title and the aboriginal right to self-government. It is those doctrinal comments and the implicit conclusions that flow from them that I now want to consider in more detail.

### **Aboriginal title**

In *Delgamuukw* the court finally acknowledged that Aboriginal title is a right in land.<sup>10</sup> And as Lamer C.J. stated, its content can be summarised by the following two propositions: First, "Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which [unlike the test in *Vanderpeet*] need not be aspects of those Aboriginal practices, customs and traditions which are integral to distinctive Aboriginal cultures."<sup>11</sup> And secondly, Lamer C.J. added the following limit "that those protected uses must not be irreconcilable with the nature of the group's attachment to that land."<sup>12</sup> In determining if a claim to aboriginal title has been made out, the Court set down the following interpretative model: (i) the land must have been occupied prior to sovereignty; (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be continuity between present and pre-sovereignty occupation; and (iii) at sovereignty, that occupation must have been exclusive.<sup>13</sup>

### **The aboriginal right to self-government**

On the issue of the aboriginal right to self-government the Court noted that this was not the right case to lay down the legal principles concerning self-government. Partly this was because of what the Court had said in *R. v. Pamajewon*<sup>14</sup> about the need to frame the right to self-government in a way that was not in excessively general terms.<sup>15</sup> In

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<sup>10</sup> *Delgamuukw*, *supra* note 3 at para. 111.

<sup>11</sup> *Ibid.* at para. 117.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* at para 143.

<sup>14</sup> [1996] 2 S.C.R. 821. [hereinafter *Pamajewon*].

<sup>15</sup> *Delgamuukw*, *supra* note 3 at para. 170.

*Delgamuukw*, it was determined that the right to self-government had been framed in very broad terms and so was not cognizable under s.35(1). In stating that the right to self-government would have to be determined at a retrial, the Court made reference to the Royal Commission's work on the right to self-government and the difficult conceptual issues involved.<sup>16</sup>

## **B. Places of Plurality**

### **1. Shifting theoretical underpinnings to new ground**

Interestingly, the court has cited with approval the idea that Aboriginal rights are "peculiar to the meeting of two vastly dissimilar legal cultures"<sup>17</sup> and that the "law of aboriginal rights is 'neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities.'"<sup>18</sup> If this is so, then one may well be confused as to why in *Vanderpeet* the time frame for determining aboriginal rights is one of pre-contact with European society.<sup>19</sup> Furthermore,

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<sup>16</sup> *Ibid.* at para. 171.

<sup>17</sup> *Vanderpeet*, *supra* note 9 at 547, Lamer C.J. citing M. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 412-3.

<sup>18</sup> *Ibid.* Lamer C.J. citing B. Slattery, "The Legal Basis for Aboriginal Title" in F. Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (1992) at 120-1. For a detailed discussion of the theoretical basis for the emergence of an 'inter-societal community', see J. Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623.

<sup>19</sup> In this way, the 'inter-societal' spaces that were constituted by a post-contact complex network of 'relations of power' are erased of legal significance. For a recent discussion of how "native people's engagement with the law speaks to and for the ambiguities and contradictions of power, complicating our understanding of agency and oppression", see T. Loo, "Tonto's Due: Law, Culture and Colonisation in British Columbia" in H. Foster and J. McLaren, eds., *Essays in the History of Canadian Law: Volume VI. British Columbia and the Yukon* (Toronto: University of Toronto Press, 1995) 128 at 129. Also, for

to date, the content of Aboriginal rights has tended to be constituted within one society's institutions. The result being that abstract doctrinal testing grounds, which are supposedly 'inter-societal', have enunciated and legitimised the dominant social order through legal narratives relating to: the fiduciary duty of the Crown; the purpose of s.35(1); the content of Aboriginal rights; and finally, the justifications for the governmental infringement of an Aboriginal right that may have made it through this legal obstacle course.<sup>20</sup> Importantly, it seems to me, such doctrinal developments have been extracted from British Columbian cases that didn't involve a treaty relationship. Therefore, in the absence of a consensual agreement or treaty between two or more societies it seems questionable if 'aboriginal rights' can be said to be the result of an inter-societal dialogue. Rather, it would seem that at, *and on this stage*, they are more appropriately characterised as being the result of a limited judicial hegemonic monologue.

However, I suggest that the recent developments extending from *Van der Peet* to *Delgamuukw* have provided more than just a 'timely' shift in theoretical ground.<sup>21</sup> For

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accounts of the varying role of law, see H. Foster, "The Queen's Law is Better than Yours: International Homicide in Early British Columbia" in J. Phillips, et al., eds., *Essays in the History of Canadian Law: Crime and Criminal Justice* (Toronto: University of Toronto Press, 1994); J. P. Reid, "Principles of Vengeance: Fur Trappers, Indians and Retaliation for Homicide in the Transboundary North American West" in T. Loo and L. R. McLean, eds., *Historical Perspectives on Law and Society in Canada* (Toronto: Copp Clark Longman, 1994); T. Loo, "Dan Cranmer's Potlach: Law as Coercion, Symbol, and Rhetoric in British Columbia (1992) 73 Canadian Historical Review 125. For a general background perspective on this 'inter-societal' period in British Columbia, see, R. Fisher, *Contact and Conflict: Indian-European Relations in British Columbia, 1774-1890* (Vancouver: UBC Press, 2nd ed. 1992).

<sup>20</sup> For the Court's account of these 'testing limits' see *Vanderpeet* and *Delgamuukw*.

<sup>21</sup> This shift is most explicitly evidenced in the court moving from a pre-contact time frame for determining Aboriginal rights to the assertion of sovereignty for determining Aboriginal title. Such a temporal shift was



while this shift has resulted in Aboriginal title being situated upon different theoretical foundations, it also raises questions about the place of First Nations law. Specifically, it highlights the human decisions that will need to be made about the most appropriate place for determining the content of Aboriginal rights and title; that is, whether it should happen in an 'inter-societal' legal space or if such decisions should in fact be deferred to the self-located legal places of First Nations societies. It is this tension in the decision making process that I now want to draw out in this chapter.

## **2. Reading Delgamuukw's endings: what's the story?**

On one reading of *Delgamuukw*, it could be suggested that the legal consequences of the decision are not that significant in terms of the overall doctrine of aboriginal rights. Such a view might put forward the proposition that all the court did in acknowledging the legal existence of Aboriginal title was to merely add one more form of title to what is still a unified property system. This, I would call the view from judicial accommodation.<sup>22</sup> In contrast, I suggest that the consequences of acknowledging Aboriginal title necessitates our imaginative legal geographies taking us well beyond both the limits of a unified property system and the view from judicial accommodation. In fact on closer inspection

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perceptively predicted by K. McNeil, "Aboriginal Title and Aboriginal Rights: What's the Connection?" (1997) 36 Alberta Law Review 117.

<sup>22</sup> Support for this view can be found in the obiter dicta of Lamer C.J. in *Vanderpeet*, *supra* note 9. For example at 550: "Court's adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they must also be aware that aboriginal rights exist within the general legal system of Canada."

we find ourselves situated within a legal landscape that is not only concerned with different property systems but rather a plurality of legal systems.

