# TREATY-MAKING FROM AN INDIGENOUS PERSPECTIVE: A NED'U'TEN - CANADIAN TREATY MODEL

by

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## ABSTRACT

This thesis argues that the Ned'u'ten, an indigenous people, have the right to decolonize and self-determine their political and legal status at the international level. The Ned'u'ten are currently negotiating a new relationship with Canada and are considering various treaty models to achieve this goal. This thesis advocates principles for a peace treaty model that accomplishes both Ned'u'ten decolonization and self-determination.

The first chapter of this thesis demonstrates that indigenous perspectives in legal culture are diverse and not homogeneous. My Ned'u'ten perspective on treaty-making contributes to these perspectives.

The second chapter challenges the legitimacy of the Canadian state, over Ned'u'ten subjects and territories. This is accomplished through the rejection of dispossession doctrines that Canada has used to justify colonial and oppressive practices against the Ned'u'ten. Decolonization principles are prescribed in this chapter.

The third chapter takes a historical view of the right to self-determination and shows how state practice, indigenous peoples' participation, and international scholars have attempted to articulate the scope and content of this right in the contemporary context of indigenous self-determination. A Ned'u'ten self-determination framework is proposed based on indigenous formulations of the right to self-determination. Self-determination principles are also prescribed in this chapter.

The final chapter compares two cases where indigenous peoples in Canada are attempting to create a new relationship with the state: the James Bay Cree and "First Nations" in the British Columbia Treaty Commission Process. This comparison will show that the degree of participation that indigenous peoples have in implementing their rights to self-determination, will determine the parameters of any new relationship that indigenous peoples create with the state. Negotiating principles are prescribed for a Ned'u'ten-Canada relationship as well as a peace treaty process to accomplish this goal.

It is my thesis that the Ned'u'ten and Canada can achieve a peaceful and balanced relationship through the peace treaty model I propose.

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## ACKNOWLEDGMENTS

This thesis could not be completed without the support, contributions and guidance that families, friends and colleagues have given me throughout my training in western academia. My people, the Ned'u'ten, are my inspiration, and this work commemorates my ancestors and the life forces that have enabled them to survive over a century of colonization, oppression and racism. Elders that have shared their teachings and wisdom with me have kept me still to diplomatically seek peace with a kind, honest and sharing heart. The Education Department of the Lake Babine Nation have supported my education since 1987 and have made the logistics of obtaining academic accreditation worry free. My mother has been instrumental in conditioning me to approach life critically with every step I take. My father's complicity and accounting for his peoples' dispossession of indigenous peoples homelands and status gives me hope that Canadians can take the primary step in bringing justice for past wrongs. My husband, Duncan, has stood by me, to push me to write, write, write when it was difficult to deconstruct and accept the atrocities my people face, to guard my principles fiercely and to critically examine my own thoughts while I try to liberate them, but most of all to ground me to know that the source of my strength is in our family. My daughter Samantha, who would pull me away from the computer to bring balance to rest of life around me and whose strong will shows me that her generation will be liberated. Professor John Borrows has also contributed to this thesis by continuously showing me how to approach the dominant legal culture with peace and openness and being ever patient with the pains of self-determination that I experience as a dzakaza. Professor Joel Bakan suggestions to organize and structure my thesis in a concise manner has improved this project without question. Professor Douglas Sanders for providing ample feedback and interest in my ambitious project. The U.B.C. Law Graduate Studies Program, Professor Wes Pue, Professor Karin Mickelson and Lillian Ong who have been so supportive. My friend, Ardith Walkem, has been the sounding board that I needed to test my ideas without compromising my principles or politics for short-term pragmatism. The staff and members of the Union of British Columbia Indian Chiefs have also supported me in my research for this thesis. My families and colleagues, who have supported me through this journey. The "true" hereditary chiefs at home who have put their trust in me, you have shown me that our world is waiting to flourish again. Mussie to you all.

## INTRODUCTION

As a dzakaza (hereditary chief), I see my people and ancestral territory in pain. I see our traditional governing system, the *bah'lats* low in power and spirit. I see my people unbalanced, not living in harmony, and sad. They are distrustful of their own kind. I see Ned'u'ten territory pillaged, rivers polluted, forests and medicines depleted, and the population of animals decreased. I see money and unhealthy capitalistic values eroding Ned'u'ten principles of bestowing wealth to all the people and respect. I see many of my people on Skid Row in downtown Vancouver, dying from substance abuse. I see elders drunk or dying young from heart disease, diabetes and cancer. I see children being abused. I see my people being fooled again. Self-determination can be a painful process when your people are in pain already.

I have seen how Canada has dispossessed my people in the past. I see how Canada continues to oppress my people today. I see how Canada plans to continue the colonization of my people in the future. I see how Canada tries to claim legitimacy to Ned'u'ten territory. I see all her masks. I see Canada racing to innocence as I remove those masks and reveal her true identity.

As a dzakaza, it is my responsibility to respect my name, territory and clan relations. It is also my responsibility to ensure that "the way we do things" is passed on to my children and generations after. I have used my conventional training and knowledge of my people's ways to develop a way to remove the pain my people feel and for Canadians to wipe away the shame that clings to their name. It is my gift to both of you.

This thesis proposes a way to bring peace to the Ned'u'ten and Canada. It is a study that is reflective of my perspective as a dzakaza and scholar. It is also a critical assessment of how

Canada has used Doctrines of Dispossession to hurt my people, to hurt my land. The right to self-determination and right to decolonization are two frameworks that I use to release the pain that my people feel, to liberate their spirits, and to wipe away the shame of Canada's name in Ned'u'ten territory. It is my hope to convince you that a healthy relationship can be established between the Ned'u'ten and Canada based on how the Ned'u'ten establish peace and harmony with each other and neighbouring peoples.

Invitation

If business is going to take place at a bah'lats, a deneeza or dzakaza who will host the bah'lats will issue invitations to all other deneeza and dzakaza of the Ned'u'ten clans as well as clans of neighbouring tribes. Accompanied by members of their clan, they would travel to the homes of each deneeza and dzakaza, dressed in their regalia. As the host deneeza or dzakaza enter the homes of other deneeza and dzakaza, the atmosphere is serious, solemn and respect for office is shown. Depending on the rank of deneeza or dsakaza, the tiz, nilhwis, and sineelh will be used as part of invitation protocol. C'iz will then be used to make the invitation legal and the host deneeza or dzakaza explains the purpose of bah'lats. Feathers are returned to show that the invited accept their invitation and both will dance to acknowledge mutual respect.

# 1

# INDIGENOUS LEGAL THEORY PERSPECTIVES

## A. Introduction: De-Centering The Colonial Framework Through Indigenous Perspectives

It seems strange to begin by stating - Indigenous perspectives exist, they are alive. If I stated this in my people's territory, my people would look at me strangely. Of course Ned'u'ten perspectives exist and are alive... and have been since time immemorial. If I stated this to an academic audience or opened a paper with this statement, some would agree; but really, the existence of indigenous perspectives is recent, only going back thirty years or so.

These conclusions may seem contradictory. However, both statements are true, depending on who you are talking to, and if the only medium of communication you are accessing indigenous perspectives from is written records. Indigenous perspectives, are not limited to the western written record nor are they frozen in a western linear continuum of time. The decision to transmit these perspectives into the written convention of western academia, in non-indigenous languages, is not a decision always made by indigenous scholars. Other mediums and venues may be chosen. Access to these perspectives may require broadening

conventional written training to include different frameworks of writings or oral traditions of indigenous peoples. This chapter focuses on indigenous perspectives in legal cultures situated around the colonial framework.[1]

Indigenous perspectives are diverse. In the context of colonialism, such diversity can provide various angles on how colonial regimes and their modern masks dominate and oppress indigenous peoples. Legal cultures provide just one standpoint for indigenous peoples to analyze and reject colonial practices legitimated by the dominant culture's usage of their law. Not all indigenous scholars come to the dominant legal culture ("DLC") equipped to combat the 'dominant discourse of colonizing powers.'[2] In fact, indigenous scholars coming from their own legal cultures may look for similarities in foreign legal cultures. Whatever the reason indigenous scholars engage with the DLC (whether to search for justice, truth, equality, peace; to ensure respect for the land, family or their people; to do front-line legal work for indigenous peoples trapped underneath the DLC's gaze; or just to practice law generally), they will no doubt come across the racist masks of colonialism that have suffocated and altered the lives of so many peoples. How indigenous scholars handle or treat these masks of colonization will vary as well.

The standpoint from which indigenous scholars identify and understand the colonial regime is crucial to understanding the perspectives of indigenous scholars. In learning to respect

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[1]This chapter canvases just a handful of indigenous scholarly writings mainly in North America and Canada. The writings selected by no means are intended to represent all indigenous writings in legal culture. Although indigenous writings are represented in indigenous communities, indigenous scholars are not well-represented in the dominant legal culture. Indigenous scholars active in legal culture at law schools at the time of this writing include: Heather Raven, Marilyn Poitras, Larry Chartrand, John Borrows, Brad Enge, James Youngblood Henderson, Wendy Whitecloud, and Gordon Christy. I look forward to the contributions that these scholars, and emerging scholars may make to legal cultures. Exposure to more indigenous scholarly writings provides a wider basin of knowledge from which to understand the legal cultures of so many peoples.

[2] Robert Williams, Jr., "Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System" (1995) 2 Review of Constitution Studies 146 at 146 [hereinafter "Sovereignty, Racism, Human Rights"].

the diversity of indigenous perspectives, it has helped me to situate their scholarship around the colonial regime. Each indigenous scholar sees a different angle of the colonial regime and can speak from their position of experience. Indigenous scholars can respectively share how the same regime oppresses them and how they envision decolonization as part of self-determination. The colonial regime, however, must become de-centered. At this transitory standpoint, indigenous scholars, in my opinion, have a responsibility to uphold: not to be over-inclusive or essentialize the "indigenous." In other words, there is a point at which Ned'u'ten people can only speak for Ned'u'ten people, and no one else. There is a point at which I can only speak for myself. If this responsibility or standard amongst indigenous scholars is not respected, then the audience will read such self-determining strategies as belonging to a homogeneous, universalized or essentialized populace.[3]

The diversity in perspectives that indigenous scholars bring to western legal cultures is rooted in who they are as descendants of their ancestors. Ancestors who walk beside them today, who are the original inhabitants of their territories, and who through collective consciousness and memories guide indigenous peoples in all their relations in the present and for future generations. Such perspectives can also be representative of indigenous scholars' interaction with their peoples' past, present and future consciousness. These connections can be the heart of diversity that exists within indigenous perspectives. Indigenous scholars are careful to point out that their

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[3] In her piece, "Aboriginal Peoples and the *Charter*", Mary Ellen Turpel examines the reality that dominant legal culture maintains a monopoly over interpretation of human rights in Canada. By exploring the ideological context of how the *Charter* is interpreted, Turpel "calls into question the cultural authority of the *Canadian Charter or Rights and Freedoms*, and constitutional legal analysis , especially insofar as the *Charter* is applied to Aboriginal peoples. By cultural authority, I mean, in this context, the authority which one culture is seen to possess to create law and legal language to resolve disputes involving other cultures and the manner in which it explains (or fails to explain) and sustains its authority over different peoples." See Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-1990) 6:3 Can. Hum. Rts.Y.B. 3 at 4 [hereinafter "Aboriginal Peoples and the *Charter*"]. I would like to extend this exploration to the writings of indigenous scholars, in that no one scholar should assume 'cultural authority' over the interpretation of indigenous rights or the effects that such interpretations might create with respect to indigenous peoples.

individual perspectives contribute to a wider variety of perspectives held "amongst" their peoples.

A perspective represents one way of looking at the world. For example, in the context of establishing a new relationship with Canada, as a member of the Ned'u'ten, I have a vision about how to do so, what principles to base this relationship upon and how to maintain it. But my perspective is not the only one amongst my people. In this respect, I can only speak for myself and contribute to the creativity that my people could share with Canada in restructuring (or in my view dismantling) the current colonial relationship that "defines acceptable parameters"[4] for Ned'u'ten self-determination.

Through academia, indigenous scholars can share their perspectives on decolonization. At the same time, indigenous scholars can present perspectives that come not from their colonized status, but from *who* they are and where they come from. In this chapter, I first emphasize the difference between being Ned'u'ten and indigenous. Second, by canvassing the writings of various indigenous scholars, I highlight some of the strategies that indigenous scholars may use to bring their perspective to the DLC. Finally, I show that while some indigenous legal scholars may share strategies in decolonizing the colonial regime in their dialogues with the DLC, indigenous scholars must be careful to not represent all indigenous peoples as being homogeneous, or holding the same perspective, even if people in DLC have been conditioned to read and understand indigenous perspectives in this way. It is in this context that I bring my 'Ned'u'ten perspective' to the DLC.

**B. From Ned'u'ten to Indigenous...**

Each evening, my grandmother, tired and worn, retraced her steps

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[4] "Sovereignty, Racism, Human Rights", *supra* note 2 at 146.

home, laid aside her mask, and reentered herself.[5]

Peoples who originally inhabited their territories are known as indigenous.[6] These peoples have been illegitimately dispossessed of certain territories and personhood by colonial-settler cultures. Some non-indigenous people have been socially, legally and politically conditioned to translate "indigenous" to mean "aboriginal, Indian, or First Nations" people (in the Canadian context). Understanding the difference between these constructions of "indigenous" is necessary in order to understand the diverse range of indigenous perspectives. The usage of "indigenous" is in my opinion, temporary, and will dissolve proportionately with

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[5] C. I. Harris, "Whiteness as Property" (1993) 106:8 Harv. L.R. at 1758 [hereinafter "Whiteness as Property"].

[6] Indigenous peoples have the right to self-identify who they are. In international discourse on the rights of indigenous peoples, the following description is apt:

> As empire building and colonial settlement proceeded from the sixteenth century onward, those who already inhabited the encroached-upon lands and who were subjected to oppressive forces became known as indigenous, native, or aboriginal. Such designations have continued to apply to people by virtue of their place and condition within the life-altering human encounter set in motion by colonialism. Today, the term *indigenous* refers broadly to the living descendants of preinvasion inhabitants of lands now dominated by others. Indigenous peoples, nations, or communities are culturally distinctive groups that find themselves engulfed by settler societies born of the forces of empire and conquest. The diverse surviving Indian communities and nations of the Western Hemisphere, the Inuit and the Aleut of the Arctic, the Aborigines of Australia, the Maori of New Zealand, the tribal peoples of Asia, and other such groups are among those generally regarded as indigenous. They are *indigenous* because their ancestral roots are imbedded in the lands in which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living on the same lands or in close proximity. Furthermore, they are *peoples* to the extent they comprise distinct communities, tribes, or nations of their ancestral past.
> In the contemporary world, indigenous peoples characteristically exist under conditions of severe disadvantage relative to others within the states constructed around them. Historical phenomena grounded on racially discriminatory attitudes are not just blemishes of the past but rather translate into current inequities. Indigenous peoples have been deprived of vast landholdings and access to life-sustaining resources, and they have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined. In both industrial and less-developed countries in which indigenous people live, the indigenous sectors almost invariably are on the lowest rung of the socioeconomic ladder, and they exist at the margins of power.

See J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 3. For examples of other descriptions of indigenous peoples, see ILO Convention 169 *Concerning Indigenous and Tribal Peoples in Independent Countries*, June 27, 1989, International Labour Conference and U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add.4.

the level of self-determination achieved by peoples who now fit this description. For this reason, I use "indigenous" as a transitory description of peoples re-determining or dissolving their colonized identities in contemporary times. While my perspective can be labelled "indigenous", I prefer Ned'u'ten.

**1. My Ned'u'ten Mask**

I name myself - my people name me.

My people, the Ned'u'ten, have perspectives that are constituted by their relationship to the territories they have inhabited since time immemorial or more accurately since their creation story stipulates so. Territories belonging to the Ned'u'ten are located along Lake Babine in what is now northern British Columbia. The Ned'u'ten people order themselves according to a clan system and traditional governing system, the *bah'lats*, which colonial-settler populations have come to call the "potlatch." The *bah'lats* is structured procedurally so that there are five main stages to complete. First, the host clan must invite other clans to the *bah'lats* at least a month before the proposed date. Second, on the day of the *bah'lats*, there is a feast to feed the clans. Third, the business of the host clan will take place. For example, someone may be inheriting a name or paying a headstone or paying debts. Fourth, gifts are distributed by the host clan to the clans to show respect and appreciation to them for witnessing and contributing to the host's business. Fifth, the *bah'lats* is completed with final speeches and prayers by deneeza and dzakaza.

The Ned'u'ten speak through their language, crests, oral histories, ceremonies, songs, customs and protocols that have been passed down from generation to generation. The Ned'u'ten have a reciprocal relationship with the Creator in which they have the responsibility to care, nurture and maintain balance in the inter-connectedness of this world and on. I am a

subject of the Ned'u'ten. My perspective is shaped by my people's way of life as taught to me by my family, clan, and lineage of deneeza and dzakaza (hereditary chiefs), by the consciousness of my peoples' territories, my ancestors, and the role that I am learning to fulfill amongst my people as a dzakaza. It is also shaped by my contributions to the Ned'u'ten as well. My "Ned'u'ten mask", is alive and is carved by me so that I can connect to my ancestors and their knowledge and transmit this life force to the yet to arrive Ned'u'ten. My perspective speaks from this mask.

## 2. My Mask of Aboriginality

> You seek to "renew us; to remake us; to make us perfect,
> whole." Get away from my face. We are not
> half-human, in need of remodelling.[7]

Carved onto my Ned'u'ten perspective is the alien-constituted subject of the "Indian"[8] or "aboriginal".[9] The creation of this non-Ned'u'ten subject by colonial-settler populations was to eliminate or erase the legitimacy of the Ned'u'ten and their relationship to their territories. Colonial-settler populations could then acquire Ned'u'ten territories for commercial/imperial expansion, conversion to christianity and settlement into the so-called "New World." Manifestations of "the Indian or aboriginal subject" used by settlers to label my people include:

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[7] L. Maracle, *I Am Woman: A Native Perspective on Sociology and Feminism* (Vancouver: Press Gang Publishers, 1996) at 86.

[8] See *Constitution Act,1867,* [(U.K.), 30 & 31 Vict., c.3, reprinted in R.S.C. 1985, App. II, No. 5,] s. 91(24) which is the federal head of constitutional power that gives the federal government the sole jurisdiction to legislate in relation to "Indians, and Lands reserved for the Indians." The Ned'u'ten were now constituted as Indians under the *Indian Act*, R.S.C. 1985, c. I-5.

[9] By 1982, the Canadian constitution was repatriated and amended to now include constitutional provisions that expressly relate to "aboriginal peoples" and their existing rights. In addition to being categorized as Indians, the Ned'u'ten were also constituted by Canada as "aboriginal" with "aboriginal rights", and possible future "treaty rights". See Part II of the *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11,] and the *Canadian Charter of Rights and Freedoms*, s. 25, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 which is the non-derogation provision for aboriginal rights or freedoms.

pagans, heathens, infidels, barbarians, savages, Natives, and First Nations. The Ned'u'ten became aliens in their homelands when the Crown claimed dominion therein. In other words, the Ned'u'ten did not become British subjects upon sovereignty's assertion.[10]

The involuntary enforcement of this false identity on my people has impacted upon Ned'u'ten worldviews. By denying the Ned'u'ten subject status, colonial-settler populations have been able to re-constitute my peoples' territories as Indian reserve lands and Crown lands. By denying the Ned'u'ten' existence, the foreign state of Britain and later the settler state of Canada created its own identity on the backs of the Ned'u'ten; it illegitimately acquire the territories of the Ned'u'ten for the purposes of granting this territory to colonial-settler-Canadian subjects while reserving some to the Ned'u'ten (read "Indians"). By denying the Ned'u'tens' existence, and not recognizing the capacity of the Ned'u'ten to maintain the constitution of its own subjects, Canada has been able to rely on doctrines of dispossessions[11] to shield challenges against the legitimacy of the Canadian state as represented through its governments for settler populations. Although my people never consented to such dispossessions, they have been dispossessed. The Ned'u'ten have been treated by the settler society as "Indians"or "aboriginals" and not as "Ned'u'ten". Ned'u'ten territories have been treated as reserve lands and now aboriginal title lands.[12]

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[10] Kent McNeil rejects the contention that "indigenous peoples were aliens, and therefore disqualified by the common law from holding land within the Crown's dominions." Rather he has argued that indigenous peoples have aboriginal title rights recognizable by the common law. See K. McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 208.

[11] Doctrines of dispossession include but are not limited to: *terra nullius*, discovery (occupation), conquest (through use of force or treaty), cultural superiority rationalizations, prescription and their modern masks.

[12] In *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010; 153 D.L.R. (4th) 193 [hereinafter *Delgamuukw* cited to S.C.R.], it was held that aboriginal title to lands, including reserve lands, if proven by the aboriginal claimant, exist at commonlaw and are constitutionally protected by s.35(1) of the *Constitution Act, 1982*. This is how the settler state colonizes Ned'u'ten territories today as well as other peoples that have occupied and possessed their territories since time immemorial. The colonizers' laws and policies categorize all these peoples

As a member of the Ned'u'ten people, I am trying to carve out legal fictions such as the "Indian or aboriginal" subject used by Canada to carve my inherent existence and redefine my responsibilities (to my people and my territory) in maintaining that true existence. At the same time, I am attempting to carve out spaces that break apart the categories of identity and history associated with racism and western domination,[13] the same racializations that meld my mask of aboriginality and my Ned'u'ten mask together. At a time when non-Ned'u'ten people are trying to understand the injustices and violence inflicted upon my people and possibly remedy this through a restructured relationship, it is imperative to ask: which mask you see: my Ned'u'ten mask or my aboriginal mask? Do you know the difference?

The Ned'u'ten are also trying to understand how historical injustices can be remedied today by Canada. The Ned'u'ten are going through the growing pains of re-building their nation and have yet to decisively choose how they intend to order themselves today. In trying to understand these questions and resolve the confusion that exists, there are many perspectives, discourses and voices to look upon for insight and guidance. The perspective I convey and draw from, comes from both my identity as a Ned'u'ten dzakaza and an indigenous person that continues to be colonized by the Canadian state. The perspective I voice educates members of my own people of the difference between creating a relationship with Canada as Ned'u'ten (a nation-to-nation relationship based on co-existence) or as a First Nation, redefined by Canada (a nation-within a-nation relationship based on colonial-settler conquest).

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into one group: aboriginal peoples. For example, while the Gitxan and Wet'suwet'en people have brought their own specific legal actions in the colonizer's courts regarding aboriginal title and self-government, the decision handed down by the court affects all peoples that fit the definition of aboriginal. This includes the Ned'u'ten who have never consented to the colonizer's legitimacy over Ned'u'ten people and Ned'u'ten territories and who have yet to create a restructured relationship with Canada.

[13] G. Prakash, "After Colonialism" in G. Prakash, ed., *After Colonialism: Imperial Histories and Postcolonial Displacements* (Princeton: Princeton University Press, 1995) at 12.

**C. From Indigenous to...**

> We've opened the door and we all realize that something has to take place, but I don't think any of us has gone through the door. We're still looking out. We are still scared what will happen if we go through the door. We are fearful of all the labels and brands that might be put upon us if we do go through that door... So why haven't we gone through the door? I think there are two reasons: fear and vested interest in the existing system...we are standing in the doorway. The door is open..."Let's do it." Let's all go through.[14]

Indigenous scholars, in all disciplines, have to grapple with how to write about indigenous issues. Indigenous scholars can show how dominant disciplines fail to respect differences between indigenous peoples and dominant society, as well as differences amongst indigenous peoples. Mary Ellen Turpel, highlights this problem:

> I would like to raise some specific areas of concern about the institutional and imaginative framework of the Canadian *Charter vis-a-vis* Aboriginal peoples in order to call into question what are arguably general epistemological problems with legal knowledge, reasoning and decision-making. For example, I question the extent to which the dominant legal culture has taken account of differences *between* itself and Aboriginal peoples, and differences *within* the plethora of Aboriginal cultures which exist, precariously, alongside Canadian society.[15]

I question whether the dominant legal culture can take account of such differences. It would basically cause an adminstrative nightmare for Canada to do so. Further, liberal notions of treating each indigenous people with equality would be raised to defend the position that indigenous peoples are *all* "aboriginal". Still some indigenous scholars go under the "difference discourse" and name the racist underpinnings :

> the racist focuses on a perceived difference between himself or herself and the intended victim of racial discrimination. The racist perceives this difference as a deficiency: "they" do not use the land as we do and are therefore less "efficient;" or inferior." On the basis of this negatively-perceived difference, the racist then legislates and enforces a regime of privileges and power discriminating against his or her victim...And so, through the thin veneer of law and the assumed rights of sovereignty and jurisdiction, the racist who has

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[14] L. Little Bear, "Part II: What's Einstein Got To Do With It?" in R. Gosse, J. Henderson, & R. Carter, eds., *Continuing Poundmaker & Riel's Quest: Presentations Made At a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) at 75-76 [hereinafter "What's Eistein Got To Do With It"].

[15] "Aboriginal Peoples and the *Charter*", *supra* note 3 at 6.

> acquired and continues to hold power over his or her victim justifies what otherwise might be regarded as inhumane and irrational treatment of another human being through his or her racism.[16]

To understand how the "Indian/aboriginal subject" came to be legitimated by non-indigenous societies, indigenous scholars may draw upon legal theories that now exist in western and non-western canons to help explain the difference between an aboriginal and a Ned'u'ten or Gitxan, etc. Such theories may assist in explaining how aboriginal peoples came to be colonized.

Indigenous scholars may draw upon teachings, approaches, strategies, methodologies or protocols of their respective peoples to illustrate their perspective. Some scholars may accept *how* the colonizer has constructed the identity of the 'aboriginal people' and may not take issue[17] with establishing a relationship with the settler state based on this identity. While I take issue with such perspectives, I acknowledge that indigenous peoples have been changed as a result of being dispossessed and colonized; I also acknowledge that some indigenous peoples aspire to change their original governing systems to reflect some new formation of order, even if it reflects western notions of democracy or ideologies; I acknowledge that treaty relationships (yet to fully be implemented) already exist between indigenous peoples and colonizing states in some parts of North America, and for these reasons, indigenous scholars that attempt to reach greater cultural awareness between the two worlds by incorporating their systems and ways of life into the

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[16] "Sovereignty, Racism, Human Rights", *supra* note 2 at 173. See also "Whiteness as Property", *supra* note 5 at 1759 where Harris states:

> The racialization of identity and the racial subordination of Blacks and Native Americans provided the ideological basis for slavery and conquest. Although the systems of oppression of Blacks and Native Americans differed in form - the former involving seizure and appropriation of labor, the latter entailing the seizure and appropriation of land - undergriding both was a racialized conception of property implemented by force and ratified by law.

[17] I do recognize that some scholars may not have a choice due to the genocidal effects of colonial practices that have erased a large portion of a people's collective memory. At the same time, some scholars have strategically used their colonized identity to defend against attitudes lodged by the ruling elite of their people who prefer to profit from neo-colonialism .

dominant culture have legitimate perspectives. Such perspectives contribute to the representation of the diverse voices of indigenous peoples worldwide and should be heard with the same respect and understanding as the perspective I bring as a Ned'u'ten who chooses to speak from my "Ned'u'ten mask", and not through the "mask of aboriginality".

The common thread indigenous scholars share is their efforts to educate others about the colonial relationship that has existed between indigenous peoples and non-indigenous peoples for centuries. This is an enormous and weighty responsibility. As indigenous scholarly writings continue to be carved in tandem with political activism geared towards the liberation of indigenous peoples, common goals can be enhanced, contextualized and realized. Indigenous scholars can also *reassess* academic literature on indigenous peoples that exclude indigenous perspectives:

> In the past, research concerning Aboriginal peoples has usually been initiated outside the Aboriginal community and carried out by non-Aboriginal personnel. Aboriginal people have had almost no opportunity to correct misinformation or challenge ethnocentric and racist interpretations. Consequently, the existing body of research, which normally provides a reference point for new research, must be open to reassessment.[18]

Attention to indigenous scholarly writings provides the DLC with a wider basin of knowledge to *critically analyze* other academic writings that tend to downplay, deflate, restrict or interpret rights and aspirations of Indigenous peoples, especially, in a less favourable manner; with different standards of objectivity; or in a homogeneous manner:

> Serious problems can develop in regard to issues pertaining to aboriginal people should the academic legal literature that is being generated virtually ignore, without explanation, certain essential aspects. These aspects include: i) the relevant writings of aboriginal people; ii) the relevant writings of non-aboriginal people that reinforce the validity or legitimacy of Aboriginal positions and perspectives; or iii) an author's

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[18] Royal Commission on Aboriginal Peoples, *Ethical Guidelines for Research* (Ottawa:-n.d.) at 2 cited in Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska: Eeyou Astchee, 1995) at 412.

> own previous relevant analyses that had reached conclusions favourable to aboriginal peoples.[19]

Reference to indigenous scholarly writings also exposes the DLC to a greater basin of knowledge and thereby creating affirmative action in DLC:

> Affirmative action, a concept we have accepted in respect to bringing new colours and shapes of human bodies into law schools, should also apply to our primary function as scholars: the exploration of human knowledge. The new individuals we are bringing to the law schools also bring new ideas about law.[20]

It is vital to understand the frameworks that indigenous scholars employ to shape their perspectives. By considering some of the following carving tools used in indigenous scholarship, it has helped me to respect their writings.

**Some Carving tools of indigenous legal perspectives**

**1. Historical**

> ...to revisit the historical record, to push at the edges, to unsettle the calmness with which colonial categories and knowledges were instituted as the facts of history. This is to shake colonialism loose from the stillness of the past.[21]

In trying to map out the terrain of the colonial regime, indigenous scholars may take a historical approach to show how the foundations of this regime have been landscaped by

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[19] *Ibid.* at 411-419.

[20] M. Matsuda, "Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-up Ground" (1998), II Harv. Women's L. J. 1 at 2. Matsuda explains her rationale for citing affirmative action scholarly writings:

> When outsiders' perspectives are ignored in legal scholarship, not only do we lose important ideas and insights, but we also fail in our most traditional roles as educators. We fail to prepare future practitioners for effective advocacy and policy formation in a world populated by women and men of differing points of view...Citing outsider scholarship is a political act...It challenges other readers to expand their sources and prevents the ghettoization of outsider writing. Outsiders' scholarship is often front-line scholarship...We are intellectual workers. Our shared words can end apartheid on our bookshelves and can help to banish it from our lives.

*Ibid.* at 4 -5, 16. See also M. Matsuda, "Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction" (1991)100 Yale L.J. 1329.

[21] Prakash, *supra* note 13 at 6.

dominant cultures.[22] Indigenous voices have been historically silenced. Indigenous scholars who take a historical approach are re-writing history to remedy this deliberate exclusion. The historical analysis an indigenous scholar brings to their perspective can identify the seeds, roots and origins of colonialism. It can also bring balance to the subjective version of ethnocentric and racist history that the dominant culture claims to objectify. Historical analysis can provide context, understanding and possible solutions or alternative models to dismantling such relationships at a heterogeneous level. Realigning the colonial record permits indigenous historians to use history as a tool to "fasten on to the tensions, anxieties and intermixtures in colonial discourses" and "split apart" illegitimate foundations that continue to support the present manifestations of the colonial regime.[23]

As 'historians of decolonization',[24] indigenous scholars who take a historical approach can share their peoples stories in their own cultural medium and translate to different legal cultures how their peoples' understood contact relations with immigrant populations.[25] In

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[22] Injustices are not just contemporary or isolated but rather historic, systemic and institutionalized.

[23] Prakash, *supra* note 13 at 12.

[24] See R. Williams Jr., *Linking Arms Together* (New York: Oxford University Press, 1997) at 12 and R. Williams Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1989). Professor Williams, a legal historian, has through his historical approach, provided a thorough and comprehensive analysis of the colonial regime in North America. In doing so, Williams has been able to balance the one-sided version of history as recorded in dominant legal cultures and challenge, debunk or reject myths or legal fictions constructed by the colonizer to legitimate its dispossession of the original peoples in North America. By historically analyzing treaty processes, negotiations and agreements reached between indigenous peoples in North American and Europeans from the 1600-1800's, Williams exposes the reader to lessons that we can learn from the past to make healthy, peaceful and multicultural relations today between peoples.

[25] John Borrows has taken a historical approach in his writings to show his readers that understanding the historical relationship of Canada with his people, the Chippewas of Nawash, will help facilitate the understanding of this relationship in contemporary times and particularly in the context of self-government and sovereignty:

> ...I am proposing a structure around which other Native people can present their experiences to illustrate the historic continuity of self-definition and self-government that has existed since contact within First Nations all across Canada. The structure that I suggest consists of Native people recounting relevant incidents of contact with settler society from the Aboriginal perspective and demonstrating how, in the face of intrusions, their particular society dealt with encroachments on their traditional ways while preserving a measure of their self-government.

contemporary times, our histories can be our greatest teachers. Other scholars may find it difficult or painful to use a historical approach and will therefore prefer to write on the impacts of colonialism on indigenous peoples in contemporary society.[26] Regardless of the standpoint chosen, indigenous peoples' experience as being colonized is not linear, the past is not simply the past,[27] and for this reason indigenous shcolars will use a historical approach in their analysis of indigenous issues.

## 2. Language and Langscape

the language of freedom...how will we speak it?

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> Events that provide a common framework of historical experience which can bring us together include: the wars involving European powers fighting on our soil; the effect of Christianity; the preservation of culture through institutions such as indigenous health care, language, and education; the signing of treaties; and the imposition of the *Indian Act*.

J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L.J. 1 at 9; See also "Constitutional Law From a First Nation Perspective: Self-government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 [hereinafter "Constiutional Law From A First Nation Perspective"]; "Negotiating Treaties and Land Claims: The Impact of Diversity within First Nations Property Interests" (1992) 12 Windsor Y.B. Access Just. 179 [hereinafter "Negotiating Treaties and Land Claims"].

[26] Mary Ellen Turpel writes about the colonial relationship from its contemporary setting. See "Aboriginal Peoples and the *Charter*", *supra* note 3; M.E. Turpel, See also "Home/Land" [1991] 10 Can. J. of Fam. L. 17; "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L. J. 579; "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1991) 6 C.J.W.L. 174; "On the Question of Adapting the Canadian-Criminal Justice System of Aboriginal People: Don't Fence Me In" in *Aboriginal Peoples and the Justice System* (Ottawa: Supply and Services, 1993) at 359. In "Reflections on Thinking Concretely About Criminal Justice Reform" in R. Gosse, J. Henderson & R. Carter, *supra* note 14 at 208, Turpel states:

> We cannot erase the history of colonialism, but we must, as an imperative, undo it in a contemporary context. The challenge of this process is great because we are not conversing outside the colonial context. We are aware that it is part of what we say and do, and that we are attempting to resist and dismantle it.

Indigenous scholars that have taken a historical approach to identifying the colonizer/colonized relationship between indigenous peoples and settler states include: J. Henderson, "Mikmaw Tenure in Atlantic Canada" (1996) Dal. L. J. 196 [hereinafter "Mikmaw Tenure"]; "First Nations Legal Inheritances in Canada" (1995) Man. L.J. 1; "The Doctrine of Aboriginal Rights in Western Legal Tradition" in M. Boldt and J. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 185; H. Adams, *Prison of Grass: Canada from a Native Point of View* (Saskatoon: Fifth House Publishers, 1989); *Tortured People: The Politics of Colonization* (Penticton: Theytus Books Ltd., 1995) [hereinafter *A Tortured People*]; G. Alfred, *Heeding the Voices of Our Ancestors* (Toronto: Oxford University Press, 1995).

[27] RCAP, *The Familiar Face of Colonial Oppression: An Examination of Canadian Law and Judicial Decision Making* (Research Report) by P. Monture-Angus (Ottawa: Supply and Services Canada, 1994) at chapter one [hereinafter *The Familiar Face of Colonial Oppression*].

Indigenous scholars must be skilled to communicate their perspectives in the language of the DLC. Misunderstandings, confusion and serious communication problems may occur when dominant languages are not carefully scrutinized. To use the DLC's language as the sole source of communication in all aspects of relationships between indigenous peoples and colonial-settler populations does not prevent the occurrence of such problems. To highlight three examples: common law property regimes have been incapable of understanding indigenous land tenure systems and do not capture the essence of how indigenous peoples understand their relationships and responsibilities to their territories;[28] rights discourse does not necessarily translate into responsibilities that indigenous peoples have to their people or their territories;[29] disputes over language used in historical and modern treaties in North America stem from miscommunication and sole reliance on the written record of the colonizer.[30] Indigenous scholars must be careful to

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[28] Henderson takes note of how limiting the colonial language of property really is and that in no way could settlers capture the meaning of indigenous peoples understanding of their territories through the colonizer's language:

> Any construction of Mikmaq tenure in British law must confront the unique predicament of the colonial context - the langscape of property. Property becomes landscape when it is seen, and langscape when it reveals human attitudes and perceptions in languages or *paysage interieur* (the landscape of mind). This constant tension between landscape and langscape has dominated Canadian writing and judicial decisions.

"Mikmaw Tenure in Atlantic Canada", *supra* note 26 at 202. Borrows takes a different approach to the English usage of the term "property" in his scholarly writing on land allocation and use in negotiating treaties:

> While the use of the word "property" is a common law creation that contains many notions that are antithetical to First Nation's understanding of land use, I will nonetheless use this word to describe Native concepts of land title. This is done in order to heighten the possibility that one day common law courts will recognize aboriginal views on land as possessing parallel status with "western" ideas about property, and thus provide a higher degree of protection for First Nation's land than is currently the case.

"Negotiating Treaties and Land Claims", *supra* note 25 at 180, n. 3.

[29] See "Aboriginal Peoples and the *Charter*", *supra* note 3 at 30-45.

[30] Canadian cases on treaty interpretations include *R.* v. *Syliboy*, [1929] 1 D.L.R. 307 (N.S. Co. Ct.; *R.*v.*Wesley*, [1932] 2 W.W.R. 337; *Francis* v. *R.*, [1956] S.C.R. 618; *R.* v. *White and Bob* (1964), 50 D.L.R. (2d) 613; *R.* v. *Taylor and Williams* (1981), 34 O.R. (2d) 360 (Ont. C.A.); *Nowegijick* v. *R.*, [1983] 1 S.C.R. 29; *R.* v. *Bartleman* (1984), 12 D.L.R. (4th) 73 (B.C.C.A.); *Simon* v. *R.*, [1985] 2 S.C.R. 387; *R.* v. *Horse*, [1988] 1 S.C.R. 187; *R.* v. *Sioui*, [1990] 1 S.C.R. 1025; *R.* v. *Horseman*, [1990] 1 S.C.R. 901; and *R.* v. *Badger*, [1996] 1 S.C.R. 771.

not perpetuate the colonial framework through the DLC's language.[31]

Indigenous scholars have used the colonizer's language successfully and creatively to construct dialogues. Language is the key to understanding who indigenous peoples really are and their relationship to their territories, laws, theories, customs, and ceremonies. Language can be a diplomatic transmitter for the making or maintenance of peace with other peoples. The language characterizing any new relationship with indigenous peoples will be a new language, as it will contain both the worldviews of the colonizer and colonized. How indigenous peoples communicate with the DLC will create a new language,[32] or what I see to be a fuller understanding of how knowledge is transmitted amongst peoples.

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[31] See P. Monture-Angus, *Thunder in My Soul* (Halifax: Fernwood Publishing, 1995) at 221 [hereinafter *Thunder in My Soul*] where she highlights this potential problem in structural changes to mainstream institutions of dominant society:

> ...the result of this review must be the creation of a detailed understanding of our oppression and the oppression of others. We must understand exactly how oppressive relations operate and are perpetuated. Language is one such condition.
>
> Language is the mechanism by which we communicate what knowledge is. Language is a powerful tool which reinforces mainstream cultural meanings and insights. Language invisibly incorporates culture into our communications...As we develop a knowledge of justice, we must also illuminate the many other manifest ways in which gender, racial and cultural "otherness" is reinforced.

[32] Borrows offers an explanation for the necessity of this new language he describes as "perspicuous contrast" or "a vocabulary of comparison":

> Introducing a First Nations perspective into legal narrative is a two step process. First, I write from inside the galaxy of knowledge learned through my experiences as a First Nations person. However, once I have so written, I must then compare and contrast my self understanding with other voices from different spaces. This process has been referred to as developing a language of perspicuous contrast or, alternatively, to constructing a vocabulary of comparison. In generating this new language of vocabulary, one neither speaks fully in the language of the oppressed. The vocabulary of comparison and contrast incorporates perspectives from both cultures and requires that I question my own perspective while simultaneously challenging the other. This distinctions revealed in this process underscore and accentuate where confusion, misinformation or self-contradictions exist in our shared universe.
>
> A blending and mingling of perceptions will produce a language which will neither be fully Native, nor will it be entirely "western." The testing of each perspective against the other creates a new language because it allows for the critique and incorporation of conceptions from diverse cultural understandings. This new language has the potential to transform traditional legal doctrine.

"Constitutional Law From a First Nation Perspective", *supra* note 25 at 6.

## 3. Stories and the Oral Tradition Framework

when the first snow falls...stories fill our house... til' the ice melts

The art of story-telling is indeed complex, and not a medium that can be used gracefully by everyone.[33] A skilled storyteller is a master of the language and of the history of his or her people.[34] A skilled story-teller is able to bring stories to life in the listener's mind, heart and spirit, as if the listener is really there. At the same time, oral traditions keep ancestors peoples alive when passed on to a person that has observed and listened appropriately to the story-teller. This is a gift. Stories have the effect of saving peoples lives as well as healing and nurturing them. Stories are used to instill proper behaviour and correct improper behaviours. Stories as told through oral tradition frameworks contain the histories in many indigenous cultures and embody the legal customs and laws of a people and keep them alive. Such stories are not told in some hypothetical abstract but are based on experiential events[35] that have transcended

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[33] Oral traditions are usually held by designated persons amongst indigenous cultures. Such people are responsible for carrying these traditions to the people and recounting them when appropriately asked by the people. As it takes a lifetime to learn the histories of peoples through this medium, not to mention the required protocols for accessing this information, elders' recounting of the oral traditions are seen as most accurate and reliable. The Ned'u'ten oral traditions are the primary source of knowledge for the people and are communicated to the people by deneeza and dzakaza and elders who have the authority to interpret laws and customs, and recount events from the peoples' collective memories. Stories are only told at certain times of the year. Oral traditions are made accurate through constant verification, assessment, debate, contestion. Oral traditions receive legal sanction in the *bah'lats.*

[34] Sharon Venne discusses the oral basis for interpreting and understanding Treaty 6 and the negotiations that led to Treaty 6 evidenced in Cree oral traditions. Venne transmits this information by recounting the collective memory of her elders in the form of story-telling. See S. Venne, "Understanding Treaty 6: An Indigenous Perspective" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) 173 at 174 [herinafter "Understanding Treaty 6"].

[35] Patricia Monture-Angus, in the writings I have read to date, uses a first person singular voice in her style of writing to share her experiences in legal culture:

> Aboriginal history is oral history. It is probably fortunate for Aboriginal people today that so many of our histories are oral histories. Information that was kept in peoples' heads was not available to Europeans, could not be changed and molded into pictures of "savagery" and "paganism." The tradition of oral history as a method of sharing the lessons of life with children and young people also had the advantage that the Elders told us stories. They did not tell us what to do or how to do it or figure out the world for us - they told us a story about their experience, about their life or their grandfather's or grandmother's or auntie's or uncle's life. It is in this manner that Indian people are taught independence as well as respect

generations and generations of indigenous peoples. Stories are inter-related or connected.[36] Stories are the life line of a people and keep the people connected to their ancestors, future relations and their respected territories.

While stories can provide narratives that cannot be controlled by the DLC upon initial transmission,[37] there is still concern for introducing them into a written environment that may not be capable of appreciating the life teachings therein. In contemporary times, there is debate about whether to codify oral traditions in writing and within different legal cultures. Oral traditions must be treated with respect upon reception. Keepers of oral traditions may not be able control how the medium of writing may impact the transmission of knowledge to the listener/now reader and whether the receiver of this knowledge has properly understood the story. The medium of writing has the consequential effect of decontextualizing the story as well as deflating the ambiance and charisma of a good story-teller's presentation. The medium of

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because you have to do your own figuring for yourself.
*Thunder in My Soul, supra* note 31 at 1.

[36] Borrows emphasizes the intersectionality of stories in his peoples' oral traditions:

> However, 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 correlates with other stories. Therefore, a full understanding of First Nations law will only occur when people are more familiar with the myriad stories of a particular culture and the surrounding interpretations given to them by their people.

J. Borrows, " Living Between Water & Rocks: First Nations, Environmental Planning & Democracy" (1997) 47 U.T.L.J. 417 [hereinafter "Living Between Water & Rocks"]; See also "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L. J. 629 [hereinafter "With or Without You"]; "The Trickster: Integral to a Distinctive Culture" (1997) 8 Constitutional Forum 29; "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997) 22 Am. Ind.L.Rev. 37. Sharon Venne also points out that amongst the Cree, various portions of a story are held by different elders so that the collective memory of a story is not just accessible in one elder's recounting of the oral tradition:

> No one Elder knows the complete story. The information is spread among a wide group of people for a variety of reasons...So stories are spread among the people, and only through repeated and continuous contact with Indigenous communities can the complete stories be known...If one Elder is changing their part of the story, then the parts held by other Elders will not fit together.

"Understanding Treaty 6" in Asch, *supra* note 34 at 176.

[37] R. Williams, Jr., "Vampires Anonymous and Critical Race Practice" (1997) 95 Mich. L. Rev. 741 [hereinafter "Vampires Anonymous"].

writing does not have the patience of complexity and attention to detail required in oral traditions.[38] Indigenous scholars, when sharing oral traditions in academia, must ensure that the message of the story is not simplified to one isolated text. Nonetheless, oral tradition frameworks provide a conduit to the value and principle systems of many indigenous peoples. Just as some indigenous peoples shared their territories with colonial-settler populations, some oral traditions will be shared in mediums such as writing to transmit knowledge of the intricate legal cultures of diverse indigenous peoples.

**4. Subjectivity**

My voice rises up... burning your heel.

The DLC purportedly rationalizes the law in an "objective" manner. Indigenous scholars who write from the margins of DLC may choose not to conform to such conveniently promoted objective standards when writing about how the DLC treats indigenous peoples. What indigenous perspectives achieve is debunking the myth that the dominant legal culture is objective (procedurally and substantively). By drawing out the subjective face of the DLC, indigenous scholars are able to demonstrate racialized differences[39] and/or cultural differences[40]

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[38] Venne states that "attention to detail indicates the memory is accurate". "Understanding Treaty 6" in Asch, *supra* note 34 at 176.

[39] Redefining racism as a social construction of difference rather than a biological difference as legitimated by science, has been the work of many critical race theorists and critical race practitioners. For understanding the problemitization of race and racism see F. Henry, et al., eds., " 'Terminology', and the forms of Racism," in *The Colour of Democracy: Racism in Canadian Society* (Toronto: Harcourt, Brace & Co., 1995) at 44-49. See also P. Li and B. S. Bolaria, "Chapter 1: Racism and Racism," in *Racial Oppression in Canada* (Toronto: Garamond Press, 1988) at 15 where race and racism are distinguished:

> It should be clear by now that skin colour does not provide scientific grounds for classifying population groups. There is no empirical basis whatsoever for the idea that skin colour is a more salient physical feature than eye colour, or hair colour, or physical height in categorizing people. The social significance of skin colour is in itself an indication of a racially stratified society wherein skin colour assumes a social importance beyond what biological evidence warrants. As Wilson succinctly puts it: "it is only when social and cultural attributes are associated with physical features that the concept racial and hence that of racial groups takes on special significance" (Wilson, 1973:6). The study of race as a social category is inevitably a study of the social process whereby the unequal relationships between the dominant and subordinate groups are defined and maintained on racial grounds.

between the DLC and indigenous legal cultures. By challenging its objectivity and more specifically its culturally hegemonic roots, indigenous scholars can bring out the built-in limitations of the DLC's ability to foster new relationships with indigenous peoples that recognize and respect the co-existence of two legal cultures. Sensitizing the DLC legal framework requires subjective strategies on the part of indigenous scholars.

Indigenous scholars that bring their perspectives to the DLC face potential criticisms such as: not being objective; being too biased; revisionist; polemic; not scholarly in their writings; and not capable of going beyond foregone conclusions. Monture-Angus has written extensively on the premises of such complaints:

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Dara Culhane describes racialization as an "ideological process whereby biological, genetic, or phenotypical characteristics are employed to classify categories of people. The most common example of the historically and socially constructed nature of racial categories is illustrated by the varying ways Jews have been classified throughout European history, where they have sometimes and in some places been classified as a distinct "race" of people, and at other times and in other places, not." D. Culhane, *Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talonbooks, 1998) at 46, n. 8.

[40] See "Aboriginal Peoples and the *Charter*", *supra* note 3 at 4 where Mary Ellen Turpel prefers cultural differences over racial differences:

> I intentionally use the term 'culture' and 'cultural difference' instead of 'race' or 'racial difference' because I view this as more accurate and more expansive. The terms 'race' or 'racial differences' are too readily equated with 'colour' or visible biological differences amongst peoples; whereas cultural differences should be understood more as manifestations of differing human (collective) imaginations, of different ways of knowing. The expression 'culture difference' conjures up more than differences of appearance (colour). It allows us to consider profound differences in understandings of social and political life.

The 'cultural difference approach' has been critiqued by Sherene Razack. In the context of education, this approach reinforces an important epistemological cornerstone of imperialism:

> What makes the cultural differences approach so inadequate in various pedagogical moments is not so much that it is wrong, for people in reality are diverse and do have culturally specific practices that must be taken into account, but that its emphasis on cultural diversity too often descends, in a multicultural spiral, to a superficial reading of differences that makes power relations invisible and keeps dominant cultural norms in place. The strategy becomes inclusion and all too often what Chandra Mohanty has described as 'a harmonious empty pluralism.'...These models suggest that with a little practice and the right information, we can all be innocent subjects, standing outside hierarchical social relations, who are not accountable for the past or implicated in the present. It is not our ableism, racism, sexism, or heterosexism that gets in the way of communicating across differences, but *their* disability, *their* culture, *their* biology, or *their* lifestyle. In sum, the cultural differences approach reinforces an important epistemological cornerstone of imperialism: the colonized possess a series of knowable characteristics and can be studied, known, and managed accordingly by the colonizers whose own complicity remains masked.

S. Razack, *Looking White People in the Eye* (Toronto: Univeristy of Toronto Press, 1998) at 9-10.

> A student in my public law class complained to me that he did not understand what Aboriginal rights had to do with public law. Nor did the student think the topic was being portrayed objectively even though we were reading Canadian court decisions and not the writings of First Nations Peoples. I have heard that complaint many times. What it fails to acknowledge is the fact that Canadian court decisions do reflect a specific culture, even if that culture is not named. As I am willing to share my perspective and acknowledge that it is an Aboriginal perspective, I am criticized for my failure to be objective. I see my willingness to share my perspectives and its biases as an effort that is honest. I was raised to be honest and not objective. The criticism is a result of a failure to examine the contours of academic and legal bias.[41]

I would also add that such criticism is a result of the failure of the DLC to acknowledge that the oppression that indigenous scholars write and speak about can be objectively assessed. Certainly when indigenous scholars share their stories of oppression with each other, it is validated. However, when indigenous scholars share their angle on colonization with western academia and how it impacts them, their stories and histories risk being dismissed.[42]

Monture-Angus also points out that in the dominant culture, academic understanding is about sanctioning knowledge only through assertions of objectivity. Given her cultural experience as a Mohawk woman, knowledge is understood as not separating feelings from thought, the heart from the mind.[43] In court systems, this separation is explicit when information

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[41] *Thunder in My Soul*, *supra* note 31 at 37.

[42] Howard Adams, Metis, offers his frustration when indigenous scholars who reclaim their history through their writings are dismissed by academia:

> As an aboriginal historian, I am deeply concerned by the incredible lack of authentic Aboriginal historical writing...Our histories are dismissed or marginalized by not including them in most bibliographies and reviews...Of course white historians offer several excuses for dismissing Aboriginals' work. The most common argument is that Aboriginal writing lacks documentation, authenticity, or methodology, and therefore, credibility. State functionaries also accuse Aboriginal writers of sloganeering of radical political dogma. Although they will not admit it, the true reason is that Aboriginal writers, free to write from their own consciousness and perspective, will challenge and eventually succeed in sidelining eurocentricism.

*A Tortured People*, *supra* note 26 at 34.

[43] Monture-Angus states that aboriginal peoples, and particularly women, must take the responsibility of putting the heart back into the law:

> ...read some court judgments and hear them talk about impartiality and objectivity. It is not about your head. Where the answer lives is in your heart. Law is not about how you feel. And where is fairness? What is fairness? Fairness requires feeling. When you see something and it is unfair you get angry. It is in your heart, the standard of fairness. If fairness is in your heart and the law is not about feeling, then how are we going to get to fairness? How are we going to get to justice? Ask yourself who wrote down the law. It was men who wrote down that law. They took women out of it. Our responsibility of this land

is brought before the courts in an objective and neutral mind set, excluding the emotions that are layered within indigenous peoples' claims rooted in colonial oppression.[44] Monture-Angus's experience in academia has been one of negotiating contradictions whereby on the one hand, indigenous perspectives are sought out by the DLC but only in accordance with that culture's standards for locating truth and knowledge:

> Individuals of Aboriginal ancestry who try to walk in both the academic world and the Aboriginal world are confronted by the profound cultural differences in the ways in which truth, knowledge and wisdom are constructed. The instructions we receive through institutionalized education indicate that we must locate truth and knowledge outside of ourselves. Introspection is not a proper research method. It is improper to footnote the knowledge that my grandmother told me. Yet, more and more frequently, Aboriginal academics are asked to explain our unique cultural ways of being. However, it is expected that the objective style of academic writing ought not to be changed to accommodate the new understandings that Aboriginal academics bring to various disciplines. These two understandings of truth, are perhaps, diametrically opposed. Yet these two ways of knowing co-exist within my experience. My experience is one of negotiating contradictions.[45]

In the context of colonization, both the colonizer and the colonized have to decolonize in tandem before the colonial regime can truly be de-centered or dismantled and different legal cultures can co-exist. This requires the voice of the colonizer to be subjective about their relationship with indigenous peoples, to be complicit and accountable for creating masks of oppression that continue to suffocate indigenous peoples. The standards of the DLC to assess indigenous academic writings will continue to be challenged by indigenous peoples that take the

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> is to see that they put the heart back in the law so that it starts to work for all of us. Then our relationship can start to be about fairness - about justice.

*Thunder in My Soul*, *supra* note 31 at 149.

[44] *Ibid.* at 133.

[45] *Ibid.* at 218-219. Some indigenous scholars may not want to negotiate contradictions in the dominant legal culture but rather eliminate them. Again, Razack has helped me to articulate this difference:

> Educators and legal practitioners need only learn to navigate their way through these differences, differences viewed as unchanging essences, innate characteristics- the knowledge of which enables us to predict behaviour...Encounters between dominant and subordinate groups cannot be 'managed' simply as pedagogical moments requiring cultural, racial, or gender sensitivity. Without an understanding of how responses to subordinant groups are socially organized to sustain power arrangements, we cannot hope either to communicate across social hierarchies or to work to eliminate them.

Razack, *supra* note 40 at 8.

responsibility for transmitting their perspective as being true to their respective legal cultures' value systems, standards and life experiences. Perhaps, as more indigenous scholarly writings are shared for the purpose of decolonizing our lives, usage of subjectivity in indigenous perspectives will not seem so uncomfortable.

**5. Legal Theories**

> In these first moments in the story law tells us - in its assertion of terra nullius - we see the central role played by the abstraction and theory in western law and culture: the world is conceived, and is acted upon, as if reality can simply be conjured up in whatever form suits the desire of the powerful at the moment. Within this ideology, human beings can be considered, legally, not to exist, and can be treated accordingly. At this most fundamental, common sense level, a study of British and Canadian law in relation to Aboriginal title and rights therefore begins not "on the ground," in concrete observations about different peoples' diverse ways of life, but rather "in the air," in abstract, imagined theory. Hovering, like the sovereign, who embodies this abstraction, over the land...It is within this space between the ideal and the real that ideologies of justification are constructed in law, government, imagination, and popular culture. This is the space wherein lies are legalized and truths silenced. In the histories of colonial laws we can see both the mendacity and the crudeness of the original lie of European supremacy, and the shockingly unsophisticated nature of the edifice built upon it...This same space between theory and practice, between avowed principles and lived experience, between the letter and the practice of the law, is one of the sites where Aboriginal peoples historically and contemporarily mount their resistance struggles.[46]

Indigenous scholars may choose to contribute, challenge and create legal theories about colonization and in particular how to dismantle the colonial regime. It should be noted, however, that the development of indigenous theories on colonization is not recent:

> The history of Canada is a history of colonization of Aboriginal peoples. Franz Fanon (*The Wretched Earth*, 1963) and Albert Memmi (*The Colonizer and The Colonized*, 1957) have convincingly shown that colonization is a pervasive structural and psychological relationship between the colonizer and the colonized and is ultimately reflected in the dominant institutions, policies, histories, and literatures of occupying powers. Since the 1970's, Native writers and educators, including myself, have articulated this colonial experience, and in the last decade or so, a growing number of other scholars from various disciplines and backgrounds have also begun to document Native/white relations from the context of colonization.[47]

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[46] Culhane, *supra* note 39 at 49.

[47] E. LaRoque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Asch, *supra* note 34, 75 at 237, n. 6.

In contemporary times, indigenous scholars such as James [sakej]Youngblood Henderson advocate a decolonized legal regime accompanied with decolonization legal theories:

> Decolonizing Canadian law requires a new analysis of property law and Aboriginal title precedents. It requires a legal theory that is not comprised of racist assumptions. It requires an understanding of the false superiority of colonial legal thought that is built into existing precedents. It requires a legal theory that is not comprised of racist assumptions. It cannot be assumed that British law automatically applies to North America because the Indian had no law or property systems. Such an assumption is built on supremacist colonial theory. A decolonizing legal system requires a departure from law as an artifact of Eurocentric society, to take into account the legal history of the actual dialogue and agreements between the nations and discovering the obvious.[48]

Indigenous scholars have used feminist theory,[49] people of colour;[50] race/culture and gender analysis,[51] critical race theory,[52] post-colonial theory-settler theory, state theory,

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[48] "Mikmaw Tenure in Atlantic Canada", *supra* note 26 at 291.

[49] Teressa Nahanee is a member of the Squamish Nation and has used feminist legal theory to shape what she calls "Native female perspective":

> What appears to me to be unique about feminist legal theory is the concentration on the value of individual experience and the way in which it can contribute to legal theory. This is particularly true in looking at necessary legal reforms to make them conform to female human experience and look at law as some kind of mathematical equation, or chemical formulation which, with some adjustment, will suit any occassion. I find myself explaining and being somewhat apologetic because there are those learned "men" who will wonder why there might be a Aboriginal feminist perspective? What is a female perspective?

T. Nahanee, "Dancing with a Gorilla": Aboriginal Women, Justice and the Charter" in *Aboriginal Peoples and the Justice System* (Ottawa, Supply and Services, 1993) [hereinafter "Dancing with a Gorilla"]; *Gorilla in the midst* (LL.M. Thesis, Queen's University, 1995) [unpublished]. See also S. McIvor, *ABORIGINAL SELF-GOVERNMENT: The Civil and Political Rights of Women* (LL.M. Thesis, Queen's University, 1995) [unpublished] [hereinafter *ABORIGINAL SELF-GOVERNMENT*].

[50] Mary Ellen Turpel, John Borrows, Patricia-Monture Angus, Robert Williams, Jr., Kelly MacDonald, are just some of the indigenous scholars that have been influenced and liberated by other peoples or voices of colours such as Audre Lourde, bell hooks, Patricia Williams, Mari Matsuda, Sharene Razack, N. Dulcos Iyer, Minh-ha T. Trinh.

[51] Patricia Monture-Angus does not see mainstream feminism as capable yet of shedding its colonial yoke or how colonialism meanders through the crack's of women's ideology. She rejects the term 'aboriginal feminism' as a label to describe her perspective that is rooted in being a Mohawk first and woman next:

> I do not consider my position to be anti-feminist. I just do not see feminism as removed from the colonial practices of this country. My position is a reaction to the exclusions and intrusions I have felt from within the women's movement and feminist academia. I remain very woman-centered. Some would call it Aboriginal feminism but I have no use for a label that has no meaning for me. My view is simple. It is the view of a single Mohawk woman who has experienced more than a decade of study of Canadian law and before that a decade of overt physical violence in my life.
>
> Some aboriginal women have turned to the feminist or women's movement to seek solace (and solution) in the common oppression of women. I have a problem with perceiving this as a full solution. I am not just a woman. I am a Mohawk woman. It is not solely my gender through which I experience the world, it is my culture (and/or race) that precedes my gender. Actually if I am the object of some form of

decolonization theory, post-modern theory, and theories rooted in socialist, capitalist or liberal ideologies. James [sakej] Youngblood Henderson states:

> [T]he current intersections of post modernism, critical theory, feminist criticism, and post-cultural theory illuminate the need for dismantling colonial thought, its strategy of hierarchical differentiation, and its law.[53]

Indigenous scholars are also illuminating legal theories rooted in their own legal cultures to identify and delegitimize the existence of colonial practices of the colonizer. The colonial record is realigned[54] when indigenous scholars release their experiential knowledge and histories and create new theories and counter-theories[55] that identify the colonizer's masks of ideological

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> discrimination, it is very difficult for me to separate what happens to me because of my gender and what happens to me because of my race and culture. My world is not experienced in a linear and compartmentalized way. I experience the world simultaneously as Mohawk and as a woman.

*Thunder in My Soul, supra* note 31 at 177-178.

[52] Critical race analysis is necessary for understanding how indigenous peoples have been racialized and how racism has yet to be de-raced from DLC. See R. Williams, Jr., "Taking Rights Aggressively: The Perils and Promise of Critical Legal Theory for People of Colour" (1987) 5 L. & Inequality 103 [hereinafter "Taking Rights Agressively"]; *Thunder in My Soul, supra* note 31 at 35-36; and "Constitutional Law From a First Nation Perspective", *supra* note 25.

[53] "Mikmaw Tenure in Atlantic Canada", *supra* note 26 at 207.

[54] Prakash, *supra* note 13.

[55] Howard Adams mentions the contributions of Ron Bourgeault, a Metis historian, to Indigenous scholarship in Canada. Bourgeault argues that the fur trade was a structure designed through European domination to prevent the possibility of independent development by indigenous peoples. Adams states:

> It was a distinctive form of dependent development that was subject to the dictates of the powerful Western imperial nations and corporations. The lack of autonomy in terms of economic and political power placed Indians and Metis in a dependent and subjugated relationship to European nations. Bourgeault's theories represent a great advance over the traditional establishment notions on the history of Aboriginal people and fur trade. He has shown that the Indian nation and the mercantile fur trade could not be studied in isolation from the historical context of imperialism and cultural domination. He has unearthed and examined the 'non-existent' history of Indian/Metis struggle and its radical tradition, which leads to recognition and understanding of its past in order that it may continue to develop and inform present and future struggles. Bourgeault has provided us with a new interpretation which is truly representative of an indigenous perspective. Although Bourgeault's writings have not yet reached the popular mainstream society, they have already become influential in the Aboriginal academic community. There is no doubt that his theories and writings will bring an entire new development of intellectual thought to Indian and Metis scholarships.

*A Tortured People, supra* note 42 at 100-101. Also see R. Bourgeault, *Five Centuries of Imperialism and Resistance* (Winnipeg: Fernworld Publishers, 1992).

domination. Indigenous perspectives *bring* you to the various masks of colonization, floating in mainstream legal theories. Legal theories used will depend on what mask of oppression indigenous scholars have encountered, experienced or their angle of how the DLC's value-base is named. Sometimes, the DLC's legal theories may intersect with indigenous perspectives. However, the colonization of indigenous peoples outside that legal culture will require indigenous scholars to transmit legal theories that can only come from indigenous peoples' experiences of being oppressed and subjected to colonial practices that reinforce indigenous subjugation, genocide, and the subordination of indigenous peoples to the lowest rung of humanity.

In particular, indigenous scholars have recently challenged the rationalizations and legal justifications put forward by colonial-settler populations that have dispossessed indigenous peoples from possessing and occupying their respective territories.[56] More and more indigenous scholars are rejecting these "doctrines of dispossessions" that have been used and are continuing to be used presently by colonizing powers to assert sovereignty over indigenous lands and peoples.[57] Indigenous scholars are rejecting legal fictions developed in the DLC that maintain the colonial regime used by colonial-settler populations over indigenous peoples. As more and more indigenous scholars develop legal theories, legal discourses will be broadened. Counter-mythologies have already had influential impacts on conventional legal theory. It is reflective of the growing awareness of the colonized mind-sets that indigenous peoples have and their attempts to decolonize this consciousness.

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[56] See the writings of Robert Williams, Jr.; Patricia Monture-Angus; James Youngblood Henderson; and John Borrows cited herein. See also R. Clinton, "Redressing the Legacy of Conquest: A Vision Quest for a Decolonized Federal Indian Law" (1993) 46 Ark.L.R. 77. Indigenous decolonization theories will be discussed in more detail in chapter 2.

[57] See R. Williams Jr., *supra* note 24.

## 6. Ecological

my mother wraps me with her arms holding
all my creations and bestowing responsibilities
to remind me how to respect her comforting

From my experiences in meeting indigenous peoples throughout the world, we share the connection that our peoples value and respect the territories that we come from and the stories that accompany this interactive relationship. While it is not the place in academia to discuss such spiritual connections and worlds, indigenous peoples inherently have responsibilities to the earth, to protect, nurture and maintain our balance amongst all her creatures.

At a time when DLC wears a secular mask, indigenous peoples' knowledge and relations to their territories has been subordinated to economic and corporate interests. Yet, a balance has to be restored between exploiting the earth and just letting her be. Indigenous peoples' while still colonized and oppressed, have shared teachings on respecting the earth to the DLC. John Borrows,[58] Robert Williams' Jr.,[59] James Anaya[60] and Rebecca Tsosie[61] have analyzed

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[58] Most of John Borrows scholarly writings focus on respect for the land and territorial rights of indigenous peoples. He states indigenous peoples are most likely to be excluded from key decision-making with respect to ecological issues in a democractic sense creating racism:

> Since even members of the present generation are not squarely represented in the current construction of representative democracy, one questions if and how future generations will be served. Future generations are much like indigenous peoples, and are given insignificant influence in the design of human settlements. It appears as though indigenous peoples, past and future generations, and the environment itself are not treated as proper subjects of democracy. They are cast in the role of its passive objects, those which are acted upon, and are not viewed as active agents able to participate on their own terms in the formulation of decisions regarding our settlements. They are drawn out of the geography of law and their ideas and institutions are erased from the philosophical maps that guide our legal imagination. This racist, agist, and anthropocentric view of representative democracy does not bode well for environmental revitalization.

"Living Between Water & Rocks", *supra* note 36 at 432.

[59] R. Williams, Jr., "Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World" (1994) 95 W.Va. L.Rev. 1133. Decolonizing the law in the environmental context requires 'environmental justice.' Williams states that environmental racism must be identified and confronted:

> Indian resistance to the threats posed to our social, physical, and spiritual world by our environmental law are dismissed as attributable to "religious, magical, fanatical behvaviour. If the story and narratives of American Indian peoples are to serve as effective and viable paths of resistance against our currently

environmental racism in tandem with colonization. The DLC continues to criminalize indigenous peoples for fulfilling their responsibilities to the earth as well as for benefiting from her fruits. In the context of treaty-making or government-jurisdiction building, indigenous scholars will continue to write about how their respective territories are being affected by colonial-settler populations through an ecological approach.

## 7. International[62]

> In the postmodern world - one shaped by sophisticated communication technologies, emergent international institutions, and a heightened awareness of global interconnectedness - indigenous peoples are capable of exerting influence at the international level invoking discourse of human rights. The openings provided by the new international human rights agenda may prove to be the most effective vehicle with which to promote the decolonization efforts of indigenous peoples, transform the domestic policies of the advanced democracies

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> colonized environmental law, then the environmental racism which has been institutionalized in the deepest levels of our society must also be identified and confronted, for it too is part of a dying colonialism.
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> ...
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> And the Mt. Graham controversy demonstrates how our environmental law perpetuates the legacy of European colonialism and racism against American Indian peoples. Historically, Indians have been required to conform to the dominant society's values, without any recognition of the values that might govern Indian social life. There are no alternatives by which the great diversity within Indian communities and across Indian country can be recognized and reflected in our environmental law. Thus, our environmental law tells Indians that they must run their governments the same way that the dominant society runs their governments. This means that when the tribal government in a factualized Indian community fails to respond to a request from the Forest Service about the tribal community's religious interests in a mountain, our environmental law can treat the tribe as having no religious interests in that mountain at all. Indians can only engage in the federal land use and environmental regulatory process through cultural and political institutions determined by the dominant society.

*Ibid.* at 1136, 1162.

[60] J. Anaya and S.T. Crider, "Indigenous Peoples: The Environment, and Commercial Forestry in Developing Countries: The Case of Awas Tingni, Nicraragua" (1996) 18 Hum. Rts. Q. 345; J. Anaya, "Native Land Claims in the United States: The Un-Atoned for Spirit of Place" (1994) Cultural Survival. Q. 52.

[61] R. Tsosie, "Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge" (1996) 21(1) Vermont L.R. 3.

[62] Mary Ellen Turpel comments on the use of international fora for the recognition of indigenous rights:

> There is little space within the confines of these conceptions to take interest in or recognition of the cultural differences among Aboriginal peoples, let alone differences in the conception of a legal order. It is therefore, not surprising that, because of the restrictions inherent in the framework for rights defined by the single state, indigenous peoples focus on the international recognition of "rights".

"Aboriginal Peoples and the *Charter*, *supra* note 3 at 20.

and also improve the conditions of indigenous peoples in other countries.[63]

James Anaya,[64] Sharon Venne,[65] Robert Williams, Jr.,[66] Dalee Sambo Dorough,[67] and Mililani B. Trask[68] have been instrumental in shaping international human rights standards, norms and principles and have contributed to the formation of the Draft Declaration on the Rights of Indigenous Peoples[69]:

> Despite the shortcomings in existing and emerging international human rights instruments, it may be concluded that substantial progress is being made. The work done at the international level, by indigenous representatives, is having a positive effect on legal and political developments not only in Canada but in states around the world. Indigenous peoples themselves are increasing their efforts and involvement in the international arena. Indigenous peoples are raising the level of international norms not merely for their own benefit but for the overall advancement of humankind. The contributions that indigenous peoples have made in the elaboration of the right to development and the need to recognize and respect the integrity of values, practices, and institutions are just two examples of improving upon emerging rights and standards.[70]

Through such efforts, indigenous scholars have worked with indigenous peoples and have focused their energies on restoring their "subject" status in international fora:

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[63] "Sovereignty, Racism, Human Rights", *supra* note 4.

[64] See Anaya, *supra* note 6; "Commenting on the Working Group Report and Draft Declaration" (1991) 8 Arizona J. of Int'l. & Comp. L. 221; "Indigenous Rights Norms in Contemporary International Law" (1991) 8 Arizona J. of Int'l. & Comp. L. 1; "A Contemporary Definition of the International Norm of Self-determination" (1993) 3 Transnational Law & Contemporary Problems 131.

[65] S. Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (LL.M. Thesis, University of Alberta, 1997) [unpublished]; "The New Language of Assimilation: A Brief Analysis of ILO Convention 169" (1990) Without Prejudice 53; "Self-determination Issues in Canada: A First Person's Overview" in D. Clarke & R. Williamson, eds., *Self-determination - International Perspectives* (London: St. Martins Press, 1996) at 291; "Understanding Treaty 6 " in Asch, *supra* note 34.

[66] R. Williams, Jr., "Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous Peoples' Right to Self-determination" (1991) 8 Arizona J. of Int'l. & Comp. L. 51; "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" [1990] Duke L. J. 660.

[67] D. Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?" (1993) 3 Transnational Law & Contemporary Problems 13.

[68] M. B. Trask, "Historical and Contemporary Hawaiian Self-determination: A Native Hawaiian Perspective" (1991) 8 Arizona J. of Int'l. & Comp. L. at 77.

[69] See UN Doc. E/CN.2/1993/29; UN Doc. E/CN.4/Sub.2/1994/Add.1.

[70] Sambo, *supra* note 67 at 45.

> For five hundred years, Indigenous Elders have told young people that they belong to a nation of Peoples - an Indigenous nation. This is their reality. Indigenous Peoples have accomplished considerable progress in returning to their natural status as subjects of international law. The time will come when international instruments on Indigenous rights are not drafted and adopted without the full participation and consent of Indigenous Peoples and Indigenous nations take their place among the family of nations. Our elders have told us so.[71]

Through the recognition and development of indigenous peoples' rights to self-determination, human rights development and future conventions on the rights of indigenous peoples, indigenous scholarly writings can assist indigenous peoples to 1) engage in substantive dialogues with states and 2) transform domestic state policies and legislation[72] that prevent or have denied indigenous peoples from realizing their self-determined destinies. This is evidenced by indigenous peoples that have participated in international fora such as the Draft Declaration, and who have recently published their experiences as part of the written historical record.

**8. Rights discourse**

> As colonized peoples, Natives have been forced to use whatever arsenal is at their disposal in response to relentless political pressure - pressure that amounts to sociological and cultural warfare - from Canadian governments, especially on issues of land rights and (land) rights on the basis of cultural differences, when it should simply be on the basis of inherent rights that flow from aboriginality.[73]

The politics, experience of oppression and colonization, and self-determining visions of an indigenous scholar will reflect how he or she may approach rights discourse. There is no universal approach to using and challenging rights discourse. Indigenous scholars have been able to illustrate that rights discourse can connect traditions of indigenous peoples to contemporary

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[71] S. Venne, "Understanding Treaty 6" in Asch, *supra* note 34 at 224.

[72] Sambo, *supra* note 67.

[73] E. LaRoque, "Re-examining Culturally Appropriate Models" in Asch, *supra* note 34 at 87.

manifestations and which can create instruments for social change.[74] Their perspectives will reveal how rights cannot be understood in isolation. The interaction between international indigenous rights; human rights; territorial rights; domestic doctrines of aboriginal/Indian rights and treaty rights; rights to self-government or autonomy; gender equality rights; cultural rights; economic rights; or language rights has been demonstrated by indigenous scholars. Oppressed peoples such as indigenous peoples have benefited from strategies that employ rights as a means to protect immediate intrusions into their everyday realities by dominant majoritarian societies as well as from a neo-colonial indigenous elite.

Using the rights framework, however, is not the end of the story or strategy. Long-term struggles to achieve self-determination and to dislodge the dominant culture's hierarachical distribution of power that is used to maintain oppression and domination over indigenous peoples and which permeates through the DLC's rights paradigm, requires analyzing the foundations of this paradigm as well:

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[74] See J. Borrows, "Contemporary Traditional Equality: The Effect of the *Charter* on First Nations Politics" (1994) 43 U.N.B.L.J. 19 at 48 [hereinafter "Contemporary Traditional Equality"]. This article presents one perspective on the use of rights' discourse by aboriginal women who seek gender equality in Canada as a group and the complications that can arise when translating traditions in contemporary forms through a right's framework. Borrows finds a way to mediate ideological differences raised in rights' discourse amongst aboriginal peoples:

> The ideology of the *Charter* stood as a backdrop in the development of this discourse and subtlety helped to strengthen claims for equality. Tradition was brought forward, and its concepts were draped around the contemporary language of rights. The dialectical interaction of traditional practices and modern precepts forged a language that partook of two worlds. Rights talk could not overwhelm traditional convictions of symmetry in gender relationships while tradition could not ignore current concerns about equality in these same associations. People who were concerned about their traditions could use the language of equality to preserve their interests, while people who sought for equality could use tradition to show that it sanctioned and justified the removal of gender discrimination.
>
> This mingling of ideologies constructed an alignment of wider interests because greater individual sovereignty and self-determination for First Nations women could potentially be seen as incorporating these same rights for the First Nations community as a whole. Thus, the use of "rights" discourse combined the past and the present for First Nations as historical remembrances of gender relations had to take account of current notions of sexual equality.

*Ibid.* at 31-32.

> People of color must "go under" and behind the lines of majority society's discursive practices to liberate our previously colonized and subjugated knowledges. These knowledges contain our expressions of a will to insurrection which continuously challenges the authority of the dominant order. This will, therefore, shall always press its challenge until it either expires, or the penetrative task of our critique secures defensible positions from which to freely articulate our own visions. For peoples of color, rights rhetoric is a primitive weapon, but one we cannot affort to ignore or denigrate, though in our hearts, we may question its ultimate utitility or relevance once we secure our positions... Our scholarship as politics must be engaged at a practical, immediate level. We must be fancy rhetoricians who adopt neither a serious theoretical stance towards rights. Rather, we must adopt a warlike posture seeking to take rights aggresively. The ideals and principles represented by rights must be deployed as weapons, traps, and snares in the absence of some other containing discursive practice which might constrain the majority from annihilating the minority. We have no choice but take rights aggressively while we buy the time needed to perfect new weapons out of the materials at hand provided by our insurrectionist discursive traditions.[75]

Rights discourse conjures up debates and complications not only between indigenous scholars but in their dialogues with the DLC. Translating what has been understood to be responsibilities[76] to your people and your territory into rights discourse means finding a way to

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[75] "Taking Rights Aggressively", *supra* note 52 at 112, see also 120-121.

[76] Mary Ellen Turpel takes a critical approach to the liberal, individual and proprietary base of rights and states that when understanding aboriginal cultural differences, the rights paradigm is inadequate:

> Although there is not culture or system of beliefs shared by all Aboriginal peoples, the paradigm of rights based conceptually on the prototype of right of individual ownership of property is antithetical to the widely-shared understanding of creation and stewardship responsibilities of First Nations Peoples for the land, for Mother Earth. Moreover, to my knowledge, there are no narratives among Aboriginal peoples of living together for the purposes of protecting an individual interest in property. Aboriginal cultures are oral and the differences between cultures and European cultures can be found in stories voiced through generations, and in customary laws somtimes represented by wampum belts, sacred pipes, medicine bundles, or rock paintings. Social life is based upon responsibilities to creation and to the Creator...
> The collective or communal basis of Aboriginal life does not really, to my knowledge, have a parallel to individual rights: the conceptions of law are simply incommensurable. The duty to the Creator is the duty of the people. There are no "rights." To try to explain to an Elder that under Canadian law there are carefully worked-out doctrines pertaining to who has proprietary interests in every centimeter of the territory, sky, ocean, ideas and various other relationships would provoke disbelief and profound skepticism.
> The rights' paradigm, whether it be articulated in terms of legal or political rights, or through civil conceptions of a consolidated property right, is simply a historically and culturally specific mechanism for the resolution of disputes and the allocation of resources which is different from the procedures used in any of the various Aboriginal cultures.

"Aboriginal Peoples and the *Charter*, *supra* note 3 at 29-30. See also *Thunder in My Soul*, *supra* note 31 at 31 where she elaborates on teachings she has received on responsibilities:

> This process of learning about creation that I was talking about earlier must encompass a reflection on and with the traditional gifts and responsibilities that we were given. I must strive to understand how I fit into creation. There are four guiding principles which illuminate the way in which we are expected to respect these traditional gifts and responsibilties. The guiding principles are kindness, sharing, truth (or respect) and strength. These principles are different aspects of the same whole (or circle). When you are kind the kindness is returned to you. When you share you reap the benefits of what you share. Perhaps you share a

communicate that there are two fundamentally different frameworks rooted in two different and competing legal cultures. The DLC's only approach to date has been to criminalize indigenous peoples for fulfilling such responsibilities. In the context of how some indigenous worldviews see territories as space, James [sakej] Youngblood Henderson states that indigenous peoples have a special responsibility for their spacial consciousness:

> Belonging to a space is more than just living in a place or using its resources; it is attendant with benefits and obligations. Belonging is viewed as a special responsibility.[77]

A responsibility framework can also capture the realities of many indigenous peoples, while a rights framework may be too abstract. "I/we have a responsibility to feed my people"; "I/we have a responsibility to teach the children how to fish according to our laws and customs"; "I/we have a responsibility to return the bones of the fish to the river and not waste this gift"; "I/we have a responsibility to protect the river that feeds me". "I/we have a responsibility to give thanks for all that I/we take from creation." This is very different from a rights framework where "I/we have an aboriginal right to fish in DLC." In using rights discourse/framework, indigenous scholars must be aware and responsible for the possibility of jeopardizing their own respective cultural frameworks and those that belong to other cultures.

Indigenous scholars may support or reject rights constructions; how they are recognized by the colonizing state; and how they are implemented. Indigenous scholars acknowledge and

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> teaching and this is the way the teachings are kept alive. Sometimes the truth is hard, but it may be the only way that we will learn. These three responsibilities - kindness, sharing and truth- will lead to the fourth, which is strength. One principle cannot exist without the other three. There is no changing them. They exist just as the north wind continues to blow. And they shall continue to exist in this way for all the generations left to come.

Responsibilities to look after the territory of the Ned'u'ten were carried by the Deneeza and Dzakaza and are not necessarily seen as individual rights.

[77] "Mikmaw Tenure", *supra* note 26 at 219.

celebrate the sacrifices, efforts and survival that indigenous peoples have endured and that have led to some degree of autonomy or liberation.[78] Indigenous scholars who reject the colonizer's legal construction of indigenous peoples/rights may not interpret this to be a celebration, but rather a reflection of a colonized mindset that embraces the DLC's ideologies as being superior to their own people. One just has to look at how responsibilities are dichotomized into collective and individual rights and how this demarcation is discussed by indigenous scholars in Canada.[79]

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[78] Robert Williams critiques the critical legal studies theorists that challenge the ideological foundations of rights' discourse in western legal cultures and argues that the rights framework, despite such foundations has provided security of the real, tangible experience and dignity to peoples of colour:

> To the underclass, the "concept" of rights has always possessed a highly instrumental character. Rights are something to get so that one is treated similarly to those in the overclass...rights whether economic, political or legal, are seen as securing a tangible dignity in the most negative senses. That is, I am treated relatively no worse in the economic, political or legal realm than that other guy, who happens to differ from me only on the basis of racial or racial characteristics.

"Taking Rights Aggresively", *supra* note 49 at 123. More so rights' discourse is argued by Williams, to be a weapon that peoples of colour can use in transforming legal consciousness and unearthing the oppression that these peoples experience:

> It is important for minority legal scholars to always keep in mind the point at which they must part ways with their CLS brothers and sisters on the path of this transformative project. CLS scholarship as politics would seek the transformation of legal consciousness leading to the abandonement of various so-called re-ifications such as "rights." Minority legal scholars, because of the unique positions of trust they hold from their people, must pursue a different, nonmillennialist path. Our immediate goal must be to transform the conditions oppressing our respective peoples. These oppressive conditions demonstrate that the principles grounding the dominant society's legal and political discourse are corrupted and remain unrealized. These conditions in fact are the tangible proof of the failure of rights' theory. Because many of these conditions are sustained by assumptions about the way the legal, political, and social world is, the concrete political program of minority people relies on reifications such as "rights" to speak directly to the conscience of the dominant society. Rights discourse enables us to articulate the tangible injustices perpetuated upon peoples of colour by the existence of these conditions. Through rights discourse we challenge the assumptions which prevent the translation into practices of unrealized principles revered by the dominant order, such as "rights."

*Ibid.*

[79] The question has arisen in political arenas of whether the Canadian *Charter of Rights and Freedoms* should be applied to aboriginal and treaty rights has been explored by many indigenous scholars and brings out debates on individual and collective rights as well. Proponents of *Charter* application and individual rights of aboriginal women include Teressa Nahanee and Sharon McIvor. See T. Nahanee, "Dancing With a Gorilla", *supra* note 49. See also S. McIvor, *ABORIGINAL SELF-GOVERNMENT*, *supra* note 49. Indigenous scholars that question whether the *Charter* should apply to aboriginal peoples in Canada and who take a collective rights' approach include Mary Ellen Turpel, "Aboriginal Peoples and the *Charter*", *supra* note 3; "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L. 174.; See also P. Monture-Angus, *Thunder in My Soul*, *supra* note 31 at 131. See also "Contemporary Traditional Equality", *supra* note 74 at 19; T. Issac & M.S. Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21:3 Man. L.J. 453; T. Issac, "Individual

At a general level, debate by indigenous scholars over whether the rights framework is adequate or appropriate for constructing and representing the interwoven realities of indigenous peoples can be a starting point to understand and unearth the colonial and oppressive elements of the DLC's ideological foundations of rights discourse. The challenge for indigenous scholars is to turn debates on rights discourse into constructive dialogues where a balance is struck between 1) the choice of using rights as a tool to shield against oppressive practices whether inflicted by the colonizer or neo-colonizers that now exist amongst our own peoples; and 2) rejecting the imposition of rights, as constructed by the colonizing power, on indigenous peoples.[80] Indigenous scholars, while presenting individual perspectives on rights' discourse, must uphold their responsibility to not monopolize or speak for all indigenous peoples or groupings.

**9. Indigenous Perspectives in Practice**

There really is not a boundary or demarcation line between perspectives and practice, like responsibilities, they are interconnected. Indigenous legal theories are practice. Robert Williams, Jr. refers to theory and practice as "thinking independently and acting for others."[81] There are many factors that can explain this reality. It is not enough to present an angle of the colonial regime through your perspective as an indigenous scholar. Perspectives also contribute to dismantling the colonial regime when indigenous scholars participate in the life of their people or respective community. Scarcity of indigenous legal practictioners also gravitate indigenous scholars to put their perspectives into practice outside academia fora. Indigenous scholars do

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Versus Collective Rights: Aboriginal People and the Significance of *"Thomas v. Norris"* [1992] 21:3 Man.L.J. 618.

[80] In the context of whether indigenous justice systems should be separate or included into the Canadian justice system, see constructive dialogues by indigenous scholars, practitioners, judges and commissioners in Gosse, Henderson & Carter, *supra* note 14.

[81] "Vampires Anonymous", *supra* note 37 at 742.

not have the privilege to just sit back in their offices and put their thoughts unto computer screens. Life is just not that individual. Putting your mind into practice outside law journals is viewed by indigenous communities as the norm, standard, and a healthy mindset that indigenous scholars should possess especially given the migrancy between DLC and indigenous legal cultures. Balance is the key between your mind, body and spirit. An indigenous scholar's ties to their people or community can provide the backbone and strength they require when faced with the constant energy depletions caused by breathing in DLC. To avoid their perspectives from being ghettoized to law review articles, many indigenous scholars publish outside DLC. Maintaining connections to your people and community can prevent you from being engulfed into a culture that can erase who you are and where you come from. At the same time, sharing your perspective within dominant legal practice gets your message out to a wider audience and hopefully across professions and disciplines as well.