The reason for this, I submit, is that the content of Aboriginal title and any disputes relating to such a title or the activities taking place within its boundaries are something to be self-determined by the holders of that title. In other words, the internal complexities and conflicts which take place within the legal terrain of Aboriginal title are subject to the holders jurisdiction. As Brennan, J. recently pointed out in *Mabo v. Queensland*<sup>23</sup>, Aboriginal title "is given *its content by the traditional laws* acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory."<sup>24</sup> Additionally, in *Johnson v. M'Intosh*<sup>25</sup>, Marshall C.J. noted that indigenous peoples were "the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and *to use it according to their own discretion....*"<sup>26</sup> And in the case of *Worcester v. Georgia*<sup>27</sup>, Marshall C.J. stated that America was inhabited by a "distinct people, divided into separate nations, independent of each other and the rest of the world, having institutions

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<sup>23</sup> [No. 2] (1992) 175 C.L.R. 1 [hereinafter *Mabo*]. Note, for the sake of consistency, I will use the Canadian term Aboriginal title in place of native title.

<sup>24</sup> *Ibid.* at 58. [my emphasis]. Brennan, J., although discussing the restrictions on title, emphasises the role of indigenous legal practices play once title is recognised: "that a right or interest possessed as a [Aboriginal] title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people." at 60.

<sup>25</sup> 21 U.S. (5 Pet.) 1 (1823)

<sup>26</sup> *Ibid.* Cited by Lamer C.J. *Vanderpeet*, *supra* note 9 at 541. [my emphasis]. Marshall C.J. does go on to note the limits regarding full sovereignty and issues concerning the disposing of such title. For an argument that the historical body of inter-societal custom that informed International law from 1600-1800 is now part of the common law, see B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L.J. 681.

<sup>27</sup> 31 U.S. (6 Pet.) 515 (1832)

of their own, and governing themselves by their own laws.”<sup>28</sup> Indeed, in *Delgamuukw*, it was noted in passing by Lamer, C.J. that the “adaawk was relied on as a component of and, therefore, as proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by the appellant.”<sup>29</sup> Furthermore, it was noted that the adaawk and kungax of the Gitksan and Wet’suwet’en relate to more than simply land tenure:

The adaawk and kungax of the Gitksan and Wet’suwet’en nations, respectively, are oral histories of a special kind. They were described by the trial judge...as a “sacred ‘official’ litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House.”<sup>30</sup>

Furthermore, given the influence that the writings of McNeil have had on the court’s formulation of Aboriginal title, it is worth recalling what he has had to say about content and jurisdiction. Prior to the Supreme Court’s decision in *Delgamuukw*, McNeil surveyed the jurisprudential landscape to determine the relationship between Aboriginal rights and Aboriginal title. He came to the following conclusion: “Traditional laws and customs would apply internally to determine the nature of the rights and interests of members of the community, which may or may not be proprietary....”<sup>31</sup> In turn, such an approach to ‘content’, would seem to capture, or at least put to some use, the significance of Lamer C.J.’s proposition that Aboriginal rights find their source both in prior occupation and in *Aboriginal legal systems*.<sup>32</sup> Although, not impossible, it would seem

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<sup>28</sup> *Ibid.* Cited by Lamer C.J. *Vanderpeet*, *supra* note 9 at 543. [my emphasis].

<sup>29</sup> *Delgamuukw*, *supra* note 3 at para. 94. [my emphasis].

<sup>30</sup> *Ibid.* at para. 93.

<sup>31</sup> McNeil, *supra* note 21 at 140.

<sup>32</sup> *Delgamuukw*, *supra* note 3 at para. 114. It seems to me, that his Lordship is attempting to merge what were two differing lines of judicial thought on the question of the source of ‘common law aboriginal title’

logically inconsistent for a court to justify the recognition of a First Nations society's jurisdiction over property matters and not over other internal matters that related to, what former Chief Justice Dickson termed, its 'cultural and physical' survival.<sup>33</sup>

It is against this background that we need to reflect upon the significance of the following statement and the extent to which First Nations laws are still relevant to issues that logically extend beyond land tenure:

[I]f at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title.<sup>34</sup>

Thus, while First Nations laws may support the claim for aboriginal title, by analogy that is not their only relevancy, purpose or role. As Borrows has explained, "just as the common law is only understood through a grid of intersecting judgments, likewise one cannot understand First Nations law unless there is an appreciation of how each story

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(prior occupation) and 'native title' (aboriginal legal systems). See K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989); the discussion by Toohey, J. in *Mabo*, *supra* note 23, about the lines of authority and reasoning that stem from North American decisions and those from England and Australia, at 184-188; and for a discussion of the merits of each, see, G. Nettheim, "Judicial Revolution or Cautious Correction? *Mabo v Queensland*" (1993) 16 UNSWLJ 1. Also, for a comparative look at developments in the common law of Australia and Canada prior to the decision in *Delgamuukw*, see Kainthaje, P., *The Intersection of Aboriginal Law and Aboriginal Rights in the Common Law Frameworks of Canada and Australia* (LL. M. thesis, University of British Columbia, 1996).

<sup>33</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075, at 1099. [hereinafter *Sparrow*].

<sup>34</sup> *Delgamuukw*, *supra* note 3 at para. 148. For a discussion of how First Nations laws could, and indeed should, play a more prominent role in relation to issues extending beyond land tenure, see Borrows discussion of First Nations Laws and their possible role to Environmental law and land use planning processes: J. Borrows, "Living Between Water and Rocks: First Nations, Environmental Planning and Democracy" (1997) 47 University of Toronto Law Journal 417. [hereinafter "Between Water and Rocks"]. In this article the author discusses how First Nations laws have been excluded from spaces of environmental law and land use planning processes in an area he calls home; Neyaashinigmiing, a place "also known as the Cape Croker Indian Reservation, the heart of the Chippewas of the Nawash First Nation." For a general background to First Nations Laws in this area, see J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 291.

correlates with other stories.”<sup>35</sup> Furthermore, given the existence and relevancy of First Nations laws the question becomes one of how such laws interconnect with other ‘law’. It is in addressing this question that I think one must be careful to develop an analysis which takes account of the relationship between the common law and First Nations law in a way prior to considering what happens to such a relationship in the context of s.35(1) and its stated purpose. And this is what I now propose to do.

### 3. Common law and First Nations law: ‘telling tales’

First Nations laws are integral to the exercise of all Aboriginal rights; they must be part of the courts’ interpretation of those rights.<sup>36</sup>

Although the court has recognised the existence of First Nations law and its relevancy for determining aboriginal title, it has, to date, said little about its applicability and enforcement in the wider context of aboriginal rights. In fact, it seems that the intersecting judgments of the Court have produced a representation of aboriginal rights which seems to have little room for First Nations *laws*.<sup>37</sup> Yet when one considers the history of the common law, it is apparent that this is not because of some inability on the part of the common law itself. For example, in discussing the difficulty and inappropriateness of trying to locate a single source for the common law of England, Sir Matthew Hale maps the common law thus:

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<sup>35</sup> *Ibid.* “Between Water and Rocks” at 455.

<sup>36</sup> J. Borrows, “With or Without You: First Nations Law (in Canada) (1996) 41 McGill L.J. 629 at 645. [hereinafter “With or Without You”].