One way to put perspective into practice is to tailor legal academic training for law students to the needs and demands of indigenous people both in urban and traditional territories. Renee Taylor, a clinical law professor at University of British Columbia and indigenous practitioner directs an aboriginal law clinic in Vancouver as part of the University's public interest law advocacy theme in providing practical educational experience to law students. Both indigenous and non-Indigenous law students can receive practical legal training in mostly "front-line" work for indigenous peoples who cannot afford legal representation, as well as providing supervised legal services to indigenous governments, other universities, and indigenous organizations. Taylor describes the reciprocal relationships that indigenous law students have with the larger indigenous community:

> Indirectly, the Faculty of Law, through the VAJC clinic, has had extensive contacts with First Nations organizations and clients. Virtually every major aboriginal organization has offered letters of support for

> the clinic at the VAJC and referred cases to the clinic. As well, the clinic is routinely asked by various tribes to give opinions on a wide range of legal matters, such as co-management agreements between the tribe and the provincial government's Wildlife and Fisheries Department and child protection agreements between tribal governments and the province's Ministry of Social Services and Housing. We have also been asked to draft by-laws for various aboriginal groups.
>
> Individual cases, however, comprise the bulk of the workload. The cases are a combination of criminal, civil, family, and aboriginal rights. A maximum of seven students work as the VAJC per semester. The clinicians, thus far, have consisted of half aboriginal people and half not. The students have, in a relatively short period of time, built a good reputation with crown council, judges, and the police.
>
> More importantly perhaps, is that many of the First Nations students state that they can now see trial work as a viable option. The clinic builds self-confidence by teaching students to prepare cases thoroughly and to aggressively pursue their clients' interests. Standard law office procedures are followed, giving students an opportunity to hone their skills prior to the articling period. The biggest impact, however, has been on the clients. First Nations people are generally delighted that they can access aboriginal council.[82]

Other ways to bring indigenous perspectives to the dominant culture have been used by indigenous scholars including: speaking to high schools, the judiciary, churches, indigenous peoples both on-reserve and off-reserve. Robert Williams, Jr. describes how he incorporates legal theories into practice both at the university and within Indian communities:

> ....I'd always try to incorporate some critical race theory aspect into those student assignments; for example, I'd develop a conflict mediation problem around the topic of environmental racism, or I would ask them to do a research paper on what critical race scholars have to say about John Locke on property or law and economics. Teaching is a vital part of translating critical race theory into practice. It's the students...They're future practictioners who won't have a lot of time to read law review articles on critical race theory when they get out into the real world....I wrote an article for a bar journal review, and produced other, information-type pieces for Indian Country newsletters, enclyclopedia-type publications,..I was reaching more people--different types of people--with the message, and that's what doing Critical Race Practice is all about in my mind. I became semi-computer literate and started using the Internet..I became a co-editor of an Indian law casebook, and incorporated critical race, critical legal studies, feminist, and indigenist materials in a new edition. I wrote a teacher's manual and accompanying syllabi that explained how the book could be used in a graduate or undergraduate ethnic studies course on Indian law and policy. I taught myself how to write grants and raise funds for various projects that needed to be done by the various organizations I was involved in, or to get funding for tribal judge training conferences and community workshops...I had probably been doing Critical Race Practice in a semi-serious vein for about two or three years when I decided in 1990 to go really big time and begin offering a clinical seminar on what I called "Tribal Law"; or what became known as the Tribal Law Clinic...All of our projects are approached as efforts at decolonizing United States law and international law relating to indigenous peoples' rights. Students are encouraged to try to understand how the legacy of European colonialism and racism are perpetuated in contemporary legal doctrine, to expose that legacy at work in the project they are working on, and to develop strategies which delegitimate it, literally clearing the ground for the testing an

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[82] R. Taylor, "All My Relationships" (1996) 26 New Mex. L.R. 191 at 195.

development of new legal theories.[83]

Kelly MacDonald, a full-time practitioner and part-time LL.M. candidate at the University of British Columbia incorporates women of colour theory into her area of practice which is family and child protection. She conducts workshops for social workers both indigenous and non-indigenous on how the Canadian constitution creates jurisdictional problems in the area of Child and Family Law and its effects on indigenous groups who are seeking greater autonomy over providing social services to their people. As interim Director of the First Nations Legal Studies at the University of British Columbia, she co-authored a report critiquing the lack of aboriginal women participation in all aspects of the British Columbia Treaty Commission Process.[84] Kelly MacDonald's academic and practitioner work has contributed to what she terms "indigenized feminism."

Sharon McIvor, Teressa Nahanee, Patricia Monture-Angus; James Youngblood Henderson[85] have all worked in the area of criminal justice and have documented their experiences in their scholarly writings and reports to government commissions. In the era of self-government and 'alternative aboriginal justice systems' talk"; these scholars have contributed their experiences (personal and professional) of violence against women, children, and aboriginal peoples overall.

Many indigenous scholars produce research, opinions, analysis for local, regional, national, and international indigenous political organizations as well as for DLC. In Canada,

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[83] "Vampires Anonymous", *supra* note 37 at 762-63.

[84] K. MacDonald, E. Herbert & K. Absolon, "Aboriginal Women & Treaties" (Vancouver, 1996) [unpublished].

[85] See S. McIvor, *ABORIGINAL SELF-GOVERNMENT*, *supra* note 49; T. Nahanee, "Dancing with a Gorilla", *supra* note 49; P. Monture-Okanee, "Thinking About Aboriginal Justice: Myths and Revolution" in Gosse, Henderson & Carter, *supra* note 14 at 222; P. Monture-Okanee and M.E. Turpel, "Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice" (1992) U.B.C. L.R. (Spec. Ed.: Aboriginal Justice) 249; M.E. Turpel, " On the Question of Adapting the Canadian Criminal Justice System for Aboriginal Peoples", *supra* note 26; M.E.Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform", in Gosse, Henderson & Carter, *supra* note 14 at 206; J. Henderson, "Implementing the Treaty Order" in Gosse, Henderson & Carter, *supra* note 14 at 52; J. Henderson, "All is never said" in Gosse, Henderson & Carter, *supra* note 14 at 423. See also M. Sinclair, Associate Chief Judge, Man. Prov. Ct., "Aboriginal Peoples, Justice and the Law" in Gosse, Henderson & Carter, *supra* note 14 at 173; T. Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in Justice and the Law" in Gosse, Henderson & Carter, *supra* note 14 at 273; L. Little Bear, "What's Einstein Got To Do With It", *supra* note 14; P. Chartrand, " Issues Facing the Royal Commission on Aboriginal Peoples" in Gosse, Henderson & Carter, *supra* note 14 at 357.

numerous reports were commissioned from indigenous scholars in North America for the Royal Commission on Aboriginal Peoples.[86] Practicing perspectives is indeed a necessary requirement for indigenous scholars to incorporate into their academic careers.

John Borrows and Darlene Johnston are from Cape Croker on the western shores of Georgian Bay and have made invaluable contributions to their people as well as indigenous perspectives. John Borrows designed the "Intensive Program in Land and Resources and First Nations Governments" in 1993 and has taught the program with Shini Mah and Gordon Christy. This program is offered at Osgoode Law School as a 15 week course that combines both a class room component as well as a community (First Nations or legal) component for students. Over 50 indigenous and non-Indigenous students have accessed the program since its inception. Darlene Johnston has taught at the University of Ottawa. She returned to practice in her community and has provided excellent legal research and advice on areas of aboriginal rights, land claims, and self-government. Her work has received honourable mention by the Canadian judiciary in *R. v. Jones*[87], an aboriginal rights case concerning the right to harvest fish and where Jones was successful in proving that he had such a right.

As I have pointed out the various tools that indigenous scholars have used to carve out their own perspectives have been instrumental in providing different angles of the colonial regime. Identifying the current masks of oppression as well as contributing to the transformation of the existing colonial regime is a weighty task. Indigenous perspectives, being diverse, can facilitate this project through expressing their experiences of being dispossessed and oppressed. Indigenous perspectives at the same time can contribute to visions of self-determination, of no longer being colonized and oppressed by the dominant society. While scholars such as Robert Williams, Jr., Patricia Monture-Angus, James Youngblood Henderson and John Borrows have begun the process of decolonizing DLC, indigenous scholars entering DLC can carry on their hard work and develop more indigenous strategies both in the context of colonization and in relation to their peoples or groupings.

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[86] Paul Chartrand, a Metis law professor was appointed to be a Commissioner for RCAP. See also P. Chartrand, *Manitoba's Metis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, University of Saskatchewan,1991); "Aboriginal Rights: The Dispossession of the Metis" (1991) 29 Osgoode Hall L.J. 457.

[87] *R* .v. *Jones* (1993), 14 O.R. (3d) 421. (Ont. C.A.)

**D. ....Ned'u'ten**

Speaking from my 'Ned'u'ten mask', my perspective on DLC can provide an angle of how my people and myself have been colonized and how the legal system has been used to accomplish this goal. As a Ned'u'ten, I can also share decolonization strategies tailored to my people's aspirations. How I envision the implementation of self-determination for my people is just one perspective amongst many. It is principled. I do not believe in compromising my principles for political or legal pragmatism. In studying DLC, like other indigenous scholars, I have set out to ascertain its value base, its hegemonic roots, and how it positions different legal cultures subordinant to it. I am still on this journey. I am still exploring the colonial site.

Upon entering DLC in 1991, my primary goal was to understand the legal arm of the Canadian state to supplement the economic and political dimensions of the state that I had already studied in undergraduate work. At law school, I had just enough time to learn the nuts and bolts of Canadian law, while balancing clinical work and meeting countless numbers of indigenous peoples throughout the world. I remember having a discussion with an indigenous graduate law student over the *Sparrow*[88] decision. He was very upset about the 'justification test' for infringing aboriginal and treaty rights. I dismissed his concerns thinking, "but don't you see, Mr. Sparrow has an aboriginal right to fish, he won." Being in Ottawa, I was able to see and participate as a youth in indigenous national politics, organizing conferences for indigenous youth during the Charlottetown Accord process, conduct research for the Royal Commission on Aboriginal Peoples, organize indigenous youth for the UN Earth Summit, support the Mohawk people during their resistance, and set my course for home. I did not make time to delve into the murky waters of DLC and examine closely its roots and how this arm of the Canadian state would sanction so many atrocities against indigenous peoples. My anger had not been named yet. Upon returning to British Columbia to clerk for the British Columbia Court of Appeal and complete my articles, I decided that there was enough I needed to know about the legal dimensions of the Canadian state. As I began my journey as a hereditary chief, I became more conscious of how my peoples' governing system was still very much intact, how strong our language was and excited about how much I had to learn. This was very different from my observations of indigenous peoples in the east, as *Indian Act* governments and national

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[88] See *R.* v. *Sparrow,* [1990] 1 S.C.R. 1075.

organizations were the only forms of governance or political fora that I saw. I also realized that the spirit of indigenous peoples in the East was very strong compared to what I observed when I came home in the West. Some ceremonies of eastern indigenous peoples were separate from governance and this struck me as different because ceremonies form such an important part of my people's *bah'lats*. Outside the political realm, however, this is not the case. Colonization and oppression continue to prevent this generation from accessing a balance.

My goal was to go back to my people and territory after getting called to the bar. I have yet to achieve this goal. My mother's status was taken away before I arrived because she had married a non-Indian. In 1987, I was reinstated. I grew up knowing what Canadian culture was, speaking English only, and experiencing racism without being able to name it and confront it. Going back home was to fill this void in my life. However, as decisions on aboriginal rights and as the treaty process unfolded, I realized that I did not learn all that I needed to know about DLC so that I could teach my people about it.

As I learned more about the *bah'lats* and my role as a dzakaza, and about the treaty process, I began to realize just how much my people's way of life was in jeopardy, especially if they embarked upon a course that would lead to extinguishing our rights as a people. While my people have never ceded their territories to the Canadian crown, nor engaged in any warfare, I could not understand *how* Canada acquired my people's land outright. During law school, I just assumed that once my people treatied with Canada, they and other indigenous peoples in British Columbia would finally be a part of Canada and begin a prosperous road to developing a productful way of life. Yet the principles of treaty-making that I had learned from elders across the country during law school were not sought after by my people as they participated in the treaty process currently underway. While I saw indigenous peoples' pursuing economic self-determination, I did not see sacred, solemn or spiritual and cultural self-determination on the table. Further, any treaty completed in the treaty process would be a domestic treaty, would include the province of British Columbia as a party to any agreements and would not entail 100% recognition of my peoples' territories. Rather, models proposed included 5% recognition of indigenous lands. Although the *Delgamuukw* decision has increased the bargaining power of indigenous peoples at the treaty table, I still view this decision as being colonial. I could not accept this. My responsibilities as a dzakaza became to protect our traditional governing system

and the territories, 100%.

And so began my journey back into the DLC, to answer that burning question: How did Canada acquire my peoples' territories legally?

The answers I found, with the assistance of all the indigenous scholars canvassed in this chapter, allowed me to name my anger. I did not like the truths that I found and, honestly, I do not think I could go back to my naive conclusions about DLC. It is very hard for me to read decisions on aborignal and treaty rights, knowing how aboriginal and treaty rights are constructed (not recognized) by the Canadian state. In learning how my people and in particular how I have been colonized and dispossessed by illegitimate means, there is only one place I could go: the site of decolonization. My memory flashed back to that indigenous graduate law student telling me the *Sparrow* decision was the worst thing that could have happened to indigenous peoples. Seven years later, I finally understand him. Seven years later, I clearly see my mask of aboriginality. Seven years later, my journey has lead me to my Ned'u'ten mask. Seven years later, I can finally hear my ancestors and they are telling me that "it is not the right time to treaty."

My perspective as a Ned'u'ten and indigenous scholar is motivated by my search to find an alternative treaty process for my people. Indigenous scholars mentioned in this chapter have already presented treaty perspectives about treaties made since the 1600's. My perspective is on treaty-making in the new millenium. But my answers require reaching back into the past in both DLC and Ned'u'ten legal culture in order to begin to de-centre and dismantle the colonial regime that hovers over my people and our territory. It is my thesis that decolonization theory does not just start from today. Rather, both Canada and the Ned'u'ten, you and me, must fasten onto our past and begin to decolonize there.

In carving my Ned'u'ten mask or perspective in relation to this thesis, I use many of the tools that indigenous scholars have already employed in their writings. My approach is historical; based on oral traditions as used in the *bah'lats*; and uses decolonizing language to communicate to the audience. It is also subjective and objective. Indigenous legal theories are used to challenge colonial theories that maintain the colonial regime. I have also benefitted from the theories and writings from other peoples of colour or what I call "oppression theorists." They have helped me to liberate my colonized consciousness at the same time as dismantling the

colonial regimes' racialized construction. Treaty-making in relation to indigenous peoples is an 'international act.' I have used rights discourse, in particular, the right to self-determination and the right to decolonize, to internationalize a Ned'u'ten-Canadian relationship through treaty-making. In the end, carving my 'Ned'u'ten mask' has been grounded in my political activism with my people through my participation in the *bah'lats*. In other words, my alternative treaty model has been presented to my people in the *bah'lats* for consideration and debate. These are the tools that I have used to shape my thesis and perspective.

It is unnatural for me to limit my perspective to legal culture discourse whether it originates from DLC or Ned'u'ten legal culture. For this reason, I have taken an interdisciplinary approach to include the writings of scholars in fields of anthropology, history, geography, political, literary criticism and physcology, etc. This is an act of balance which can also be reflected in my comparisons of indigenous legal cultures and DLC as well as differences between indigenous peoples' efforts to decolonize. It is clear that to dismantle the indigenous-colonial state relationship, the writings of indigenous peoples can be fundamental to this project and for this reason, I have deliberately employed 'indigenous thoughts' into my story. Yet as I de-center myself from the colonial regime, my 'Ned'u'ten mask' takes form and shapes how I envision my people and Canadians being decolonized and living in peace. This is the true source of Ned'u'ten power, and my energy to rooted here.

I have chosen to structure my thesis in four parts, however, not according to the standard academic linear framework. Rather, since most Canadians do not understand that indigenous peoples, such as the Ned'u'ten, have governing institutions and processes for living peacefully and harmoniously, I have used a *bah'lats* framework' to shape each chapter of this thesis.

Generally, when a *bah'lats* takes place there is 1) an invitation process; 2) a feast; 3) the business; and 4) gift-giving. For example, if an individual Ned'u'ten is to get a hereditary name by succession and/or inheritance, then that person will have to hold the requisite amount of *bah'lats* to receive this name appropriately. This will include a "smoke" party, where the individual will state his or her intention before deneeza and dzakaza; another *bah'lats* to pay for the name; payment of your seat to each of the clans when they host a *bah'lats*; and payment for your regalia at another *bah'lats*. Each of these stages to the taking of a name, is known as the "business" that occurs in our governing system. The process is the same for other "business"

such as the headstone *bah'lats*; funeral *bah'lats*; drying up the grave *bah'lats*; transfer *bah'lats*; shaming *bah'lats* etc. Framing my thesis in this way allows the reader to access the thought processes that my people have used to establish social relations and peace. In the same way, if I intended to bring the discussion of an alternative treaty process to the *bah'lats*, I would have to invite deneeza/dzakaza to this "business." To contextualize my thesis in this framework, therefore, is only natural.

**Invitation: Chapter 1**

Every *bah'lats* will start with the host clan inviting deneeza and dzakaza to the intended business, at least 1-2 months in advance. Before paved roads and automobiles, it would take over a week to travel between communities and invite deneeza/dzakaza to a *bah'lats*. When I invited deeneza and dzakaza, to attend and witness, the taking of my grand-father's name, it took over four days. I went to the communities of Woyenne, Fort Babine, Nedo'ats, and Tachet. I also invited the Wet'suwet'en from Moricetown. Some deneeza/dzakaza live in municipalities such as Smithers, Prince George, and Vancouver, so they had to be invited as well. Members from my clan and my mother travelled to each house, dressed in regalia. I wore my grand-father's blanket. I would express my intention to do business before each deneeza/dzakaza and after all protocals were complete, we would visit.

I have chosen this introductory chapter to be like an invitation to a *bah'lats*. This chapter identifies the purpose of the "business": to establish a decolonizing framework. It also provides the reader/guest with the opportunity to witness my business by reading on. This chapter outlines the approach I have taken to carve out my perspective as a Ned'u'ten and is therefore unique and specific to this project. It is my hope that, like attending a *bah'lats*, the reader will leave this thesis with something to take with them and know that I appreciate the time and interest that they have put into witnessing my business.

**Feast: Chapter 2**

When guests arrive to witness the host clan's *bah'lats*, they are appropriately seated and immediately fed by the host clan. Deneeza and dzakaza have often travelled long distances to attend the *bah'lats* and given the usual length of a *bah'lats*, will need food to nourish this responsibility. It is my intention to feed the reader with the knowledge in chapter 2. This is my legal theory chapter. It sets the foundation for the business to take place by suggesting principles,

that I consider necessary for nation-to-nation treaty-making. It is my hope that as the reader continues to read this thesis, chapter two will nourish the reader's understanding of the purpose of my alternative treaty model and the efforts by indigenous peoples to decolonize.

**Business: Chapter 3**

After the deneeza/dzakaza are fed, the business will take place and the *bah'lats* will be legally sanctioned with swan down to bring the government to order so to speak. After the business has been completed, the head deneeza/dzakaza will each speak about the business. Chapter 3 is my "business" chapter. It focuses on treaty-making at the international level and discusses how the right to self-determination framework can legally pave the way for indigenous peoples such as the Ned'u'ten to restore their international subject status and be recongized in the international community with political and legal rights. I do not believe that any new relationship with Canada and my people should be domesticated. It is indeed an international relationship. Principles for the internationlization of this relationship will be discussed as well.

Not all business is concluded at one *bah'lats*. For example, the taking of a name could be discussed by all clan members for up to a year, especially if there is competition for the name by members of the same clan. Likewise, the principles that I suggest for restoring the Ned'u'ten to their international status are for meant for consideration and can be discussed and elaborated upon further. It is my hope that such consideration will lead to some concrete foundations for nation-to-nation treaty-making.

**Gift Giving: Chapter 4**

Once all the business is finished there is a give-away or distribution of gifts according to rank of deneeza/dzakaza. Sugar, flour, coffee, traditional meats, and non-perishable foods, towels, cloth, clothes, blankets are distributed to the guests. No one is to leave the *bah'lats* hall empty handed. In the same way, Chapter 4 is my gift to my people to take with them when they participate in treaty-making with Canada. The discussion therein centers around an alternative treaty process and the principles, once again, to achieve this.

Each *bah'lats* is opened by the head speaker of the host clan with a prayer and welcome. Each *bah'lats* closes with a prayer and kind words to thank the people for witnessing the host clan's business and for the safe return of the guests to their homes. The introduction and conclusion of this thesis is the opening and closing of my business. Now that a brief description

has been provided of how I have structured my thesis, my perspective as a Ned'u'ten dzakaza can proceed. This is how I carve my 'Ned'u'ten mask.

**E. Conclusion: Invitation to a Ned'u'ten perspective on treaty-making**

I now invite you to my challenge of the legitimacy of the Canadian state in my peoples territories, and the rationalities used by Canada to acquire Ned'u'ten territories and jurisdiction over these territories. I now invite you to witness how a true nation-to-nation relationship can be obtained with Canadians through a peace treaty. This can be accomplished through indigenous formulations of the right to self-determination, a universal human right that my people are beneficiaries of and a right that will carry them into the new millenium as subjects in international fora. I now invite you to witness my process for the decolonization of the Ned'u'ten. This is my "*bah'lats* business" and you are invited. Now it does not seem so strange.

Feast

After ample time of preparation, the host clan and deneeza or dzakaza, will then begin to conduct business in the bah'lats. On the day of the bah'lats, the guests will come to the hall and be greeted by the head of the host clan who will announce their names to all present. The deneeza and dzakaza are then escorted to their seat. Before they are seated to witness the business, the floor is struck many times with an invitation stick. The guests are seated according to their clan affiliation. As more guests arrive, the seated deneeza and dzakaza are fed by the host clan with food from their territories.

# 2

# DOCTRINE OF DISPOSSESSION THEORY

## A. Rights Of Conquest, Discovery, *terra nullius* and their Modern Masks

mauvaise volonté
-Sartre-

Newcomers and indigenous peoples have yet to find a way to live with each other in North America, even though over five hundred years have passed since first contact. We have not yet found a way to communicate to each other, though numerous attempts have been made. The use of treaties to chart a course for establishing relationships between indigenous peoples and the newcomers would serve different and, until recent treaty discourse, clearly opposite *purposes.* The newcomer's practice of making 'conquest treaties' amongst themselves clashed with indigenous peoples' understandings of making peace by establishing relationships. While the former considered the status of indigenous peoples as mostly 'defeated' tribes, the latter did not and pursued treaty-making as independent sovereign peoples. It is this fundamental difference of political identity that transcends into current treaty-making creating impasses. Treaty-making in the millennium era has yet to establish the "rough equality" that existed in what

Robert Williams Jr. calls the North American Encounter Era.[1]

After first contact and as settlement moved westward, the unwillingness to set or maintain[2] precedents for peace-building gave way to colonial-settler populations dispossessing

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[1] Robert Williams' research into treaty-making from 1600-1800 between Europeans and indigenous peoples provides current negotiators with examples of cultural group negotiations designed to shape a multicultural society where both indigenous peoples and the newcomers were equal:

> According to the countermythology that emerges from the Encounter era, North America during the seventeenth and eighteenth centuries was a unique, multicultural landscape of different, conflicting groups. Understood in this sense, the North American Encounter era can be reimagined as an extended story of cultural group negotiations in selected areas of intercultural cooperations. Adapting John Rawls; famous philosophical construct to the unique conditions that actually existed on the North American multicultural frontier, Indians and Europeans were in an original position of a rough equality on the continent. A new kind of society was emerging from this unique cultural landscape, in which place, class, and social status were largely irrelevant. Both groups approached cultural group negotiations with each other with little knowledge of what each side's future fortunes would be in this radically different and new type of multicultural society. Each was similarly situated to propose the principles of justice that should govern the type of society envisioned by their agreements.

R. Williams, Jr. *Linking Arms Together: American Indian Treaty Visions of Law & Peace, 1600-1800* (New York: Oxford University Press, 1997) at 27. Martinez examines the "treaty relations" between indigenous peoples and the newcomers and states that at first contact, the newcomers recognized the sovereign status of indigenous peoples:

> In establishing formal legal relationships with peoples overseas, the European parties were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term during the period under consideration.
>
> This remains true independently of the predominance, nowadays, of more restricted, State-promoted notions of Indigenous "self-government", "autonomy", "nationhood" and "partnership" -- if only because the "legitimisation" of their colonisation and trade interests made it imperative for European powers to recognise Indigenous nations as sovereign entities.

Miguel Martinez, Spec. Rapp. *Final Report on the Study of treaties, agreements and other constructive arrangements between States and indigenous populations,* (1998) E/CN.4/Sub.2/AC. 4/1998/CPR.1 at 23, paras. 108-109 [hereinafter *Final Report on Study of treaties*].

[2] Peace-making was made between the Europeans and the Iroquois at a time when the power balance between both peoples was mutually treated as equal. Treaties were made based on the Great Law of Peace or *Kaienerekowa* and the principles of the Two Row Wampum or *Kahswentha* which embodied the ideal of mutual respect for the cultural and political autonomy of each society or the non-interference of each other's internal affairs. See G. Alfred, *Heeding the Voices of Our Ancestors* (Toronto: Oxford University Press, 1995) at 140, 185. The two row wampum has also been described by John Borrows as a "First Nation/Crown relationship that is founded on peace, friendship, and respect, where each nation will not interfere with the internal affairs of the other." John Borrows, "Wampum at Niagra: The Royal Proclamation, Canadian Legal History, and Self-Government" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference.* (Vancouver: UBC Press, 1997) at 164 [hereinafter "Wampum at Niagra"]. Patricia Monture-Angus describes the Two Row Wampum treaty as follows:

> One of the most important of our treaties is this day and age is the "gus-wen-qah." It is also referred to in english as the "Two-Row Wampum". It is the treaty which governs the relationship between the Six Nations Confederacy (respectively called the Haudenosaunee) and the Settler Nations...The gus-wen-qah is vastly complex but is visually quite simple. It is two purple rows of shell imbedded in a sea of white. One of the two purple paths signifies the European sailing ship that came here. In that ship are all the European things - their laws, and institutions, and forms of government. The other path is the Mohawk canoe and in it are all the Mohawk things -- our laws, and institutions, and forms of government. For the entire length of that wampum, these two paths are separated by three white beads. Never do the two paths become one. They

indigenous peoples through colonial laws and conduct that would eventually ignore indigenous peoples' capacities to possess territorial sovereignty and title to their territories.[3] Although modern attempts to achieve a mutually consensual relationship[4] have been recommended to achieve this goal, critical examination must ascertain whether proposed relationships completes the newcomer's quest for conquest or not. If this is the end result of treaty-making, our future generations will have an even harder time unravelling our tangled past. The illegitimacy of doctrines that sustain the rule of law upon, which the constitution of Canada affords territorial integrity and sovereignty over indigenous peoples will be validated through indigenous consent. A relationship between nations should not be reflective of one nation being defeated by the other, but rather should achieve peace and political equality between international subjects.

This chapter focuses on how to avoid conquest treaty-making. It suggests that reaching into the past and examining colonial-settler practices and laws can reveal various masks of dispossession and how dispossession continues to plague current treaty-making in Canada. It is

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> remain an equal distance apart. And those three white beads represent "friendship, good minds, and everlasting peace."...It is these three things that Aboriginal People and the Settler Nations agreed to govern all of their future relationships by...Returning to the "gus-wen-qah", and the paths that belong to each of our nations, the descendants of the Settler Nations have your laws and beliefs, your institutions. These things will be kept on the Canadian path. Canadian people have their own way of doing things and they have the right to be that way. It is parallel to the right to be a Mohawk woman (which is in fact the only right that I have) and be in that canoe on the other purple path with all the Mohawk laws, ways, language and traditions. Those paths do not become one. Nowhere have my people ever agreed to live governed by your laws or your way of thinking. Nor have my people tried to change the way Canadians govern themselves. That is our respect for your rights. This is the place where my people wish to remain, living in respect of the Two-Row Wampum Treaty.

RCAP, *The Familiar Face of Colonial Oppression: An Examination of Canadian Law and Judicial Decision Making* (Research Report) by P. Monture-Angus (Ottawa: Supply and Services Canada, 1994) at chapter one [hereinafter *The Familiar Face of Colonial Oppression*].

[3] Dichotomizing territorial sovereignty and title to territory may be how European states organized themselves with respect to distribution of property and rights therein or determining possession, however, this is not necessarily the case for indigenous peoples. This dominant construction will be discussed below. Sovereign attributes discussed by commentators to be possessed by indigenous peoples include their territory, the capacity to enter into international agreements, and their specific forms of government.

[4] Canada, *Report on the Royal Commission on Aboriginal Peoples*, vols. 1-5 (Ottawa: Supply and Services Canada, 1996).

my thesis that indigenous peoples can provide counter-realities to prevent the seeds of conquest and dispossession from flourishing in territories such as those of the Ned'u'ten. First, a brief description of doctrines of dispossession will be provided. By taking a doctrinal and jurisprudential approach, it will be demonstrated how these doctrines continue to shape treaty-making in Canada. Second, an exploration of challenges by indigenous peoples to these doctrines will be made at three levels: Ned'u'ten, national, and international. This exploration will evidence indigenous resistance to dispossession. Finally, by focusing on an international treaty framework for Canada, this chapter will propose principles for an alternative treaty framework that is not based on doctrines of dispossession, nor aimed to complete the colonizers' game of conquest. Central to the rejection of dispossession theories is the challenge to state legitimacy. It is this challenge that we now explore.

## 1. Challenging Canada's legitimacy as a State

> Our system of leadership saw the Indigenous peoples through the first five hundred years after Columbus. If the state of Canada wants to claim use of the lands of Indigenous peoples, it must recognize that the traditional governments of Indigenous Peoples are the only governments which lend legitimacy to the state of Canada. The International Court of Justice was very clear in its decision concerning terra nullius and the role of treaty-making with Indigenous peoples. Only agreements entered into with the Indigenous peoples of the territory can give any legitimacy to the use and occupancy of the lands. Canada must recognize the position of the traditional governments that entered into treaty with the British Crown. To discount the legitimate governments of Indigenous peoples is to discount Canada's own legitimacy.[5]
> -Sharon Venne-

Doctrines of dispossesions[6] such as the rights of conquest and discovery are

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[5] S. Venne, "Understanding Treaty 6: An Indigenous Perspective" in Asch, *supra* note 2 at 206-207 [hereinafter "Understanding Treaty 6"].

[6] See E. Daes, Spec. Rapp. "Human Rights of Indigenous Peoples: Indigenous people and their relationship to land". ECOSOC, CHR E/CN/Sub.2/1997/17, 20 June, 1997 [hereinafter "Human Rights of Indigenous Peoples"]. In this preliminary working paper, theories that justify dispossession of indigenous peoples' lands by non-Indigenous sovereigns are called doctrines of dispossession. Such doctrines include 1) non-recognition of the indigenous relationship's to their lands; 2) the conversion of indigenous peoples to Christianity; 3) Eurocentric attitudes of

rationalizations used by European states at contact to acquire sovereignty over indigenous lands. It is my thesis that such rationalizations are the fictions upon which current treaty talks in British Columbia are based. Critical inquiries must simultaneously be made regarding treaty policies, processes and substantive entitlements proposed by Canadian state governments that stem from these rationalizations. A place to start, is to challenge the statehood of Canada. By doing so, indigenous peoples located in what is now called British Columbia can 1) find real, practical but principled ways to make aspirations such as nation-to-nation treaty making just; and 2) simultaneously facilitate a decolonization regime that both Canadians and indigenous peoples such as the Ned'u'ten could use for legitimating future relations.

One can challenge the legitimacy of the Canadian state by exposing colonial theories regarding Crown acquisition of sovereignty over indigenous peoples' traditional territories. Although colonial-settler populations have not felt it in their interest to challenge the validity of their Crown's declaration of sovereignty over indigenous territories, until recently,[7] it remains to be proven legally how Canada acquired such sovereignty.[8] The practice by the Canadian

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civilization or civility; 4) economic agenda's of states that drove attitudes, doctrines and policies developed to justify the taking of lands from indigenous peoples; 5) rationalization; 6) conquest discovery; 7) terra nullius. Also see a comprehensive study on these doctrines in RCAP, *Doctrines of Dispossession: A Critical Analysis of Four Rationales for the Denial or Extinguishment of Aboriginal Rights in Canada* (Research Report) by R. Spaulding (Ottawa: Supply and Services Canada, 1995).

[7] See C. Bell and M. Asch, "Challenging Assumptions: The Impact of Precedent in Aboriginal Rights Litigation" in Asch, *supra* note 2 at 38. See also P. Bowles, "Cultural Renewal: First Nations and the Challenge to State Superiority" in B. Hodgins, S. Heard & J. Milloy, eds., *Co-Existence? Studies In Ontario-First Nations Relations* (Peterborough: Trent University, 1992) at 132.

[8] Kent McNeil states:

> The assumption that along with sovereignty the Crown in settled Canada acquired title in fee simple to lands occupied by indigenous people has never been directly challenged in a Canadian court. Nor do any of the decided cases preclude such a challenge from being made.

K. McNeil, *Common Law Aboriginal Title* (Oxford, Clarendon Press, 1989) at 289 [hereinafter *Common Law Aboriginal Title*]. Brian Slattery did not find it necessary to question how the Crown acquired territorial sovereignty from indigenous peoples until 1991. Accepting the assumption of Crown sovereignty as being valid and legitimately acquired in the approach taken in Slattery's earlier writings on aboriginal rights in Canada:

> The question is this. When the British Crown claimed sovereignty over a territory and introduced new laws

judiciary and scholars has been to 1) accept the assertion of Canadian sovereignty over indigenous peoples and indigenous territories as being valid; 2) ascertain whether the colonial-settlers' law afforded indigenous peoples in non-ceded or conquered territories with common law aboriginal rights to land and governance at the time Crown sovereignty was acquired[9] and 3) validate any Canadian rights acquired during the dispossession era.[10] This is convenient. The

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and legal institutions, what impact did this have on the land rights held by aboriginal peoples? Were those rights nullified, or did they survive in a form cognizable by Crown courts?

B. Slattery, "Ancestral Lands, Alien Laws: Judicial Perspectives on Aboriginal Title" (Saskatoon: University of Saskatchewan Native Law Centre, 1983) at 1 [hereinafter "Ancestral Lands"]. By 1991 he makes the following argument:

> My basic argument is that any approach which purports to rely *exclusively* on a body of positive or conventional law is necessarily afflicted by arbitrariness or circularity. The only possible approach is one that draws to some extent on basic principles of justice. In fact, so-called "positive law" cannot be severed from "Natural law," nor the latter from the former: they are both aspects of the unitary phenomenon of law. I will argue that native American peoples held sovereign status and title to the territories they occupied at the time of European contact and that this fundamental fact transforms our understanding of everything that followed.

B. Slattery, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L. J. 681 at 690 [hereinafter "Aboriginal Sovereignty and Imperial Claims"].

[9] Like Brian Slattery, Kent McNeil has broadened his focus on indigenous issues from a British colonial, common law and predominately proprietary perspective to looking at sources of indigenous rights outside this framework. However, his attempt to bring the judiciary progressively in line with a more balanced discourse has not been realized in judicial pronouncements. Rather, the Supreme Court of Canada has relied heavily on McNeil's earlier restrictive interpretation of sources that could recognize indigenous rights. Such restrictive approaches leave aside the legitimacy of Crown's claim to sovereignty over indigenous territories, self-determination, and the growing recognition of indigenous peoples at international law as subjects:

> The focus of this work is thus on the moment of acquisition of a new settlement by the Crown. The principal theme is the applicability of English real property law to any indigenous people living their at the time. The approach taken is therefore doctrinal rather than jurisprudential. **The morality of the colonization process, the justice of applying English law in this context, and related ethical issues are generally not discussed. The question sought to be answered is not whether the Crown should have respected indigenous occupation, but whether it was under a legal obligation to do so.**

*Common Law Aboriginal Title*, *ibid.* at 5. See also K. McNeil, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments" (1994) 7 Western Legal History 113.

[10] For example, Spaulding explicitly states that while trying to redress the dispossession indigenous peoples face today, in the interests of justice, ethics, the rule of law and equality, Canadians cannot be dispossessed in this process:

> It should be emphasized that this paper's critical project does not presume that renovations to the law that might overcome the defects identified here must restore absolute rights to Aboriginal peoples, and none to the descendants of settlers. None of the values just mentioned support such a stance, and few human rights are considered unsusceptible to justifiable limitation. In arguing, in particular, that the doctrines examined here do not justify denying Aboriginal land rights the status of property in English law, or Aboriginal rights of self-government that status of internal sovereignty, this paper does not claim that non-Aboriginal people hold no valid deeds of title from the Crown or that Canada's sovereignty is chimerical. Rather, if the analysis advanced here is persuasive, colonial law must look elsewhere than these doctrines to justify entitlements coordinate with Aboriginal rights.

following inquiry into "doctrines of dispossession" avoids this approach and asks the question are such acquisitions valid? This approach also voices indigenous scholarship to de-center the claimed legitimacy of the colonial regime.

Indigenous scholars question not just the juridical *effect* of debatable colonial acquisitions' practice, but the *act* of acquisition itself. Although non-Indigenous scholars may also support the invalidations of such doctrines, I have yet to see any of these scholars take the next step to publicly challenge the legitimacy of their own status as subjects of colonizing states nor the juridical effect that accompanies such fictions. This "theoretical justice" remains to be seen.[11] The presumption that has underlying title to indigenous soil vested in the Canadian

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See Spaulding, *supra* note 6 at Part A.

[11] Albert Memmi provides an explanation as to why colonizers are unwilling to decolonize themselves completely. Memmi paints an accurate observation of the "colonizer." I have extracted portions of the 'colonizer portrait' he has painted and paraphrased the essence of his work to try and understand the positions taken by colonial scholars regarding indigenous peoples:

> The colonizer *knows* he is both a privileged being and a usurper. Memmi argues that the colonizer illegitimately grants himself privileges upon entering foreign lands by creating his own laws and rules to replace those of the original inhabitants. The colonizer believes that the colonized will be refused certain rights forever while reserving advantages strictly to himself. The colonizer who has a consciousness of this identity eventually comes to a crossroads where he can neither reject this identity nor becomes one of the colonized. While refusing to accept colonial ideologies, he continues to live with its actual relationships. He refuses to take the next step to a complete revolt, to be a turncoat. Rather Memmi, describes this colonizer as both a revolutionary and an exploiter with no intention to becoming decolonized. He discovers that if the colonized have justice on their side, and he approves and offers his assistance, his solidarity will stop there; he is not one of them and has no desire to be one. He vaguely foresees the day of their liberation and the reconquest of their rights, but does not seriously plan to share their existence, even if they are freed...He invokes the end of colonization, but refuses to conceive that this revolution can result in the overthrow of his situation and himself. For it is too much to ask one's imagination to visualize one's own end, even if it leads to his rebirth. Memmi states that a colonizer, aware of his illegitimate status, is politically ineffective. He refuses to demand the status quo of the colonial regime, but cannot identify his future with that of the colonized. He remains at the crossroads while he legitimates colonization and manages the colonized. He endeavors to falsify history, rewrite laws and extinguish memories - anything to succeed in transforming his usurpation into legitimacy. The colonizer navigates between a faraway society which he wants to make his own and a present society which he rejects and thus keeps in the abstract. He does not address the racism that unites himself with the colonized. He is master and innocent in a new moral order that he founds, an order that cannot be questioned by others and certainly not by the colonized. He portrays a colonized according to his reconstruction. He begins to construct myths.

A. Memmi, *The Colonizer and the Colonized* (Boston: Beacon Press, 1965) respectively at 9,20,22,23,32,40,41,52,68,70 and 76.

Crown is based on the domestic legitimization of doctrines of conquest and discovery, now deplored by the international world order and rejected by indigenous peoples. The questionable fact that Europeans legitimately acquired title to indigenous lands in North America at the time of contact; the exclusion of indigenous peoples as subjects from the international system; and the colonization of indigenous peoples provide sufficient reasons for indigenous peoples in British Columbia and other parts of Canada to challenge Canada's assertion of sovereignty over their territories.

As indigenous discourses worldwide are gaining respect and support for self-determination, decolonization and subject status, it is imperative for indigenous peoples to understand why they have been excluded from history as sovereign peoples with sovereign territories. The histories, laws, customs, and traditions of indigenous peoples must be told to the world and be accepted by the colonizing state before any new relationships are created. In other words, any new relationship between indigenous peoples and colonizing states must be based on compliance with evolving international standards and must recognize indigenous peoples' survival as sovereign entities. Their right to decolonize completely and peacefully must also be recognized. Equally, to canvass indigenous scholarly writings also brings out the racialized nature of dispossession doctrines. This analysis is certainly lacking in colonial scholarship to date.

## 2. Colonial Acquisitions Theories

> ...The ancestors of these people had been there for thousands of years. They defended this territory against enemies to the north and south and, when Europeans arrived, debated how best to deal with them. However, the peoples of the canyon were up against not only superior fire power, but also well-developed strategies of colonialism worked out in the course of Europe's worldwide advance into the non-European world. In detail colonialism took many forms, but it turned on common assumptions about the superiority of European civilization to the ways of the non-European world and, for all the kindly intentions of some of those who

> were caught up in it, depended on force to achieve its essential purpose: the transfer of land from one people to another. This was true in British Columbia as anywhere else. Broadly, we are here, most of us, because we have imposed ourselves.[12]
> -Cole Harris-

Historically, in international law there are five ways to acquire territory of a foreign sovereign: discovery/occupation, cession, prescription, conquest and accretion.[13] In modern international law, acquisition to title in lands are based on an act of effective occupation, conquest or cession.[14] In contemporary international law, foreign territory can no longer be acquired by conquest through use by force but only through agreement with the original sovereign. However, it remains that territorial sovereignty over lands acquired by right of prescription, if continuously and peacefully displayed to other states will be as good as title, and sufficient to mark boundaries between states and accord the state the exclusive right to do state activities.[15]

Brian Slattery observes that there is no universal consensus[16] on how "original title" was

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[12] C. Harris, *The Resettlement of British Columbia: Essays on Colonialism and Geographical Change* (Vancouver: University of British Columbia Press, 1997) at xii.

[13] With respect to land territory, acquisition by occupation will occur when 1) the territory belongs to no other state or is uninhabited and 2) the occupying state exercises effective control over such territory. Acquisition by cession will occur when territory is transferred from one state to another by a treaty of cession or where the acquisition of territory by a new state through the grant of independence by a former colonial power. Acquisition by prescription occurs when a state peacefully, over a period of time, occupies a certain territory with the knowledge of and without protest by the original sovereign. Acquisition by conquest is achieved through war and subsequent annexation leaving the conqueror in possession of the conquered's territory. Acquisition through accretion occurs when natural forces enlarge a state's territory. See H. Kindred, International Law: Chiefly as Interpreted and Applied in Canada, 4th. ed. (Canada: Emond Montgomery Publications Ltd., 1987) at 360. Note these acquisition rules are descriptions or codifications of colonial practice after unknown inhabited territories were "discovered" by European colonizing powers.