<sup>37</sup> For a perspective of how the Court might make explicit use of First Nations Law in regards to Aboriginal rights, see *Ibid.* “With or Without You”.

That this Kingdom has many and great Vicissitudes of People that inhabited it, and that in their several Times prevail'd and obtain'd a great Hand in the Government of this Kingdom, whereby it came to pass, that there arose a great Mixture and Variety of Laws: In some Places the Laws of the Saxons, in some Places the Laws of the Danes, in some Places the Laws of the ancient Britains, in some Places the Laws of the Mercians, and in some Places, or among some People (perhaps) the Laws of the Normans: For altho', as I shall shew hereafter, the Normans never obtain'd this Kingdom by such a Right of Conquest, as did or might alter established Laws of the Kingdom..."<sup>38</sup>

What this mapping suggests is that not only is there no single source to the common law but that the relationship between the common law and the laws of a particular place is one of deferral and self-location. That is, the common law is to be determined in a particular 'Place' by reference to the laws and customs of that place or people. Indeed, this was the theoretical position adopted by the High Court of Australia after it had reviewed the historical role of customary laws and their relationship to the common law in 'settled' and 'conquered' territories. Having done so, the Court stated that the common law on its interpretation would "protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (as far as is practicable to do so)."<sup>39</sup> Admittedly, the High Court was speaking to the question of proprietary rights and interests but by analogy the reasoning which underpins the relationship between the common law and First Nations laws would include other non-proprietary rights and interests. Consequently, the lack of recognition paid to

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<sup>38</sup> See particularly, Sir M. Hale, *The History of the Common Law of England* (Chicago: University of Chicago Press, 1971), at 39-43 "Touching the Original of the Common Law of England".

the potential role of First Nations laws should not be put down to the inability of the common law of Canada. Rather the responsibility is with the Courts and their inability to be more forthcoming about such a role.<sup>40</sup>

To return to the decision in *Delgamuukw*, I think we should reconsider the consequences of the following statement:

The adaawk and kungax of the Gitksan and Wet'suwet'en nations, respectively, are oral histories of a special kind. They were described by the trial judge...as a "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House."<sup>41</sup>

In common law doctrinal terms, the Court here is recognising the existence of the laws of the Gitksan and Wet'suwet'en nations in relation to particular places or people. Consequently, to take this a step further, if the Court recognised that some of those First Nations laws were relevant to another right or an issue in dispute then the role of the Court would be to subsequently defer to those laws that find their home in such places.<sup>42</sup> Indeed, the following extract from Borrows seems telling about the 'possibility of place' for First Nations laws in contemporary society:

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<sup>39</sup> *Mabo*, *supra* note 23 at 60. Brennan, J.

<sup>40</sup> Remembering that in discussing the right of self-government in *Delgamuukw*, *supra* note 3, Lamer, C.J. noted: "Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation." at para. 170. Interestingly, it didn't stop the Court laying down the principles for Aboriginal title.

<sup>41</sup> *Delgamuukw*, *supra* note 3 at para. 93.

<sup>42</sup> For an insight into the place of law in relation to Gitksan and Wet'suwet'en Nations, see G. Wa & D. Uukw, *The Spirit in the Land: Statements of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia, 1987-1990* (Gabriola, BC: Reflections, 1992) and A. Mills, *Eagle Down is our Law: Witsuwit'en Law, Feasts and Land Claims* (Vancouver: University of British Columbia Press, 1994). Also, for a commentary on the *Delgamuukw* case, see D. Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talon Books, 1998).

First Nations law originates in the political, economic, spiritual, and social values expressed through the teachings and behaviour of knowledgeable and respected individuals and elders. These principles are discovered in the rich stories, ceremonies, and traditions within First Nations. These stories contain the law in First Nations communities as they represent the accumulated wisdom and experience of First Nations conflict resolution. Some of the narratives pre-date the common law, have enjoyed their effectiveness for millennia, and have yet to be overruled or distinguished out of existence.<sup>43</sup>

In this regard, it would seem that the importance of the *place* that First Nations legal practices may have in relation to contemporary 'cultural and physical' survival of First Nations is potentially ground breaking.<sup>44</sup> As the Royal Commission recently stated: "In our view, the common law doctrine of Aboriginal rights includes the right of Aboriginal peoples to govern themselves as autonomous nations within Canada."<sup>45</sup> Thus, if we accept that in certain places there still exists First Nations laws which are capable of common law recognition and deference, what are the consequences for such a state of affairs given that this *doctrine of aboriginal rights* is now constitutionalized?<sup>46</sup>

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<sup>43</sup> "Between Water and Rocks", *supra* note 34 at 454. [footnotes omitted].

<sup>44</sup> For an interesting discussion of some issues that have arisen in the context of the Navajo Nation and their Court system, see R. Austin, "Incorporating Tribal Customs, Traditions, and Anglo Jurisprudence into Tribal Court Decisions" (Paper presented to the Aboriginal People and the Justice System Conference, UBC, 1998) [Update of article that appeared in the 1992 Conference Book of the Federal Bar Association's Indian Law Conference, Albuquerque, New Mexico].

<sup>45</sup> Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 2:1 *Restructuring the Relationship* (Ottawa: The Commission, 1996) at 192. [hereinafter *RCAP*].

<sup>46</sup> For a discussion of how international law may be relevant to the legitimacy of subsequently limiting the existing jurisdiction of First Nations, see J. Zion, "Attempts to Strip Indian Nations of Jurisdiction or Limit Jurisdiction as a Violation of the International Human Right to an Independent Judiciary" (Paper presented to the Aboriginal People and the Justice System Conference, UBC, 1998).



### **C. Reconciling Difference**

In effect, the stated purpose of s.35(1) is about reconciling difference and its legal underpinnings. That is, First Nations societies and their laws on the one hand and the sovereignty of the Crown and its laws on the other. As such, it seems to me that this activity of reconciling difference has an inescapable ethical and political dimension to it if it is to involve the 'taking away' of one society's laws and jurisdiction. To highlight this and to address the consequences of constitutionalization, I will proceed in the following manner: (i) Given that there is a 'place' for First Nations laws in the lives of specific First Nations people, what is the extent of the jurisdiction or 'right' of First Nations to continue to use such laws?; and (ii) Having addressed this question, I will reflect upon the ethical and political dimensions that are present when it comes to deciding *how and where* to draw the legal line.

#### **1. Drawing the 'right' line: sole jurisdiction and co-jurisdiction?**

Slattery, has argued that the Constitution should be understood through an Organic Model of interpretation. As such the Constitution is seen as:

(1) *indigenous* to Canada, rather than an alien import; (2) *complex* in structure, rather than monistic; and (3) fundamentally *customary* in nature, rather than composed simply of positive law.<sup>47</sup>

Consequently, I suggest that we need to *interpret* s.35(1) and the *act* of reconciling difference within this context. This is because the foundation of the Constitution, like the

common law, cannot be traced to a single source or reduced to the closed system of a Western positivist legal science. Slattery indicates that there are two principles which provide a foundation for the Organic model. The first principle, is based on the *doctrine of aboriginal rights*; this rejects "the view that North America was a legal vacuum at the time of European contact. It holds that America was the domain of a variety of aboriginal polities, possessing international status, territorial title, jurisdiction, laws, and land rights, with the capacity to enter into international treaties and other relations."<sup>48</sup> The second principle is based on the *doctrine of continuity*; this "denies that aboriginal laws, jurisdiction, and land rights were automatically terminated when European power gained sovereignty. It maintains that these rights presumptively remained in force under the new regime, as necessarily modified by the advent of the Crown."<sup>49</sup> I suggest, it is with these principles in mind that we can best assess the doctrinal developments of the Court and where it is at in reconciling difference.