[14] *Island of Palmas Case, Netherlands* v. *United States* (1928), 2 R.I.A.A. 831.

[15] *Ibid.*

[16] Slattery states:

> The authorities disagree as to how an original title could be obtained. Some argue that the first European state to "discover" or explore American lands gained title. Others say that a symbolic act of taking possession, such as the planting of a cross, a flag, or royal insignia, was necessary. Still

obtained in North America. He states that territorial sovereignty could be acquired by aliens through the establishment of factual control and continuity of this factual dominion over a territory regardless of whether such territory was inhabited by peoples or not. Other scholars also accept these modes of territorial acquisition.[17] According to such scholars, conquest through effective occupation is favoured over the right of discovery as the theory to explain how indigenous peoples became dispossessed.

Alternative articulations of the same theory have been developed as well.[18] Canadian

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> others insist that none of these methods was valid, that the incoming European power had to occupy the territories in an effective manner before sovereignty vested, as by establishing settlements, a governmental apparatus, or at least the elements of factual control.
>
> All of these methods - discovery, symbolic acts, and effective occupation - presuppose that North America was legally vacant at the relevant time, that there were no existing rights capable of impeding the smooth flow of incoming sovereignty...Where a territory is already held by a sovereign power, title to it can only be won by such methods as conquest, cession from the existing sovereign, or the continuous exercise of factual dominion for a period long enough to confer prescriptive title.

"Aboriginal Sovereignty and Imperial Claims", *supra* note 8 at 685-686.

[17] Kent McNeil states:

> For an assertion of sovereignty by the Crown to be effective internationally the criteria of the law of nations relating to acquisition of territory would have to be met. These criteria are derived mainly from the practice of States and the opinion of jurists of the period in question. At the dawn of the colonial era towards the end of the fifteenth century, there were no set rules for acquisition of territories which were not already within the jurisdiction of a recognized sovereign. The European powers sought to fortify shaky claims by whatever means they could, including assertions of discovery, symbolic acts of possession, papal bulls, the signing of treaties with rival States or local chiefs and princes, the establishment of settlements, and the outright conquest by force of arms. The juridical effect of these various acts is a matter of debate. In practical terms, however, might made right, so that a sovereign who succeeded in exercising sufficient degree of exclusive control was generally regarded as having acquired sovereignty.

*Common Law Aboriginal Title*, *supra* note 8 at 110.

[18] Douglas Sanders states that european colonial powers were able to effectively assert suzerainty over tribes which decreased Indian autonomy and accompanying rights. Suzerain has been defined as a feudal lord; a sovereign or nation having some control over another nation that is internally autonomous. See K. Barber, ed., *Canadian Oxford Dictionary*, (Toronto: Oxford University Press, 1998) *s.v.* "suzerain". Suzerainty has been discussed by Hurst Hannum to be associated with a "vassal state" which is considered by international law as possessing some degree of international personality and sovereignty:

> A *vassal state* subject to the suzerainty of another state does have some international personality, but it is subject to greater control by the suzerain state than is the case for protected states. The status of vassals may be defined both by treaty and by rather vague customary and personal relations which originated within feudal law. "[A] distinctive element of the feudal suzerainty relationship is that the suzerain holds the source of the governmental authority of the vassal State whose ruler he grants the right to exercise the authority autonomously. International treaties of the suzerain are automatically binding on the vassal, although the

governments and judiciaries have not pronounced how the territorial sovereignty of indigenous peoples, in what is now Canada, have been acquired by Europeans.[19] Without a judicial endorsement of acquisition theory in Canada, Sanders believes one has to look to state practice to answer this question. However, he states that acquisition theory can facilitate the determination of aboriginal and treaty rights in Canada, the extinguishment of these rights and internal self-government or territorial rights.[20]

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vassal does retain some capacity for independent international action, for instance Bulgaria's war against sovereign Serbia while Bulgaria was at least a nominal vassal of Turkey. The term has most commonly been employed to describe various components of the Ottoman empire, and other examples might include the Native States in India under British "paramountcy," Outer Mongolia, and pre-1911 Tibet.

H. Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1996) at 17.

[19] Sanders states:

> United States law has used the doctrine of "discovery" to justify the takeover of Indian people and territory. In the same way Australian law has used the concept of "terra nullius," the legal myth that Australia had no previous owners. Today it is easy to see that both doctrines are racist. Both are inconsistent with modern international law. The United Nations Working Group on Indigenous Populations rejects both doctrines. Canadian law has never used either "discovery" or "terra nullius". Our legal tradition has been so self-confident, so arrogant, that it felt no need to have any legal theory justifying British colonialism.

D. Sanders, "The Supreme Court of Canada and the Legal and Political Struggle over Indigenous Rights" (1990) 22 Canadian Ethnic Studies 122 at 122.

[20] Sanders states:

> Acquisition theory, that is, the legal principles involved in the acquisition of colonies, can be used either to establish that some aboriginal rights survive the acquisition of the area as a colony or be used to limit or deny the survival of aboriginal rights. Litigation in Australia has been preoccupied with using acquisition theory to establish some aboriginal rights. Now that Canadian law accepts the survival of aboriginal rights, acquisition theory could be used in this country to establish limitations on those rights. Canadian law currently has no acquisition theory, as such, that could explain which aboriginal rights survive and which do not. The only acquisition theory apparently around in Canadian law is "occupation and settlement", which would deny survival of any aboriginal rights and therefore is in conflict with both *Guerin* and section 35.
>
> The logical analytical framework, consistent with *Guerin*, is for the courts to begin with the proposition that Indians and Inuit had a full range of territorial, legal and political rights. European colonial powers first took control over Indian foreign relations by effectively asserting suzerainty over the tribes and blocking their relations with other European powers. Incrementally other rights were assumed by the European colonial power and Indian autonomy was further reduced. This historical approach abandons two alternative theories that are both now indefensible. The first, is that the Indian tribes had no legal order. The second is that "discovery" or the planting of a flag or some blind imperial enactment aimed at the new world had the effect of completely ending Indian rights on a particular date.

Slattery, McNeil, and Sanders accept that Britain, and later Canada, established effective occupation of indigenous territories according to state practice. None of these colonial authorities present the argument that colonial sovereignty asserted by means of racialized doctrines such as prescription can survive the legitimacy of sovereign indigenous peoples. By limiting colonial discourse to only rights that survive Crown assertion of sovereignty, the writings of these colonial theoreticians should not be viewed as absolute. These conclusions should be measured against the voices of indigenous peoples and scholars who argue otherwise.

While these colonial scholars argue that the domestic conduct of the state in question must be reviewed to ascertain the mode of acquisition and juridical effect, others state that international law regulated such conduct. The extent to which European states abided such modes is a matter of debate. However, indigenous peoples can be argue that acquisition of their territories in Canada has occurred outside the realm of international law.

By examining European transgressions from international laws, it is my thesis that Canada has illegally, and without regard for justice, *assumed* sovereignty over my people and my peoples' traditional territory. Such an inquiry will also show the foundation on which Canada based its colonial acts over my people and demonstrate why my people can assert the fullest right to self-determination and complete decolonization. This inquiry will contribute to 'sovereign discourses' by indigenous peoples and provide a caution for indigenous peoples that prefer to

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> Logically there should be no single rule for extinguishment of aboriginal rights. There should be different rules for the taking of different aboriginal rights. The taking of Indian external sovereignty in what is now Canada was not accomplished by conquest, consent or explicit legislative act. What was explicit was the creation of British and Canadian sovereignty, which necessarily reduced Indian and Inuit sovereignty. There was no reason why the implicit taking of Indian external sovereignty should mean that internal self-government or territorial rights should be able to be taken in the same way. These are the questions that need to be canvassed in the current aboriginal title cases.

D. Sanders, "Pre-existing Rights: The Aboriginal People of Canada: s.25 and s. 35" in G. Beaudin & E. Ratushny, eds., The Canadian Charter of Rights and Freedoms, 2nd. ed. (Toronto: Carswell, 1989) 707 at 732 [hereinafter "Pre-existing Rights"].

place pragmatism ahead of principles. History has to be retold; the state has to recognize its illegitimacy; and a new relationship must be constructed on the unconditional legitimacy of indigenous peoples' governing systems and rights to their territories. In other words, indigenous peoples are not just mere burdens on the underlying title of the state. Peace and justice can be achieved when two nations can live in harmony and co-existence with the growing world order. Indigenous peoples assert that they have always been subjects under international law, even though their contributions and membership into the family of nations was denied or rationalized to not exist by colonizing powers.[21]

## 3. Masks of Dispossession

### a. The right of conquest (where territory is inhabited)

> Events on the ground, not theories of law, no matter how carefully crafted, have often been the true determinants of Indian rights.[22]
> -Thomas Berger-

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[21] Martinez sets out subject status at international law:

> ...both in theory and in practice - and during the whole era of European expansion - international law was taken to be universal and its norms were considered to be applicable to the whole world. The bone of contention was determining who were subjects of such a universal system of norms.
>
> Two conflicting replies were offered to that question: (i) the Law of Nations were restricted to the European "actors" wherever they operated; this thesis was based on aspirations to European world hegemony and excluded from its scope any non-Christian or "uncivilized" political entity, and (ii) each of the independent political entities in the world would be declared a potential subject of that universal international law, and would only achieve full status as such when it established relations with the "authentic" subjects that already existed (hence the importance acquired by the so-called "theory of recognition" both in this discipline and in its diplomatic law branch. Obviously, in practice it was impossible for either of these two variants to establish itself. In reality a wide variety of situations obtained.
>
> ...concerning the situation in English-speaking North America...the practice followed by States, as a source of customary international law, contradicts "conventional wisdom" which denies indigenous nations legal capacity as subjects of international law. Quite the contrary: from the very beginnings of that relationship, the indigenous nations were considered as capable of preserving peaceful and warlike relations and of entering into treaties with the European Powers.

M. Martinez, Spec. Rapp., *Second Progress Report on the Study of treaties, agreements and other constructive arrangements between States and indigenous populations*, (1995) E/CN.4/Sub.2/1995/27 [hereinafter *Second Progress Report*] at paras. 166-170.

[22] T. Berger, *Village Journey: The Report of the Alaska Native Review Commission* (New York: Hill and Wang, 1985) at 124.

In modern and contemporary international law, the right of conquest[23], is no longer an acceptable way to acquire territory of a foreign sovereign, though traditional international law certainly recognized the right of conquest. Conquest was initially an *absolute* and unrestricted right to acquire territory by force of one sovereign over another and was not qualified by standards of morality or justice which would assess whether the means of acquiring title by conquest were lawful or not. In such circumstances, the conquered sovereign and its territories would be subjugated to the conqueror's sovereign unilateral will, powers and laws.[24]

Within the context of this thesis, this *absolute* right of conquest could not be invoked against the Ned'u'ten by the Canadian Crown today. It would also not apply at the time of contact (1822) or even at the date of sovereignty's assertion in British Columbia (1846). Ned'u'ten territories have never been acquired by the use of an unregulated force by foreign entities. A conqueror could not claim title by conquest over foreign territories if no force occurred.[25]

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[23] The right of conquest has been defined as:

> ...the right of the victor, in virtue of military victory or conquest, to sovereignty over the conquered territory and its inhabitants...The only requirement of fact to be fulfilled before the title by conquest can be established is that the territory must be in the effective possession of the conqueror. Legally, this is presumed to have occurred when the conquest of military occupation is followed either by the complete extinction of the political existence of the conquered state; or by the cession of the conquered territory through a treaty of peace (when the defeated state remains in existence to make it); or by the practical acquiescence of the defeated state in the conquest, as would be evidenced by its failure to prolong war for the purpose of recovering it...

S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International Law and Practice* (Oxford, Claredon Press, 1996) at p. 9.

[24] Korman cites Grotius, *De Jure Belli ac Pacis, bk. III, ch. 7 sect. 1* for an explanation of the absolute power granted to a victor of conquest: It was Grotius' view that the rights of the conqueror over the conquered were, in his own time (the early seventeenth century), absolute and unlimited. Hence, he claims, the conqueror was at that time permitted by the law of nations to kill or enslave any person captured on enemy territory, including women and children, and to destroy and pillage all private property belonging to inhabitants. *Ibid.* at 30.

[25] Korman makes this point:

> Thus the first essential condition for establishing a title by conquest was the existence of a state of

Canada asserts sovereignty and title to indigenous lands in British Columbia in 1846 through the Treaty of Oregon, an agreement between foreign entities. This should not include or imply that such assertions are between Canada and indigenous peoples such as the Ned'u'ten. The right of conquest was acceptable in international law until 1919 when the League of Nations and its successor the United Nations rendered it in principle, no longer acceptable.[26] Substantial contact with the Ned'u'ten people by Europeans did not occur until the late 1800's, and no force or war occurred at the time the Crown asserted sovereignty. So at the time the Crown asserted sovereignty in British Columbia, its underlying title to Ned'u'ten territories could not be founded on the right of conquest as accepted by international law.

In the Enlightenment Era, the unrestricted right of conquest grew unpopular and the use of force to acquire foreign territory began to be regulated by state practice and developing international norms of justice and humanity. Use of force now had to be just[27] and the victorious conqueror could no longer absolutely subsume the conquered into its sovereign domain.[28] To

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> war: 'Unless preceded by war, the unilateral annexation of the territory of another State without contractual consent is illegal.' The isolated snatching of territory by force, in the absence of war, was not a recognized basis of title.

*Ibid.* at 109.

[26] The first and second world wars have rendered the right of conquest obsolete. After the first world war, the League of Nations sanctioned the annexation of territories by force and coupled with the second world war, paved the way for the U.N. Charter to denounce conquest as stated in 2(4) of the Charter which "prohibits the threat or use of force against the territorial integrity of...any state".*Charter of United Nations*, 26 June 1945, Can. T. S. 1945 No. 7; See also Article 52 of the Vienna Law Convention on the Law of Treaties which declares "any treaties procured by the threat or use of force in violations of international law is void". From 1919, onward, peaceful settlement of territories and sovereignty would be based on the right to self-determination.

[27] See writings of Vattel, *The Law of Nations* bk. III, Grotius *Mare Liberum and De Jure Belli ac Pacis* and Victoria found in J. Brown Scott, *The Spanish Origin of International law Francisco de Victoria and his Law of Nations* (Oxford: Claredon Press, 1934) and R. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (Oxford: Oxford University Press, 1990) [hereinafter *The American Indian*].

[28] Korman cites Vattel:

> While war might result in a transfer of sovereignty to the conqueror, the property of individuals was to be left undisturbed: In the conquests of ancient times even individuals lost their lands...But at present war is less dreadful in its consequences to the subject: matters are conducted with more humanity: one sovereign makes war against another sovereign, and not against the unarmed citizens.

preclude the duration of war, treaties became a necessary requirement to peacefully facilitate cession of territory from the conquered to the conqueror. In such treaties, while the conquering state gained sovereignty over the conquered territory, it did not immediately gain jurisdiction over the inhabitants whose laws and ways of living were kept intact, subject to the future conduct of the new sovereign.[29] In theory, treaties had to be based on the consent of the conquered before the conqueror could claim its sovereignty by the right of conquest. So we see how the absolute right of conquest and the territorial sovereignty acquired under this mode was no longer validated in international law with the increase in morality in human rights. It can be argued that states who acquired territories in indigenous North America based on this "regulated right of conquest" through war or treaty, leave indigenous peoples at present in a strong position to assert the right to self-determination and have their traditional territories recognized by subjects of the international order. This is because 1) such treaties were not necessarily understood as ceding sovereignty or title;[30] and 2) contemporary international law now holds any acquisition of foreign

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> The conqueror seizes on the possessions of the state, the public property, while private individuals are permitted to retain theirs. They suffer indirectly by the war; and the conquest only subjects to a new master.

Korman, *supra* note 23 at 31.

[29] See the relationship established between Britain and its conquest over France's claims to the new world in the Treaty of Paris, 1763 where the inhabitants originally subjects of the state of France were able to eventually retain their liberties such as religion, language, civil code over civil law for property and civil rights as codified in the *Quebec Act, 1774*, while English common law governed criminal and public law. See also Britains' treatment of the inhabitants of Scotland, whereby the latter were able to hold office, exercise local government and practice their own religion. But see Britain's relationship with Ireland where the inhabitants were to be assimilated into the sovereign of the conqueror. M. Hechter, *Internal Colonialism: The Celtic Fringe in British National Development, 15-36-1966* (Berkeley: University of California Press, 1975).

[30]Venne observes the purpose for Cree treaty-making in the latter 19th century:

> Sharing the land through treaty-making was a known process. The treaty-making process with the British Crown and others followed the Cree laws. The way to access the territories of the Cree, Assiniboine, Saulteau, and Dene was to enter into a treaty.

"Understanding Treaty 6" in Asch, *supra* note 2 at 184. See "Wampum at Niagara" in Asch, *supra* note 2 at 169 where John Borrows states that in the context of treaty-making between the Anishnabe and Britain, his people did not recognize the sovereignty of Britain: "[t]he promises made at Niagara, and their solemnization in proclamation and treaty, demonstrate that there was from the outset considerable doubt about the Crown's assertion of sovereignty and legislative power over Aboriginal rights." See also J. Henderson, "First Nations Legal Inheritances in Canada: The

territory through the use of force (ie/ imposed treaties as opposed to freely given consent) as illegal.

The Ned'u'ten have never given consent, to have their traditional territories governed by their clan systems, be subsumed into the Canadian Crown, by conquest nor cession through treaty or purchase. The Ned'u'ten have never had their traditional territories annexed to the Canadian Crown. In other words, the Ned'u'ten have never gone to war with the Crown and have yet to surrender their traditional territories to any foreign sovereign. So how can Canada legitimately assert sovereignty over Ned'u'ten traditional territories and categorize the Ned'u'ten's interest in their homelands as only those lands under federal jurisdiction: "s.91(24) reserve lands or aboriginal title lands"?[31] Furthermore, how can Canada through its import of English legal

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Mikmaq Model" (1995) Man. L.J. 1 [hereinafter "First Nations Legal Inheritances"]; "Mikmaw Tenure in Atlantic Canada" (1995) 18 Dalhousie L.J. 195 [hereinafter "Mikmaw Tenure"].

[31] Martinez offers an explanation for the theory behind the right of conquest in the context of Britain taking possession of Australia around the 1830's and 1840's:

> ...but although this theory could have explained how the British had gained sovereignty over the continent, it did not justify the total dispossession of the original inhabitants, since according to legal doctrine at that time (e.g. Vattel) conquest implied taking possession of the property of the conquered State, but not of that of its individual inhabitants. It should be noted that although international law at this time did not recognize indigenous peoples as subjects, had it done so, the juridical effect of conquest leaving the individual inhabitants with their property subject to the will of the conquering sovereign would be suspect as indigenous peoples would have contributed principles of peace-making as practiced in their realms of diplomacy to international discourse and would have most likely 'enlightened' Europeans by questioning the justness of territorial acquisitions of lands already inhabited by peoples. The soundness of any juridical effect stemming from the territorial acquisitions by foreign sovereigns over indigenous peoples will be explored below.

*Second Progress Report, supra* note 21 at para. 208. See also J. Borrows, "Because it does not make sense: A case comment on Delgamuukw v. British Columbia" [forthcoming in 1999],[hereinafter "Because it does not make sense"], where he states that the Crown is able to restrict aboriginal title by treating its status as being the same interest that courts recognize with respect to reserve lands:

> While the Court is careful to note that aboriginal title is not "restricted to those uses which are elements of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right, the Court found, quoting from *R. v. Guerin*, that "the same legal principles governed the aboriginal interest in reserve lands and lands held pursuant to aboriginal title." Aboriginal people will find little solace in the statement that "the Indian interest in the lands is the same in both cases." The similarity of reserve and title land restricts aboriginal title because "the nature of the Indian interest in reserve land" is held by Her Majesty for the use and benefit of the respective bands for which they are set apart..." While the Court focuses on the similarity in title and reserves to demonstrate the "breadth" of uses for "any...purposes for the general welfare of the band", its reasons ignore the fact that this similarity removes the underlying title from the land's original inhabitants, and vests this title interest in another.

traditions, categorize the remaining portions of Ned'u'ten territory as 'settled territories'.[32] The answers to this foundational question lies in challenging the statehood of Canada, its sovereign presumptions, and the justification for the colonization of Ned'u'ten people by Canada.

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[32]*Common Law Aboriginal Title*, *supra* note 8 at 267 where McNeil states that aboriginal title can only exist in 'settled territories' and therefore it is necessary to classify regions in Canada as being conquered, ceded or settled:

> Before discussing indigenous land rights in Canada, it is essential to distinguish the regions to which the Crown has original territorial title by settlement from those acquired derivatively by conquest and cession from France. Settled parts consist of Newfoundland (including Labrador), Rupert's Land (granted to the Hudson's Bay Company by Royal Charter in 1670), the old North-Western Territory, the Canadian Arctic Islands, and British Columbia.

Douglas Sanders questions the "settled territories "application to B.C. as being inconsistent with treaty policy elsewhere in the country:

> The distinctions between settled colonies and colonies acquired by cession or conquest was described by Blackstone in his Commentaries on the Laws of England. It seemed that in settled colonies there was no pre-existing legal order to be recognized. The crudest formulation was that such an area was "terra nullius", the land of no-one, even it was occupied by indigenous peoples, as in Australia. The indigenous population was seen as having no legal order. This is a formalized version of the recurrent depiction of indigenous peoples as "wandering savages", a depiction used to deny the possibility of legal rights... A strict application of the idea of a "settled colony" denied Aboriginal rights. Clearly, then, this did not explain colonial practice in Canada, where treaties were negotiated in major parts of the country.

D. Sanders, "Politics and Law - Land Claims in British Columbia" (15 August , 1995) on file with author. In response to a recent article by P. McHugh, "The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past" (1998) 611 Sask. L.R. 393, Sanders has reformulated his position:

> ...What this suggests, then, is that Canada is not odd. My analysis that Canada has no acquisition theory would be met by an analysis that Canada, like the U.S. and New Zealand, came to be considered to be a "settled colony", but that the "settled colony" analysis was not applied in the late 18th and part of the 19th century to deny indigenous rights. I think there is some tradition of regarding Canada as a "settled" colony - which I used to think made no sense because of the treaties and the Royal Proclamation. What I think McHugh would say was that Canada came to be treated as a settled colony with the birthright kind of analysis - British law automatically applied (a clear result of the settled colony analysis) - but other factors determined the recognition or non-recognition of indigenous rights. So what we wind up with is not "no acquisition theory" [as I had been arguing], but an "acquisition theory" to deal with colonial issues of the relationship of settlers/Crown/imperial parliament and no acquisition [or other] theory on the survival of indigenous rights into the colonial situation.

(Pers. comm.) The point I am trying to illustrate is that indigenous peoples such as the Ned'u'ten have 'original title' or 'Ned'u'ten title' and sovereignty over these territories. Constituting Ned'u'ten territories as settled territories (regardless of who it is in relation to) presumes 1) the Crowns' acquisition of Ned'u'ten territory is effected thereby leaving the juridical effect that the Ned'u'ten are only capable of possessing 'aboriginal title' over their non-reserve designated territory and 2) that as settlers arrived, there was no suitable law (ie/ Ned'u'ten law) for settlers. I do agree with McHugh, however, that designating or categorizing indigenous territories as conquered, ceded or settled is a "red herring and only relevant to the extent that the scholarship has made it so". James [sakej] Younblood Henderson challenges the assumption of 'settled colonies':

> It cannot be assumed that British law automatically applies to North America because the Indian had no law or property systems. Such an assumption is built on supremacist colonial theory.

"Mikmaw Tenure", *supra* note 30 at 291.

**b. right of prescription (where territory is inhabited)**[33]

> In case of conquest the only test as to the title of the conqueror is found in the course of dealing which he himself has prescribed. When he adopts a system that will ripen into law he settles the principle on which the conquered are to be treated.[34]

States have been able to work their way around the requirement that force is necessary to acquire title by conquest by fashioning a new title based on the right of prescription. In other words, foreign territories illegally held and possessed by another foreign sovereign would be sanctioned by state practice if it can be established that "if the law is violated successfully and the fruits of illegality prove enduring, the change is presumed to give rise to new rights of sovereignty which cannot be questioned and which, by the principle of prescription, must not in future be tampered with."[35]

By ignoring the injustice of the right of prescription from an indigenous, human rights, or decolonizing perspective, it has been argued that Canada acquired Ned'u'ten territories through the right of prescription as practiced by Britain in the 19th century.[36] In *Reference re Secession*

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[33] Martinez defines prescription:

> ...in order to exercise a right of prescription, a conquering state must take continuous possession of conquered lands for a long period of time and with the general acquiescence of the conquered to the right.

*Second Progress Report, supra* note 21 at para. 209.

[34] See the Supreme Court of Canada decision of *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1887) 13 S.C.R. 577 at 580 where counsel for the plaintiff company argued that prescription applies to territories designated as conquered [hereinafter *St. Catherine's Milling* cited to S.C.R.].

[35] Korman, *supra* note 23 at 17.

[36] Sanders believes so, and writes:

> International law accepted colonialism as valid and gave no force to treaties with indigenous peoples. Native tribes were outside the exclusive club of nation states. Today, colonialism is a violation of international law and certain non-state peoples are recognized as having the right to self-determination. The International Court of Justice's ruling on the Western Sahara in 1975 destroyed most of the theories which had justified the European takeover of populated lands. **We are left without an international law justification for the British acquisition of Canada, other than the consent of the tribes expressed in treaties or in other forms of acquiescence.**

"Pre-existing Rights", *supra* note 20 at 736.

*of Quebec*[37], the Supreme Court of Canada held that through the right of prescription and acquiescence, Canadian law recognizes two modes of acquiring territorial sovereignty or possession regardless whether the acquisition was legal or not, **if internationally, such acquisition is recognized by state actors**. This pronouncement is made in the context of the Court's discussion on the principle of effectivity and whether the international community would recognize an independent Quebec born from unilateral secession. Implicitly, indigenous peoples should be able to read between the lines and see the inherent contradiction or double standard this would create in the indigenous context. It therefore, cannot go unnoticed where indigenous peoples are concerned:

> The principle of effectivity operates very differently. It proclaims that an illegal act may eventually acquire legal status if, as a matter of empirical fact, it is recognized on the international plane. **Our law has long recognized that through a combination of acquiescence and prescription, an illegal act may at some point be accorded some form of legal status.** In the law of property, for example, it is well-known that a squatter on land may ultimately become the owner if the true owner sleeps on his or her right to repossess the land. In this way, a change in the factual circumstances may subsequently be reflected in a change in legal status. It is, however, quite another matter to suggest that a subsequent condonation of an initially illegal act retroactively creates a legal right to engage in the act in the first place. The broader contention is not supported by the international principle of effectivity or otherwise and must be rejected.[38]

According to this articulation by the Supreme Court of Canada and putting Quebec's story aside for the moment, it could be argued that since Canada is recognized internationally, its state legitimacy and acquisition of requisite sovereignty, even if illegally acquired from indigenous peoples, will eventually be made legal. This result would require that the indigenous territory in question be categorized as "conquered", like Quebec. The Court's interpretation of prescription would therefore hold because there is arguably a change in factual circumstances (of who owns the territory in question), that would change the illegal status of Canada's undisputed

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[37] *Reference re Secession of Quebec* (20 August, 1998) S.C.C. File No. 25506 [hereinafter *Secession Reference*].

[38] *Ibid.* at para. 146.

acquisition. It is interesting that this statement by the Court is the last word in the *Secession Reference,* which is argued to be the most important judgment in Canadian history. It is my submission that prescription theory is challengeable because it presumes that Indigenous territories are conquered.

It was not until the late 19th century that colonial-settler populations came in contact with the Ned'u'ten, and certainly not enough time had passed to warrant Canadian control over Ned'u'ten territory. Certainly, the "settler's precarious presence" could not oust Ned'u'ten sovereignty.[39] To apply this theory today would run contrary to the contemporary international law requirement to obtain consent from the Ned'u'ten, through agreement. Canada's conduct to establish a treaty process in British Columbia today evidences this inconsistency. Further, since Ned'u'ten territory is not conquered territory, prescription could not legitimate Canadian Crown sovereignty therein.

The doctrine of prescription needs fuller exploration by indigenous peoples. Such an inquiry can ascertain whether or not it was a right recognizable at international law at the time of contact in the 15th century, or whether it remains to be a conveniently and self-serving fashioned right by colonizing powers who came upon peoples that held systems or principles of sharing or peace-making in their territories as customary to their respective governing orders. In other words, colonial powers that took sharing to be acquiescence to colonial settlement and thereby acquiescence to the Euro-Canadian sovereignty assertions over indigenous peoples would be tantamount to an absolute right of conquest, a mode of territorial acquisition no longer

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[39] Spaulding, *supra* note 6 at Part 2.3.1 where he cites H. Fosters's "Forgotten Arguments: Aboriginal Title and Sovereignty in Canada Jurisdiction Act Cases." (1992) 21 Man.L.J. 343. Fosters argues that in 1818, the Crown had a "precarious presence" in Indian Territories that did not oust exclusive Aboriginal jurisdiction over Aboriginal persons and non-British subjects.

sanctioned in international law. If this is the case, then the right of prescription as it may be argued by colonial-settler states including Canada to apply to indigenous peoples in North America, should be repudiated and made illegal, like its predecessor: conquest.

The right of prescription has been used against indigenous peoples as a mode of acquiring Canadian sovereignty over non-ceded lands or non-conquered lands in Canada. The juridical effect of prescription leaves indigenous peoples in the same position as other dispossession doctrines, the foreign crown has underlying title to indigenous territory and maintains its claims to sovereignty supreme and intact. Many indigenous scholars agree that, with conquest debunked, the discovery right, should be the primary legal fiction to dismantle.

**c. right of discovery**

> In the 1820s and 1830s, Chief Justice Marshall undertook to describe the nature of United States sovereignty, Indian self-government, and Indian title. Marshall accepted the legitimacy of Native sovereignty, Native institutions, and Native title, and he wove them into the American polity. Ever since then, Marshall's analysis of the question has served as the basis for the assertion of Native claims, not only in the United States, but throughout the Western world.[40]
> -Thomas Berger -

The right of discovery has undergone many derivative forms. While many Canadian scholars may disagree[41] with "discovery" as being the legal theory for Crown sovereignty assertion over indigenous territories in Canada, it is my thesis that the doctrine of discovery is the leading doctrine that set in motion doctrines of dispossession. By the time settlement reached the territory of the Ned'u'ten, the juridical effect of discovery was the same as if the territory was uninhabited: i.e. the Crown has underlying title to the soil; sovereignty over indigenous peoples;

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[40] Berger, *supra* note 22 at 121.

[41] See B. Slattery, *Land Rights of Indigenous Canadian Peoples, as Affected by the Crown's Acquisition of Their Territories*,( Doctoral Dissertation, Faculty of Law, Oxford University 1979) reprinted by the University of Saskatchewan Native Law Centre, 1979; "Ancestral Lands", *supra* note 8 at 17-38. See also *Common Law Aboriginal Title*, *supra* note 8 at 244-264.

and indigenous peoples are forced to abide by the "distribution preference of the discovery principle."[42]

Some authors may organize dispossession theory around the doctrine of *terra nullius.*[43] Although I agree that this doctrine was used against the Ned'u'ten, it is not the doctrine that justifies Canada's dominance over indigenous peoples. For example, now that international and common law courts have deemed *terra nullius* illegal and states acknowledge that indigenous peoples are the original inhabitants of their territories, rejecting the *terra nullius* doctrine alone will not prevent states from continuing the dispossession of indigenous peoples' territories. For this reason, I believe the right of discovery must be discarded in order for indigenous peoples to decolonize. The doctrine of *terra nullius* will be discussed in tandem with the right of discovery as I examine Ned'u'ten territories.[44] The following indigenous scholars have centered their

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[42] Spaulding refers to the "inalienability" of the Indian title except to the "discover", as the distribution preference.

[43] Spaulding has taken this approach in his research report to the Royal Commission on Aboriginal Peoples. He argues that the *terra nullius* doctrine possesses an 'unacceptable currency' in Canadian law and is the initial principle used by colonizing powers that have then tailored it to meet their immediate needs in relations to indigenous peoples. He lists the following effects as derived from this principle:

> ...in particular, that the "organized society" requirement for proof of Aboriginal rights, the doctrine of peaceful settlement, and the ancillary rationales under which Aboriginal land rights have been treated as "usufructuary, and Aboriginal rights confined to uses notionally frozen at the moment of contact with settler societies, all owe an unacceptable debt to this discredited theory.

While Spaulding has taken the doctrine of *terra nullius* and demonstrated its use in international law; its enlarged and distorted state formulations; and the juridical effects that stem from it, I have taken the approach that it is the right of discovery that was consistently applied in all indigenous territories. I do agree with Spaulding's descriptions of *terra nullius*, I just do not agree that it is the *initial* or *foundational* principle of dispossession. Regardless of these approaches, *terra nullius* is a doctrine of dispossession that must be rejected. See Part 4 of Spaulding, *supra* note 6 where he discusses *terra nullius*.

[44] For example, the right of discovery coupled with *terra nullius* fictions that Ned'u'ten territories were vacant and unknown (not literally, but indigenous peoples were racialized and categorized to not exist) permitted European and American sovereigns to make treaties with each other (such as the Treaty of Oregon) to regulate their self-proclaimed rights to the territories in question as of 1846, and whereby Canada could settle and occupy these territories north of the 49th parallel without the informed consent of the indigenous peoples therein and worry-free from the reach of the American's manifest destiny to do the same. In other words, most colonial theoreticians that attempt to concentrate their understanding of history between indigenous-newcomer relations on isolated or discrete inquiries into colonial practices and conduct of Europeans to ascertain possible defects in acquisition, fail to assess the

scholarship around the right of discovery as being the foundational doctrine of indigenous dispossessions.

Patricia Monture-Angus contributes to indigenous discourses on the right of discovery by showing how the constitution of Canada as a colonizing tool for indigenous peoples is premised on the right of discovery:

> It may seem crazy to some people to try to locate an Aboriginal vision or image in Canada's constitution. What I am really trying to accomplish on this guided journey through the constitution of Canada is to discover the ways in which and the extent to which the constitution is a tool of the colonization of Aboriginal Peoples. 'Primitive,' 'sub-human,' 'uncivilized,' 'savage,' 'backwards,' 'without law or government' and so on is still the language of the courts in Canada when discussing Aboriginal rights and claims. Section 91(24) is part of the problem as it reinforces the subordinate status and inequality accorded Aboriginal nations. Section 91(24) creates that possibility. The first step that Aboriginal litigants are forced to make is to prove to the court that they exist and then show that they lived in "organized societies".
>
> The philosophical underpinnings of section 91(24) rest on the European doctrine of discovery. Aboriginal peoples were less than human because the territory "discovered" was then *terra nullius* (empty lands). The European state could then claim title by virtue of their discovery. Section 91(24), as long as it stands as part of Canadian constitutional law, entrenches an ethnocentric (at best) view of history of this country. All of these historical myths that must be corrected if we are to proceed as a country, from here, in a good way. And it must be considered who clings to these myths. It is difficult being colonized, but it is more difficult to be a decolonized colonizer.[45]

Robert Williams, Jr., a native American scholar stresses the spiral inter-connectedness of such doctrines and that through the doctrine of discovery, the discovering European nation, maintains an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest:

> ...Marshall's opinion essentially collapses the distinctions between modes of acquisition of territory under the doctrine of discovery. I take his reasoning in *Johnson* to be that once "discovered" by a European nation-state, the indigenously-occupied country came under its sovereignty, and vested in it inchoate rights to title. Marshall's analysis is essentially indifferent as to how those inchoate rights might be perfected; by purchase, conquest, or abandonment; no matter, "the rights thus acquired being exclusive," in Marshall's

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culminating effects of the dispossession doctrines as a whole with respect to indigenous peoples nor its historical racialized construction. Such scholars must put their national allegiance to their state aside when delving into the murky waters of dispossession doctrines. It does not matter whether colonial practices are signatured as Canadian, American or European for at the time of contact, these colonial practices were owned by aliens, foreigners and strangers to indigenous peoples.

[45] P. Monture-Angus, *Thunder In My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 164.

> words, "no other power could interpose between them". Other English-derived settler state courts, and continental writers on international law, have drawn more careful distinctions between modes of acquisition and rights acquired under the doctrine. Yet, despite the distinctions, the outcome historically has been the same. Indigenous peoples around the world have been dispossessed of their territories whenever the doctrine and its varying permutations have been applied.[46]

John Borrows, inquires into the Crown's sovereignty assertion over indigenous peoples in his forthcoming case comment on *Delgamuukw v. B.C.* He traces "sovereignty dispossession" back to its 'discovery roots' and states:

> The keywords which unlock sovereignty's power are ancient. Practitioners of its craft can summon a tradition that reaches deep into the past. Its channeling flows from classical times through the renaissance. Political and legal ascendancy are conveyed to those who can conjure fictions that vindicate their claims of authority. In the thirteenth century Pope Innocent IV invoked sovereignty's oath in the middle-east during the Crusades... In the fourteenth century, Papal Bulls called up these same covenants as peoples sailed out from Portugal and Spain to cast their words on Africa and North America. Such assertions enabled Iberia's Kings and Queens to "discover and make conquests of lands beyond the then-known boundaries of western Christendom." To facilitate these purposes, in 1513 another manisfestation of sovereignty's power was revealed in the Requerimiento, to be read aloud to peoples over which Spain intended to exercise control... Documents such as the Requerimiento, numerous Papal Bulls, and other proclamations mingled in a potent brew to create a cant of conquest justifying assertions of sovereignty to the other's lands. The British and Americans in the seventeenth, eighteenth and nineteenth centuries chanted these same rites to bring codes forward into contemporary jurisprudence. Imperial courts participated too... Sovereignty's incantation is like magic. Its mantra: "Aboriginal title is a burden on the Crown's underlying title". This mere assertion is said to displace previous Indigenous titles by making them subject to, and a burden on, another's higher legal claims. Contemporary Canadian jurisprudence has been susceptible to this artifice. In *Delgamuukw v. B.C.* the Supreme Court of Canada declared that the Crown gained "underlying title" when "it asserted sovereignty over the land in question." This annoucement illustrates that, as in past centuries, sovereignty once again heralds the diminishment of another's possessions. In this respect, the decision echos ancient discourses of conquest.[47]

Sharon Venne also examines the origins of the discovery right and its contribution to the development of international standards drawn from the Eurocentric world view regarding Indigenous Peoples:

> Spanish and other European exploration led to the development of the doctrine of discovery and its acceptance in international law... the right of Indigenous Peoples in the Americas to continue determining their way of life was denied though acceptance of the doctrine of discovery, and this denial persists to the

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[46] R. Williams, Jr., "Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System" (1995) 2 Review of Constitutional Studies 146 at 163, n. 34 [hereinafter "Sovereignty, Racism Human Rights"].

[47] "Because it does not make sense", *supra* note 31 (paragraphs omitted).

> present day... Columbus arrived on the shores of the Indigenous America in 1492. Columbus came to Indigenous America as an invader and a colonizer without regard for the original inhabitants of the lands "he discovered"... The belief in the inherent superiority of the European current at the time allowed the initial claim to be made -- but the legal basis for the legitimacy of this claim is doubtful... The sovereign and the church collaborated to deny the rights of Indigenous Peoples using the "doctrine of discovery" as their basis. It is noteworthy that these Papal Bulls were enacted without consulting or achieving the consent of the Indigenous Peoples of the Americas... By 1493, the patterns were set for the next five hundred or so years in the Americas and other places where European colonizers relocated, displaced and dispossessed Indigenous Peoples from their lands and resources. No state in Europe contested the doctrine of discovery. Every subsequent European state that moved onto the lands of Indigenous peoples used the doctrine of discovery to assert their jurisdiction. Indigenous Peoples were moved along with flora, fauna, water and land. They had no protection against slavery, torture, murder and other horrendous acts committed against the Indigenous inhabitants by the European colonizer. During the colonization period- lasting five hundred years - Indigenous lands changed hands from one sovereign to another without consideration of the rights of the Indigenous inhabitants. The colonizer states treated Indigenous Peoples in national law as they were being treated in international law - as objects rather than subjects - and denied the Peoples their right to continue determining their way of life.[48]

Indigenous discourses on the doctrines of dispossessions reject the doctrine of discovery as the foundational right for claims of sovereignty over indigenous peoples and their respective territories. They bring balance to the rationales put forward by non-Indigenous authorities that try to 'race to innocence'.[49] The right of discovery wears many masks from its application to indigenous territories in North America in the 15th century through to today. In viewing these masks, we are able to connect its origins to today and see how this right gave way to conquest treaties and their present manifestations. Distinctions will be made as to whether territory that was "discovered" was inhabited or not and where inhabited territories were racially categorized to be vacant or unknown.

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[48] S. Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* ( LL.M. Thesis, Faculty of Law, University of Alberta 1997) at 9-22 [unpublished], (paragraphs omitted), [hereinafter *Our Elders Understand*].

[49] Razack describes "racing to innocence" as the failure to see the connections between subordination and privilege: "We fail to realize that we cannot undo our own marginality without simultaneously undoing all the systems of oppression." S. Razack, *Looking White People in the Eye* (Toronto: University of Toronto Press, 1998) at 14.

**i. doctrine of discovery #1 (as applied in non-inhabited territories - acquisition of absolute sovereignty once possession is effective)**

The doctrine of discovery as it was originally used by Europeans was a regulatory mechanism to achieve peace or quiet territorial claims amongst themselves over "unoccupied or unknown lands" and the acquisition thereof. If the lands were 'unoccupied" or *terra nullius*, the right to discovery did not automatically vest title to such lands in the discovering sovereign.[50] Rather, "discovery" gave an inchoate or paper title to the discoverer to establish sovereignty by effective occupation. In other words, the juridical effect would have the discoverer's sovereignty vest in the territory inchoately upon initial discovery. This rudimentary claim would become complete or developed upon possession and the successful" discoverer" would have absolute territorial sovereignty against all others.

**ii) doctrine of discovery #2 (as applied in inhabited territories- acquisition of territorial sovereignty)**

If foreign territories were occupied and were not *terra nullius* but were unknown or *terra incognita*, then the inchoate discovery right would be made complete through possession obtained by 1) conquest or 2) purchase. Churchill states the basic tenet of the doctrine was interpreted by American courts and was argued to be a composite of international law with respect to acquisitions of foreign territories in the early 19th century:

> ...that the European nation which first discovered and settled lands previously unknown to Europeans thereby gained the right to acquire those lands from their inhabitants - became part of the early body of international law dealing with aboriginal peoples... [B]y the time Europeans settled in North America, it was well-established international law that natives had property rights could not be lawfully denied by the

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[50] Slattery states:

> The doctrine of "discovery" was never a principle of inter-national law, but at most a part of "the common law of European sovereigns. If it could not confer sovereignty, neither could token occupation.