To date, the Supreme Court has indicated that questions of continuing jurisdiction are to be addressed in terms of the right to self-government and "cannot be framed in excessively general terms."<sup>50</sup> The Court has also noted that there are many difficult

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<sup>47</sup> B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1995) 34 Osgoode Hall L.J. 101 at 111.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.* at 112.

<sup>50</sup> *Delgamuukw*, *supra* note 3 at para. 170 with reference to the Court's decision in *Pamajewon*. It is interesting to note how excessively general the Court is in framing the 'sovereignty of the Crown'. Especially given that the Court in *Sparrow* spoke about Federal powers being *read together* with s.35(1) through the *reconciling* of federal power and federal duty. It seems that the purpose of s.35(1) has now been inscribed in a way that shifts the process from *reading powers together* to *reconciling First Nations specificity with Crown generality*. As Barsh and Henderson, have observed "'Reconciliation', then, was

conceptual issues involved in recognising the aboriginal right to self-government. In particular, the Court has made reference to the work of the Royal Commission on this topic.<sup>51</sup> In this regard, if we are to explore the potential that current doctrinal developments have for altering the legal landscape it seems necessary to pursue this line of reasoning by recalling what the *RCAP* had to say about the inherent aboriginal right to self-government.<sup>52</sup> The *RCAP* pointed out that *at present* an Aboriginal nation could “exercise comprehensive government powers and authority in a variety of areas of jurisdiction.”<sup>53</sup> As one model among others, the Nation model being proposed by the commission provides us with an example of the more imaginative legal geographies which need to be drawn out of *Delgamuukw*’s endings. The commission provided the following vision:

An Aboriginal nation’s own land and resource base [Category I lands] would sustain full rights of ownership as well as beneficial use and enjoyment by its citizens. Aboriginal governments would exercise core jurisdiction in most matters affecting their lands, including resource management and allocation, and the lands would be administered in accord with a nation’s traditions of tenure and governance. Only an Aboriginal nation would be able to grant rights and interests in these lands and resources. Parts of a nation’s traditional territories ...[category II lands] are shared with non-Aboriginal governments, and the relationship between Crown and Aboriginal rights and interests is negotiated and reflected in co-management, co-jurisdiction or similar arrangements.<sup>54</sup>

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pulled from thin air, in defiance of the main trends in contemporary Canadian constitutional thought.” See R.L. Barsh and J.Y. Henderson, “The Supreme Court’s Van der Peet Trilogy: Naive Imperialism and Ropes of Sand” (1997) 42 McGill L.J. 993 at 999.

<sup>51</sup> *Ibid.* *Delgamuukw* at para. 171.

<sup>52</sup> *RCAP*, *supra* note 45.

<sup>53</sup> For an elaboration of this see the section headed ‘Jurisdiction and powers’, *RCAP*, *supra* note 45 at 253.

<sup>54</sup> *RCAP*, *supra* note 45, at 250-1.

If the Court is to follow this approach with regard to Category I and II lands; how would it do so given the theoretical underpinnings of the current doctrinal limitations? One way to think through this is by attempting to equate 'Category I lands and core jurisdiction' with Aboriginal title and the potential role of First Nations laws that I have been outlining. By that I mean that the 'right to self-government' would include what the Royal Commission termed core jurisdiction.<sup>55</sup> Thus, with regards to the lands subject to Aboriginal title which can be used for a variety of purposes, it could be determined that *one such purpose is that those lands be used for the continuation of First Nations laws and the right to self-government* in relation to such matters that come within the core jurisdiction. If such an approach were adopted, then the Court would reconcile the pre-existence of First Nations societies with the sovereignty of the Crown by following the common law process of extensively recognising and deferring to First Nations laws of that place and people.

However, it would seem that the more difficult problem for current doctrinal limitations arises in terms of 'Category II lands and co-jurisdiction'. As such, the question seems to be whether the *Vanderpeet* test is capable of addressing this aspect of the Nation model. I say this because the concept of co-jurisdiction seems to me to be

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<sup>55</sup> *Ibid.* The Royal Commission suggested this would include the following matters: citizenship and membership; government institutions; elections and referendums; access to and residence in the territory; lands, waters, sea-ice and natural resources; protection and management of the environment; economic life, including commerce, labour, agriculture, hunting, trapping, fishing, etc.; regulation of businesses, trades and professions; management of public monies and other assets; taxation; family matters, including marriage, divorce, adoption and child custody; property rights, including succession and estates; health; social welfare, including child welfare; education; language, culture, values and traditions; some aspects of criminal law and procedure; administration of justice; policing; and, housing and public works.

suggestive of how 'border-line' rights may be addressed. Indeed, if we now reflect on the *Vanderpeet* test, we can see that the rationale of that test was to address the content of rights that don't come under Aboriginal title but are still integral to a particular First Nation and its people. In this sense they are rights that while outside an area subject to Aboriginal title are still connected via the people to a given First Nation and its Aboriginal title.<sup>56</sup> As such, we can say that rights such as fishing rights are taking place in a way that connects the particular First Nation with 'Category II lands and co-jurisdiction' by way of its people or a specific site. In this way, it could be argued that the First Nations land or territorial connection would require changing the date from pre-contact (as per *Vanderpeet*) to the date that sovereignty was asserted (as per *Delgamuukw*). Then, if we focus on the spatial relationship concerning co-jurisdiction, a re-reading of the *Vanderpeet* test would argue that the actual *use* of 'First Nations laws/oral traditions' are themselves *sui generis* legal practices<sup>57</sup>; that is, they would no longer be relegated to an 'evidentiary en suite' in which they merely signify factual aspects for determining what other practices are aboriginal rights. Rather, and more

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<sup>56</sup> Indeed the rights may still be within the First Nations larger traditional territories. Or as Lamer C.J. put it in *Delgamuukw*, *supra* note 3 at para. 138: "The picture that emerges...is that the aboriginal rights which are recognised and affirmed by s.35(1) fall along a spectrum with respect to their degree of connection with the land. At the one end, there are those aboriginal rights which are practices, customs and traditions that are integral to the distinctive aboriginal culture of the group claiming the right. However, the 'occupation and use of the land' where the activity is taking place is not 'sufficient to support a claim of title to the land'. Nevertheless, those activities receive constitutional protection. In the middle, there are activities which, out of necessity, take place on land and indeed, might be intimately related to a piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have site-specific right to engage in a particular activity. ... At the other end of the spectrum, there is aboriginal title itself."