B. Slattery, "The Indigenous Peoples of Canada in International Law" (University of Dar es Salaam, 1973) at 28.

> discovering European nation... The Right of discovery served mainly to regulate the relations between European nations. It did not limit the powers or rights of Indian nations in their homelands; its major limitation was to prohibit Indians from diplomatic dealings with all but the discovering European nation - Moreover, the right of discovery gave a European nation the right to extinguish Indian land title only when the Indians consented to it by treaty.[51]

According to these accounts, the right of discovery was a mere regulatory right between European sovereigns.[52] When indigenous peoples had greater population densities and held the balance of power, the newcomers recognized indigenous sovereignty.[53]

If lands were occupied or inhabited, then no foreign sovereign could acquire such lands outright. In North America, lands were not *terra nullius* and were inhabited by indigenous peoples when the Europeans came upon their lands. Under international law, where foreign inhabited territories with Christian kingdoms were said to be acquired by conquest or cession, the law of conquered peoples will continue to apply until altered by the new sovereign at a later period. Colonial powers did not abide this standard, however, when acquiring indigenous

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[51] W. Churchill, "The Earth is Our Mother" in A. Jaimes, ed., *The State of Native America: Genocide, Colonization and Resistance* (Boston: South End Press, 1992) at 140 [hereinafter "The Earth is Our Mother"].

[52] Morris also recounts the purpose of the doctrine in relation to inhabited territories and its juridical effect:

> After the 17th century, the discovery doctrine was generally understood not to limit or divest indigenous nations of any authority over their territories. The doctrine was developed as a regulatory mechanism between European sovereigns to prioritize their rights to engage in international relations with indigenous nations, and to preempt other European states from interacting with the same indigenous nation.

G. Morris, "International Law and Politics: Toward a Right to Self-Determination for Indigenous Peoples" in Jaimes, *Ibid.* at 64 [hereinafter "International Law and Politics"].

[53] For example, the Dutch recognized the sovereign status of indigenous peoples and their occupation of their lands since time immemorial:

> Enforceable rights under immemorial possession were recognized by the legal theorists of the Middle Ages, as they had been by the Romans before them. The doctrine of immemorial possession, combined with the recognition of the inherent sovereignty and possessory right of indigenous nations, was found to be **so compelling** by the Dutch that they began to negotiate treaties for land cessions from indigenous nations from their first contact with one another.

*Ibid.*

territories in North America void of Christian kingdoms.[54]

In order to expand trade into the 'new world' the Europeans had to fashion a way to exercise the right of discovery so as not engage in simultaneous wars with 1) the indigenous peoples and 2) other competing european sovereigns. However, as the balance of power tipped in favour of Europeans states such as Spain, France and Britain coupled with the increase in the settlement of colonial populations, the newcomers eventually[55] denied that indigenous peoples had the sovereign capacity to occupy or hold title to their lands in the international sense.

The transgressions begin to unfold in tandem with the increase in colonial power over indigenous peoples. Conquest through cession treaties with indigenous peoples no longer had to be pursued because indigenous peoples were not Christian[56] and were not civilized.[57] These

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[54] Spaulding states that the law of "conquered infidels" did not apply in North American indigenous peoples, but rather was mere rhetoric:

> ...Crown sovereignty and English law could be unilaterally applied wherever the colonists planted, whether or not there had been actual conquest, whether or not any war had been just, and regardless of the requirement otherwise that the law of conquered peoples must continue to apply, at least to them, until altered by the Crown. As in the case of its international counterpart, the outlines of this colonial law argument appear to have originated in the rhetoric of 17th century colonial pamphleteers.

Spaulding, *supra* note 6 at Part 4.2.3.2.

[55] Britain signed treaties until the balance of power tipped in their favour.

[56] Without legal basis, Europeans acquired territories over non-Christianized territories of the world, on the basis that indigenous peoples' in such lands were not Christian, but rather were heathens, infidels, pagans and barbarians that needed to be converted in order to satisfy Eurocentric values and beliefs of religious superiority. The fact that the indigenous peoples were not Christians gave sufficient cause to wage war even though theorists at the time of discovery questioned the legal basis of such conquest as it could not satisfy conquest through"just wars". The Pope issued papal bulls to Spain and Portugal to legitimize the taking of indigenous lands. See *Our Elders Understand*, *supra* note 48 at 12 where Venne states that these papal bulls "declared that non-Christians could not own land in the face of claims made by the Christian sovereigns." Morris compares spanish and english usages of christianity to justify war with indigenous peoples and rights to acquire territories through discovery:

> English justifications for the dispossession of North America from indigenous peoples derived from an Elizabethan Protestant doctrine declaring the English in covenant with God to bring "true" (as opposed to Spanish) Christianity to "heathen natives". The development of English legal doctrines regarding colonization was heavily influenced by George Peckham, who, in turn, relied on the writings of Victoria. Peckham, however, used Victoria for his own purposes, primarily to justify English colonization under the Laws of Nations by asserting that English Christians had the lawful right to trade with indigenous peoples worldwide. According to Peckham, if infidels refused to trade, the English were then entitled to conquer the resisters and dispossess them of their lands. By this reasoning, all that was required to wage a Just War was to come upon a people that was unwilling to trade or accept missionaries...As often happens in the development of law affecting indigenous peoples, these early self-serving justifications of the English became

rationalizations or justifications provided "just" cause for Europeans to engage in warfare and acquire indigenous territories through conquest as well. By characterizing indigenous peoples in these ways, European sovereigns could justify using the right of discovery to regulate acquisition of occupied lands. Although it was necessary for their survival to get the Indigenous peoples' consent to settle in the primary days of contact, this was no longer the case when survival was no longer a necessary concern of the discoverers.

Discovering sovereigns would get around the conquest rules of cession or purchase by recategorizing indigenous territories as *terra nullius*.[58] The doctrine of *terra nullius* holds that

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enshrined and legitimized in legal precedent. The 1622 *Barkham*'s case held, despite contrary writings by Vattel and other legal authorities, that the legal and political authority of "heathen infidels" was necessarily abrogated when it came into contact with Christian sovereignty.

"International Law and Politics", in Jaimes, *supra* note 51 at 63. See also *The American Indian*, supra note 27 and M.F. Lindley, *The Acquisition and Government of Backward Territory in International Law: A Treatise on the Law and Practice Relating to Colonial Expansion* (London: Longmans, Green, 1926).

[57] Korman, *supra* note 23 at 57-59 set out elements of the doctrine of civilization, including variations of the doctrine: superiority of agriculture over nomadic food-gathering by inhabitants, and civil good government for the legitimization of conquest by discovery:

> In the eighteenth and nineteenth centuries, as religious influences on international politics gave place to secular ones, the apologists of European expansion in the colonial world tended to justify the conquest of 'barbarian' peoples less in terms of the right and duty to convert infidels to Christianity than by reference to the benefits of civilization' which European conquest and rule would serve to confer on the backward. For by this time there had emerged within Europe a sense of cultural superiority - 'so strong that we would not hesitate to condemn it today as "racist" - that Europeans on both sides of the Atlantic came to believe that in virtue of the superiority of the 'white man's' civilization, Europeans peoples 'had a self-evident right to settle in territories they found agreeable and to subjugate any native inhabitants as might offer resistance.'
>
> ...
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> But the introduction of agriculture in backward territories was only one aspect of the civilizing mission that was taken to justify the conquest of non-European lands. The provision of good government, of law and order and economic development - in short, the institution of civilized rule on the European model - in 'primitive' parts of the world was the end which was universally held by educated opinion within Europe to justify conquest, if this was the only means by which the advancement of 'civilization' could be achieved. In all its variations, the justification given for the conquest and rule of colonial peoples to meet the standards of 'civilization'.

[58] Spaulding states that *terra nullius* can be traced back to Roman times:

> The international law rule derives by analogy from a rule of Roman civil law concerning, not sovereignty over territory, but property in land. Under the Roman law doctrine of occupation, property in unowned and unoccupied lands (or unowned and unappropriated chattels) could be acquired by occupation.
>
> The basic Roman law principle also applies, in one way or another, to Crown acquisition of lands

where a territory is found to belong to no one or "is without a sovereign or uninhabited," a discovering sovereign could occupy such territories and acquire territorial sovereignty. The discovering sovereigns' law would immediately become the law of the "vacant land".

Spaulding states that *terra nullius* was enlarged or distorted when indigenous territories were sought after by Europeans. This created a limitation on the indigenous peoples' right of occupation.[59] Dara Culhane aptly describes how Euro-Canadian colonizers applied the *terra nullius* to indigenous peoples in British Columbia to acquire inhabited lands (doctrine of discovery #2) while benefitting from the fruits of doctrine of discovery #1 as applied in non-inhabited territories:

> In the case of *terra nullius*, Britain simply proclaimed sovereignty by virtue of discovery and British law became, automatically, the law of the land. Where Indigenous populations were found inhabiting the desired land, the law required that British sovereignty had first to be won by military conquest achieved through the negotiation of treaties, before colonial law could be superimposed.
>
> Of course, Britain never had colonized and never would colonize an uninhabited land. Therefore, the doctrine of discovery/occupation/ settlement based on the notion of *terra nullius* was never concretely applied "on the ground." Rather, already inhabited nations were simply legally *deemed to be uninhabited* if the people were not Christian, not agricultural, not commercial, not sufficiently evolved" or simply in the way. In British Columbia, the doctrine of *terra nullius* has historically legitimized the colonial government's failure to enter into treaties with First Nations. The application of the doctrine of conquest to First Nations in British Columbia, which would have required recognition of the fact of prior occupation, and their status as human beings, *was available within the confines of British imperial law* but was rejected by colonial governments in British Columbia. When Aboriginal people say today that they have had to go

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> under English colonial law. On one view, the Crown acquires ownership of "vacant" or "waste" lands in a colony, solely by operation of this principle. On another view, the Crown acquires a limited paramount lordship over all lands in a colony on the basis of a transported theory of tenures, and the lordship includes unqualified ownership of vacant lands, on the basis, shared with the Roman law principle, that "there would be no other proprietor". The theory of tenures giving rise to paramount lordship over occupied lands is itself rooted in this principle, relying in large part upon the legal fiction that the monarch originally occupied all the lands in the realm, and subsequently granted them to subjects.

Spaulding, *supra* note 6 at Part 4.

[59] Spaulding notes this juridical effect:

> "Occupation" came to be defined by culturally Eurocentric and politically biased standards, reflected in a variety of legal tests. Aboriginal peoples were deemed, on account of their presumed inferiority, "inhabitants", whose permanent connection to territory must be tested before it could qualify as occupation. The territory of peoples who failed the test was deemed to be terra nullius, freely available for acquisition by occupation on behalf of European sovereigns.

*Ibid.*

to court to prove they exist, they are speaking not just poetically, but also *literally*.[60]

Through *deemed terra nullius*, British colonial governments would acquire indigenous territories, such as those of the Ned'u'ten, and would benefit from the following juridical effects: 1) Britian and later Canadian governments would not have to obtain the consent of indigenous peoples to settle and use their territories; 2) colonial governments could unilaterally and arbitrarily assert sovereignty over indigenous territories and colonial laws would vest in settled territories because it was deemed that Ned'u'ten laws did not exist; 3) colonial governments would not have to bore the cost of conquest through use of force or cession treaties; and 4) because the laws of the Ned'u'ten could not meet eurocentric standards of legitimacy, no proprietary interests would be recognized.

This was the first departure from the doctrine of discovery in inhabited territories.[61] Discovery coupled with a tailored *terra nullius* right, allowed for peaceful settlement of indigenous territories where colonizing powers held the balance of power and could effect their occupation. The fruits of discovery and doctrines such as *terra nullius* would allow western states to acquire indigenous territories and eventually displace the international subject status of indigenous peoples as owners of their homelands.

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[60] D. Culhane, *The Pleasure of the Crown* (Burnaby: Talonbooks, 1998) at 48.

[61] In *Johnson* v. *M'Intosh,* 21 U.S. (8 Wheat.) 543 (1823), Chief Justice Marshall domestically legalized the doctrine of discovery to mean that Indigenous peoples did not have the capacity to convey title in its own sovereign right. Since indigenous peoples were not christian and not civilized, they could not own the soil, but only could occupy it. They could not like an independent state convey title at their will to anyone because "discovery gave exclusive title to those who made it" who would then assert "ultimate dominion to grant the soil, while yet in possession of the natives." Marshall states that all Europeans sovereigns recognized each other assertion of discovery which gave an exclusive right to appropriate lands occupied by the Indians and to extinguish Indian title to such lands upon purchase or conquest. He also concludes that the doctrine of discovery can be used to convert an inhabited country into conquest by asserting discovery, maintaining possession of discovered indigenous lands and creating property from such lands through crown grants.

**iii) doctrine of discovery #3 (acquisition of territorial and political sovereignty in inhabited territories)**

The second expansion[62] to the doctrine came about when Europeans enlarged the right of discovery that gave *access to acquire indigenous lands* to include the ability to gain sovereignty over the *political status* of indigenous peoples as well.[63] Churchill summizes the Marshall trilogy, which has had great influence in the development of common law aboriginal rights, as follows:

> By the end of this sequence of decisions, Marshall had completely inverted international law, custom, and convention, finding that the Doctrine of Discovery imparted preeminent title over North America to Europeans - the mantle of which implicitly passed to the U.S. when England quit-claimed its thirteen

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[62]Brian Slattery also observes this expansion:

> The international legal history of North America has traditionally been presented as a series of military and diplomatic struggles among European states and their colonial offshoots, culminating in the grand treaty settlements of the 18th and 19th centuries in which the modern international boundaries of the United States and Canada were fixed. The accounts differ in explaining exactly how European powers originally gained sovereignty over North America, with some authors allowing for such supposed methods as discovery and symbolic acts, and others discounting these and arguing that effective occupation was necessary. Despite these differences, the traditional accounts tend to assume that the original peoples of North America had no significant role to play in this high imperial drama. Indigenous peoples, it is thought, lacked sovereign status in law and so had no international title to the territories they occupied. On this view, lands of North America were legally equivalent to vacant territories which could be appropriated by the first European state to discover or occupy them. The only role assigned to the original inhabitants of North America was subsidiary, as factual obstacles or aids to the spread of European sovereignty.

Slattery, *supra* note 8 at 682.

[63] The United States extended the modified doctrine as rights to acquire indigenous territories and rights to assert sovereignty over their political status as well, thereby making any relationship with the indigenous peoples domestic or to be regulated by internal mechanisms. In later decisions, Marshall defines indigenous peoples as "domestic dependent nations" and wards under the guardianship of the state. See *Cherokee Nation* v.*Georgia* 30 U.S. (5 Pet.) 1 where Chief Justice Marshall holds that Indians as original occupants of North America do not constitute foreign states:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian. See *Worcester* v. *Georgia* 31 U.S. (6 Pet. 515) where Marshall states that while Indians were wards of the state for the purposes of land acquisition, they were sovereign for the purposes of self-government within their territories.

> dissident Atlantic colonies - mainly because Indian-held lands were effectively "vacant" when Europeans found them. The chief justice was forced to coin a whole new politico-legal expression - that of domestic, dependent nations...[64]

Two main colonial powers that flowed from the discovery right and exemplify that the discovering sovereign gained absolute sovereignty over indigenous peoples and territories were a) the transferability of the discovery right and b) exclusive powers to internally regulate relations with indigenous peoples.

**The transferable discovery right**

The discovery right became transferable between European sovereigns only. If one European sovereign acquires territory through the right of discovery as applied to indigenous peoples' territories and later subsequently cedes territory gained through treaty with another European sovereign, then the new sovereign will acquire the discovered indigenous lands as well as sovereign control over the indigenous people. To state again, it has been argued that through the Treaty of Paris, 1783, "Americans believed that they had inherited the discovery claims of Great Britain to that area of North America where Britain had recognized their independence."[65] One can also look to the Treaty of Paris, 1763 where France ceded its discovered indigenous territories to Britain who acquired sovereign title to these lands and sovereignty over the inhabitants in them.

Canada's position regarding the transfer from France to Britain use to be that no Indian rights survived in the transferred areas, however, this position has recently changed, given the context of the Quebec secession from Canada.[66] Indigenous peoples would transfer with the

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[64] "The Earth is Our Mother", in Jaimes, *supra* note 51 at 142.

[65] V. Deloria, Jr., "Trouble in High Places: Erosion of American Indian Rights to Religious Freedom in the United States", in Jaimes, *supra* note 51 at 272.

[66] See discussion of *R.* v. *Côté* (1996), 138 D.L.R. (4th) 385 [hereinafter *Côté*], below where the Supreme

territory without their consent or knowledge signifying *absolute conquest* was still practiced against indigenous peoples. Closer to home, it was held by Judson, J. that indigenous territories in what is now British Columbia were jointly occupied by the United States and indigenous territories in what is now Alaska were originally possessed by Russia.[67] Under the 1846 Oregon Treaty, the foreign sovereigns would regulate their claims and boundaries would be established between states. Portions of British Columbia would be transferred to Britain and Russia would transfer Alaska to the United States. Indigenous peoples would pass with the land into these newly constituted boundaries.

**The internal regulatory aspect of the discovery right**

The right to discovery also gave the discovering European sovereign the authority to **internally regulate** its relations with indigenous inhabitants.[68] As part of the discovery regulatory power, the regulation of European and individual settler competitions over indigenous lands yet to be acquired in fact through occupation or possession, became necessary. Britain codified its "holding" policy of acquiring lands from indigenous peoples through purchase in the *Royal Proclamation, 1763*. Indigenous peoples'territories under the reach of this proclamation, could only be purchased from the Indigenous Nation's or Tribes through a land cession and surrender to the Crown and with consent of the Indigenous people.

In the eighteenth century, it is argued by indigenous peoples' that their political status had not changed, they were still nations recognizable at international law, even if a treaty existed.

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Court of Canada held that aboriginal rights survived the transferability of a discovery right or change in sovereignty.

[67] See this discussion in *Calder* v. *A.G. B.C.* (1973), 34 D.L.R. (3rd) 145 [hereinafter *Calder*].

[68] "Those relations which were to exist between the discoverer and the nation were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them." This passage is from *Johnson v. M'Intosh, supra* note 61 and is cited by Hall, J. in the *Calder* decision in the context of determining the nature of aboriginal rights. *Ibid.* at 194.

This view has not changed and stands to challenge colonial views to the contrary. However, by assessing colonial conduct at the time the *Royal Proclamation, 1763* came into force, it can be argued that the proclamation was premised on Britain's discovery rights. While Indigenous peoples argue that it is the 'Indian Bill of Rights' in that it states indigenous peoples are 'nations',[69] it cannot be argued that the Crown consistently held the same view for it did not recognize the full sovereign status of indigenous peoples that had not treatied with it.[70] The

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[69] "Wampum at Niagra" in Asch, *supra* note 2 at 155. The lack of consistency in the Crown recognition and non-recognition of the sovereignty of indigenous peoples does not change the position shared by Indigenous peoples that entered into treaties with Crown as sovereign peoples:

> It is worth underlining, however, that this position is not shared by Indigenous parties to treaties, whose own traditions on treaty provisions and treaty-making (or negotiating other kinds of compacts) continue to uphold the international standing of such instruments. Indeed, for many Indigenous peoples, treaties concluded with European powers or their territorial successors overseas are, above all, treaties of peace and friendship, destined to organize coexistence in --not their exclusion from --the same territory and not to restrictively regulate their lives (within or without this same territory), under the overall jurisdiction of non-indigenous authorities. In their view, this would be a trampling on their right to self-determination and/or their other unrelinquished rights as peoples.
>
> By the same token, Indigenous parties to treaties have rejected the assumption held by State parties, that treaties provided for the unconditional cession of Indigenous lands and jurisdiction to the settler States.

*Final Report on the Study of treaties, supra* note 1 at 25, para. 115-116.

[70] Venne summizes the Proclamation as follows:

> After the war in Indigenous America against the French and their Indigenous allies (1755-1763), the British Monarch, George, George III, reconfirmed boundaries between the colonies and the Indigenous territories in the Royal Proclamation of 1763. Nearly one-third of the text is devoted to British relations with Indigenous Nations, many of whom were allied to the British victors. The Proclamation refers to Indigenous Peoples as "Nations," as distinct societies with their own forms of political organization, with whom treaties had to be negotiated. It also enshrines protection of Indigenous lands by the British Crown, and a process for seeking Indigenous consent through a treaty process to allow for European settlement. Finally, the Royal Proclamation clearly spells out that Indigenous Nations have an inalienable right to their lands. The Royal Proclamation was to bind the British Crown and its colonial agents to the rules to be followed in relation to Indigenous Peoples and their lands. In fact, the Proclamation was a codification of the norms of customary international law for the British Crown to enter into treaties with Indigenous Nations in the Americas. International law requires that a sovereign enter into formal agreements with another's peoples sovereign prior to entering into lands occupied by those peoples. However, entering into treaties with Britain did not ensure a place for Indigenous Peoples within the family of nations under international law in the face of the doctrine of discovery.

*Our Elders Understand, supra* note 48 at 21. Further, the *Royal Proclamation, 1763* applies to those nations or tribes that the British crown had connection to and who lived under the protection of the British Crown. Spaulding also states that from the period of the Royal Proclamation and of more importance to time period when Crown sovereignty is asserted in British Columbia, the Crown never intended to treat Aboriginal peoples as equals:

> Upon reviewing Lord Watson's judgment for the Privy Council, and before repeating that "Chancellor Boyd was also upheld by majorities in the Court of Appeal... and Supreme Court of Canada" Steele J. concluded that "on the nature of aboriginal rights, Chancellor Boyd's analysis and related sources should serve to correct

Crown has always asserted underlying or ultimate title to non-treaty lands within the reach of the proclamation; that indigenous nations could not dispose of their title of occupancy by its own will to anyone but the Crown; and that the Crown has the exclusive right to extinguish Indian title of occupancy once the title is purchased from, surrendered and ceded by the Indian nations to the Crown with their consent. As it has been now held by the Supreme Court of Canada in *Delgamuukw*[71], the *Royal Proclamation, 1763* is a recognition instrument for aboriginal title. The federal governments capacity to extinguish aboriginal title as affirmed by the Court through treaty, surrender and purchase is codified in the Proclamation, and remains an undisputed power of the federal Crown.[72]

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any modern inclination to assume that the Crown might have intended to treat Aboriginal peoples as equals in the period of the Royal Proclamation.

> "In a commission report laid before the Legislative Assembly of Canada in 1842] reference was made to Vattel on the Law of Nations indicating that the commissioners considered that the Indians did not have any proprietary rights in the lands, that the Indian occupation could not be considered as a true and legal habitation, and that the Europeans were lawfully entitled to take possession of the land and settle it with colonies. Whether or not this was proper law or a proper view, it was the view in 1845 of person in what is now Ontario, and it must be borne in mind in interpreting any legislation or contracts or treaties made at that time. This view is consistent with my interpretation of the meaning of the Royal Proclamation itself."

It followed for Steel J. that at the time of the Royal Proclamation "Europeans did not consider Indians to be equal to themselves and it is inconceivable that the king would have made such vast grants to undefined bands, thus restricting his European subjects from occupying these lands in the future except at great expense" In Delgamuukw, the trial judge cited the statement quoted above from Taschereau J.s opinion in St. Catherines's Milling, among other authorities, in support of his ruling that Aboriginal peoples never held rights of a proprietary nature in their lands.

Spaulding, *supra* note 6.

[71] Lamer, C.J. writes on behalf of an unanimous bench that:

> Aboriginal title is sui generis, and so distinguished from other proprietary interests, and characterized by several dimensions. It is inalienable and cannot be transferred, sold or surrendered to anyone other than the Crown. Another dimension of aboriginal title is its sources: its recognition by the *Royal Proclamation, 1763* and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing assertion of British sovereignty. Finally, aboriginal title is held communally.

*Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010 at 1014 [hereinafter *Delgamuukw*].

[72] On the issue of extinguishment, the Supreme Court of Canada stated in the *Delgamuukw* decision that the federal Crown has jurisdiction to extinguish aboriginal rights:

> Section 91(24) of the Constitution Act, 1867 (the federal power to legislate in respect of Indians) carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it. The ownership by the provincial Crown (under s. 109) of lands held pursuant to aboriginal title is separate

Contemporary international studies refer to the power of discovering and colonizing states to internally regulate relations with indigenous peoples as "the process of domestication." This process became the norm when the military and economic capacity of colonial-settler populations had increased and where indigenous sovereignty and rights were denied or ignored. This process continues to exist today despite the lack of evidence that indigenous peoples have renounced their sovereign attributes:

> Thus began the process that the Special Rapporteur has preferred to call (without any pretension of originality) the "domestication" of the "Indigenous question." This is to say, the process by which this entire *problematique* was removed from the sphere of international law and placed squarely under the exclusive competence of the internal jurisdiction of the non-Indigenous States. In particular, although not exclusively, this applied to everything related to juridical documents already agreed to (or that were negotiated later) by the original coloniser States and/or their successors and Indigenous peoples.[73]

Challenging the modern mask of the internal regulatory arm of the discovery right or "domestication" as it is now called, can be done through self-determination and decolonizing procedures as well as processes to remedy the "encroachment on indigenous sovereignty." As *The Final Report on the Study of treaties* states, more extensive reviews of domesticating indigenous rights and the status of indigenous peoples must take place.

It is my contention that Canada, as transferee to Britain's right of discovery, has, by its conduct and judicial endorsements of American formulations regarding the doctrine of discovery, based its legal theory for asserting underlying title to ned'u'ten territories and people on the illegitimate use of the legal fiction: the doctrine of discovery and the subsequent legal fictions conveniently employed by Canada such as *terra nullius* and prescription. For until the Ned'u'ten people extinguish, cede or release their political and territorial sovereignty to the Crown through

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> from jurisdiction over those lands. Notwithstanding s. 91(24), provincial laws of general application apply proprio vigore to Indians and Indian lands.

*Ibid.* at 1022.

[73] *Final Report on Study of Treaties, supra* note 1 at 38, paras. 192-197.

treaty, Canada does not have possession of its inherited "discovered title" under colonial practice. It can only assert that it has title through its domestic policies codified in law by Britain and now part of the *Constitution Act, 1982* under the *Royal Proclamation, 1763* where all lands not ceded by Indian nations and tribes are to be reserved for them by the Crown until at which time, such lands are ceded to the Crown. While non-indigenous scholars[74] may disagree that the doctrine of discovery cannot explain the asserted Canadian acquisition of sovereignty over territories and political status such as those of the Ned'u'ten, it is my thesis that Canada's foundation for this declaration was born from the right to discovery.

The following jurisprudential survey exemplifies that Canadian courts accepted the right of discovery and the juridical effects that flowed from this right as a method to dispossess indigenous peoples of their inherent international status and territories. As we will see, the law as an "instrument of colonialism,"[75] legitimized in the colonizer's eyes, the dispossession of

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[74] Douglas Sanders understands the colonial practice differently. To paraphrase his position, he states:

> Spain and Portugal grab and enslave Indians and thereby depopulate the Caribbean and coastal South America. Support for Indians is evidenced in the writings of Victoria, the position of the Pope and the new laws of the Indies. These efforts to establish norms and non-racist international law fails - instead we have "the conquest". Britain begins settlement in New England and the Maritimes. There is lots of warfare and treaties are imposed on defeated tribes. Treaties continue as settlement expands. The early pattern of imposed, unequal treaties is followed by the much more equal treaties with the Iroquois and the "Civilized Tribes" in the South East. But the expansion of settlement causes serious problems- fraudulent land grabs and Indian resistance. The Royal Proclamation of 1763 tries to cope with these problems by stopping (for a while) western movement of settlers. It fails. The Royal Proclamation is part of a centralization of control over Indian policy that is a departure from earlier practice. Marshall tries to rationalize things and give the treaties a legal meaning and force. He makes up his international law so his language should not be read backwards, as if it was the language and framework from the beginning. His attempt fails. Indians are relocated and settlement spreads. Congressional control takes over from the treaty framework. In our time, ideas of (limited) decolonization take hold that do not require agreement on colonial theory but only agreement that some redress, some adjustment of roles and rights is necessary. International law on decolonization never worried about the earlier legality of colonialism.

See also L. Robertson, "John Marshall as Colonial Historian: Reconsidering the Origins of the Discovery Doctrine" (1997) Vol. XIII:745 Journal of Law and Politics 759 where she explores the credibility of the discovery rule as fashioned by Marshall that left indigenous peoples divested of fee title and loss of the right to the free alienability of their territories.

[75] Martinez provides examples of how the law was used as an instrument of colonialism:

> There are numerous historical examples of law as an instrument of colonialism, such as the doctrine

indigenous peoples in Canada.

**iv. Tracing the right of discovery through Canadian Jurisprudence**

In 1887, over fifty years after the United States grappled with the meaning, scope and nature of Indian title, the Supreme Court of Canada in the decision of *St. Catherine's Milling*[76] entered its debate about the legal status and constitutional jurisdiction of Indian lands ceded or unceded through purchase to Crown. This decision has been hailed by one indigenous scholar to be "a colonial gesture of great magnitude."[77] Before this decision, Indian title had not been recognized by any court of Canada and no court had been asked to go behind a grant from the crown to inquire whether or not an Indian title was well founded. In this judgment, the Court makes numerous references to the American Marshall trilogy and endorses the American's interpretation of the doctrine of discovery, at the same time as offering its own interpretations of domestic regulations governing Indian lands and tribes.[78]

The appellants' argued that Indian title was 'a right of occupancy' based on public policy

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> of *terra nullius*, the *encomienda* and repartimiento systems instituted in Latin America by the Spanish Crown in the sixteenth century, the so-called removal treaties imposed on the Indigenous nations of the southwestern United States under President Jackson in the 1830s, and various types of State legislation encroaching on (or ignoring) previously recognised Indigenous jurisdiction, such as the Seven Major Crimes Act and the Dawes Severalty Act passed by the United States Congress in the 1880's, the federal Indian Act in Canada, post-Mabo legislation in Australia, and in many pieces of legislation throughout Latin America.

*Final Report on Study of treaties, supra* note 1 at 21, para.98.

[76] *St. Catherine's Milling, supra* note 34.

[77] *The Familiar Face of Colonial Oppression, supra* note 2 at chapter two.

[78] The Supreme Court of Canada accepts the doctrine of discovery and the right of prescription:

> All this country was once occupied by Indian tribes. On its discovery by Europeans the discoverers acquired a right of property in the soil provided that discovery was followed by possession...
> In the case of conquest the only test as to the title of the conqueror is found in the course of dealing which he himself is found in the course of dealing which he himself has prescribed. When he adopts a system that will ripen into law he settles the principle on which the conquered are to be treated.
> In Canada, from the earliest times, it has been recognized that the title to the soil was in the Indians, and the title from them has been acquired, not by conquest, but by purchase.

*St. Catherine's Milling, supra* note 34 at 580.

and not upon any legal right in the aboriginal inhabitants. Indigenous peoples were not recognized to have the capacity to own title to their lands because they were not regarded as civilized by the European sovereigns, including Britain. In order for an Indian tribe or nation to convey their right of occupancy to the Crown, it had to satisfy the Crown prerogative that such an Indian tribe had the capacity to do so. The following excerpt from the Supreme Court of Canada decision legitimizes colonization:

> To maintain their position the appellants must assume that the Indians have a regular form of government, whereas nothing is more clear than that they have no government and no organization, and cannot be regarded as a nation capable of holding lands.
>
> It is also contended that the crown had never recognized the aboriginal inhabitants of a country who where without any settled government as the proprietors of the soil. This was not only the rule uniformly acted upon by the Sovereigns of England, but it was a part of the common law of Europe.
>
> At the time of discovery of America, and long after, it was an accepted rule that heathen and infidel nations were perpetual enemies, and that the Christian prince or people first discovering and taking possession of the country became its absolute proprietor, and could deal with the lands as such.
>
> It is a rule of common law that property is the creature of the law and only continues to exist while the law that creates and regulates it subsists. The Indians had no rules or regulations which could be considered laws.
>
> No title beyond that of occupancy was ever recognized by the crown as being in the Indians, and this recognition was based on public policy and not upon any legal right in the aboriginal inhabitants.[79]

As the American Courts recategorized indigenous peoples as 'domestic dependent nations', the Supreme Court of Canada now held indigenous peoples to be 'quasi-independent nations'[80] based on the reasoning from the American decision of *Cherokee Nation v. Georgia.*[81] A quasi-independent Indian nation had title to occupy its lands, but did not have a proprietary right to do so. This proprietary right was absolutely held by the Crown and was subject to the

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[79] *Ibid.* at 596-7.

[80] In all the treaties mentioned the word "cede" is used; this is a term usually employed in cases of transfers of land between different States. The Indians are dealt with as quasi-independent nations. *Ibid.* at 588.

[81] *Cherekee Nation* v. *State of Georgia*, 5 Peters 1.

Indian right of occupancy. The issue that the proprietary right was a legal right which vested in the Crown absolutely subject to Indian occupancy was not questioned. Rather, the Court focused on how the undisputed power of the Crown can take away the Indian occupancy right: via extinguishment established through conquest or purchase.[82] The occupancy title was characterized as usufructuary. In Strong, J.'s opinion, the nature of the Crown's relationship to Indians was characterized as follows:

> As will appear hereafter very clearly, such relationship is not in any sense that of trustee and *cestui que trust*, but rather one analogous to the feudal relationship of lord and tenant, or, in some other aspects, to that one, so familiar in the Roman law, where the right of property is dismembered and divided between the proprietor and a usufructuary.[83]
> ....
> In the commentaries of Chancellor Kent and in some decisions of the Supreme Court of the United States we have very full and clear accounts of the policy in question. It may be summarily stated as consisting in the recognition by the crown of a usufructuary title in the Indians to all unsurrendered lands. This title, though not perhaps susceptible of any accurate legal definition in exact legal terms, was one which nevertheless sufficed to protect the Indians in the absolute use and enjoyment of their lands, whilst at the same time they were incapacitated from making any valid alienation otherwise than to the crown itself, in whom the ultimate title was, in accordance with the English law of real property, considered as vested.[84]

Perhaps the most express endorsement of the doctrine of discovery as interpreted by the United States and representative of doctrine of discovery #3 (that the right of discovery gave sovereignty over 1) indigenous lands and 2) indigenous inhabitants ) is given by the Court regarding France's non-recognition of a doctrine of Indian Title. Taschereau, J. states:

> There is no doubt of the correctness of the proposition laid down by the Supreme Court of Louisiana, in *Breaux v. Johns* (1), citing *Fletcher v. Pecks*, and *Johnson v. McIntosh*, "that on the discovery of the American continent the principle was asserted or acknowledged by all European nations, **that discovery**

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[82] Ritchie, J. opined that "the crown owns the soil of all the unpatented lands, the Indians' possessing the legal title subject to the occupancy, with the absolute exclusive right to extinguish the Indian title either by conquest or purchase." *St. Catherine's Milling, supra* note 34 at 599-600.

[83] *Ibid.* at 604. Under Roman Law, a 'usufruct' is a type of rental arrangement which gave the occupant the right to the use and fruit of the land; although the occupant could pass the land to his heirs, he could not sell it. S. Cottam, "The Twentieth Century Legacy of the *St. Catherine's Case*: Thought on Aboriginal Title in Common Law" in Hodgins, Heard, Milloy, eds., *Co-existence? Studies In Ontario-First Nations Relations* (Peterborough: Trent University, 1992) at 118.

[84] *St. Catherine's Milling, supra* note 34 at 608.

> **followed by actual possession gave title to the soil to the Government by whose subjects, or by whose authority, it was made, not only against other European Governments but against the natives themselves.** While the different nations of Europe respected the rights (I would say claims) of natives as occupants, they all asserted the ultimate dominion and title to the soil to be in themselves.
> ...
> The necessary deduction from such a doctrine ( Indian title) would be, that all progress of civilization and development in this country is and always has been at the mercy of the Indian race. Some writers cited by the appellants, influenced by sentimental and philanthrophic considerations, do not hesitate to go as far. But legal and constitutional principles are in direct antagonism with their theories. The Indians must in the future, every one concedes it, be treated with the same consideration for their just claims and demands that they have received in the past, but, as in the past, it will not be because of any legal obligation to do so, but as a sacred political obligation, in the execution of which the state must be free from judicial control.[85]

It was argued by counsel that the Indian right to occupancy either derived from English common law as applicable to American Colonies or from the law of nations:

> ...at the date of confederation the Indians, by the constant usage and practice of the crown, were considered to possess a certain proprietary interest in the unsurrendered lands which they occupied as hunting grounds; that this usage had either ripened into a rule of common law as applicable to the American Colonies, or that such a rule had been derived from the law of nations and had in this way been imported into the Colonial law as applied to Indian Nations; that such property of the Indians was usufructuary only and could not be alienable, except by surrender to the crown as the ultimate owner of the soil...[86]

According to Strong, J.'s characterization of the Crown as being feudal like a landlord or a proprietor under Roman law, the ultimate title to the lands would vest in the Dominion in both circumstances. Taschereau, J., however, understands the ultimate title to the same lands vested in European governments by right of discovery. The Supreme Court of Canada dismissed the appeal leaving the question of how Canada obtained sovereignty over indigenous territories inconclusive. The decision was appealed to the Judicial Committee of the Privy Council ("J.C.P.C.") the next year.

The J.C.P.C. agreed with the Supreme Court's characterization of the 'Indian title' held by Indian tribes who pursuant to the *Royal Proclamation, 1763* lived under the sovereignty and protection of the British Crown and whose title was personal, usufructuary and dependent on the

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[85] *Ibid.* at 643 and 649.

[86] *Ibid.* at 616.

goodwill of the Crown:

> With regard to the alleged absolute title of the Indians to which the Dominion is said to have succeeded by treaty, no such title existed on their part either as against the King of France before the conquest or against the Crown of England since the conquest. Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or an equitable title in the ordinary sense.[87]

Dominant discourse has relied on the *Royal Proclamation, 1763*; the ascription of rights therein; and the J.C.P.C.'s introduction of the words "personal and usufructuary right dependent upon the good will of the sovereign" as the basis for the Crown's sovereignty claim. The construction by the J.C.P.C. of an "Indian title of occupancy" being a "personal and usufructuary right dependent upon the good will of the sovereign" seems to have been a formulation derived from arguments made by counsel for the province of Ontario:

> In his opening remarks to the Privy Council Blake had identified three possible views of Indian title: the Dominion view that it meant virtually a fee simple ownership alienable only to the Crown; a middle view, based on U.S. law emanating from the Marshall decisions, that recognized a right of occupancy that was a burden on the paramount title of the Crown; and a lower view, his own and Ontario's, that the Indian title was merely a matter of grace.
> ...
> Blake and their lordships agreed, to use Lord Watson's words, that "a pretext has never been wanted for taking land, "that the taking of land by the stronger from the weaker was "a right" and that the British were merely trying "to please the Indians... by swelling words [about their ownership of the land], always provided that the English got from them just what they wanted."[88]

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[87] *St. Catherine's Milling* v. *The Queen* (1888), 14 A.C. 46 at 49 [hereinafter *St. Catherine's Milling* cited to A.C.].

[88] Cottam, *supra* note 83 at 122. Spaulding also examines oral argument of counsel before the J.C.P.C. to identify why the Court had defined Indian right as usufructuary:

> The common law of aboriginal title represses the fact that native people were the original inhabitants of North America...Anglo-Canadian property law extended the 'English law fiction...that all lands in the realm were originally possessed, and accordingly owned, by the Crown and thus as a proprietary interest in land subject only to a special "burden" entitling Aboriginal peoples to use the land. Although justifications for such treatment sometimes refer vaguely to the special nature of Aboriginal land use or of Aboriginal conceptions of land rights, the usufructuary rights doctrine ensures that these results follow, independently of such considerations, by confining the Aboriginal right affirmed to a non-proprietary interest. Indeed, the oral argument before the Privy Council in St. Catherine's Milling, and the tenor of the judgment itself, suggest that it was these negative consequences, rather than any characteristic of Aboriginal property regimes or relationships to the land, which moved the Privy Council to define Royal Proclamation rights as "usufructuary".
>
> "Watson asked, 'What difference do you think it makes to your case that the Indian title should be greater or less so long as there is a substantial interest underlying it in the Crown? Does the precise extent or limit of the Indian title matter much...so long as there is left a right in the Crown, a substantial right, not a mere casuality

It is my submission that the "pre-text for the taking" of lands inhabited by indigenous peoples in Canada is the doctrine of discovery as applied by Europeans in their acquisition of indigenous lands in North America and therefore continues to be relied by upon by Canada for its assertion of sovereignty over indigenous lands to this date. The J.C.P.C. heard various arguments on the "precise quality of Indian title" and found it not necessary to express any opinion. Rather Lord Watson of the Privy Council stated:

> It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever that title was surrendered or otherwise extinguished.
> ...
> The Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.[89]

In 1889, it is questionable whether the Canadian Crown had "a substantial and paramount estate," underlying Ned'u'ten title. It is interesting to note that while discovery discourse is absent from the J.C.P.C.'s decision in *St. Catherine's Milling*, the position of this empire colonial court accepted doctrines of dispossession such as discovery and in particular *terra nullius* at the same time this decision was handed down. Spaulding comments on the "thematic commonality" of decisions by the J.C.P.C. in 1889 regarding aboriginal title and dismisses any notions that racist or social Darwanist thought was absent from Canadian legal thinking at this time:

> Lord Watson, who characterized Royal Proclamation rights in St. Catherine's Milling as "personal and usufructuary" in nature, a "mere burden" on the "proprietary estate" of the Crown, and "dependent upon the good will of the sovereign," authored the Privy Council's decision in Cooper v. Stuart less than four months later. As we have seen, Cooper v. Stuart represented the Privy Council's first unequivical endorsement of

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> which will depend on the Indian title but a substantial title?' Blake was quick to reply; 'So long as it is agreed there is such an interest...I care for nothing more."

Spaulding, *supra* note 6.

[89] *St. Catherine's Milling, supra* note 87 at 55-58.

> the distorted doctrine of terra nullius that had figured so prominently in Australian colonial policy and in the decisions of the Canadian courts in St. Catherine's Milling. The authority of Cooper v. Stuart has since been rejected by the High Court of Australia because of the doctrine's racially discriminatory premise. Lord Watson's proximate authorship of both judgements is perhaps only a coincidence of legal history, but the thematic commonality between these two superficially dissimilar judgements is difficult to dismiss when the Privy Council's role as the keeper of the empire's law is considered, and when it is noted that Lord Watson's concept of the personal usufruct inspired generations of rulings denying that the ancestors of Aboriginal peoples in Canada held property in their land.
>
> Evidently Canada's courts have not been immune to the attitudes and influences which gave rise in other British colonial jurisdictions to the notion that Aborignal peoples never possessed any rights of sovereignty or property cognizable in law. In matters of public policy and scientific understanding, there is no reason to believe that 19th century racialist and social Darwinist thought was less firmly entrenched in Canada than elsewhere in the western world.[90]

Indeed, Canadian courts continued their acceptance that of the right of discovery coupled with *deemed terra nullius* over indigenous territories throughout the 20th century.[91]

In British Columbia, the province denied that Indian title existed and by the 20th century refused to acquire indigenous lands through purchase or cession. It was not until the Nisga'a people brought a claim before the Canadian courts seeking declaration of their unextinguished right to occupy their traditional territories that the doctrine of discovery once again molded Canadian legal thought.

In *Calder*[92], the Supreme Court of Canada refers to it's decision in *St. Catherine's Milling* and concludes that the court in 1887 was heavily influenced by the Marshall trilogy for the

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[90] Spaulding, *supra* note 6.

[91] For example, in the *Syliboy* decision, Patterson, Acting Co. Ct. J. of the Nova Scotia County Court stated that Indians were not civilized to have the capacity to enter into treaties with 'civilized nations':

> Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britian not by gift or purchase from or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the Indians passed with it.

*R.* v. *Syliboy*, [1929] 1 D.L.R. 307. This decision has been argued by indigenous scholars to be "the extreme but logical credo of colonial law in Canada." See "First Nations Legal Inheritance", *supra* note 32 at 28.

[92] *Calder*, *supra* note 67.

interpretation of the doctrine of discovery. In dissent, Hall, J. summarizes the doctrine as follows:

> The dominant and recurring proposition stated by Chief Justice Marshall in *Johnson v. M'Intosh* is that on discovery or on conquest the aborigines of newly-found lands were conceded to be 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, but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it.[93]

Members of the Court also reviewed previous judicial considerations on the nature of Indian title recognized by the *Royal Proclamation, 1763.* While Hall, J. held that the Proclamation applies to Indian title across the country because the law of the land follows the flag (here England) and that Britain was aware of the 'western frontier', Judson, J. concluded that the Indian title in British Columbia is not derived from the Proclamation:

> I say at once that I am in complete agreement with judgments of the British Columbia Courts in this case that the Proclamation has no bearing upon the problem of Indian title in British Columbia. I base my opinion upon the very terms of the Proclamation and its definition of its geographical limites and upon the history of the discovery, settlement and establishment of what is now British Columbia.[94]

By examining Canada's sovereignty assertion date in British Columbia as 1846, it is my submission that the Supreme Court of Canada in its decision of *Calder* based its paramount or absolute sovereignty claim over indigenous territories by right of discovery as it transgressed from its initial colonial regulatory nature.

Judson, J. reviews the boundary history of British Columbia and the Nisga'a territory in his opinion. He states:

> The area in question in this action never did come under British sovereignty until the Treaty of Oregon in 1846. This treaty extended the boundary along the 49th parallel from the point of termination, as previously laid down, to the channel separating the Continent from Vancouver Island, and thus through the Gulf Islands to Fuca's Straits. The Oregon Treaty was, in effect, a treaty of cession whereby American claims

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[93] *Ibid.* at 151 and 194.

[94] *Ibid.* at 152.

> were ceded to Great Britian. There was no mention of Indian rights in any of these Conventions or the treaty.
> ...
> The Colony of Vancouver Island was established by the British Crown in 1849, James Douglas was appointed Governor in 1851. The Colony of British Columbia, being the mainland of what is now the Province, was established by the British Crown in 1858 and the same James Douglas was the first Governor of the Colony with full executive powers. Douglas remained Governor of both Colonies until 1864. On November 17, 1866, the two Colonies were united as one Colony under the British Crown and under the name of British Columbia. This Colony entered Confederation on July 20, 1871, and became the Province of British Columbia and part of the Dominion of Canada.
>
> When the Colony of British Columbia was established in 1858, there can be no doubt that the Nishga territory became part of it. The fee was in the Crown in right of the Colony until July, 21, 1871, when the Colony entered into Confederation, and thereafter in the Crown in right of the Province of British Columbia, except only in respect of those lands transferred to the Dominion under the Terms of Union.[95]

Under doctrine of discovery #2, foreign states could regulate their claims to indigenous peoples lands in what is now called British Columbia, and set up boundaries for each to settle their populations. By 1846, there was no British settler population established in Ned'u'ten territories and I presume in Nisga'a territory as well. Contact would be limited to transient resource and trade prospectors and missionaries. Yet as of this date, Britain sovereignty purportedly applies to the territory demarcated by the Treaty of Oregon. This is an inchoate title or 'paper sovereignty' where ultimate dominion to this territory does not occur by mere token occupation. Britain could not have held possession at this date. Indigenous peoples were never a party to the 1846 treaty, were not consulted, and did not give consent to such consequences that flowed from this foreign regulation. In other words, Britain could not meet doctrine of discovery #1 requirements for it had not secured possession in indigenous territories such as those of the Ned'u'ten.

Even by 1851, when the Colony of Vancouver Island was created, it is questionable whether Britain had substantial or factual control over what is now British Columbia to amount

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[95] *Ibid.* at 101-102.

to possession and to benefit from doctrine of discovery #1. Little contact had been made with the Ned'u'ten at this time and on an undisputed level, indigenous peoples outnumbered incoming settlers.[96] It is questionable whether all indigenous territories became part of the British colonies as of 1858, as Judson, J. states the Nisga'a do in his judgment. It is equally questionable whether the colonies independently, or united by 1866,[97] would have factual control over indigenous territories, although as we have seen factual control here is not in relation to indigenous peoples but in relation to the United States.

At the time British Columbia became a province in 1871, only a few treaties had been made with indigenous peoples. It is my submission that the inherited sovereignty that Canada clings to is premised on doctrine of discovery #3 and is evidenced by the majority[98] of indigenous peoples (without treaty, conquest, cession or purchase) being subsumed into British colonies that did not have factual possession of their respective territories. It is also my submission, however,

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[96] Dara Culhane takes note of that even by 1880, indigenous peoples outnumbered the newcomers:

> A census was taken in British Columbia in 1880 that listed First Nations as a majority of the total population of 49, 459. The census of 1891 counted 98,173 persons in the provincial population, of which only one third - around 35,000 - were Indians.

Culhane, *supra* note 60 at 218. John Borrows also takes note that Indians were the majority population in B.C. at this time:

> In 1881, tens years after union, Indians were still the majority population in B.C.; there were 28,704 Indians, 4,195 Chinese and 19,069 settlers of European origin. Yet in 1872, a year after union, when the Indian population was closer to 40,000 and the settler population was smaller still, one of new province's first legislative acts was to remove voting rights from the Indians.

"Because it does not make sense", *supra* note 31. The assertion of factual control or possession of Ned'u'ten territories and other indigenous territories at the time of Canada's sovereignty assertion in British Columbia is inconsistent with the demographic records.

[97] Culhane states that there was less than 100 non-Aboriginal residents in Gitxan-Wet'suwet'en territory in 1866. The indigenous population in B.C at this time was approximately 40,000. Culhane, *ibid.* at 208.

[98] Although Britain and later Canada denied that indigenous people had rights to their territories, these newcomers still had concerns regarding their earlier policy of purchasing Indian title. Treaty 8 was signed in 1899. While the province may state that financial considerations were reasons why they did not enter into treaties, I believe that where indigenous peoples such as the Ned'u'ten held the balance of power, the British and Canada would be compelled to enter into some form of agreement or treaty to access indigenous territories and to survive. With the knowledge that incoming settlers would tip the balance of power, the policy to deny indigenous sovereignty always lurked in the shadows.

that Britain, the United States and Russia abided by the regulatory nature of the doctrine of discovery #1, but had transgressed to doctrine of discovery #3 when such competing colonial powers found is no longer necessary to achieve factual possession in the international sense at this time and indigenous territories came under the 'sovereign grace' of the Euro-Canadian Crowns.

Because of the *St. Catherine's Millings* case, the Nisga'a people had to fashion their claim so as to have the Canadian courts accept leave. Without challenging the legitimacy of the Crown's sovereignty over Nisga'a lands or the federal Crown's right to extinguish aboriginal title, the Nisga'a conceded that the interest they were seeking declaration on was "an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada" and that since such an interest was not extinguished, the Nisga'a could through occupation "enjoy the fruits of the soil, the forest and of the rivers and streams, subject to the Crown's paramount title as it is recognized in the law of nations."[99] The consequence of bringing this declaration was that the Nisga'a People had to concede to the presumed legal basis for the Crown's paramount title.[100] This case set the precedent for other indigenous peoples in

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[99] *Calder, supra* note 67 at 174.

[100] Patricia Monture-Angus highlights the strategy behind the Nisga'a bringing a court action:

> The way in which the Nishga drafted their litigation is an important issue in and of itself. The remedy sought was a declaration - a judicial statement - and nothing more. The Nishga did not ask the court to define the concept of Indian title, merely to note that it had not been extinguished. The question asked the court was purposefully a narrow one. The Nishga themselves ensured that both remedially and substantively the issue before the courts could cause them as little as possible. Two comments can be substantiated from the recognition of the narrow scope of the Nishga claim. First, the Nishga did not trust the courts with the larger question of Indian title. Second, by seeking only declarative relief the Nishga understood that the real solution lay outside the judicial process and the court action was just the first step to secure a political negotiation process that had evaded the Nishga since shortly after their contact with the Settler Nations.

*The Familiar Face of Colonial Oppression, supra* note 2 at chapter two.

British Columbia who had not treatied with the Crown, and who in order to challenge violations of their rights, had to concede to the Crown's underlying sovereignty over their lands and political status.

The Supreme Court of Canada held in *Guerin,*[101] that Musqueam people have a fiduciary relationship with the Crown. This decision has been hailed by some scholars to be the first attempt by the Supreme Court of Canada to "decolonize" the law.[102] This fiduciary relationship was held to exist when Indian interests in reserve lands under s. 91(24) of the *Constitution Act, 1982* were surrendered to the Crown for their benefit, thereby confirming the Musqueam peoples' domestic status as dependent on the will of the Crown.[103] The Supreme Court of Canada held that the Musqueam people had an interest in their land that was a pre-existing legal right; not created by the Royal Proclamation of 1763 or subsequent legislative enactments of Canada; inalienable, and where surrendered to the Crown, the Crown would be under a fiduciary obligation to the Musqueam to act in their best interest. This did not happen and the plaintiff were awarded damages for breach of this obligation.

Dickson, J. agrees with Justice Marshall's judgments that hold the origin of 'aboriginal'

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[101] *Guerin* v. *The Queen,*[1985] S.C.R. 335.

[102] James [sakej] Youngblood Henderson states that the Court departed from existing legal precedents to decolonize the law with respect to aboriginal title:

> In 1984, in *Guerin*, the Supreme Court of Canada took the first fragile step in decolonizing the Anglo-Canadian law of property. It asserted that the Crown had a legal duty to the First Nations in relation to their aboriginal lands, which the majority called a fiduciary duty. While addressing issues of Aboriginal title in relation to this duty, the Supreme Court of Canada departed from existing legal precedents and pushed legal theory and language through colonialist mental barriers. Thus, the post-colonial legal context witnesses an analogous cognitive process in understanding the Canadian landscape as had post-colonial Canadian literature.

"Mikmaw Tenure", *supra* note 30 at 208.

[103] "Human Rights of Indigenous Peoples", *supra,* note 6 at para. 59 where Daes states:

> In certain countries, particularly in the Americas, States have created the legal notion that the State itself holds title to all indigenous lands and holds that title in trust for the various indigenous nations, tribes or peoples...Systems of trust title make indigenous ownership of land and resources a second-class legal right, and as such they are or can be racially discriminatory.

title to be in indigenous peoples's prior occupation, as well as the notion that discovery gave ultimate title of the land to the nation that had discovered and claimed it:

> In *Johnson v. M'Intosh* Marshall C.J. although he acknowledged the Proclamation of 1763 as one basis for recognition of Indian title, was nonetheless of opinion that the rights of Indians in the lands they traditionally occupied prior to European colonization both predated and survived the claims to sovereignty made by various European nations in the territories of the North American continent. The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it. In that respect at least the Indians's rights in the land were obviously diminished; but their rights of occupancy and possession remained unaffected.
> ...
> Their interest in their lands is a pre-existing legal right not created by the Royal Proclamation, by s. 18(1) of the *Indian Act*, or by any other executive order or legislative provision.
> ...
> In the *St. Catherine's Milling* case, *supra*, the Privy Council held that the Indians had a "personal and usufructuary right" in the lands which they had traditionally occupied. Lord Watson said that "there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title, which became a plenum dominium whenever the title was surrendered or otherwise extinguished" (at p. 55) He reiterated this idea, stating that the Crown "has all along, upon which the Indian title was a mere burden" (at p. 58). This view of aboriginal title was affirmed by the Privy Council in the *Star Chrome* case. In *Amodu Tijani, supra* Viscount Haldane, adverting to the *St. Catherine's Milling* and *Star Chrome* decisions, explained the concept of a usufructuary rights as " a mere qualification of or burden on the radical or final title of the Sovereign..." (p. 403). He described the title of the Sovereign as a pure legal estate, but one which could be qualified by a right of "beneficial user" that did not necessarily take the form of an estate in land. Indian title in Canada was said to be one illustration "of the necessity for getting rid of the assumption that the ownership of land naturally breaks itself up into estates, conceived as creatures of inherent legal principle." Chief Justice Marshall took a similar view in *Johnson v. M"Intosh, supra*, saying, "All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy..." (p. 588).[104]

Dickson, J. endorses the juridical effects of the discovery doctrine as interpreted by American courts (the Crown is the absolute sovereign over indigenous territories where indigenous peoples' rights to land are a mere burden on that claim), thereby contributing to the Canadian judicial discourse on the discovery right 11 years after the *Calder* decision and over 100 years since the issue entered into Canadian legal thought. This colonial tradition continued into the 1990's, until the highest court of Canada no longer found it necessary to explicitely recite the origin of its sovereignty assumption over indigenous territories.

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[104] *Guerin, supra* note 101 at 377-380, (paragraphs omitted).

In *Sparrow,*[105] the appellant who was a member of a people that had no treaty relationship with the Crown, argued that through immemorial occupation to his people's territories, he could fish as his ancestors did before the settlers came. His defended his fishing charge by arguing that his aboriginal right to fish, as recognized by s. 35(1) of the *Constitution Act, 1982,* was infringed by federal legislation. What is interesting is that in considering the background of this constitutional provision, the Supreme Court of Canada makes the following conclusion:

> It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, **there was from the onset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown: see *Johnson* v. *M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C)...**[106]

In *Sioui,*[107] the Supreme Court of Canada examines the status of indigenous peoples in Canada again and in particular the Huron people during the 18th century. Recall that in *St. Catherine's Milling*, the Court held the status of indigenous peoples to be a "quasi-independent nations", by 1990, this status was characterized as being deduced from sovereign nations to nations "within Canada"and that any relations with Canada would be of a *sui generis* nature and not international.[108]

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[105] *R. v. Sparrow*, [1990] 1 S.C.R. 1075.

[106] *Ibid.* at 1103. Patricia Monture-Angus states that this principle is heatedly disputed and not necessarily accepted:

> For this principle the court relies on both the Royal Proclamation and the American case Johnson v. McIntosh. This principle of underlying sovereignty and crown title is not as universally acceptable as Canadian courts lead us to believe. In fact, it would be heatedly disputed by most Aboriginal people. It is a concept which Canadian courts must begin to consider. In fact, Aboriginal litigation has largely been successful only because Aboriginal people have carefully drafted their litigation matters to avoid running into this presumption of Canadian law.

*The Familiar Face of Colonial Oppression, supra* note 2 at chapter 3.

[107] *R. v. Sioui* (1990), 70 D.L.R. (4th) 427.

[108] Lamer, J. states:

Lamer, J. cites American decisions that have taken note of British policy towards the status of indigenous peoples as being "capable of maintaining the relations of peace and war.' Although Lamer, J. paints a picture of what the status of indigenous peoples were during the 18th century with a 'modern paintbrush' of historical treaty-making, he still rejects this sovereign status of indigenous peoples as capable of being recognized today. This is evidenced by what status he gives to the treaty in question:

> Such a document could not be concerned because under international law they had no authority to sign such a document: they were governed by a European nation which alone was able to represent them in dealings with other European nations occupying North American territory. The *sui generis* situation in which the Indians were placed had forced the European mother countries to acknowledge that they had sufficient autonomy for the valid creation of solemn agreements which were called "treaties", regardless of the strict meaning given to that word then and now by international law. The question of the competence of the Hurons and of the French or the Canadians is essential to the question of whether a treaty exists. The question of the capacity has to be examined from a fundamentally different viewpoint and in accordance with different principles for each of these groups. Thus, I reject the argument that the legal nature of the document at issue must necessarily be interpreted in the same way as the capitulations of the French and the Canadians.[109]

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> I consider that, instead, we can conclude from the historical documents that both Great Britain and France felt that the Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.
>
> The mother countries did everything in their power to secure the alliance of each Indian nation and to encourage nations allied with the enemy to change sides. When these efforts met with success, they were incorporated in treaties of alliance or neutrality. This clearly indicates that he Indian nations were regarded in their relations with the European nations which occupied North America as independent nations.

*Ibid.* at 448.

[109] *Ibid.* at 451. Martinez makes note of that the characterization of treaties as being domestic rather than international stems from three assumptions:

> First, of all, in the case of treaty relations, one notes a general tendency to contest that treaties involving indigenous peoples have a standing, nowadays, in international law. This point of view, which is widespread among the legal establishment and in scholarly literature, has been basically grounded alternatively on three assumptions: either it is held that Indigenous peoples are not peoples according to the meaning of the term in international law; or that treaties involving Indigenous peoples are not treaties in the present conventional sense of the term: that is, instruments concluded between sovereign States (hence the established position of the U.S. and Canadian judiciary, by virtue of which treaties involving Indigenous peoples are considered to be instruments *sui generis*); or that those legal instruments have simply been superseded by the realities of life as reflected in the domestic legislation of States.
>
> Whatever the reasoning followed, the dominant viewpoint - - as reflected, in general, in the specialized

As *Sparrow* and *Sioui* were written at approximately the same time, we can see that Canadian courts still rely on discovery for territorial acquisition and its juridical effect being that Canada has underlying title to all indigenous territories by virtue of its sovereignty assertion. We see the status of indigenous peoples and treaties being domesticized or internally regulated by the discovering sovereign. Even in other common law jurisdictions or international fora were dispossession doctrines that flow from discovery such as *terra nullius,*[110] are being rejected, Canada maintains that all along, it had underlying title and sovereignty over indigenous peoples and their territories.

As aboriginal common law developed within the 1990's, the doctrine of discovery was legally cemented into Canada's relationship with indigenous peoples regardless if a treaty relationship existed or not. By 1997, the doctrine of aboriginal rights and the doctrine of aboriginal title as part of the doctrine of aboriginal rights had been completed by the Supreme Court of Canada in the decisions of *Van der Peet*[111] and *Delgamuukw.*[112]

In *Van der Peet*, aboriginal peoples now have to prove that in order for their aboriginal rights to be protected by s. 35(1) of the *Constitution Act, 1982*, such rights, limited to customs, practices and traditions, had to exist at the time of contact, and had to be integral to the

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> literature and in State administrative decisions and the decisions of the domestic courts -- asserts that treaties involving Indigenous peoples are basicially a domestic issue, to be construed, eventually implemented, and adjudicated via existing internal mechanisms, such as the courts and federal (an even local) authorities.

*Final Report on the Study of Treaties, supra* note 1 at 24, para. 113-114.

[110] See *Mabo* v. *Queensland* (1992), 175 C.L.R. 1 for the Australian common law repudiation of the *terra nullius* doctrine. See also *Western Sahara: Advisory Opinion*, [1975] I.C.J.R. 12 for international repudiation of the *terra nullius* doctrine.

[111] *R. v. Van der Peet,* [1996] 2 S.C.R. 507 at 541-548 [hereinafter *Van der Peet*].

[112] *Delgamuukw*, *supra* note 71 at 1098-1099.

distinctive aboriginal culture. Chief Justice Lamer, writing for the majority of the Supreme Court of Canada, refers to the Marshall trilogy, albeit for its principles, rather than their specific legal holdings, for the purpose of s. 35 of the *Constitution Act, 1982*:

> In the course of his decision (written for the court), Marshall, C.J. outlined the history of the exploration of North America by the countries of Europe and the relationship between this exploration and aboriginal title. In his view, **aboriginal title is the right of aboriginal people to land arising from the intersection of their pre-existing occupation of the land with the assertion of sovereignty over that land by various European nations.** The substance and nature of aboriginal rights to land are determined by this intersection...
>
> ...
>
> It is similarly, the reconciliation of pre-existing aboriginal claims to the **territory** that now constitutes Canada, with the assertion of British sovereignty over that territory, to which the recognition and affirmation in s. 35(1) is directed.
>
> ...
>
> In so doing the court considered the nature and basis of the Cherokee claims to the land and to **governance** over that land. Again, it based its judgment on its analysis of the origins of those claims which, it held, lay in the relationship between the pre-existing rights of the "ancient possessors" of North America and the assertion of sovereignty by European nations.
>
> The Canadian, American and Australian jurisprudence thus supports the basic proposition put forward at the beginning of this section: aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of aboriginal rights must be directed at fulfilling both of these purposes...[113]

In 1996, the Supreme Court of Canada also casts its rejection of *terra nullius* as permitting foreign sovereigns from acquiring territories that are inhabited, while maintaining Canada's inherited discovery claims. In the *Côté*[114] decision, Lamer, C.J., reiterates arguments made before the bar:

> The argument of the respondent is fairly straightforward. Under the British law of discovery, the British Crown assumed ownership of newly discovered territories subject to an underlying interest of indigenous peoples in the occupation and use of such territories. Accordingly, the Crown was only able to acquire full ownership of the lands in the New World through the slow process of negotiations with aboriginal groups leading to purchase or surrender.
>
> Unlike the British process of colonization, however, it is suggested that the French Crown did not legally recognize any subsisting aboriginal interest in land upon discovery. Rather, the French Crown assumed full ownership of all discovered lands upon symbolic possession and conquest. Accordingly, French colonizers

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[113] *Van der Peet, supra* note 111 at 541-548.

[114] *Côté, supra* note 66.

> never engaged in the consistent practice of negotiating formal territorial surrenders with the aboriginal peoples.
> ...
> To begin, I am not persuaded that the status of French colonial law was as clear as the respondent suggests...while French law never explicitly recognized the existence of a *sui generis* aboriginal interest in land (translation) "nor did it explicitely state that such an interest did not exist." Indeed, some legal historians have suggested that the French Crown never assumed full title and ownership to the lands occupied by aboriginal peoples in light of the nature and pattern of French settlement in New France.
> ...
> ...In one of the mysteries of the history of New France, the Iroquois people who occupied the region at the date of Jacques Cartier's visit in 1534 had simply disappeared by 1603. The French colonists thus claimed and occupied this particular areas as *terra nullius*... Content with occupation of the *terra nullius* of the Valley, the French never engaged in a pattern of surrender and purchase similar to British colonial policy.[115]

Lamer, C.J. then relies on the australian *Mabo* decision to reject justifications that the French held regarding the non-survivability of indigenous rights upon French sovereignty assertions.[116] Lamer, C. J. also rejects *terra nullius* claims of the French to acquire indigenous territories. He based his reasoning on the fact that to accept that no indigenous rights survived French sovereignty and therefore could not be recognizable by the British upon conquest over such territories, would "create an awkward patchwork of constitutional protection for aboriginal rights across the nation, depending upon the historical idiosyncracies of colonization over particular regions of the country." Lamer, C.J. does not resolve, however, the anomaly that Britain does not have to engage in treaty, purchase, or surrender of the indigenous peoples in question, the same people that the French colonizers failed to engage in such practice. Rather, upon conquest of the New France to Britain from France, the indigenous peoples passed with the land echoing *Syliboy* above and providing evidence of the transferability nature of the discovery right.

In *Delgamuukw*, the Supreme Court of Canada did not have to refer to the American

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[115] *Ibid.* at 402-407.

[116] Lamer, C.J. quotes Brennan, J. of the Australian High Court:

> Whatever the justification advanced in earlier days for refusing to recognize the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted.

*Ibid.* at 407.

decisions for its understanding of the common law legal basis for aboriginal title. The *Van der Peet* case already did so when it confirmed the legalization of the internationally repudiated doctrine of discovery in Canada. The Court confirmed in this decision, that aboriginal title was one of occupancy and that in order to receive constitutional protection, the aboriginal claimant has to prove it existed **at the time the Crown asserted sovereignty in 1846**. The Court states:

> ...from a theoretical standpoint, aboriginal title arises out of prior occupation of the land by aboriginal peoples and out of the relationship between the common law and pre-existing systems of aboriginal law. **Aboriginal title is a burden on the Crown's underlying title**. However, the Crown did not gain this title until it asserted sovereignty over the land in question. Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted... For these reasons, I conclude that aboriginals must establish occupation of the land from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title. McEacheren C.J. found, at pp. 233-34, and the parties did not dispute on appeal, that British Sovereignty over British Columbia was conclusively established by the Oregon Boundary Treaty of 1846.[117]

While the Supreme Court of Canada held that aboriginal title had not been extinguished, it did not disturb the trial judge's theoretical basis for the Crown's title which was based on the discovery right.[118]

In both of these colonial decisions, aboriginal rights and title are **parasitic** or **burdens** on the underlying Crown title to indigenous territories. The Crown is able to define the nature and scope of aboriginal rights even where it has a paper sovereignty/inchoate title to indigenous lands and peoples and where no treaty relationship exist. Here discovery gives underlying title of all

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[117] *Delgamuukw, supra* note 71 at 1098-1099.

[118] The trial judge relied on the *Johnson* v. *M'Intosh* decision to trace Crown title:

> The underlying purpose of exploration, discovery and occupation of the new world, and of sovereignty, was the spread of European civilization through settlement. For that reason the law never recognized that the settlement of new lands depended upon the consent of the Indians. So early at the year 1496, her monarch granted a commission to the Cabots, to discover countries then unknown to Christian people, and to take possession of them in the name of the King of England. Two years afterwards, Cabot proceeded on this voyage, and discovered the continent of North America, along which he sailed as far south as Virginia. To this discovery the English trace their title.

*Delgamuukw* v. *British Columbia*, [1991] 3 W.W.R. 97 at 207.

indigenous territories to Britain, and then Canada, just by a mere assertion of sovereignty. Constitutionally protected and pre-existing aboriginal rights have to and must be directed to the reconciliation with the sovereignty of the Crown. Pre-existing aboriginal rights are held to not be absolute in the face of the doctrine of discovery and indigenous peoples are left to forfeit their prerogatives to define their rights and are denied the authority to determine their own domestic relations.[119]

A jurisprudential survey of Canadian decisions on aboriginal rights establishes, in my view, that the primary legal theory for Canadian acquisition of indigenous territorial and political sovereignty is based on its transferred or inherited discovery right. The decision to take a jurisprudential approach to examine how Canadian courts have recorded use of discovery for its sovereignty assertion claims may seem unnecessary given the undisputed fact that it has shaped aboriginal rights discourse in this country, however, given the reluctance of colonial discourse to accept this fact, I have found it necessary to state the obvious through highlighting the 'discovery presence' in colonial written tradition. This approach has also allowed me to "understand the source as well, as the tools of indigenous oppression and to clear my pathway to decolonization."[120] It has also helped me to unmask the "pattern of flowing Aboriginal rights

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[119] Monture-Angus cites Menno Bolt in the following passage on the s. 35 process:

> At least one notable scholar concerned with the issues of Aboriginal and treaty rights believed that the section 35 process was doomed from the outset. Menno Bolt suggests:
>
> > While entrenchment may have given a small measure of legal and political legitimacy to aboriginal rights, a strong case can be made that entrenchment has placed aboriginal rights in a legal and political quicksand. As a consequence of entrenchment, Indians have essentially forfeited their prerogative to define these rights. Because entrenched aboriginal rights can be constitutionally defined only by amendment, if and when there is a constitutional amendment that defines aboriginal rights it will say what the eleven governments of Canada want it to say. If there is no constitutional amendment, then Canadian courts will define aboriginal rights. Either way, whether the definition is made by political process or by judicial process, Indians will be spectators (euphemistically termed 'consultants'), not decision makers or arbitrators.

*The Familiar Face of Colonial Oppression, supra* note 2 at chapter 3 and 4.

[120] Patricia Monture-Angus analyses Canadian law as a tool of oppression against indigenous peoples. She

language" designed to legitimate unquestioned presumptions of Crown sovereignty assertion.[121] The impact of colonial judicial decisions has influenced treaty-making as well and in my opinion facilitates the political process of making "conquest treaties" and maintaining colonialism in Canada.

While there are some authorities that may agree that doctrines such as the right of discovery should be rejected today, there has been no attempt or faith that making such political and social changes retroactive can delegitimize conquest treaty-making today. Rather indigenous peoples are repeatedly told that they should raise themselves up from their state of oppression and colonization in today's currency for tomorrow and stop romancing the past to live as their forefathers once did:

> The clock can't be turned back nor can the rule of discovery be vitiated on any retroactive basis: the reality of effective occupation stands in the way. Nevertheless, some measure of self-rule could be accorded to Native peoples within the constitutional framework of any Western nation.[122]

As long as the doctrine of discovery is 'quietly' legitimized by Canada for its capacity to assert sovereignty in 1846 over indigenous peoples in British Columbia, indigenous peoples will not be

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states:

> All the attempts to destroy cultures and peoples have had in common one thing -- the law. Every attempt at assimilation and cultural destruction has been implemented through law. Although Aboriginal people have forced the truth about their experiences to be told in louder voices this decade, little mention is yet made about the tool through which our oppression has flowed -- the law. This recognition must include the Canadian judicial system. This second silence must also be broken. Understanding the source as well as the tools of our oppression allows us to see clearly the pathway to the decolonization of our lives.

*The Familiar Face of Colonial Oppression, supra* note 2.

[121] *Ibid.* Patricia Monture-Angus notes that when the courts recognize an aboriginal right, the right is immediately diminished by the next statement or what she calls a "slight of pen":

> This establishes a familiar pattern of "slight of pen" which emerges with a nominal scrutiny in all Aboriginal rights cases. The courts frequently make sweeping statements which affirm Aboriginal views and Aboriginal rights. These are next subtly diminished in a single sentence which affirms that the crown's interest is greater than the Indian interest. No explanation of how this is legally so is ever provided. This pattern of flowing Aboriginal rights language masks the colonial aspects (often one-liners) of most decisions.

[122] Berger, *supra* note 22 at 181.

able to achieve true reconciliation with Canadians through treaties. Why? The treaty policies of the Crown are designed to transform its inchoate title over indigenous peoples and their territories into a full sovereign title recognizable in international law.

If indigenous peoples do not challenge how the Crown can assert sovereignty over them, reconciliation will be founded on Canada's belief that indigenous peoples were never absolute sovereign peoples before contact. As a result, indigenous peoples will be forever 'domesticized' into Canadian colonial attitudes of what indigenous peoples should be. The consequences of Canada's capacity to domesticize indigenous peoplehood has certainly taken its toll on indigenous peoples.[123]

States like Canada do not recognize indigenous peoples assertions to exercise their

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[123] See generally the *Report of the Royal Commission on Aboriginal Peoples*, *supra* note 4. See also *Final Report on the Study of treaties, supra* note 1 at 43, para. 222-226 where the various methods to dispossess indigenous peoples of their lands is noted:

> The process that took the indigenous peoples' lands from them left behind very limited and debilitating alternatives for survival: vassalage (or servitude in its diverse forms), segregation in reduced areas "reserved" for them, or assimilation into the non-indigenous sector of the new socio-political entity created without indigenous input. The last alternative meant the social marginalization and discrimination prevalent in these mixed societies, about which little or nothing could be done despite praiseworthy efforts by certain non-indigenous sectors.
>
> Various methods were utilized to achieve dispossession of the land. They, unquestionably, included treaties and agreements, at least if we accept the non-indigenous interpretation of these documents (and in general, that version is the only one available in written form). This issue will be returned to later.
>
> Coercion --either by armed force or by judicial and legislative institutionality , or both -- was very frequently brought to bear. This is true whether or not its employment was preceded by formal juridical commitments contrary to it.
>
> It went to extremes, as mentioned in an early report. An example is the forced exodus in the 1830s to the other side of the Mississippi of the so-called "five civilized tribes" of the southeastern United States. This is the first documented case of "ethnic cleansing," the background available to the Special Rapporteur, as duly noted in a previous report.
>
> Another method was frequently employed to attain dispossession in those case in which no juridical instruments of any sort had been compacted. This took advantage of the inability of the Indigenous peoples (or individuals) to show "property deeds" considered valid under the new, non-indigenous law. This made their ancestral lands vulnerable to seizure by non-indigenous individuals holding such documents (acquired via the most diverse -- and, most often, less than honourable -- means), or by the central or local authorities, who claimed them as public property (or lands belonging to the Crown, or federal lands) subject to their jurisdiction.

respective collective human rights to decolonize according to international treaties, customs, principles and evolving norms.[124] Instead, Canada continues to "internally colonize"[125] the indigenous peoples within it regardless if no treaty relationships exist.

Canada has therefore "domesticized" indigenous peoples within the state; their rights to land; their relationship with the Canadian state who it is the ultimate arbiter of the degree of sovereignty exercised by indigenous nations.[126] In other words, the internal colonization, integration[127] or domesticization of indigenous peoples by Canada has permitted Canada to

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[124] Implementation of ending colonialism "in all its forms and manifestations" by states was guided by the *Declaration on the Granting of Independence to Colonial Countries and Peoples,* UNGC Resolution 1514 (XV) (1960) 15 UN GAOR, Supp. (No.16) 66, U.N. Doc. A/4684, however, state practice dictated that decolonization could only occur where territories where identified as being held in trust, or non-self-governing, or territories yet to gain independence. Indigenous peoples are not to this day recognized as "peoples" by states so as to fall under this declaration and could not therefore decolonize their traditional territories as the peoples of India or Morrocco have. This is further explained by the states usage of the "Blue Water thesis" where if a people's territory was outside the independent state that has colonized it, then those people could decolonize and exercise their right to self-determination with international state recognition. Indigenous peoples such as the Ned'u'ten people would be precluded from decolonizing from Canada as their traditional territories exist within Canada. For further discussion, see D. Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) Univ. Tor. Fac. L. Rev. 1.

[125] In their submission to the UN Commission on Human Rights, the Eeyouch or James Bay Cree Nation determine that indigenous peoples in Canada, including themselves, are internally colonized by Canada because aspects of colonialism exist: indigenous peoples traditional territories are systematically exploited by Canada, the development of such territories leaves the people further dependent on the state as the benefits from use of indigenous lands flow directly to Canada causing inequitable distribution of wealth. Further, indigenous peoples are subordinated under, discriminated against and marginalized within the Canadian state. "In reference to the Crees of Quebec, our communities continue to suffer from a wide range of problems that constitute for the most part a violation of fundamental human rights. These include: (i) inadequate rights of self-government; (ii) insufficient participation in the political life of the state; (iii) economic inequalities; (iv) lack of respect by the state for our customary practices; (v) attempts to impose hydroelectric projects without proper environmental and social impact assessment and our free and informed consent; (vi) destruction of cultural sites and sacred burial grounds of great significance; (vii) destruction of hunting and fishing areas and traplines; (viii) overall lack of respect by federal and Quebec governments for our treaty rights; and (xi) inadequate recognition of Cree offshore rights. See Grand Council of the Crees, *Status and Rights of the James Bay Crees in the Context of Quebec's Secession From Canada* Submission to the Commission on Human Rights, 48th Session, February, 1992 at 26-28 [hereinafter *James Bay Cree*]. This submission has been also published Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska, 1995) and Grand Council of the Crees, *Never without consent* (Toronto: ECW Press, 1998).

[126] "International Law and Politics", in Jaimes, *supra* note 51 at 70.

[127] *Ibid.* at 75. Morris states: Similar examples of colonial powers integrating colonies in circumvention of international law have been held to be illegal. The colonial rationale for integration schemes is explained by

circumvent current international laws that deem colonialism in this day and age illegal. From this perspective, it can be argued Canada has, through its courts, policies, and agreements regarding indigenous peoples, consistently denied indigenous peoples the right to self-determination and/or to decolonize in accordance with evolving international standards regarding indigenous peoples. The Canadian's highest court use of doctrines of aboriginal title and rights[128] and Canada's policies towards treaty-making are just two, but fundamental areas that Canada has used domesticity or territorial integrity to shield its presumption of underlying Crown title to indigenous lands from being effectively challenged by indigenous peoples both within Canada and abroad. The perpetual use of doctrines of dispossession, such as the doctrine of discovery are kept alive to the detriment of indigenous peoples' attempts to decolonize according to their traditional laws.[129] Therefore, it is imperative that indigenous peoples such as the

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Alfredsson:

> [T]he practice by some colonizing states of integrating their colonial territories, even though such integration in many cases was pure constitutional fiction introduced in order to avoid international supervision by sheltering these territories under an umbrella of domestic jurisdiction, implies strongly that political decolonization appeared to the colonizers as a legal force and not just political rhetoric which they could have flatly rejected or more simply ignored.

[128] See *The American Indian, supra* note 27 at 326 where Robert Williams, Jr. states:

> Today, principles and rules generated from this Old World discourse of conquest are cited by the West's domestic and international courts of law to deny indigenous nations the freedom and dignity to govern themselves according to their own vision.

See also "Human Rights of Indigenous Peoples", *supra* note 6 where Daes states at para. 29:

> In this regard, the final working paper will give attention to the concept of aboriginal title and the relationship of this legal concept to the human rights of indigenous peoples. In many countries, particularly those of the British Commonwealth, as well as others, exclusive use and occupancy of land from time immemorial gives rise to aboriginal title, a title that is good against all but the sovereign, that is, the Government of the State. Where aboriginal title is recognized, indigenous peoples have at least some legal right that can be asserted in the domestic legal system. However, aboriginal title is normally subject to complete extinguishment by the Government of the State, without the legal protection and rights that in most countries protect the land and property of citizens. This single fact probably accounts for the overwhelming majority of human rights problems affecting indigenous peoples.

[129] This means that the hierarchy of title to lands in Canada is cemented into common law by charaterizing aboriginal title as "a 'burden' or 'parasitic' on the Crown's underlying title". Second, the federal crown power to extinguish aboriginal title is recognized by the Court as a valid power under s. 91(24) of the *Constitution Act, 1982*.

Ned'u'ten challenge these dispossession doctrines that have validated Canadian state legitimacy since its inception over 131 years ago.

**B. Challenging Canadian State Legitimacy By Rejecting Doctrines of Dispossession**

> It is not possible to understand this process of gradual --but incessant-- erosion of the Indigenous peoples' original sovereignty, without considering and, indeed, highlighting the role played by "juridical tools", always arm in arm with the military component of the colonial enterprise. In practically all cases --both in Latin America and in other regions mentioned above--, the legal establishment can be seen coming together and serving as effective tools in this process of domination. Jurists (with their conceptual elaborations), domestic laws (with their imperativeness both in the metropolis and the colonies), the judiciary (subject to the "rule of [non-Indigenous] law", one-sided international tribunals (on the basis of existing international law), have all been present to juridically "validate" the organized plunder at the various stages of the colonial enterprise.[130]

As one looks to indigenous discourses, the sound rejection of the doctrine of discovery is paving the way for challenges to state sovereignty over indigenous peoples and their territories. Indigenous peoples through the assertion of the right to self-determination, are now confronting colonial attitudes based on cultural superiority that deny their international status. They are asserting their holistic governing systems, their inherent non-human centric connection to their lands, and the ability to determine their own destiny free from colonial bondage in the global fora. No one can escape the undisputable fact that the doctrine of discovery is racist, inhumane and can no longer be tolerated or legitimized in the developing fora of human rights. Nor can

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Third, the Canadian Crown can impose limitations on the use of aboriginal title land rights by aboriginal peoples who prove aboriginal title exists in their homelands. Fourth, the Canadian Crown can justify infringements of aboriginal title land rights through valid legislative objectives. Fifth, aboriginal title can be surrendered to the federal Crown if aboriginal peoples use their lands in a way that aboriginal title does not permit. In such cases, aboriginal title would be "converted" into non-title lands to do so. These are a just a few of the consequences that are apparent from the characterization of the doctrine of aboriginal title and the title test by the Supreme Court of Canada. By not challenging the assertion of Canada's sovereignty, aboriginal title is not absolute and can be limited by the Canadian state.

[130] *Final Report on the Study of treaties, supra* note 1 at 38-39, para. 195-196.

such doctrines prevent indigenous peoples from establishing decolonizing regimes. There is consistency in rejecting these rationales as a valid basis for the legitimacy of the sovereign status of the colonizing state.

Robert Williams, Jr. is one indigenous scholar re-writing history to denounce the myth that indigenous peoples were not a civilized people at the time of contact and that decolonization of indigenous peoples begins by decolonizing the laws of the colonizer, starting with the rejection of the doctrine of discovery:

> For the Native peoples of the United States, Latin America, Canada, Australia, and New Zealand, therefore, the end of the history of their colonization begins by denying the legitimacy of and respect for the rule of law maintained by the racist discourse of conquest of the Doctrine of Discovery. This medievally grounded discourse, reaffirmed in Western colonizing law by Chief Justice John Marshall in *Johnson v. McIntosh*, vests superior rights of sovereignty over non-Western indigenous peoples and their territories in European-descended governments. The Doctrine of Discovery and its discourse of conquest assert the West's lawful power to impose its vision of truth on non-Western peoples through a racist, colonizing rule of law.
> ...
> The Doctrine of Discovery was nothing more than the reflection of a set of Eurocentric racist beliefs elevated to the status of a universal principle -one culture's argument to support its conquest and colonization of a newly discovered, alien world. In its form as articulated by Western legal thought and discourse today, however, the peroration of this Eurocentric racist argument is no longer declaimed. Europe during the Discovery era refused to recognize any meaningful legal status or rights for indigenous tribal peoples because "heathens" and "infidels" were legally presumed to lack the rational capacity necessary to assume an equal status or to exercise equal rights under the West's medievally derived colonizing law.
>
> **Thus the first step toward the decolonization of the West's law respecting the American Indian, the Doctrine of Discovery must be rejected. It permits the West to accomplish and in good conscience what it accomplished by the sword in earlier eras: the physical and spiritual destruction of indigenous peoples.**[131]

The doctrine of discovery is premised on the colonizing states' denial of indigenous peoples' sovereignty and rights existing at the time of contact. Anaya also succinctly describes the doctrine as follows:

> By deeming indigenous peoples as incapable of enjoying sovereign status or rights in international law, international law was thus able to govern the patterns of colonization and ultimately to legitimate the colonial order, with diminished or no consequences arising from the presence of aboriginal peoples. For international law purposes, indigenous lands prior to any colonial presence were considered legally

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[131] *The American Indian*, *supra* note 27 at 325-326.

> unoccupied or *terra nullius* (vacant lands). Under this fiction, discovery was employed to uphold colonial claims to indigenous lands and to bypass any claim to possession by the natives in the "discovered lands". In order to acquire indigenous lands, a colonizing state need not pretend conquest where war had not been waged, nor rely on the rules of war where it had. Instead, the positivist doctrines of effective occupation of territory and recognition of such occupation by the "Family of Nations" provided the legal mechanism for consolidating territorial sovereignty over indigenous lands by the colonizing states. An indigenous community's right to govern itself in its lands, as well as any right not to be conquered except in a "just war," was simply considered outside the competency of international law.[132]

From an Ned'u'ten perspective which contributes to indigenous discourses and as a dzakaza within the *bah'lats*, the ned'u'ten have political and territorial sovereignty. This does not change in nature or characterization with the alleged assertion of Canadian sovereignty over my people's traditional territories. From a Ned'u'ten perspective, the *bah'lats* and our clan system is the sovereign basis for our political status and constitutes the sovereign jurisdiction for my people and their lands. Until the legitimacy of the Crown's assertion of sovereignty is proven by the Canadian state, it is self-defeating to domesticize or integrate Ned'u'ten sovereignty into Canada's legal regime as aboriginal title and internal self-government, subject to the federal Crown's extinguishing power. Ned'u'ten sovereignty can only be limited by Ned'u'ten laws. If indigenous peoples, like the Ned'u'ten do not pierce the shield that Canada hides behind, then their respective indigenous rights will be subsumed into Canada's domestic laws such as the doctrine of aboriginal rights and title and its limitations. Such rights will have to be reconciled with Canadian interests which have to date been in their favour. Such recourse will impede any future attempts by indigenous peoples to obtain substantive self-determination and once again indigenous peoples, such as the Ned'u'ten people, could be "nipped at the heels of state legitimacy."[133]

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[132] J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 22.

[133] *Our Elders Understand*, *supra* note 48 at 23.