<sup>57</sup> This may go some way to avoiding the legal slippage that I outlined in chapter III and which Fiske has drawn attention to in her historical examination of how customary laws became transformed into oral traditions within legal discourse. See J. Fiske, "From Customary Law to Oral Traditions: Discursive

importantly, they are *legal* practices which should be recognised and affirmed as Aboriginal rights under s.35(1). In other words, if acknowledged there would exist a right to use such First Nations legal practices to determine what other practices constitute aboriginal rights. In this regard, the work of John Borrows is particularly suggestive of the potential role of First Nations laws in the legal narratives of the Court.<sup>58</sup>

If such an approach were adopted, then the *Vanderpeet* test would focus upon the First Nations legal practices themselves which are being asserted as integral to the distinctive society. In fact, this integral aspect has already been acknowledged by Lamer, C.J. when he stated that it "is apparent that the *adaawk* and *kungax* are of integral importance to the distinctive cultures of the appellant nations."<sup>59</sup> Moreover, I suggest that they could be considered, in their modern form<sup>60</sup>, necessary resources for the society's cultural and physical survival<sup>61</sup> and thus capable of being (re)asserted in relation to co-jurisdictional issues.<sup>62</sup> In sum, such developments would respect not just an 'aboriginal perspective',

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Formation of Plural Legalisms in Northern British Columbia, 1857 -1993" (1997-8) 115/6 B.C. Studies 267.

<sup>58</sup> For example, see, "With or Without You", *supra* note 36 and "Between Water and Rocks", *supra* note 34.

<sup>59</sup> *Delgamuukw*, *supra* note 3, at para. 94.

<sup>60</sup> As was noted in *Vanderpeet*, *supra* note 9 at 557: "The evolution of practices, customs and traditions into modern forms will not, provided that continuity with pre-contact practices, customs and traditions is demonstrated, prevent their protection as aboriginal rights."

<sup>61</sup> As the Borrows and Rotman point out, "Aboriginal rights are *sui generis* because Aboriginal peoples have laws, traditions, customs, and practices which have developed, grown, changed - and been invented - as Aboriginal people have struggled for physical and cultural survival in North America." See J. Borrows and L. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alberta Law Review 9 at 36.

<sup>62</sup> As was noted in *Vanderpeet*, *supra* note 9 at 557: "It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right."

but rather a First Nations *legal* perspective.<sup>63</sup> So much so, that it would be constitutionally protected.

In the end, it seems that doctrinally, there does exist a possibility for *sui generis* First Nations legal practices to play a more prominent role in any given space subject to either First Nations core jurisdiction or co-jurisdiction. In this way, First Nations laws would have a prominent place in constituting the 'aboriginal' and his or her rights which are being exercised within and across such spaces.<sup>64</sup> Finally, the recognition of First Nations legal practices as 'law' would also challenge the legal cultural hegemony that has resulted from a discursive practice of producing the meaning of s.35(1) rights in legal spaces which are subject only to one society's jurisdiction.<sup>65</sup> In sum, First Nations laws would have a role to play in constituting the 'aboriginal' and his or her rights in *both* an inter-societal space and a self-located place.

## **2. Just legal limits?: the ethical and political dimensions of jurisdiction**

In short, for a decision to be just and responsible, it must, in its proper moment if there is one, be both regulated and without regulation: it must

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<sup>63</sup> Even though Lamer C.J. quoted Walters, *supra* note 17, for the proposition that the court should take account of both the aboriginal and non-aboriginal legal perspective, it should be noted that the legal aspect seems to have been erased. See *Vanderpeet*, *supra* note 9, at 551.

<sup>64</sup> I suggest that this might go some way towards *meeting*, what Borrows and Rotman, *supra* note 56 have termed, the internal and external challenges to the common law.

<sup>65</sup> On the way the Court has produced a legal interpretative monopoly in the past, see Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Differences" in R. Devlin, *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications Limited, 1991).

conserve the law and also destroy it or suspend it enough to have to reinvent it in each case, rejustify it, at least reinvent it in the reaffirmation and the new and free confirmation of its principle.<sup>66</sup>

It seems to me, that the decision (*juris-diction*) of how and where to draw the line on legitimately reconciling difference is one that is layered with complications. One interesting complication concerning the Court's refusal to lay down the principles to guide litigation on jurisdiction and the right to self-government, is that it draws attention to the way the Court is currently both regulated and without regulation. That is, it is regulated by future principles and it is unregulated because they have yet to be laid down by the Court. Beyond that though, I think the preceding discussion of the potential role of First Nations laws highlights the 'undecidable' nature of the legal limits that surround the right of self-government. In thinking about this issue of undecidability in terms of interpreting s.35(1) rights, it should be noted that:

The undecidable is not merely the oscillation or the tension between two decisions; it is the experience of that which, though heterogeneous, foreign to the order of the calculable and the rule, is still obliged - it is of obligation that we must speak - to give itself up to the impossible decision, while taking account of law and rules. A decision that didn't go through the ordeal of the undecidable would not be a free decision, it would only be the programmable application or unfolding of a calculable process. It might be legal; it would not be just.<sup>67</sup>

In this chapter so far, I have attempted a partial and tentative (re)mapping of where the doctrine of aboriginal rights is at. That is, I have explored the location of Lamer, C.J.'s 'here to stay' in order to face up to the undecidability that underpins such a statement. To

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<sup>66</sup> J. Derrida, "Force of Law: The 'Mystical Foundation of Authority'" in D. Cornell, et al, eds., *Deconstruction and the Possibility of Justice* (London: Routledge, 1992) at 23.



that end, I have sought to show how an examination of the Supreme Court's narrative on inter-societal legal space actually reveals the potential places of First Nations laws.<sup>68</sup> As such, I suggest that the undecidability of whether the most appropriate place for determining the content of Aboriginal title and rights is in an 'inter-societal' legal space or if such decisions should in fact be deferred to self-located First Nations societies, is one that is 'beyond the law'; that is, the law in this area is undecidable. And it is this undecidability that demands justice. As such, if I have been successful in my analysis then it should be apparent how the places of First Nations laws may *appear* to alter the legal landscape. Hopefully, they have appeared to you in such a way that allowed you to sense from where the 'possibility of justice' may come. In that regard, contra Ronald Dworkin, I am not suggesting that the possibility of justice provides us with any single correct answer to the decision of how to legitimately reconcile difference.<sup>69</sup> However, it does seem that it is only by going through the undecidability of s.35(1) that justice as something unrepresentable has the chance of appearing in law's excess. This can be explained by trying to answer the question of what is a *just* interpretation of the right to self-government? For while I have made some use of the Nation model put forward by the *RCAP*, it is of course not the only legal model or perspective being presented for

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<sup>67</sup> *Ibid.* at 24.

<sup>68</sup> Such legal places of First Nations would thus operate as counter sites or heterotopias. In discussing 'counter sites', Gregory explains how for Foucault a heterotopia may also be a "space of compensation: 'a space that is other, another real space, as perfect, as meticulous, as well arranged as ours is messy, ill constructed and jumbled.'" See, Gregory, *supra* note 4 at 151, (footnote 175).