**How to challenge the Crown's assertion of sovereignty over indigenous peoples and their territories**

> Knowledge of your territory is essential for Deneeza/dzakaza territorial management. The earth can be a dangerous and life threatening place to live. Travelling to a trapline or fishing site was taken with precaution. You never would know whether a footstep would trigger an avalanche or crack the ice. Obstacles may also block your path. My grand-father would say that you would have to clear your path before carrying on your journey. If you came across a heavy wooded or bushy area, you would clear your path. To not do so could cost you your life. My grand-father would say that you could also go around the obstacle; over or under it; or remove it altogether, but you could not walk through the obstacle without risking your life. If you could remove the obstacle this would be done with calculation, a sense of calmness and respect for the land. Each branch, stick or tree would be brushed aside until your path was clear.

My destination is the liberation of my people. But there are many obstacles that need to be cleared away. As a people, the Ned'u'ten can clear these obstacles. The Ned'u'ten have to be aware that their identity as a people born from their territories could be at risk if they decide to remove this obstacle with Canada's tools and subject to Canada's will. Some indigenous peoples have chosen to go through the obstacle and accept Canada's declaration of sovereignty over them. Time will tell if they survive as a liberated people. Canada's discovery right is the root that the Ned'u'ten must eventually sever if they want to reach liberation. To go around, over or under this obstacle will not prevent future generations from having to do the same. It must be removed.

At the outset, I acknowledge that there is nothing in the colonizer's common law, nor in existing international state practice of international law that support the indigenous peoples' own attempts to decolonize in the true sense of the word and obtain the fullest self-determination possible. Challenging the legitimacy of the Crowns' sovereign assertions is indeed a political, legal, social and moral revolution. It is imperative to challenge the territorial integrity of the Canadian state, both domestically and internationally. Such challenges may trigger the act of

state doctrine. However, if the Québécois can assert their ability to do so, so can indigenous peoples, regardless of how colonialism has been applied to them. In other words, I do not believe the challenge is unrealistic, given Canada's current statehood crisis and where the rule of law maintains its racist foundations with respect indigenous peoples. Canadians have to be prepared for the inevitable change in its identity as a state and nation. Indigenous peoples, likewise, have to be prepared for such changes. It is within this context, coupled with the overarching search for truth, justice and non-western notions equality, that indigenous peoples could assert their rights to self-determination. It must be restated, that in the context of this thesis, the objective is to design a nation-to-nation relationship between Canada and indigenous peoples, through treaties that have international status and to which indigenous peoples seeking such a relationship, can contribute to the developing indigenous discourses and evolving international human rights and standards regarding their status and rights.

**1. Ned'u'ten fora**

Indigenous conceptions of sovereignty are founded in their respective traditions and relationships with their territories. The power to assert sovereignty lies in their laws, customs and governing systems and their interconnectedness with the earth.

The Ned'u'ten are located in north central British Columbia and have resided in their traditional territories since time immemorial. The traditional governing system of the Ned'u'ten is called the *bah'lats*, a governing system that still is practiced today. The *bah'lats* was created to instill peace between indigenous peoples from the interior of British Columbia to the west coast:

> ...there was a time when "the Indians were all killing one another over land." The people had no laws to stop trespassing and poaching until the potlatch, the source of "Indian Law," came about to put an end to the killing. A "peace meeting" was held and it "was decided to divide the lands and make laws." At this time, the clans, as they have come to be known, were organized in a manner similar to those of neighbours

> to the west so that Lake Babine peoples would be protected by their shared clan membership when travelling through foreign lands.[134]

The Ned'u'ten people have four main clans: *Likhc'ibu* (Bear), *Jilh ts'e yu* (Frog), *Gil lan ten* (Caribou) and *Lakh tsa mis yu* (Beaver). Within each clan there are sub-clans. For example, I am a member and dzakaza of the Grizzly Bear sub-clan which sits with the Bear clan in the *bah'lats*. The traditional territories of the Ned'u'ten people are subdivided by clan affiliations. Each clan and sub-clans have deneeza and dzakaza that are mandated with the responsibility to manage and steward over the lands that accompany their names. The resources from the territories are then shared and redistributed with families, clan members and the people. The *bah'lats* was also used for trading purposes, to settle territorial disputes and create peace between neighbouring tribes such as the Gitxan, Wet'suwet'en and Sekani. Through *bah'lats* laws, customs, oral histories and traditions, clans systems and deneeza/dzakaza management of traditional clan territories, the ned'u'ten people governed themselves peacefully prior to European contact in 1822 and continue to carry on their traditional governance to this day.

In 1993, the Lake Babine Band entered into the British Columbia Treaty Commission Process (B.C.T.C.P.) as the "Lake Babine Nation" in accordance with the British Columbia Treaty Commission (B.C.T.C.) requirements for "First Nation" status as constituting an aboriginal government. The government entity recognized by the B.C.T.C. was the Lake Babine Band and not the deneeza/dzakaza under the *bah'lats* system. In 1994, a *bah'lats* was held to talk about land claims, however, 50% of the deneeza/dzakaza did not attend. It was not until March 28, 1998 that there was an official *bah'lats* held where deneeza/dzakaza from all clans spoke about how their jurisdiction over traditional territories has been assumed by the band council and

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[134] Lake Babine Nation, *C'iz dideen khat When the Plumes Rise: The Way of the Lake Babine Nation* (Lake Babine Nation Justice Report) by J. Fiske and B. Patrick (Lake Babine: Lake Babine Nation, 1996) at 188.

treaty team. This *bah'lats* legally documents into Ned'u'ten law that sovereign jurisdiction over Ned'u'ten territory and people has always and continues to vest in the *bah'lats;* deneeza/dzakaza; and oral traditions and customs. Current leaders of the Lake Babine Nation have not respected this *bah'lats*. Instead, endorsements of the treaty process stages continue by a small number of band membership and selected deneeza/dzakaza that to date have conducted treaty talks outside the *bah'lats.* The Lake Babine Nation is currently at stage 3[135] of the B.C.T.C.P. and is actively seeking ratification of their "framework agreement" by membership.

As a dzakaza, I do not recognize the band council's jurisdiction to make treaties over the traditional territories of the ned'u'ten people. As the framework agreement has not been passed at the time of this writing, discussions have occurred amongst "true" deneeza/dzakaza about how to have their traditional governing system recognized and respected by the Canadian state through treaty-making as well as their international political status.

The sovereignty of the Ned'u'ten is also reflected in the establishment of principles and laws as exercised in the *bah'lats*. At the time of contact and certainly at the time the British Crown asserted sovereignty over the traditional territories of the Ned'u'ten, the Ned'u'ten were a majority, had systems of governance and laws that governed and regulated territorial use. Despite over a century of European colonialism, the Ned'u' ten still exist as a people and reside in their traditional territories and off-reserve municipalities in British Columbia.

It is my opinion that the ned'u'ten must return to their traditional ways and source their power from these principles. If not, deneeza/dzakaza must give their informed consent to any change of governance over ned'u'ten territories. By using their traditional governance and laws,

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[135] There are 6 stages in the B.C.T.C.P.: Stage 1: Filing a Statement of Intent to negotiate a treaty; Stage 2: Preparing for negotiations and assessing readiness; Stage 3: Negotiating a Framework Agreement; Stage 4: Negotiating an Agreement in Principle; Stage 5: Negotiating a Final Treaty and Stage 6: Implementing the treaty.

the Ned'u'ten people will begin to realize that the B.C.T.C.P. is really designed to create certainty of Canadian sovereignty devolved from Britain over Ned'u'ten territories. Canada has no intention of assisting the Ned'u'ten in removing itself as an obstacle to Ned'u'ten liberation. The Ned'u'ten would have to argue that their pre-existing governing systems and jurisdiction over Ned'u'ten territories must be recognized and affirmed by the Canadian state through a true nation-to-nation treaty and that any treaty relationship should not alter Ned'u'ten ties to their homelands in order to prevent Canada from becoming a permanent obstacle. This is one way to clear a path liberation for the Ned'u'ten. It is my hope that one day Canadians will be liberated as well.

So trying to find reality within sovereign paradigms of self-determination is not a mere academic exercise for me.[136] Time, assimilative mindsets, and non-Indigenous mythologies that state indigenous peoples do not possess sovereignty seem to be the greatest obstacle to creating a true nation-to-nation relationship. Such obstacles must be removed by deneeza/dzakaza who have the responsibility to maintain and uphold their names and clans systems under the *bah'lats*. From a Ned'u'ten perspective, the traditional governing systems of the Ned'u'ten and their connection to their traditional territories form solid ground from which to enter into a nation-to-nation treaty relationship with Canada as a 'people with international state-like status' that can exercise their substantive right to self-determination.

The Ned'u'ten can also assert their full right to self-determination with assistance from

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[136] This reality includes a principled approach to establishing new relationships. Even colonial courts recognize that this is the necessary approach to take in the context of secession:

> An exploration of the meaning and nature of these underlying principles is not merely of academic interest. On the contrary, such an exploration is of immense practical utility. Only once those underlying principles have been examined and delineated may a considered response to the questions we are required to answer emerge.

*Secession Reference, supra* note 37 at para.1.

evolving international human rights principles and norms. This assertion includes the right to decolonize. The strongest argument that can be made by the Ned'u'ten to ensure a nation-to-nation treaty relationship with Canada is to challenge the legitimacy and legality of Canada's assertion of sovereignty over the Ned'u'ten and their homelands.

**2. national fora**

**a. Challenging the Crown's assertion of sovereignty over indigenous peoples through the colonizer's domestic courts.**

The doctrine of discovery allows European sovereigns and their successors the right to domesticate their relationship with indigenous peoples. The shield of state sovereign immunity would be raised along with the acts of state doctrine[137] if anyone challenged the legitimacy of the state and its acquisition of indigenous territories. The act of state doctrine has been described as a legal fortress that subjects can not penetrate to challenge state jurisdiction or sovereignty. It has also been described as an effective way to extinguish indigenous rights prior to 1982. It is a resistance silencer.[138] Spaulding recognizes that this doctrine was also a tool to facilitate "state projects; serve colonialism; and legitimate simplistic and absolute notions of Canadian sovereignty." He further argues that by immunizing the seizure or acquisition of an inconsistent Crown right in relation to aboriginal sovereignty from judicial review, courts do not have to address competing claims. In other words, the non-justiciability to ascertain the legitimacy or validity of Canada's sovereignty assertion over indigenous peoples has a "nullifying effect over

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[137] Spaulding provides an extensive analysis of the act of state doctrine in his research report commissioned to the Royal Commission on Aboriginal Peoples. He lists examples of acts of state as being: declaration of war; the annexation of a new territory; an act of the executive as a matter of policy; the making of treaties; peace-making; seizure of property by act of war or conquest; making a person a prisoner of war; the recognition of foreign states and governments; the reception of their diplomatic agents; and the unequivocal declaration by the Crown of territorial sovereignty. See Spaulding, *supra* note 6 at Part 1.1.

[138] *Ibid.*

aboriginal rights while at the same time ascertaining the boundary of the courts' authority to supervise crown assertions of sovereign power.[139] The doctrine becomes a presumptive shield against challenges that if allowed, would nullify Canada's assertion of sovereignty over indigenous peoples. The doctrine protects imperialism both internationally and within the state.

State practice and judicial deference with respect to the act of state doctrine has shown any action by the executive or Crown that is determined by a court to be an 'act of state,' will not be reviewable or entertained by the court. The courts will defer to the Crown's jurisdiction to solely handle matters of "high policy".[140] So, for example, in determining whether a declaration of sovereignty by the Crown can lead to the acquisition of indigenous territories, the court can find the requisite intention to take such action. If found, the court can declare this an act of state. The courts will not be able to rule on the validity of such acquisition, including its "manner, method, and the time of acquisition, nor define sovereignty over the new territory."[141]

Not only are there substantive domestic impediments to bring such a challenge in Canada, but there are procedural impediments as well.[142] Within Canada, the Nisga'a were denied a

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[139] *Ibid.*

[140] *Ibid.*

[141] *Ibid.*

[142] See also *Coe* v. *The Commonwealth of Australia and The Government of the United Kingdom of Great Britain and Northern Ireland* (1979) 53 A.L.J.R. 403, and *Isabel Coe on Behalf of the Wiradjuri Tribe* v. *The Commonwealth of Australia and State of New South Wales* S. 93/017 (1993) 68 A.L.J.R. 110 where the High Court of Australia dismissed both claims by Indigenous claimants who challenged how Australia gained sovereignty over their lands. The case was predominately dismissed on the grounds of defective pleadings and that the claim should have never been accepted leave in the court of first instance. In the pleadings of the 1979 decision, the indigenous claimant argued that Australia wrongfully acquired sovereignty over aborigine territories. The Court stated that "[T]he contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible to maintain." Jacob, J. writing for the High Court stated:

> It is clear that the allegations whose effect I have briefly stated in pars. (A) and (b) above could not form the basis of any cause of action. The annexation of the east coast of Australia by Captain Cook in 1770, and the subsequent acts by which the whole of the Australian continent became part of the dominions of the Crown, were acts of state whose validity cannot be challenged: see New South Wales v. The Commonwealth (1975), 135 CLR 337, at p. 388, and cased cited. **If the amended statement of claim intends to suggest either that**

majority opinion from the Supreme Court of Canada on the existence of aboriginal title in the *Calder*. The Nisga'a people did not obtain a fiat to claim declaratory relief and were procedurally barred by the Court from receiving judicial determination.[143] Within Canada, substantive bars by

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> **the legal foundations of the Commonwealth is insecure, or that the powers of the Parliament are more limited than is provided in the Constitution, or that there is an aboriginal nation which has sovereignty over Australia, it cannot be supported.**...The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. **The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.**
>
> The allegations summarized in par. (d) above also do not raise an issue fit for consideration. It is fundamentally to our legal system that the Australian colonies became British possessions by settlement and not by conquest. It is hardly necessary to say that the question is not how the manner in which Australia became a British possession might appropriately be described. For the purpose of deciding whether the common law was introduced into a newly acquired territory, a distinction was drawn between a colony acquired by conquest or cession, in which there was an established system of law of European type, and a colony acquired by settlement in a territory which, by European standards, **had no civilized inhabitants or settled law. Australia has always been regarded as belonging to the latter class: see Cooper v. Stuart (1889), 14 App Cas 286, at p 291**.
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> ...
>
> The proposed amended statement of claim seeks to raise a number of issues which can be regarded separately. The first part is apparently intended to dispute the validity of the British Crown's and now the Commonwealth of Australia's claim to sovereignty over the continent of Australia in the face of sovereignty alleged to be possessed by the Aboriginal nation. Paragraphs 2A and 3A are in much the same form as the original statement of claim but the word "wrongfully" has been added, thus disputing the validity of the Crown's proclamations of sovereignty and sovereign possession. **These are not matters of municipal law but of the law of nations and are not cognizable in a court exercising jurisdiction under that sovereignty which is sought to be challenged. As such, they are embarrassing and cannot be allowed.** I would therefore strike out of the proposed amendments the word "wrongfully" where it appears in pars. 2A and 3A. I would also strike out (or, strictly, refuse to allow) par. 3B. Para. 3C suffers from the same defect and so far as it is unnecessary; and the same is true of par. 3D. Par. 8A appears also to be directed to the question whether under the law of nations Australia was terra nullius in 1770 and 1788. Further, it seeks to impugn the proclamations taking possession of New South Wales on behalf of the British crown. This is not permissible in a municipal court. Paragraphs 13A and 14A suffer in the same way. Paragraphs 15A, 16A and 16B are also directed to a claim of international sovereignty and cannot be allowed. **Thus what I have called the first branch of the proposed statement of claim cannot be allowed because generally it is formulated as a claim based on a sovereignty adverse to the Crown.**

Note that *Mabo (No.2)* changes the Cooper decision in that aboriginal inhabitants had rights in land which were recognized at common law but in the 1993 *Coe* decision, the High Court reaffirmed that in light of *Mabo (No. 2)*, the Crown's acquisition of sovereignty over Australia can be challenged in the municipal courts of that country.

[143] In *Calder*, Hall, J. held that the B.C. Court of Appeal erred when it applied the Act of State doctrine to the Nisga'a peoples' declaration that there aboriginal title was not extinguished by settlement. The Supreme Court of Canada stated that the rationale behind the doctrine of act of state is that it recognizes the sovereign prerogative to acquire territory in a way that cannot be later challenged in a municipal Court; that the doctrine denies a remedy to the citizens of an acquired territory for invasion of their rights which may occur during the change of sovereignty; English

the Courts to either refuse leave to hear a jurisdictional challenge have been the norm during the 1990's.

Applications have been made in the last decade to challenge the jurisdiction of Canadian courts over criminal matters between indigenous peoples and Canadians over territory that has not been purchased by the Canadian Crown. Canadian courts have declined to hear such challenges. On 14 May, 1998, the Supreme Court of Canada denied a leave to appeal to hear a Constitutional Question of whether Canadian courts have jurisdiction to hear disputes concerning non-treatied land in Canada.[144] This appeal had been dismissed three months earlier by the B.C. Court of Appeal with written reasons. Braidwood, JJ.A. of that Court accepted the Crown's submission that the applicants had no residual sovereignty capable of displacing the general

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Courts have held that a municipal Court has no jurisdiction to review the manner in which the Sovereign acquires new territory; a procedural bar to municipal action and as such is irrelevant to the question whether in international law change of sovereignty affects acquired rights. The Court held that the Act of State doctrine has never been applied to aboriginal title claims and that it would be inappropriate for the Courts to extend the doctrine in such cases at pp 209-211. Challenging the Crown's assertion of sovereignty by rejecting the doctrine of discovery and the right of the assumed sovereign to prevent challenges to its sovereignty domestically would no doubt have the municipal courts in British Columbia considering the Act of State doctrine again to deny hearing the claim. Further, the successful argument was made by the Crown in *Calder* that in British Columbia, the *Crown Procedure Act* governs how actions against the Crown are made: that the claimant must first get the consent of the Crown evidenced by a fiat in respect of the petition of right. Hall, J. notes that the petition of right procedure is conceptually one to assert proprietary rights evolved in an age of status and feudalism.(p. 221) Pigeon, J. stated "I am deeply conscious of the hardship involved in holding that the access to the Court for the determination of the plaintiff's claim is barred by sovereign immunity from suit without a fiat." However, I would point out that in the United States, claims in respect of the taking of lands outside of reserves and not covered by any treaty were not justiciable until legislative provisions had removed the obstacle created by the doctrine of immunity. In Canada, immunity from suit has been removed by legislation at the federal level and in most Provinces. However, in British Columbia, the requirement for obtaining a fiat ended after the *Calder* decision, except for injunctive relief where the provincial Crown' consent must be obtained. (p. 226) There are also procedural bars for indigenous peoples to bring a constitutional reference case based on challenging to Crown sovereignty.

[144] *Jones Williams Ignace, Shelagh Anne Franklin, James Allan Scott Pitawanakwat* v. *R.* (14 May 1998) S.C.C. File No.: 26185 [also indexed as R. v. Pena]. Application for leave to appeal dismissed (without reasons). The "jurisdiction challenge" brought by Ignace was dismissed by colonial courts at various levels. A *petition* challenging Canadian courts jurisdiction over indigenous peoples was dismissed on 29 May, 1996. *Application for a declaration* that the court has no jurisdiction was dismissed by the B.C. Supreme Court 14 May, 1997. An application to refer appeals to a panel for summary judgment on the issue of jurisdiction as adjourned by the B.C. Court of Appeal on 23 July, 1997 by the B.C. Court of Appeal. *Ancillary motions* were also dismissed by the Supreme Court of Canada on 6 November, 1997. On 11 December, 1997, *a consolidation of jurisdictional appeals* to the B.C. Court of Appeal were heard and judgment was rendered on 5 February, 1998 dismissing the case. *Leave to appeal* to the Supreme Court of Canada from this decision was denied on 14 May, 1998.

jurisdiction of the court:

> As in my view, correctly stated by the Crown submission: "There is no residual aboriginal sovereignty capable of displacing the general jurisdiction of the Provincial Court to try persons, whether aboriginal or a non-aboriginal for offenses under the Wildlife Act and Criminal Code throughout British Columbia, whether or not the alleged offenses took place "beyond the treaty frontier'. Nothing in the Supreme Court of Canada's recent decision in Delgamuukw v. British Columbia... casts doubt on that reasoning. In Delgamuukw...the Supreme Court confirmed that "the purpose of s. 35(1) [of the Constitution Act, 1982] is to reconcile the prior presence of aboriginal peoples in North America with the assertion of Crown sovereignty..." The court also affirmed ...its statement in R. v. Pamajewon...that "rights to self-government, if they existed, cannot be framed in excessively general terms". The appellants claimed immunity to prosecution in this case is framed in excessively general terms. It is well established that the courts of British Columbia have jurisdiction over aboriginal accused where an offence has allegedly been committed within the Province, regardless of whether or not the territory could be said to be "beyond the treaty frontier" or is "unsurrendered ground" as the terminology is used by the appellants in their argument before this Court.[145]

The jurisdictional issue was also dismissed in three other instances in 1993,[146]1994,[147]1995,[148] and 1997.[149] Canadian courts through their consistent refusal to entertain jurisdictional challenges to their legitimacy clearly requires an independent body to review such issues.

When domestic or municipal remedies are exhausted by a claimant, in theory, international remedies should arise. However, when the Lil'Wat Nation brought the jurisdictional issue before the International Court of Justice, the court declined to hear the issue because the Lil'Wat Nation was not a 'state.'

While some scholars have tried to address the arbitrary nature of the act of state doctrine,

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[145] *R.* v. *Jones William Ignace, Shelagh Anne Franklin, James Allan Scott Pitawanakwat* (2 February 1998), Vancouver CA023439, CA023440, CA023441 (B.C.C.A.).

[146] *Delgamuukw* v. *B.C.,* [1993] 5 W.W.R. 97.

[147] *R.* v. *Williams* (1994), 52 B.C.A.C. 296.

[148] The Supreme Court of Canada refused to accept leave from 11 jurisdiction challenge cases by indigenous peoples located in British Columbia, Ontario and Alberta in 1995. In the same year, there was an attempt by a hereditary chief in the *Delgamuukw* case to raise the issue before Canadian courts.

[149] *R.* v. *Clark* (1997), 88 B.C.A.C. 213. The B.C. Court of Appeal upheld its previous decisions in *Delgamuukw* and *Williams*, dismissing the jurisdictional challenge.

other scholars have rejected it completely as a valid means to dispossess indigenous peoples. For example, Spaulding argues that the constitution of Canada including the *Royal Proclamation, 1763*; the rule of law; s. 35 of the *Constitution Act, 1982*; and the *Charter of Rights and Freedoms* can prevent the Crown from unilaterally imposing the act of state doctrine against indigenous peoples and that the courts are not absolutely barred from having the jurisdiction to review any acts of state that would violate aboriginal and treaty rights protected by the constitution, such as the extinguishment of such rights:

> Known in law as the "act of state" doctrine, courts have traditionally imagined executive and legislative action in relation to the acquisition of new territory to fall outside the purview of domestic courts. Whatever may have been the case prior to 1982, however, the passage of s. 35(1) of the Constitution Act, 1982 dramatically changes the role of the judiciary as it relates to the legal and constitutional position of Canada's First Nations. Section 35(1) expressly "recognize[s] and affirm[s]" aboriginal and treaty rights of Canada's indigenous population. The content of those rights is directly dependent upon a judicial assessment of the legitimacy of the assertion of territorial sovereignty by European nations at the time of European settlement: Canadian sovereignty over its indigenous population is now a question for domestic constitutional law... For courts to invoke the "act of state" doctrine in such a context would be, in Brian Slattery's words, to "conced[e] their status as passive instruments of colonial rule."[150]

Although such constraints may mark a departure from the act of state doctrine, this does not remedy the state's use of the doctrine from the time of alleged acquisition of indigenous territories. Spaulding aknowledges this fact[151] and is aware that the act of state doctrine remains a mask that continues to oppress indigenous peoples through the continuing power to extinguish aboriginal rights. However, this recognition is as far as his analysis goes. Instead, he offers that the act of state doctrine be modified and leaves ethical principles to guide future relationships between aboriginal peoples "now trespassers in their homelands":

> Whatever the merits of this argument in other contexts, it is doubtful whether it should induce modern Canadian or American courts to accept fictitious accounts of the manner in which their countries came into

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[150] Spaulding, *supra* note 6 is in part quoting Patrick Mackelm in Part 1.

[151] "In all applications, the act of state doctrine offers no justification for the arbitrary dispossession of Aboriginal peoples by the Crown. Instead it purports to bar any challenge to the validity of such conduct, placing it beyond the reach of domestic law." *Ibid.*

> being, accounts that accept even the most extravagant imperial claims at face value and ignore the historical presence and viewpoints of indigenous peoples. When it comes to reconstructing the legal history of their own countries, courts cannot take refuge in the act of state doctrine without forfeiting their moral authority and acting as passive instruments of colonial rule. In this context the act of state doctrine is mischievous and should be modified.
>
> Surely the essential failure in an 'act of state' rationale for extinguishing Aboriginal rights is the complete absence of any ethical basis for the doctrine in the context of colonization of territory. Judges often react with indignation to the claim that by an act of state, Aboriginal peoples may be made trespassers in their own homelands... no amount of concern for the institutional integrity of one society can justify outlawing the institutions of other societies whose territory has been taken without their consent.[152]

By challenging the Crown's basis of sovereignty assertion: the doctrine of discovery, indigenous peoples should be able to challenge substantive and procedural bars to state immunity. The act of state doctrine remains to be part of the regulatory power that attaches to a discovery right. Challenging this regulatory power in whole will also lead to its repudiation retroactively:

> The imperial expansion of an English land law to other continents has radically destabilized its utility. By attempting to justify the taking of land from indigenous peoples other than by consensual purchase, the colonialist jurists pushed their own inherent fictions, assumptions, and traditions to their limits. Doctrines of sovereign immunity and jurisdiction serviced the fictions and silenced indigenous resistance. When this legal langscape is questioned by the Aboriginal peoples, the British legal system became jurispathic.[153]

Surely, the validity of the doctrine is still a live issue. Domestic arenas, however, have not foreclosed the issue all together. The decision of *R.v. Paul* of the New Brunswick Queen's Bench certainly shows that the issue of Canada's legitimacy and acquisition of indigenous territories is still a live issue. In this case, the appellant, a beneficiary of the Dummer's Treaty, 1725 had been charged under the *Crown Lands and Forests Act, R.S.N.B.* 1973, c.c-36.1 for harvesting timber on crown lands. Mr. Justice Turnball of the New Brunswick Queen's Bench stated that by interpreting the Dummer's Treaty, 1725 and surrounding circumstances that lead to

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[152] *Ibid.*

[153] "Mikmaw Tenure", *supra* note 30 at 206.

the negotiations of the treaty, the appellant still owned their traditional territories as the treaty in question was not a land surrender treaty, but rather a peace and friendship treaty. What is notable, however, is Turnball, J.'s comments about the legitimacy of Nova Scotia as a colony and his doubting belief that England's assertion of underlying fee title legally replaced Indian title pursuant to the treaty:

> The question of when and how the English Monarch ever obtained Indian title to the underlying fee will have to await another occasion when the matter is directly before the Court and more fully explored.
> ...
> **I may have spent altogether too much time on this aspect of when and how England obtained Indian title to Nova Scotia. To me it is a mystery and a matter of debate.**[154]

James [sakej] Youngblood Henderson raises this same debate:

> There is no evidence that the Crown ever considered reserved Mikmaw tenure before the Compact was *res nullius* or *terra nullius* or was acquired by prescription, or effective control, or accretion or ceded or conquered territory.[155]

Indeed, it is a mystery to me and a matter of debate of how England obtained Ned'u'ten sovereignty or acquired ned'u'ten territory.

**b. Challenging the Crown's assertion of sovereignty over indigenous peoples through the illegitimacy of federal and provincial treaty-making policies that do not meet the standards of recent Canadian aboriginal common law.**

Indigenous peoples who are seeking a nation-to-nation treaty relationship "within" Canada, can also try to limit the Crown's assertion of sovereignty by questioning the

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[154] *R.* v. *Paul* (28 August, 1997) (N.B.Q.B.) pp. 6 and 10 respectively; (1997), N.B.R. (2d) 321. This decision was appealed to the New Brunswick Court of Appeal and was overturned in 1998. The N.B.C.A. held that the Summary Conviction Appeal Court Judge had overstepped his powers to take judicial notice of historical documents and restored the conviction of the respondents given by the Summary Conviction Court Judge. The respondents had cut timber on lands they claimed to be under treaty and pursued harvestation. The respondents were convicted under the *Crown Lands and Forests Act*, for cutting timber on crown lands. Relying on precedent, the N.B.C.A. held that the 1725 treaty did not include lands which the respondent had cut timber from and therefore barred the respondent from making a treaty rights' defence. Since no evidence was put before the court on aboriginal title, the respondent could not use an aboriginal title defence as well. Since the appeal judgment, the Province of New Brunswick and the indigenous peoples in their traditional territories have entered into negotiations regarding timber harvesting and have reached a tentative agreement. However, this decision will most likely make its way to the Supreme Court of Canada.

[155] "Mikmaw Tenure", *supra* note 30 at 284.

constitutional validity of federal and provincial treaty-making with indigenous peoples. For those indigenous peoples that have refused to enter into the B.C.T.C.P. and who are demanding an alternative treaty process where aboriginal rights and title are recognized, affirmed and not extinguished, the following challenge may prove helpful.

Federal and provincial governments have refused to participate in an alternative process for indigenous peoples outside the B.C.T.C.P. Canada's position is that the B.C.T.C.P. is the proper forum to accommodate their needs[156] and have invited them to participate in the current negotiations to "revitalize" the treaty process post-*Delgamuukw*. However, these indigenous nations (and those reviewing the benefits of the current B.C.T.C.P.) can never create an international nation-to-nation treaty through this process, and therefore an alternative is imperative.

In 1986, the federal government came out with its reviewed comprehensive claims policy, *In all Fairness: A Native Claims Policy - Comprehensive Claims.*[157] This policy was founded on

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[156] Personal comm. with Union of British Columbia Indian Chiefs staff. See also letter from Minister of Indian Affairs, Jane Stewart to Six Nations Alliance (22 July 1998):

> I respect but regret your current position that the Six Nations will not participate in the BCTC "under any circumstances". As I have pointed out, the aim of the current tripartite review of the treaty process is to find ways to accommodate the interests of all First Nations in the province. We live in an interconnected and interdependent world: federal and provincial governments, First Nations, municipalities, third party interests and local residents are all here to stay.
>
> In further reflecting upon your May 11, 1998, letter and the *Statement*, I was struck by the similarity of the Six Nations' objectives for reconciling Aboriginal and Crown title matters with those of the First Nations who are part of the current treaty negotiation process in B.C. I would also note that many of the "ideal" features of a treaty process - as recommended by the Royal Commission on Aboriginal Peoples - can be found in the BCTC process. That notwithstanding, the *Delgamuukw* decision provides us with an opportunity to review and further improve the made-in-B.C. process. Six Nations' participation in this review would, in my view, be of great benefit to all concerned.

(On file with author).

[157] DIAND, *In All Fairness: A Native Claims Policy - Comprehensive Claims* (Ottawa: 1981; amended 1986) [hereinafter *In All Fairness*]. Since 1973, it has been the policy of the federal government that aboriginal peoples must surrender all aboriginal rights and title through a blanket extinguishment by the Crown in exchange for rights granted back by the Crown to the aboriginal people and set out by agreement. In response to rejections of this policy by aboriginal peoples, the policy was revised so that a partial surrender or extinguishment of existing aboriginal rights and

the belief of the Crown that aboriginal title has to date been undefinable:

> There is no clear definition of the term "aboriginal title." For aboriginal peoples, the term is bound up with a concept of self-identity and self-determination. For lawyers, it is one which has been referred to in case law for many years, but which has eluded judicial definition. For many, non-aboriginal Canadians, it is a term that evokes a wide range of reactions, from sympathy to concern.[158]

The federal policy is rooted in the *Royal Proclamation, 1763* which is based on feudalistic conceptions of sovereignty over property regimes where the sovereign 'grants' rights to use of lands to grantees, and where ultimate title to the 'granted' soil remains in the Crown. The federal policy is rooted in assumptions now dispelled by the *Delgamuukw* decision that 1) aboriginal title was possibly extinguished through colonial legislation, establishment of reserves, and by the issuance of provincial land grants to settlers and 2) the federal government did not have jurisdiction over traditional territories that were not reserves but categorized as provincial crown lands because it was assumed that such aboriginal title land were extinguished. The *Royal Proclamation, 1763* as interpreted by Britain, is rooted in the doctrine of discovery where discovering sovereigns could deny indigenous sovereignty over lands and people and domestically regulate relations with indigenous peoples based on their inferior status and rights. The B.C.T.C.P. is rooted in the comprehensive claims policy or federal policy described above and the *Royal Proclamation, 1763*. It can therefore be argued that the creation of the B.C.T.C.P. is the present manifestation of the discovery right inherited by the Canadian Crown from Britain.

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title could take place in a comprehensive land claim. So while aboriginal peoples may retain their rights and title as recognized at common law on reserve lands, they would have to extinguish rights and tile to non-reserve lands that are traditionally part of their territories. In 1987, the comprehensive claims policy was amended again to reflect an alternative to the extinguishment of aboriginal rights, aboriginal peoples could negotiate self-government arrangements with the Crown, but such agreements would not receive constitutional protection. To date, the federal policy of extinguishment, now called certainty, has not changed [hereinafter federal policy]. In the Nisga'a Final Agreement, certainty provisions include "this agreement is the full and final settlement"; "this Agreement exhaustively sets forth...s. 35 rights"; aboriginal rights, including...aboriginal title...are modified by the Agreement; and the Nisga'a nation "releases" all aboriginal rights not set out in the Agreement to Canada.

[158] *In All Fairness, ibid.* at 5.

For these reasons, an indigenous people can demand an alternative treaty process despite the fact that the B.C.T.C.P. is undergoing a tripartite review process to revitalize the process.[159]

In light of the *Delgamuukw* decision, the nature and content of aboriginal title is defined as "an exclusive right to use and occupy indigenous land for a variety purposes that are not irreconcilable with the group's attachment to the land"; *sui generis*; inalienable; surrenderable and transferrable only to the Crown; communal and sourced in both common law concepts of occupancy and aboriginal law concepts of occupancy.[160] The current federal policy regarding treaty-making has to be amended to be consistent with the case law on aboriginal title. *Delgamuukw* also reaffirms the Crown's fiduciary duty to consult aboriginal peoples on policies, regulations or conduct that may infringe aboriginal rights and aboriginal title rights to land. One could argue that because the federal policy that governs treaty-making in Canada was developed without the true consultation, participation and input of indigenous peoples, the policy fails to meet the Crown's fiduciary duty to consult, and could not be justified to infringe aboriginal rights and aboriginal title land rights. In other words, the current federal policy could not meet the reconciliation standard[161] as set out by the Court in s. 35(1) of the *Constitution Act, 1982.*

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[159] As a result of the *Delgamuukw* decision and diversity of interpretations over the meaning the Supreme Court of Canada gave to the content of aboriginal title, senior representatives of Canada and the province of British Columbia along with the First Nations Summit, and the AFN Regional Vice-Chief reached agreement to discuss how to create a tri-partite process to define how treaty policy will be implemented. The main areas for change included aboriginal title; certainty; an accelarated land, resource and financial settlement negotiations process and capacity building. Principles were also proposed for considering "good faith negotiations." "Revitalizing the B.C.T.C.P. will be discussed further in Chapter 4. See First Nations Summit, *Information Bulletin* (4 May, 1998); *Action Plan for Revitalizing the Treaty Negotiation Process in British Columbia* (29 April, 1998).

[160] *Delgamuukw, supra* note 71.

[161] Note that in *Calder* and *Delgamuukw,* it was argued by the Province of British Columbia that the legal theory for the crown assertion of underlying title to indigenous lands was that of extinguishment. This legal theory can no longer be justified for the dispossession of indigenous lands to date, given the *Delgamuukw* ruling. While the court did not state that its legal theory for the justification of the dispossession of indigenous lands was either *terra nullius* nor discovery, it did not have to. *Van der Peet* already stated so with respect to aboriginal rights. Logic would dictate that the purpose of s. 35(1) is the same for aboriginal rights and aboriginal title and that to suggest that the legal theory is different for aboriginal rights, site-specific aboriginal rights or aboriginal title land rights would be ludicrous. The

The intent to revitalize the B.C.T.C.P. is to bring the process in line with common law and findings of the Royal Commission on Aboriginal Peoples. Should this process fail or an impasse prevents parties at the table from realizing the "revitalization package", any indigenous people in British Columbia, including those "First Nations" at the only treaty table, can challenge the constitutional validity of the federal and provincial legislative enactments that created the B.C.T.C.P.[162]

For indigenous peoples demanding an alternative treaty process that is based on a nation-to-nation basis, the provinces' role as a party to the B.C.T.C.P. can be challenged in light of *Delgamuukw*, where it was held that the province of British Columbia does not have the jurisdiction to extinguish aboriginal rights or title.[163] The federal jurisdiction under s. 91(24) of the *Constitution Act, 1982* is no longer confined to just 'reserve lands' but to non-reserve lands that are aboriginal title lands as well. It could be argued that the federal Crown even has the fiduciary duty to enact laws that will protect aboriginal rights and title. The province has no jurisdiction over such lands. In my opinion, the provincial government should not be a treaty party with the capacity to negotiate treaties with indigenous peoples regarding indigenous lands or governance.[164]

A final challenge, for the purposes of this thesis, is to the question the capacity of the

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reconciliation standard that shapes the justificatory test set out for s. 35(1) of the *Constitution Act, 1982* is another present manifestation of the doctrine of discovery that can be used by the federal and provincial crowns to assert underlying crown title to indigenous lands as its basis for infringement of aboriginal rights.

[162] *The British Columbia Treaty Commission Agreement* (1992)and the *British Columbia Treaty Commission Act* S.C. 1995, c. 45.

[163] *Delgamuukw, supra* note 71.

[164] Note that challenging the province's position at the treaty table based on its non-extinguishing power, could be counter-challenged by the argument that *Delgamuukw* did not change the capacity of provinces to regulate aboriginal rights and given the broad 'valid legislative objective base', the province's role in the treaty process is supported by the decision.

B.C.T.C. to define what "first nation" means through s. 2(1) of the B.C.T.C. Act which states:

> "first nation" means an aboriginal governing body, however, organized and established by aboriginal people within their traditional territory in British Columbia, that has been mandated by its constituents to enter into treaty negotiations on their behalf with Her Majesty in right of Canada and Her Majesty in right of British Columbia.[165]

*Indian Act* bands have been able to enter into this process, even though they do not comprise the whole indigenous nation. Bands are actually a governing creature created by the colonizer through the *Indian Act*, but in the B.C.T.C.P. they are recognized as "an aboriginal governing body" capable of bargaining away rights and entitlements of the entire indigenous nation. Based on the fact that the Court ruled in *Delgamuukw* that aboriginal title is a collective or communal right held by aboriginal peoples prior to the assertion of Crown sovereignty, it could be argued that such legislation recognizing aboriginal governing bodies derived from conflicting federal legislation and created after sovereignty assertion would constitute an infringement of the collective nature of aboriginal title held by the people. This challenge may create spaces for indigenous peoples to repair the fragmentation that European colonialism has caused, however, this will not lead to the decolonization that all indigenous peoples require.

Finally, agreements concluded under the B.C.T.C.P. between 'First Nations" and federal and provincial Crown representatives are 'domesticized treaties" and have been called "constructive arrangements" in international fora.[166] This process precludes indigenous peoples

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[165] *British Columbia Treaty Commission Act*, S.C. 1995 c. 45, s.2.

[166] Martinez states:

> At this stage it is important to note that contrary to treaties (especially so-called "historical" treaties), constructive arrangements -- and this applies to all examples considered to date under the mandate of the Special Rapporteur -- are intended, *per se*, as to be dealt with exclusively within the municipal setting.
>
> In accordance with the abundant information recently received, *in situ*, by the Special Rapporteur, it seems clear that in the Canadian context, constructive arrangements such as "comprehensive land claims settlements" and so-called "modern treaties" are basically conceived as a means to settle all outstanding Indigenous claims.

from realizing their international subject status at international law.

The doctrine of discovery allows for the "discoverer" to prevent challenges to its authority to assert sovereignty over indigenous peoples and their territories. Obstacles arise at every attempt to challenge Canada's "borrowed rank". Despite masks of discovery such as the act of state doctrine and the doctrine of aboriginal title, indigenous peoples can still continue to resist Canada's ability to dispossess them in the national fora. While Canadian and other common law jurisdictions have denounced and rejected other doctrines of dispossession, the possibility of some limited form of decolonizing the law is an eventuality.

**3. international fora**

The reliance on dispossession doctrines is maintained by states at this level as well, so challenges to the international state-centered system must also be made by indigenous peoples. To date, international law as practiced by states, does not accord official subject status to indigenous peoples, neither does it accord human rights of substantive self-determination to indigenous peoples.[167] International law remains entrenched in western ideologies that exclude non-western concepts of human rights, including the collective right to self-determination.[168] At present, international law has prevented indigenous peoples from decolonizing according to

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*Final Report on the Study of treaties, supra* note 1 at 30, para. 145-146.

[167] Like the exercise of aboriginal rights and aboriginal title by indigenous peoples in Canada must be reconciled with Canada' assertion of sovereignty under s. 35(1) of the *Constitution Act, 1982*, so does indigenous peoples' assertion of the right to exercise self-determination must be reconciled with the 'territorial integrity' of the State.

[168] See Human Rights Committee cases that only accept individual communications of complaints and not complaints from groups. The Human Rights Committee decided to hear complaints from individual representatives of indigenous peoples in Canada (complaining that their right to self-determination was violated by Canada) as a minority and not as a people. In order to bring a complaint on behalf of a "minority", an authorized individual must be able to show that s/he was personally victimized by a violation of rights in the International Covenant on Political and Civil Rights. See *Mikmaq Tribal Society* v. *Canada,* Communication No. 78/1980, UN GOAR, 39th Sess. Supp. No. 40, UN Doc. A/39/40, Annex 16 (1984) and *Mikmaq People* v. *Canada,* Communication No. 205/1986, UN GOAR, 47 th Sess. Supp. No. 40 at 213 UN Doc. A/47/40 Annex 9(A) (1992). Also see *Ominayak* v.*Canada*, Comunications No. 167/1984, UN GOAR, 45th Sess. Supp. No. 40, vol. 2, UN Doc. A/45/40 (1990).

prescriptive procedures established in the 1960's. Indigenous peoples must reject state "reasoning that projects into the past the current domesticated status of Indigenous peoples, as it evolved from developments taking place mainly in the second half of the nineteenth century under the impact of legal positivism and other theories advocated by European colonial powers and their continuators.[169] So the struggle to reject doctrines of dispossession at home must also be fought by indigenous peoples in the global order so that their subject status will become a reality.

The right to self-determination,[170] as indigenous peoples assert, is the legal, moral and just basis from which to launch challenges to state territorial sovereignty and nationality. Indigenous peoples assert that through the right of self-determination, they can respectively decolonize. Indigenous peoples have been successfully active within the international fora at its grass roots level, since the era of decolonization began and they are now transforming norms, principles, declarations, resolutions[171] (although non-binding) into foundation settings for their aspirations of

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[169] *Final Report on the Study of treaties, supra* note 1 at 21, para. 100.