<sup>69</sup> See, R. Dworkin, *Law's Empire* (London: Fontana, 1986). On the contrary, I am persuaded by the discussion and development of Derrida's propositions about the 'possibility of justice'. See Derrida, *supra* note 66; D. Cornell, *The Philosophy of the Limit* (1992); and more recently M. Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (London: Pluto Press, 1996).

dealing with issues of self-government.<sup>70</sup> Also, if there is a lesson to be learnt from Fitzpatrick's work on the mythology of modern law, then it may well be that models based around 'cores' of jurisdiction are themselves merely a continuation of this mythology or perhaps part of an emerging mythology of (post?)modern law. Yet, in the end, it may be the case that there needs to be a new mythology or even legal fiction for reconciling law(s). Whether that is what's required or not, it still leaves the question of how any new 'legal foundation' could live up to the demands of justice. Consequently, it is important to note that there is no one model or norm (not even Dworkin's notion of integrity) that will provide us with the single *correct* next chapter in the history of aboriginal rights. As Derrida explains, it is because of the performative aspect that is inherent in the *act* of interpretation that justice escapes mere calculation and reduction to any single norm:

Paradoxically, it is because of this overflowing of the performative, because of this always excessive haste of interpretation getting ahead of itself, because of this structural urgency and precipitation of justice that the latter has no horizon of expectation (regulative or messianic). But for this very reason, it *may* have an *avenir*, a "to-come," which I rigorously distinguish from the future that can always reproduce the present. Justice remains, is yet, to come, à venir, it has an, it is *à-venir*, the very dimension of events irreducibly to come. It will always have it, this *à-venir*, and always has. Perhaps it is for this reason that justice, insofar as it is not only a juridical or political concept, opens up for *l'avenir* the transformation, the recasting or refounding of law and politics.<sup>71</sup>

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<sup>70</sup> For example, in addition to the other models offered in the *RCAP*, consider the following range of perspectives on the issues raised by reconciling difference in relation to aboriginal title and/or the right to self-government, see J. Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground" in Ellen Frankel Paul, F. Miller, Jr. and J. Paul, eds., *Property Rights* (New York: Cambridge University Press, (1994) 153; P. Macklem, "What's Law Got to do With It?: The Protection of Aboriginal Title in Canada" (1997) 35 Osgoode Hall L.J. 125; and J. Borrows, "Constitutional Law From a First Nation Perspective: Self Government and the Royal Proclamation" (1994) 28 U.B.C. Law Review 1.

Thus, while justice doesn't provide us with any single answer of where to draw the line, it does take us to the recasting or refounding of law and politics. As such, it returns us to the quote from Foucault concerning 'what foundation in the law' is to ground the current 'state of Canadian sovereignty'. Specifically this returns us to, and makes us responsible for, the actual *legitimate* reconciling of the pre-existing First Nations societies and the sovereignty of the Crown. However, importantly it does so in a way that doesn't seek to cover over the difficulty of actually drawing the line.<sup>72</sup> Indeed, the decision that constitutes where First Nations laws will begin and end is not purely a legal decision. That is, it is a decision that is both law and non-law; what Davies has theorised as the paradox of law and legal decision making. I suggest this much was implicitly acknowledged by the Court when Lamer, C.J. stated that by ordering a new trial he did "not necessarily encourage the parties to proceed to litigation and to settle their dispute through the courts."<sup>73</sup> Rather, as the quote which began this chapter noted, Lamer C.J. indicated that he thought negotiated settlements would achieve what was stated as the basic purpose of s.35(1). No doubt this was partly motivated by his concern to conceal what is the more openly political nature of law in this area. And while I have suggested that the decision of how to draw the line should be governed by a responsibility to go beyond the undecidability which is the 'law' in this area, the actual decision of where to draw the line does seem to have an inescapable political aspect to it. One that is much like the assertion of sovereignty. As Davies notes,

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<sup>71</sup> Derrida, *supra* note 66 at 27.

<sup>72</sup> Just witness the complexities that are trying to be sorted out in the current B.C. treaty negotiations.

<sup>73</sup> *Delgamuukw*, *supra* note 3 at para. 186.

The decision of the monarch is not just *like* the decisions of judges or comparable to them, it is perhaps of one and the same order, in that both are the performances which make law of the law. Both are the articulations which exist at the frontier of law, and not, as positivist idealists would have us believe, usually inside the law. The inescapable theoretical implication therefore is a picture of law as a performance, not as a static set of norms.<sup>74</sup>

In sum, it is the political and performative aspect of the frontier of law which is involved in making law of the law. And it is this aspect to which I am referring when I say the decision that is to constitute the boundaries of First Nations laws is both law and non-law. In drawing attention back to this paradoxical aspect of law and the legitimate reconciling of difference, we can see that when the Court decides where to draw the line on self-government it will do so in a way that highlights the question of '*juris-diction*'.

By drawing on the work of Jean-Luc Nancy, Davies notes that "this contradictory constraint which is *jurisdiction* - submission to a law which one is in the process of defining and articulating - is the constraint of all discourse. The speaking subject's discursive jurisdiction is defined by the re-creative event of enunciation - the speaker is at once subject *to* and subject *of* the discursive law."<sup>75</sup> Thus, when we are thinking of the actual moment of reconciling the pre-existence of First Nations societies and the sovereignty of the Crown, this new foundation is "essentially undecidable in its relation to law."<sup>76</sup> This is because it is "only by the work of a decision, or something analogous, that this undecidable moment can possibly be the basis of law as a conceptually closed

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<sup>74</sup> Davies, *supra* note 69 at 98.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.* at 99.

system. This decision on that which is first and foremost law's exception - its source - is the 'founding violence' of the law. Violent, because it forms a logic of sameness, division, exclusion and repression."<sup>77</sup> And it is *at this stage*, that the mythology of law is narrated or legal fictions are re-written and performed. It is here that the juris-*diction* of the Court and its *acts* of interpretation have, to date, repressed or taken away First Nations laws and juris(diction) *in order* to legitimate the *deductive* power of the Sovereign.

Yet despite, or perhaps because of this paradox of law, there also remains, for each one of us who considers themselves a 'legal subject', the ethical responsibility of making a just decision in the *present*. As Derrida explains:

Not only must we calculate, negotiate the relation between the calculable and the incalculable, and negotiate without the sort of rule that wouldn't have to be reinvented there where we are cast, there where we find ourselves and beyond the already identifiable zones of morality or politics or law, beyond the distinction between national and international, public and private, and so on. This requirement does not properly belong either to justice or law. It only belongs to either of these two domains by exceeding each one in the direction of the other.<sup>78</sup>

Which once again brings us back to what has been enunciated as the *present* purpose of s.35(1) and to the current order of things; that is the reconciling of the pre-existing aboriginal societies *with the sovereignty of the Crown* - rather than the other way around. To elaborate on this, we should be aware that the current order of things is founded upon a colonial violent re-ordering of things. Yet, if we are to continue to do 'violence' to the

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<sup>77</sup> *Ibid.*

current 'foundations of law', then I suggest we should affirm the language of a *revolutionary* violence. By that I mean, if we are to address the current colonial order of things, we must do so with a responsibility to the 'Other' and in a way that pays attention to remembering the place of First Nations laws by overturning the violent and illegitimate foundations of colonialism. Perhaps it is not surprising then, that when the violent 'foundation' of the current 'state of Canadian sovereignty' is examined we realise that it is not very 'successful' as a *legitimate* foundation. And it is for this reason that it seems necessary to search for a more 'successful' foundation, one I suggest that attempts to put in place a *presumptive* re-ordering of things; the purpose of which, is to legitimately reconcile the 'sovereignty' of the Crown *with the pre-existence of First Nations societies, their legal systems and jurisdiction.*

Would this be a truly revolutionary order of things? Cornell has explained that the "justificatory language of *revolutionary* violence depends on what has yet to be established, and of course, as a result, might yet come into being. If it did not depend on what was yet to come, it would not be *revolutionary* violence."<sup>79</sup> Cornell supports this position with the following quote from Derrida:

A "successful" revolution...will produce *après coup* what it was destined in advance to produce, namely, proper interpretative models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretative model in question, that is, the discourse of self-legitimation. ... There are cases in which it is *not known for*

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<sup>78</sup> Derrida, *supra* note 66 at 28.

<sup>79</sup> Cornell, *supra* note 69 at 168.

*generations* if the performative of the violent founding of the state is “felicitous” or not.<sup>80</sup>

Let us face it, we now know that the past ‘violent founding of the state’ has not been a ‘happy story’. And as legal historian Hamar Foster has noted in his historical analysis of Aboriginal title in British Columbia, there is a tension running through historical studies which attempt to address the role of law in the past:

Aboriginal organisations and scholars have pronounced upon the vexing question of the relationship between colonial law and the fate of the Indians of British Columbia in various contexts. ...Throughout such accounts there is a subtext of tension: to dwell on the damage done by the colonisers, within or without the law, is to risk portraying Aboriginal people as passive victims of implacable forces. Yet to focus on resistance and survival may present a distorted picture as well, putting a happy face on what is, by and large, not a happy story.<sup>81</sup>

In facing up to this story and thinking about a new order of things, attention should be drawn to the work of Bell and Asch. These authors have recently remarked, that much of the current legal limitations have resulted from ‘an outmoded and biased theory of culture’ which has, in turn, been used to ‘interpret the facts of Aboriginal society’. As the authors go on to point out:

[T]he evidence from anthropology strongly confirms the view that all societies possess institutions with respect to jurisdiction over their members and their territory. The form that jurisdiction takes will differ between societies, for it depends on the kind of society it is and the demands made upon it by the way of life of its members.<sup>82</sup>

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<sup>80</sup> *Ibid.* at 169. [my emphasis]. See my discussion in Chapter IV about the difficulty of critically assessing the political consequences of the emerging treaties in British Columbia.

<sup>81</sup> Foster, *supra* note 7 at 34.

There would seem to be at least two implications of accepting such a premise. Firstly, if the anthropological infrastructure of which they talk could be extended into legal spaces then the burden of proof would shift to those attempting to challenge the above premise.<sup>83</sup> And secondly, such a premise would focus attention upon the underlying and fundamental conflict in this area of law; that is, the courts would have to address the following scenario:

Given that, at the time Britain asserted sovereignty, all societies in North America had institutions including those regarding land ownership and jurisdiction in forms reconcilable to Canadian and English legal norms, how did Britain and later Canada *legitimately* acquire ownership and jurisdiction over Aboriginal peoples and their lands?<sup>84</sup>

I suggest, that the appropriation of such a theoretical infrastructure would assist in the 'revolutionary violence' necessary to overturn the current interpretative model which has its foundations in a colonial order of things; that is, the purpose of s.35(1) would shift its emphasis to reconciling *the Crown's Sovereignty* with pre-existing Aboriginal societies and their legal systems, rather than the other way around.<sup>85</sup> In turn this may force the Court to actually address the call of justice that resonates in and beyond s.35(1):

Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown."<sup>86</sup>

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<sup>82</sup> C. Bell and M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver, UBC Press, 1997) at 69.

<sup>83</sup> *Ibid.* at 73.

<sup>84</sup> *Ibid.* (my emphasis)

<sup>85</sup> *Vanderpeet*, *supra* note 9 at 539.

<sup>86</sup> N. Lyon, "An Essay on Constitutional Interpretation" (1988) Osgoode Hall L.J. 95 at 100. It should also be recalled that Dickson C.J. quoted this with approval back in *Sparrow*, *supra* note 33.



Ultimately, it seems to me, that without such a re-ordering or de-scribing of the current colonial order of things, the Court is likely to continue to enunciate or re-inscribe the dominant social order by legitimating what I have suggested remains at a foundational level the illegitimate *continuity* of taking away First Nations laws and jurisdiction.

### **Conclusion: Resisting closure...**

As Goodrich, has noted:

The text is only ever an apparent unity and to understand that appearance requires a reading of the margins of the text, a reading of its figures of incorporation, of translation and inclusion, but also and more radically a reading of its demarcation of self and other, of the points of diffraction of discourse wherein the discourse of the text becomes incompatible with the discourses external to it.<sup>87</sup>

In attempting to de-scribe this area of 'law', I have sought to draw upon external or 'other' discourses which highlight the incompatibility of thinking in terms of a single unified legal discourse. My argument has been, that the decision in *Delgamuukw* contains the potential for more imaginative legal geographies which when made explicit, lead into the complex terrain of legal pluralism. Such consequences, I suggested, have the potential to challenge current doctrinal limits and their theoretical underpinnings. This is because such limits can be understood as having been developed upon the Court's earlier and limited production of legal space. In addition, I have indicated how more imaginative legal geographies may assist the court in understanding how its current theoretical framework can go beyond mere judicial accommodation. I have argued that by

addressing the more challenging issues, such as, those arising from recognising First Nations laws and jurisdiction, the Court has a responsibility to re-order the purpose of s.35(1). And do so in a way that brings forth a more just interpretative model for constituting the meaning of aboriginal and treaty rights. Indeed, one that shifts the scrutiny of the Court to an examination and legitimation of the 'state of Canadian sovereignty'.

If nothing else, I hope this discussion of the place of First Nations laws highlights how one's own legal knowledge is at least limited in terms of where it is situated. As such, it is not only just and responsible to defer to the *legal knowledge, laws and jurisdiction* of others, but more importantly, it is necessary. In making that point, I am reminded of Doreen Jensen's account of a 'revolutionary intervention' that sought to re-order things by challenging one judge's representation of legal space:

I'll never forget the first day of the Gitksan and Wet'suwet'en court case. Mary Johnson, one of the elders from Kispiox, wanted to sing one of our dirges before the court began because that's our traditional way of doing things. Before you do anything important you sing this very ancient dirge. And Judge McEachern said, "I'm not having drums in my Court House! And besides I've got a tin ear." So Chief Mary Johnson went right up to the judge and said, very slowly, "Your Honour, I have a can opener!" and then she laughed. Chief Mary Johnson was devastated that she could not use her very ancient song, so she used humour in her response. But it was lost on the judge because he had no sense of humour, he just didn't understand her point.<sup>88</sup>

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<sup>87</sup> P. Goodrich, *Reading the Law* (Oxford: Basil Blackwell, 1986) at 221 with reference to M. Foucault, *The Archaeology of Knowledge* (1972).

<sup>88</sup> As told by Doreen Jensen, in L. Bell and C. Williams, "Interview with Doreen Jensen" (1997/8) 116 & 117 B.C. Studies 289 at 294.

## VI. Concluding Comments: 'The horizon of excess'

The theory of the text this initiates is therefore bound up in the tautology: the horizon of excess. Horizon adumbrates the continual excess, the surplus of meaning but at the same time provides a limit to the endless signifying chain of the world. This is the limit of the gaze which brings the relation between the object and its horizon into being.<sup>1</sup>

By reading the legal texts on s.35(1) as specific 'cites' of struggle over meaning, I have explored the particular relations of power at work in such 'cites'. Specifically, I have argued that the meaning of s.35(1) is a result of differing but interconnected relations of power; namely, sovereign relations (chapter V), disciplinary relations (chapter III) and governmental relations (chapter IV). Additionally, I have explored how these various relations of power shed light on law's own *juris-diction*. Consequently, I think I have provided strong support for my thesis that the legal discourse which constitutes the meaning of section 35(1) aboriginal and treaty rights, can be usefully understood and analysed with regard to the relations of power that exist within what Foucault came to call a 'sovereign-discipline-government' society.

More generally, this thesis has attempted to explore the possible dialogue between s.35(1) aboriginal and treaty rights and the work of Michel Foucault. To that end, I think the work of Foucault has shed light upon the various relations of power which are involved in constituting and limiting, not only the meaning of section 35(1) but 'law'

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<sup>1</sup> B. Ashcroft, "Excess: Post-colonialism and the verandahs of meaning" in C. Tiffin and A. Lawson, *Describing Empire: Post-colonialism and Textuality* (London: Routledge, 1994) 33 at 43. [hereinafter *Describing Empire*].

itself. And similarly, the analysis of section 35(1) has highlighted how Foucault's articulation of sovereign, disciplinary and governmental relations of power constitute this area of law in a way that supports his thesis about our living in a 'sovereign-discipline-government' society (chapter II). Furthermore, Foucault's work has shown how legal discourse is itself involved in the *juris-dictional* transformation of societies into such a 'society'.

In setting out my thesis in this way, I have, up to now, attempted to side step 'grand theory' in order to explore the more specific and diverse ways in which power operates in society today. However, in thinking of colonialism as a process rather than an abstract structure, it is possible to account for specific relations of power in the present in a way that traces their contingency to a colonial 'project' of the past. As Thomas has suggested, "the concept of a colonial *project* can draw together interests in discourse and interests in agency, not with the objective of creating a coherent or harmonious theory, but in order to establish a productive analytical tension, a reading that is stretched between regimes of truth and their moments of mediation, reformulation and contestation in practice."<sup>2</sup> And in that regard, I think the differing relations of power that were analysed in this thesis (chapter III, IV and V respectively) highlight such a tension and the problem with trying to create a 'harmonious theory' of 'law'. I say problem because we aren't dealing with a unified 'law' but a plurality of laws in a plurality of places concerned with a plurality of legal subjects.

Furthermore, I have been particularly careful to avoid reducing law itself to something that is either essentially colonial or post-colonial in nature. Rather, I think it is apparent that the 'aboriginal' subject and his or her rights are constituted by diverse relations of power which involve human beings and power in differing ways. In this thesis, I have sought to explore relations of power which constitute the meaning of 'law' in specific 'sites' of struggle. Whether these 'sites' are part of larger colonial or post-colonial discourses will ultimately depend on how they connect or 'link' with other power relations and perhaps become codified by the state and/or various First Nations. However, if we focus upon the *juris-diction* of the Supreme Court, I think it fair to say that the reconciling of difference has yet to reach the *post* of post-colonialism. This is because a *post-colonial* legal perspective on the meaning of s.35(1) would utilise a more challenging interpretative model for the purpose of reconciling 'difference':

Like the political process of decolonisation with which it shares much of its ground and motivation, post-colonial studies seeks to identify, valorise, and empower what colonialist discourses label the barbarous, the primitive, the provincial. Thus 'difference', which in colonialist discourse connotes a remove from normative European practice, and hence functions as a marker of subordination, is for post-colonial analysis the correspondent marker of identity, voice, and hence empowerment. Difference is not the measure by which the voiceless alien fails to be European; it is the measure by which the European episteme fails to comprehend the actual self-naming and articulate subject. Moreover, difference demands deference and self-location.<sup>3</sup>

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<sup>2</sup> N. Thomas, *Colonialism's Culture: Anthropology, Travel and Government* (Victoria: Melbourne University Press, 1994) at 58.

<sup>3</sup> A. Lawson and C. Tiffin, "Reading Difference" in *De-scribing Empire*, *supra* note 1 at 230.

With that perspective on difference in mind, I think the relations of power explored in this thesis have highlighted the measure by which the legal discourse of the Supreme Court has, to date, failed to comprehend the actual self-naming and articulate First Nations subject. For example, in chapter III, I focused upon the relations of power that represented the activities of Sto:lo society and led to the formulation of the *Vanderpeet* test by the Supreme Court. In doing so, I explored how the 'aboriginal' was captured by knowledges produced around the disciplinary divisions between 'Self' and 'Other'. The effect being that law's content was itself the result of a disciplinary power and knowledge that operated in a legal process of normalisation and subordination. Moreover, it was a process that contributed to a discourse of Aboriginalism and reduced the role of First Nations knowledges and laws to the factual realm.

In chapters IV and V, I then explored law's role in other processes of dealing with difference. As it turned out, these other processes are, I think, characterised to a greater extent by their potential for legal deference and self-location. For example, in chapter IV, I moved beyond the legal discourse of the Supreme Court and I considered the rationalities of self-government that are reconstituting 'First Nations' and their populations against a background of treaty negotiations in British Columbia. More specifically, I examined the emerging Nisga'a treaty in an attempt to understand the constitutive role of resistance and the 're-mixing' of governmental technologies that go towards the self-constitution of the Nisga'a Nation and the making up of its self-naming and articulate citizens. Then, in Chapter V, I returned to the legal discourse of the Supreme Court to examine the judicial narrative that has, to date, covered over the law's

plurality. In doing so, I focused on how the current 'foundation of law' was based upon a very particular and contingent ordering of things. And at present, it remains an ordering of things that puts in place a process for reconciling difference by objectivizes pre-existing First Nations societies and subordinating their 'existence' to the sovereignty of the Crown. In this regard, I suggested that the Court has yet to address the undecidability of law's own '*juris-diction*' in this area, as well as, the potential places of First Nations laws and jurisdiction. To do so, I argued that the Court will have to go beyond this undecidability in a way that comes to terms with both the contingency of the current order of things and the possibilities of enunciating a more just foundation on which to legitimately reconcile First Nations societies and the 'sovereignty' of the Crown.

In the end, it should be recalled that this thesis began after I gazed upon the legal horizon and attempted to examine the discursive vessel which constitutes the meaning of aboriginal and treaty rights. In reflecting upon the relations of power that circumscribe such rights, I realise that I have been critical of current doctrinal and *juris-dictional* limits. However, if my analysis has dwelled upon those limitations that are on the legal horizon, this has been to draw attention to the possibilities of travelling beyond such limits in a way that reveals, and makes responsible, the 'law' of the limit. After all, in focusing upon the legal horizon, it should be remembered that:

As its Greek name suggests, a horizon is both the opening and the limit that defines an infinite progress or a period of waiting.<sup>4</sup>

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<sup>4</sup> J. Derrida, "Force of Law: The 'Mystical Foundation of Authority'" in D. Cornell, et al, eds., *Deconstruction and the Possibility of Justice* (London: Routledge, 1992) at 26.





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