[170] This liberating human right been recognized as a universal human right in international laws and is expressly stated as so in the United Nations Charter and the Covenants on Political, Civil, Economic, Social and Cultural Rights and the Elimination of all Forms of Racial Discrimination .and affirmed through state customary practice. Anaya describes this foundational principle in relation to indigenous peoples:

> ...self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a premptory norm...the concept underlying the term entails a certain nexus of widely values...self-determination is identified as a universe of human rights precepts concerned broadly, with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies...The concept of self-determination derives from philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality...In its most prominent modern manifestation within the international system, self-determination has promoted the demise of colonial institutions of government and the emergence of a new political order for subject peoples... In each of these contexts, values linked with self-determination comprised a standard of legitimacy against which institutions of government were measured. Self-determination was not separate from other human right norms; rather self-determination is a configurative principle or framework complemented by the more specific human right norms that in their totality enjoin the governing institutional order.

Anaya, *supra* note 132 at 75-77.

[171] *Ibid.* at 97. Anaya devotes a chapter of his book to Norms Elaborating the Elements of Self-determination. He states:

> ...the principle of self-determination and related human rights precepts undergrid more particularized norms

international binding treaties, covenants, conventions and custom that will recognize their status as subjects in international law.

The doctrines of dispossession have been denounced by the International Court of Justice ("I.C.J.") in *Western Sahara: Advisory Opinion.*[172] It was advised by the I.C.J., that territorial acquisition over foreign sovereigns could only take place through the "free and genuine expression of the will of the peoples of the territory."[173]

From this decision, indigenous peoples worldwide mobilized existing movements to decolonize in the spirit and intent of the *Declaration on Decolonization* G.A. Resolution 1514 (XV) 1960. By 1982, a Working Group on Indigenous Populations was operating in the international fora. They have produced the *United Nations Draft Declaration on the Rights of*

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concerning indigenous peoples. Newly developing norms contain substantive and remedial prescriptions and, in conjunction with already established human rights standards of general applicability, form the benchmarks for ensuring indigenous peoples of on-going self-determination. The body of international norms indicates the minimum range of choices to which indigenous peoples are entitled in remedial-constitutive procedures (that is, in belated state-building procedures that aim to secure redress for historical and continuing wrongs). The international norms concerning indigenous peoples, which thus elaborate upon the requirements of self-determination, generally fall within the following categories: nondiscrimination, cultural integrity, lands and resources, social welfare and development, and self-government.

[172] ,[1975] I.C J.R. 12.

[173] *Our Elders Understand, supra* note 48 at 75. Venne summizes the importance of this opinion to indigenous peoples:

> The advisory opinion on the *Western Sahara* determined a number of critical issues related to the rule and competence of the Court to render advisory opinions. In addition, the Court addressed issues related to the notions of *terra nullius*, discovery and conquest, stating that the latter two concepts were not legitimate doctrines to assert sovereignty over a territory. The ICJ stated that land occupied by a group of people having some political and social organizations was not *terra nullius*. The ICJ pronounced that the only way for a foreign sovereign to acquire any right to enter into territory that is not *terra nullius* is with the freely informed consent of the original inhabitants through an agreement.
>
> The ICJ in *Western Sahara* went on to discuss whether their status as civilized or uncivilized according to European standards affected Indigenous Peoples' rights to their territory. The Court determined that the degree of civilization was no longer a valid criterion for determining if a territory inhabited by Indigenous Peoples is *terra nullius* but rather it is a question of whether such Peoples have social and political organization. In other words, Indigenous governments do not have to emulate European governmental structures to have sovereignty over their territory. European colonizing states could gain access to lands only through an agreement with the full consent of the Indigenous Peoples.

*Indigenous Peoples*[174] ("Draft Declaration"). Unlike other conventions in international fora[175], the evolution of the Draft Declaration has been shaped by the participation of international indigenous actors.

From its opinion, the Working Group has founded the principles of the 1994 Draft Declaration on the rejection of the Doctrines of Dispossession:

> 6. Discovery, conquest, settlement on a theory of *terra nullius* and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples.[176]

In the *Draft Declaration as Agreed Upon By The Members of the Working Group at its Eleventh Session*[177] (Draft Declaration, 1994) it explicitely states in the preamble the rejection of the doctrines of dispossession that legitimize the state-centered system; the recognition of indigenous treaties as international and that the right to self-determination of peoples includes 'indigenous' peoples:

> *Affirming* further **that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.**
>
> *Considering* that **treaties**, agreements and other arrangements between States and indigenous peoples are properly matters of **international** concern and responsibility,
>
> *Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the Covenant on Civil and Political Rights affirm the fundamental importance of the

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[174] E/CN.4/Sub.2/1994/2/Add.1. The Draft Declaration has now been completed and is working its way through the United Nations protocals for resolution setting by the General Assembly. It was submitted to the Sub-Commission on the Prevention of Discrimation and Protection of Minorities by Working Group Chairperson and Rapportuer Dr. Daes. The Draft Declaration was then recommended to the Commission on Human Rights where an inter-sessional working group was created to "elaborate" the principles and standards set out in the Draft Declaration. The revision of the Draft Declaration is still at this stage. Once revised, the Draft Declaration will be submitted to the Commission on Human Rights and then to organs of the United Nations such as the General Assembly.

[175] See *Convention Concerning the Protection and Integration of Indigenous and Other Tribal Semi-Tribal Populations in Independent Countries*, 328 U.N.T.S. 247 (1959) and *International Labour Organization Convention on Indigenous Populations No. 169 of 27 June, 1989.*

[176] *Indigenous Declarations of Principles* E/CN.4/Sub.2/Ac.4/ 1985/WP.4/Add.4.

[177] UN Doc. E/CN.4/Sub.2/1993/29.

> **right to self-determination of all peoples**, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.[178]

Venne documents her experience with the Working Group and concludes that in international fora, their is a place for indigenous peoples if doctrines of dispossession are eradicated:

> Indigenous peoples have been urging the UN state members to return to international law norms that reflect the reality of Indigenous Peoples and the United Nations Charter. That is, the recognition of Indigenous Peoples needs to replace the Eurocentric international law framed in the doctrine of discovery, if the UN is to live up to its mandate. International law norms have been evolving to reflect modern realities reflecting the role of Indigenous Peoples, NGOs and others in the formation of the international system.
>
> The UN-specialized agency system is only one place where international law norms can be affected. This thesis documents one such process. Indigenouns Peoples are involved in many processess both inside and outside the UN to promote recognition, application and protection of their rights to advance the evolution of international legal standards. The contradictions evident in international law based on the doctrine of discovery will eventually be resolved.[179]

The challenges raised in this chapter are just a few examples of what indigenous peoples could do as part of direct action strategies and the attempts to remove obstacles in the path towards indigenous and for my peoples' sake, ned'u'ten liberation. The political will to accomplish these tasks may seem overwhelming, however it is my hope that seeds will be planted by which indigenous peoples can creatively and justly assert their rights and political status. We now turn to principles for treaty-making that avoids, what I see, as "conquest treaties" or "dispossession treaties."

## C. Treaty-Making Void of Dispossession Doctrines

> These are the tools we need to clear our path.
> These are the obstacles that need to be removed.

In order to establish a relationship that fosters decolonization for both indigenous peoples

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[178] *Ibid.*

[179] *Our Elders Understand, supra* note 48 at 223-224.

and states such as Canada and the Ned'u'ten, principles based on the observations of this thesis, have to be established. In other words, if treaties are chosen to establish this relationship, such treaties should not be conducted in a "principle vacuum." Although principles will be proposed in this thesis at various stages of clearing the path to liberation, the principles now discussed will center on how to establish treaties void of dispossession doctrines.

- **Declaration by Canada that the Ned'u'ten have always been sovereign and the true owners of their soil but that such recognition was denied to allow colonization to take place without the consent of the Ned'u'ten;**
- **Declaration by Canada that it has dispossessed the Ned'u'ten of their territories and their status as sovereign equals;**
- **Declaration by Canada that it has illegitimately acquired Ned'u'ten territories;**
- **Declaration by Canada that it has profited from rights of discovery; conquest; and their modern masks carved to domesticize indigenous relations;**
- **Declaration by Canada that dispossesion doctrines are illegal, racist and that the elimination of such doctrines in all its forms from treaty-making with the Ned'u'ten is a condition to establishing peace;**
- **Declartion by Canada that it has colonized, oppressed and subjugated the Ned'u'ten to alien domination and that the Ned'u'ten have the full right to decolonization;**
- **Declaration by Canada that the decolonization process should be monitered by an international entity to sever the internal regulatory power that it has used as a tool of colonialism and to foster extinguishment of rights and conquest;**
- **The repudiation of the act of state doctrine that has prevented indigenous peoples from challenging Canada's sovereign assertions and jurisdiction over indigenous peoples such as the Ned'u'ten;**
- **Ned'u'ten territories are Ned'u'ten and are not Canadian nor 'settled, conquered, or ceded' territories;**
- **Ned'u'ten rights are not subject to the justificatory test set out in s. 35 of the *Constitution Act, 1982;***
- **Declaration by Canada that it does not have "underlying title" to Ned'u'ten territories;**

- **A statement by Canada that its history with the Ned'u'ten has been a racist history and racialized to keep the Ned'u'ten inferior;**
- **An apology by Canada for the dispossession of the Ned'u'ten to establish liability and remedies municipally and at international law;**
- **An accounting for Canada's dispossession of the Ned'u'ten that will compensate the Ned'u'ten for past injustices and genocide.**
- **The commitment by both Canada and the Ned'u'ten to establish a peace treaty and not a land cession treaty;**
- **The commitment to establish political co-existence that is not reflective of "state" formulations; and**
- **A joint-policy formation process for the peace treaty between Canada and the Ned'u'ten.**

These are some principles that could lay the foundation for establishing a new relationship between the Ned'u'ten and Canada. These same principles will be necessary for decolonization and will bring the Ned'u'ten and Canada to a place negotiating as equal treaty parties engaging in what has never been accomplished before in our short history: peace and justice.

**D. Conclusion**

'Walk in our moccassins the trail of our past.
Live with us in the here and now.
Talk with us by the fires yet to come.[180]

Establishing new relationships where indigenous peoples and the state are concerned fundamentally requires a change in both our identities as the colonized and the colonizer. Indigenous scholars have shown that such a relationship should be shaped by indigenous

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[180] Indians of Canadian Pavilion, Expo 67, "Walk in our moccassins" in P. Petrone, *First People, First Voices* ( Toronto: Univeristy of Toronto Press, 1983) at 167.

concerns. These include: the will to establish this change in relationship; a shared understanding; a commitment by the colonizer to non-superiority; the value and respect for indigenous traditions and participation; trust; historical honesty; a shared definitional power that creates legitimacy; the renegotiation of all presumptions to reflect the participation of all parties in this new dialogue; and examination of the concepts that both parties need to build to meet this change like outstanding consent; etc.[181] Treaty-making, in the spirit suggested in this thesis, could foster a framework for nurturing this reality.

This chapter has attempted to guide the reader through a historized account of *how* the dispossession of indigenous peoples, mainly in North America, has been legitimated by colonizing states, colonial scholars, and the lack of commitment from the colonizer to "decolonize" its privileged and usurped status in relation to indigenous peoples. Likewise, indigenous peoples can benefit from the "decolonizing thought process" that I have used to liberate myself as a colonized person and the accompanying literature by indigenous scholars that are also travelling on this journey. This process is not easy. However, I believe it is imperative. In clearing your path to liberation, indigenous peoples must make every effort to remove obstacles such as dispossession theories like discovery and its present manifestations. This is our responsibility to future generations. The legitimacy of the Canadian state in relation to the Ned'u'ten is not sound. My journey in challenging this obstacle has revealed to me that such legitimacy is indeed fragile and that underneath all the veneer, Canadians know this, yet seek ways to find some form of legitimacy or validation for their "birthright." This must stop. Canadians also have the responsibility to their future relations to begin decolonizing themselves

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[181] These requirements are suggested by Patricia Monture-Angus in chapter one of *The Familiar Face of Colonial Oppression, supra* note 1.

today. Treaty-making can facilitate this process for all our relations.

Essential to the treaty-making that I envision for my people, is the rejection of any "dispossessing presence" that Canada may cling to for its legitimacy --in the past, present, and future. This requires principles that achieve such decolonization. However, establishing such principles does not stop here. This is just the beginning. The next chapter centers around the right to self-determination at international law. While colonizing states such as Canada have recently recognized an "internal" right to self-determination for indigenous peoples, indigenous peoples have articulated countering formulations of this right to meet the requisite degree of liberation required for decolonization and the restoration of their inherent status as part of the 'family of nations.' Such an exploration will lay the foundation for the "self-determination framework" that I deem necessary for a new relationship between Canada and the Ned'u'ten.

The clans are now fed and nourished from the host's territories.
This food will sustain the guests for the duration of the business
that is about to take place.

Business

> While the community may speak of 'a potlatch," the bah'lats is really a number of events hosted by one clan. It is an opportunity for members of the host clan to conduct a range of "business" from paying personal debts or collecting money to helping someone in need, through to announcing who will be taking a name. The business of the potlatch is founded in traditions of respect and clan membership...Other forms of business include saying a final farewell to a loved one, having a song made, resolving a dispute, renovating a grave, or "drying a head stone."[1]

**3**

## THE RIGHT TO SELF-DETERMINATION

### A. Introduction

The "business" for this thesis is to discuss attempts by indigenous peoples to restore their respective political identities as subjects at international law. The right to self-determination can be a legal mechanism to bring about this reality. For the Ned'u'ten, this is essential for decolonization. This chapter focuses on indigenous decolonization through the right to self-determination.

Indigenous peoples worldwide assert that they have the right to be self-determining in their aspirations to gain subject[2] status in the international fora and to take ownership of how

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[1]Lake Babine Nation, *C'iz dideen khat, When the Plumes Rise: The Way of the Lake Babine Nation* (Lake Babine Justice Report) by J. Fiske and B. Patrick (Lake Babine: Lake Babine Nation, 1996) at 96-97.

[2] Indigenous peoples have through deliberate actions by colonizing states been excluded from being recognized at international law as subjects with legal status. Barsh advocates that indigenous peoples, as 'peoples,' are subjects at international law:

> Arguing that they are "peoples" under the United Nations Charter, indigenous peoples have been struggling for the explicit recognition of their unqualified right to self-determination. Such recognition would establish that indigenous peoples are members of the international community who have legal personality under international law - "subjects" of international legal rights and duties rather than mere objects" of international concern.

R. Barsh, "Indigenous Peoples in the 1990's: From Object to Subject of International Law?" (1994) 7 Harv. H.R.J. 33 at 35 [hereinafter "From Object to Subject"]. Historically, subjects at international law have included: states, guaranteed or neutralized states, protected independent states, associated statehood, internationalized territory, vassal states, condominiums, protected dependent states, non-self-governing territories, colonial protectorates. In contemporary times, states are the main subject actors at international law, however, other personalities are gaining subject status including: states, individuals, groups, international organizations, private international actors, transnational corporations, sub-state and inter-state entities (and I would add peoples and minorities). See H.

their respective peoples will exist generations from now. Indigenous peoples' right to self-determination does not arise from the fact that they are a colonized people. The right to self-determination is a pre-existing human right utilized by indigenous peoples before colonial-settler populations came to indigenous territories. How indigenous peoples were ordered pre-contact, evidence self-determination. Indigenous peoples represented highly civilized entities and could meet subject status criteria[3] with the evolving Law of Nations or international law. In other words, the right to self-determination is not only operable at the point when indigenous peoples are colonized, although it may be suspended forcibly or denied by the colonizing state or political entity at this point. The right to self-determination is not a new right exercised by indigenous peoples. It has always existed and is argued by indigenous peoples to survive illegitimate assertions of sovereignty by colonizing states. It has also been argued to trigger remedies when it is denied by subject actors at international law.[4]

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Hannum, *Autonomy, Sovereignty, and Self-determination: The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1996) at 15-19, 467.

[3] Basic criteria for recognition of statehood included states possessing the following elements: a permanent population; a defined territory; a government; and the capacity to enter into relations with other states. See *Convention on the Rights and Duties of States* (Montevideo Convention), 49 Stat. 3097, T.S. 881, 165 U.N.T.S. Signed at Montevideo, Uruguay, 26 December, 1933; entered into force on 26 December, 1934. See also *Draft Declaration of Principles For The Defense of the Indigenous Nations and Peoples of the Western Hemisphere* Annex 4, U.N. Doc. E/CN.4/Sub.2/476/Add.5, (1981), article 1 'Recognition of Indigenous Nations' where criteria for nationhood include "a) having a permanent population; b) having a defined territory; c) having a government; and d) having the ability to enter into relations with other States"; and article 2 'Subjects of International Law' where "indigenous peoples not meeting the requirements of nationhood are hereby declared to be subjects of international law and are entitled to the protection of this Declaration, provided they are identifiable groups having bonds of language, heritage, tradition, or other common identity". Hannum lists requirements or attributes for statehood:

> One principle upon which there seems to be universal agreement is that sovereignty is an attribute of statehood, and that only states can be sovereign...Other requirements for statehood have occasionally been advanced, for example, that a certain degree of civilization necessary to maintain international relations be allowed, or that a state's government be established consistently with the principle of self-determination.

Hannum, *ibid.* at 15-16. See also "From Object to Subject", *ibid.*

[4] James Anaya has defined the content of self-determination to be much broader than its linkage to the United Nation's decolonization regime's of subjects, prescriptions and procedures. Rather Anaya proposes that self-determination has both substantive and remedial aspects to its content. See J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 80.

The practice of the right to self-determination by indigenous peoples is therefore diverse and tailored to each peoples' circumstances. The implementation of the right to self-determination by indigenous peoples will not be homogeneously fashioned. People who do not identify as indigenous have asserted that they too have the capacity to exercise and benefit from the universal human right of self-determination.[5] However, states have been unwilling to acknowledge that the right to self-determination has a wider application than decolonization.[6]

The unfortunate common factor that indigenous peoples do share is that they are colonized peoples who have experienced various degrees of colonization and oppression and have been denied the right to practice or implement their pre-existing right to self-determination, post-contact. *How* indigenous peoples foresee remedying the colonizing states's denial of indigenous self-determination may be a result of indigenous peoples sharing energies or efforts. However, it is important to keep in mind that there will be no uniform fashion in how indigenous peoples will exercise their "subject" status in the international fora.

Efforts by indigenous peoples to attain international subject status has led to the increase of indigenous presence and participation in the international fora. This has occurred through non-governmental organizations; the Working Group on Indigenous Peoples; and lobbying

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[5] State practice has historically afforded the right to self-determination to apply to people that have been colonized. Recent attempts by Quebec separatists to justify secession from Canada on the basis of self-determination have not been successful. See *Reference re: Secession of Quebec*, (20 August, 1998) unreported decision at paras. 135-136 [hereinafter *Secession Reference*].

[6] Kindred states:

> The principle of self-determination of peoples is controversial as to both its legal status and its contents. Impetus has been given to its advancement as a legal right in recent times by inclusion in the U.N. Charter, where it is referred to rather than defined. Over the past thirty-five years, it has been nurtured by the same movement that has supported the development of individual human rights. In U.N. practice, the right to self-determination has been the basis for the decolonization of dependent territories during the nineteen sixties and seventies, but without settling the claims for its wider application.

See H. Kindred, International Law: Chiefly as Interpreted and Applied in Canada, 4th ed. (Canada: Emond Montgomery Publications Ltd., 1987) at 67.

efforts of indigenous peoples and their supporters. This participation by indigenous peoples has contributed to the transformation of international sources of law. Indigenous peoples have developed strategies on how to decolonize or remedy the denial of self-determination by colonizing states. Such remedial[7] strategies must be employed before indigenous peoples can restore substantive self-determination.

I wish to draw upon the scholarly writings of indigenous peoples and provide examples of how indigenous peoples intend to decolonize, how indigenous peoples define the right to self-determination, and ultimately determine a model or framework for my people, the Ned'u'ten, to consider in their self-determining goals to create a relationship with Canada. As indigenous scholarly writings continue to surface in tandem with political activism geared towards the liberation of indigenous peoples, it is my hope to contribute to the discourses on the right to self-determination as an indigenous scholar and one who holds a hereditary chief title in her peoples' traditional governing system. I do not discount the supportive contributions of non-indigenous peoples to see indigenous peoples obtain 'subject' status at international law. I leave non-indigenous contributions to evidence how modern international law did not apply to indigenous peoples.

It is appropriate to begin this chapter by providing the reader with a historical description of the evolving nature and scope of the right to self-determination. This will contextualize a foundation for understanding current dialogues on the right to self-determination by indigenous peoples. After a fuller description of the history of the right, I will examine two theoretical

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[7] Some formulations of remedial self-determination include: an integrated political entity within the colonizing state with limited powers of autonomy; independent state-like status with full power or jurisdiction over traditional territories and the people therein separate from the colonizing state; some new conception or political autonomy that is rooted in ancestral governing systems rather than western imperialism that will co-exist with the de-colonizer's new status; a reconceptualized sovereignty; the determination of how power is distributed between equal subjects.

frameworks used in scholarly writings to describe the scope and content of the right to self-determination: the internal/external framework and the substantive/remedial framework. A contextualized history and exemplary description of indigenous formulations of the right to self-determination will provide the sounding board for a "Ned'u'ten self-determination framework". This will require 1) Ned'uten/Canadian decolonization and 2) the recognition of Ned'u'ten subject status at international law. Finally, to build upon the principles suggested in chapter 2, principles for a Ned'u'ten self-determination framework are suggested.

**B. Contextualizing the History of the Right to Self-Determination**

> In the context of Aboriginal claims, lawyers and historians are involved in an activity that requires reconstitution of the past and an assessment of its authority in a highly controversial present. Necessarily, the past is one that is at once seen through the requirements of the present and that is at once required to yield authority or a juridical "command."[8]

As indigenous discourses worldwide are gaining respect and support for self-determination, decolonization and subject status, it is imperative for indigenous peoples to understand why they have been excluded from history as sovereign peoples with sovereign territories. The histories of indigenous peoples and their exercise of sovereignty[9] according to

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[8] P. McHugh, "The Common-Law Status of Colonies and Aboriginal "Rights": How Lawyers and Historians Treat the Past" (1998) 61 Sask. L.R. 393 at 396.

[9] I borrow the concept of sovereignty from the western language. More specifically, I do not adopt, incorporate or use the concept in the same manner as used by the western world. Nor do I endorse western understandings of the concept such as its liberal and proprietary premise; hierarchical nature and state-centered organization as the only way to define sovereignty. Rather, when I speak of Indigenous sovereignty, what I am trying to describe is respective indigenous understandings of independence as reflected in their traditional governing systems and international relations with neighbouring peoples. For example, one attribute of Ned'u'ten sovereignty over their territories and peoples is reflected in the structure of the clan systems we have and the *bah'lats* where clans exercise various aspects of sovereignty, autonomy and self-determination. Robert Williams, Jr. provides one way to describe indigenous claims to sovereignty:

> ...indigenous claims to 'sovereignty' more accurately can be said to comprehend a jurisgenerative demand on the part of indigenous peoples to live by a law of their own choosing and creation. An indigenous law, of course, holds the potentional of being a law which is separate and distinct from the majority society's law, and might, at times, even be opposed to the spirit of the majority society's law. Indigenous claims to sovereignty thus do appear to threaten to undermine the legitimating power of the majority society's law, fragmenting and destabilizing its universality of application within the territorial borders of the state.
> ...

their laws, customs and traditions must be recognized, acknowledged and accepted by colonizing states before any new relationships are created. History is alive today and operates in tandem with the present and future destinies to shape worldviews.

At present, international law as practiced by state-actors (who can maintain territorial sovereignty, nationality and legal equality) is sourced in customs, treaties or conventions, peremptory norms, general legal principles, secondary sources such as judicial decisions of the International Court of Justice, international tribunals and organizations, and documents that can show what international law is.[10] From an indigenous perspective, the practice and sources of international law are rooted in doctrines of dispossession that have prevented indigenous peoples from "subject status" recognition. This present reality has a long history and resolution to conflicting and competing rights[11] between indigenous peoples and states has yet to be achieved.

**1. The Right of Self-determination: origins (indigenous people's with object status)**

> The goal of Indigenous Peoples is to act and be treated as subjects- and not as objects -- in international law. International law has persistently viewed Indigenous Peoples as objects since the European Middle Ages. Not until the middle of the twentieth century have Indigenous Peoples begun to obtain recognition and achieve progress in changing our legal status from objects

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> For most indigenous peoples, the term 'sovereignty' comprehends a range of imagined and even yet-to-be imagined alternatives for achieving their self-determining aspirations for jurisgenerative power over their lands and communities. An indigenous claim for sovereignty, in this sense, is simply an appeal for ending indigenous peoples' continuing state of disempowerment in the postmodern world, and an invitation to their settler-state governments to open up a dialogue on developing models and institutions capable of realizing at least some of those alternatives.

R. Williams Jr., "Sovereignty, Racism, Human Rights: Indian Self-Determination and the Postmodern World Legal System" (1995) 2 Review of Constitutional Studies 146 at 154, 158.

[10] See *Case Concerning East Timor (Portugal v. Australia)* [1995] I.C.J. Rep. 1 for the proposition that the right to self-determination can be found in all sources of international law for peoples attempting to decolonize.

[11] Like the exercise of aboriginal rights and aboriginal title by indigenous peoples in Canada must be reconciled with Canada's assertion of sovereignty under s. 35(1) of the *Constitution Act, 1982*, so does indigenous peoples' assertion of the right to exercise self-determination must be reconciled with the 'territorial integrity' of the state. It has been argued by some international scholars that indigenous rights are competing and possibly conflicting rights with state rights and therefore should be "accommodated" by the state. See Hannum, *supra* note 2.

to subjects through direct participation in international organizations.[12]

After the World War I, the maintenance of peace was the new found interest underlying international relations amongst Allied state-actors. The state's right to use force to acquire foreign territory by means of conquest/just war was given greater scrutiny. This is evidenced in modern international law and the nascent theoretical development of the principle of self-determination as a non-annexation principle. More accurately, the principle was a moral limitation on the victor's use of the right of conquest to acquire foreign territory by use of force without the consent of the conquered inhabitants of defeated territories.[13] Non-secret treaties concluded after the First World War were intended to be negotiated on the basis of peace and without the characteristics of secret treaties.[14] The principle of self-determination thus marked

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[12] S. Venne, *Our Elders Understand Our Rights: Evolving International Law Regarding Indigenous Peoples* (LL.M. Thesis, Faculty of Law, University of Alberta 1997) at 1 [unpublished].

[13] Sharon Korman characterizes the demise of the right of conquest as a moral turning point in the twentieth century from annexation through the spoils of war which began with the Russian Revolution of 1917 and the Wilson era to the time when the United States entrance into the World War :

> ...the historic events of the spring of 1917 - the revolution in Russia, the entry of the United States into the war, the ensuing call for peace without annexations, and the proclamation of the right of national self-determination - created an entirely new situation; above all, they made the old-style annexationist policies of the belligerents impossible to sustain. For such blatant expansionism (or old-fashioned imperialism) was inconsistent with the new moral tone in which international relations were now being conducted...Among the first steps taken by the Russian Provisional Government was the announcement, on 10 April 1917, that 'Free Russia does not aim at dominating other nations, at depriving them of their national patrimony, or at occupying by force foreign territories; ...its object is to establish a durable peace on the basis of the rights of nations to decide their own destiny.' This was the first official public pronouncement by one of the Allies on the issue of national self-determination. And it was one which, by disclaiming the intention of acquiring foreign territories by force, may be said to have constituted an open renunciation of the right of conquest...It was clear that the liberal programme which Wilson personified repudiated the right to acquire territory by force without the inhabitant's consent, along with the theory of the balance of power that was often used to justify it. As such, it posed a fundamental challenge to the old-fashioned, imperialist war aims of the Allies contained in the secret treaties.

S. Korman, *The Right of Conquest: The Acquisition of Territory by Force in International law and Practice* (Oxford, Claredon Press, 1996) at 136-137.

[14] Such characteristics included: annexations or forced seizure of foreign territories; the transfer of peoples from one sovereignty to another or forced incorporation of peoples into a larger powerful state; and no indemnities or punitive damages. See Four Principles of Woodrow Wilson, 11 February, 1918 speech to the Peace Conference of Paris.

the beginning of a slow process towards the recognition of more actors in the international fora.

The practical use of the principle of self-determination was not absolute. It was inconsistently or selectively applied by state actors who were unwilling to relinquish their fruits of conquest for the promoted prevention of future wars and maintenance of peace. These victors assumed that the principle of self-determination only applied to peoples in defeated territories but not the victors as well.[15] Peace was reconciled with the national interests (mostly economic, geographic, strategic considerations) of the victors of the First World War.[16]

Since indigenous peoples did not have subject status in international law at the time the principle of self-determination was developing, indigenous people's contribution to its conceptualization and application is silenced from the written record. The 'object' status of indigenous peoples at this time is rooted through their colonized and dispossessed status. Apart from late 17th century treaties which did recognize indigenous peoples as subjects with the capacity to treaty with foreign peoples in North America, indigenous peoples in subsequent centuries and to this date were viewed by colonizing states to not have the capacity to contribute and benefit from the evolving laws and standards regarding human rights and in particular the principle of self-determination.

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[15] Korman states that only the victors of World War 1 could enforce the principle of self-determination:

> From this fact it necessarily followed that the right of the victors to enforce the principle of self-determination in the territory of the defeated powers derived not from the universal application of the principle of self-determination, as a norm of the society of states applicable in the territory of the victors as much as in that of the vanquished, but from the traditional entitlement of victors *qua* victors to dispose of the territory of the vanquished by *right of conquest.*

Korman, *supra* note 13 at 156.

[16] Korman states:

> The fact was, however, that the victors applied the principle of self-determination only where the interests of national and imperial policy permitted, but not where the principle came into conflict with those interests.

*Ibid.* at 140.

The object status of indigenous peoples is reflected in treaties[17] created in modern international law. The deliberate attempt to continue the non-application of international law to indigenous peoples as subjects was advocated by Woodrow Wilson. His treatment of indigenous people is found in his post-first world war solution for peace, the Fourteen Points. Korman shows that no reconciliation of the national interests of states with the interests or consent[18] of indigenous peoples had to be achieved to acquire indigenous territories:

> It was not intended, furthermore, that the principle of self-determination should apply in the colonial territories, whose native inhabitants were not as yet thought to enjoy rights of popular sovereignty...
>
> The fifth of Wilson's Fourteen Points, while it did refer to 'the interests' of the native inhabitants, insisted that these should be balanced against the legitimate interests of the colonial powers. Moreover, while the settlement in theory was to be based upon an 'absolutely impartial adjustment of all colonial claims' - with equal weight given to the interests of populations concerned - in practice...it was only the colonial claims of the victors that were taken into account. **Thus the Allied victory seemed merely to represent a new peak of imperial expansion conducted by the victors at the expense of the vanquished.**[19]

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[17] Art. 22 of the Covenant of the League of Nations states:

> To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed by them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilization and that securities for the performance of this trust should be embodied in this Covenant.
>
> The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

[18] According to the victors of World War 1, the principle of self-determination held that a plebiscite may be held in vanquished territories to see if the defeated inhabitants would consent with their own volition to a change in sovereignty without the need for territorial annexation as a result of conquest. Korman illustrates that plebiscites would be held at times when the results would not hinder underlying national interests of the victors and denied where it conflicted with such interests:

> ...plebiscites were not used to determine all territorial changes arising from war. And even where plebiscites were granted by the Allied and Associated Powers, they were 'granted as an act of conquerors, rather than as a matter of right.'

Korman, *supra* note 13 at 157.

[19] *Ibid.* at 142. Since indigenous peoples had not reached standards of civilization espoused by the western world, the colonial power was to hold in trust the well-being of indigenous peoples while holding sovereignty over them to detach indigenous peoples from their territories:

> In other words, the concept of the League of Nations Mandates provided the means whereby it could be claimed that it was not *conquest* that had conferred upon the victors the right to rule over inhabitants of the

Indigenous peoples's, by virtue of their object status, suffered the following legal consequences:

- their respective territories annexed without their consent;
- indigenous peoples were transferred like property from one sovereign to another;
- indigenous peoples were forced to be incorporated into a larger more powerful state;
- indigenous peoples did not receive any compensation or restitution[20] for past wrongs; and
- no plebiscites were held to see if indigenous peoples would agree or not to their territories being annexed by the colonizer for national self-interests or to other state actors regardless if war ensued or not.

According to contemporary international law, such conduct by states would be illegal.

The colonial acquisition of indigenous peoples territories remained largely intact while selected defeated European nations could benefit from a 'sacred trust obligation' with Allied powers. Sharon Venne punctuates history with the fact that not even indigenous peoples were "civilized" enough to be a *beneficiary* of the League of Nations' Mandates system. More importantly, indigenous peoples were not civilized enough to be a *subject* or *member* of the

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conquered territories, but rather the *League of Nations* itself- that is, a legally constituted international body which had taken upon itself (amongst other matters of international concern) the guardianship of the welfare and interests of those peoples who were not yet ready to govern themselves.

*Ibid.* Korman documents the creation of the Mandates System to solve the contradiction of the non-application of the principle to indigenous peoples. This system placed supervisory powers in the League of Nations (which Korman's call the surrogate for the right of conquest) to acquire foreign territories through conquest without calling it conquest. The ideological legitimacy of colonial conquests that underpinned the League of Nations, allowed the victors to reap the fruits of conquest but with sensitization to the ideological needs of the modern era. At the same time, providing the means to strip defeated states of their colonial territories also was practiced by the League. *Ibid.* at 143. Korman also points out that "the primary significance of the institution of Mandates as an alternative to annexation was not that it constituted a repudiation of the right of conquest in the sense of the denial of the right of the conqueror to alienate territory from the sovereignty of the vanquished, but rather that it placed new limitations on the right of the conqueror to exercise its sovereign will in that territory". *Ibid.* at 150. One must not dismiss the purpose of the Mandate system, however, in the face of the right of conquest:

...The decision of the Allied Powers to retain these territories not as colonial acquisitions, but rather as Mandates, did not alter the fact that the right to Mandates itself derived from conquest or military victory. *Ibid.* at 160.

[20] The principle of *restitutio in integrum* exists at international law whereby a remedy is available, in exceptional cases, to repair injuries by an unlawful act contrary to international law through the annulment of the unlawful act to restore the legal status that existed prior to the act. Practice shows, however that states prefer to award pecuniary compensation instead of restitution. Restitution is the normal sanction for non-performance of contractual obligations and is inapplicable where restoration of the status quo is impossible. See Kindred, *supra* note 6 at 604-5.

League of Nations.[21] This discrimination still exists today and is reflective in state resistance to indigenous peoples gaining international subject status.

Even after World War 2, the right of conquest was still used to justify acquisition of territories for security reasons. The principle of self-determination for peoples to determine their own futures in such defeated territories would be denied.[22] However, the wrath of two world wars weighed heavy on both victors and the defeated, so much that as the successor to the League of Nations - the United Nations - embarked upon a course that would eventually denounce the legitimacy of the right of conquest to acquire foreign territory by force. Just like its predecessor, the United Nations did not recognize indigenous peoples' status as subjects and in my opinion, such non-recognition, continues the colonizer's reliance upon doctrines of dispossession to ground this non-recognition. Countless efforts by indigenous peoples to this day are striving to see state-actors recognize their respective rights to self-determination.

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[21] Venne states:

> As a further protection of the rights of minorities and others, the League developed a system of mandated territory so that all the German and Ottoman colonies could be put under the protection of the League of Nations. "Under League of Nations Mandate, the well-being and development of native populations of former German and Ottoman dependent territories were considered sacred trusts and placed under control of Allied powers." The same extension of a sacred trust did not extend to Indigenous Peoples in colonies of the French, British, Spanish, Dutch, Portuguese and Americans. President Wilson said that the Covenant of the League:
>
> > is one of the greatest and most satisfactory advances that have been made. We are done with annexation of helpless people meant, in some instances by some powers, to be used merely for exploitation.
>
> The U.S. President, speaking from a land taken from American Indigenous Peoples and used by the colonizers for their own benefits, spoke with unintended irony.
>
> ...
>
> Indigenous peoples were objects and not subjects of international law. Indigenous Peoples were a domestic 'problem' of the national government involved. Their voice was not to be heard within the League of Nations. It was all right to have a sacred trust obligation to the Indigenous Peoples of the colonies of defeated European nations; however, the same right was not extended to the Indigenous Peoples of Americas .

Venne, *supra* note 12 at 45-46.

[22] Instead a trusteeship would be set up for defeated territories whereby the victor would hold sovereignty over the territory for strategic purposes.

**1960's**

By 1945, the principle of self-determination began its evolution into a human right. It was codified into international law as a purpose for the first time:

> 1(2) to develop friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.
>
> 55 [W]ith a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote...(a-c).[23]

The principle of self-determination is given effect in Chapter XI ( Declaration Regarding Non-Self-governing Territories and Chapter XII (International Trusteeship System). Standards were then set for human rights instruments such as *Declaration on the Granting of Independence to Colonial Countries and Peoples* Resolution 1514 (XV) (1960),[24] where the General Assembly proclaimed an end to colonialism in all its manifestations. According to state opinion at this time, "self-determination was viewed as a political claim, asserted on grounds of solidarity by all third world nations and supported by communist countries in order to expose the hypocrisy of the Western world in its official discourse about inequality and human rights."[25]

States like Canada did not recognize indigenous peoples' capacity to exercise their collective human rights to decolonize according to international instruments such as Resolution 1514 or Resolution 1541[26]. So the implementation of ending colonialism in all its forms and

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[23] See Chapter 1, article 1(2) and article 55 of the *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No. 7.

[24] 15 UN GAOR, Supp. (No.16) 66, U.N. Doc. A/4684. Note that the colonial powers abstained from voting on this resolution implying their discontent with the principle evolving to a right at international law.

[25] C. Tomuschat, "Self-Determination in a Post-Colonial World" in C. Tomuschat, ed. *Modern Law of Self-Determination* (Netherlands: Kluwer Academic Publishers, 1993) at 1 [hereinafter "Self-Determination in a Post-Colonial World"].

[26] See *Principles Which Should Guide Members in Determining Whether or Not an Obligation Exists to Transmit the Information Called for in Article 73(e) of the Charter of the United Nations (Declaration on Non-Self-*

manifestations by states did not extend to indigenous peoples, including the Ned'u'ten.[27] This discrimination is compounded by state conduct to limit decolonization to only territories overseas.[28] Indigenous peoples such as the Ned'u'ten would be precluded from decolonizing from Canada as their traditional territories exist within Canada.[29] Ned'u'ten territories, (although a non-self-governing territory as a result of colonization and doctrines of dispossessions in the literal sense) would not be recognized as a "non-self-governing territory"

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*Governing Territories*), G.A. Res. 1514 (XV), Dec. 15, 1960, U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1961).

[27] State practice dictated that decolonization could only occur where territories were identified as being held in trust; non-self governing; or territories yet to gain independence. Indigenous peoples are not to this day recognized as "colonized peoples" by states so as to fall under this declaration and could not therefore decolonize in their traditional territories as the peoples of India or Morocco have.

[28] Since indigenous peoples were not a 'colonized people living overseas from the colonizing state' during this period, indigenous peoples could not benefit from the United Nations's decolonization regime. In other words, the right to self-determination was not a retroactive right that could remedy indigenous peoples colonized status as a result of acquisition of indigenous territories by overseas colonial powers without the original inhabitants consent through agreement. Canada asserts sovereignty over indigenous territories in British Columbia at 1846. At this point in time, the British settler colonies of British Columbia and Vancouver Island did not extend to my peoples' territories in northern British Columbia. Most contact with aliens or foreigners and my people had been primarily with the Hudson Bay Company or Catholic Oblates. The British colony before it joined Canadian confederation in 1871 was an extension of an overseas european sovereign. After Confederation, British Columbia acquired constitutional jurisdiction over Ned'u'ten territories without the consent of the Ned'u'ten people. Ned'u'ten territories became under alien occupation. Yet because Canada inherited Britain's colonizing status, and as a state, one that resided in the colonized territory and not overseas, the Ned'u'ten would be barred at international law from raising a claim to self-determination and decolonize in post-war times. In fact, it could be argued that Canada would have the right to self-determine its political status against Britain and this is evidenced by Canada's conduct to repatriate the Constitution in 1982 from Britain. Certainly, the Ned'u'tens' political ordering would have challenged the manifest destiny of settlers spreading democracy over the Ned'u'ten people and territory. Despite state practice to exclude indigenous peoples from having a 'colonized status', I argue that such conduct constitutes discrimination and allows colonizing states, such as Canada, to justify its acts of colonization of my people. This is antithetical to the growing unpopularity of colonization as being immoral and illegally contemporary standards of international law.

[29] In determining what the colonial territorial unit was so as to trigger application of Resolution 1514 Anaya states that enclaves of indigenous peoples did not fall within this classification:

> A corollary to the focus on the colonial territorial unit is what became known as the "blue water thesis," which developed effectively to preclude from decolonization procedures considerations of enclaves of indigenous or tribal peoples living within the external boundaries of independent states. While state sovereignty over distant or external colonial territories was eroding in the face of normative precepts deployed internationally, it remained relatively steadfast over enclave indigenous groups and worked to keep them outside the realm of international concern.

Anaya, *supra* note 2 at 43. For further discussion see Darlene Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) *Univ. of Tor. Fac. L. Rev.* 1.

under these resolutions. The effect is that the Ned'u'ten would be denied the capacity to self-govern their territories. The Ned'u'ten could not a) form an independent state from Canada; b) freely associate with Canada; or c) integrate with Canada. Instead, the administration of the *Indian Act* over parts of traditional territories of the Ned'u'ten would prevail. Canada did not recognize the jurisdiction or ownership of the Ned'u'ten over the remaining portions of their territories.

During this period, other internationally recognized bodies, such as the International Labour Organization ("I.L.O.") contributed to the protection of human rights as well. The I.L.O., however, treated indigenous peoples as objects too. The I.L.O. was committed to world-wide improved labour conditions in relation to human rights. It also conducted studies on indigenous peoples' labour conditions to form the basis for instruments such as conventions. The I.L.O. was also committed to seeing through that states address issues such as forced labour; recruitment of indigenous workers; employment contracts; penal sanctions; improved educational and vocational training; social security and general application of labour protections to indigenous peoples. However, the assimilative approach of the ILO to integrate indigenous peoples into existing states culminated in the 1953 ILO Convention No. 107. This approach would improve the object status of indigenous peoples, rather than support indigenous claims to self-determination and human rights as subjects.[30]

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[30] Venne elaborates on the intent of the I.L.O. to preserve the object status of indigenous peoples:

> The ILO viewed Indigenous Peoples as being in a disadvantaged position vis-a-vis the rest of society and the organizations's broad approach to eliminate discrimination in the workplace extended to groups perceived as disadvantaged...
>
> Was the ILO's suggested to redress to change the colonial system that oppressed Indigenous Peoples? No, the ILO decided that Indigenous Peoples should be treated as objects, they should be changed. The ILO proceeded on the assumption that it had an obligation to bring Indigenous Peoples to a sufficient level of education to participate in the wage economy.
>
> The ILO expressed the view that the "ultimate aim of transforming the presently existing primitive

Between 1960 and 1970 the transformation of the principle of self-determination to a legal right began with resolutions passed by the General Assembly affirming its support for colonial peoples efforts to be self-determining through decolonization: the granting of independence to non-self governing territories; to recognize the struggle of peoples under colonial rule to exercise their right to independence and self-determination; that no foreign pressure could be used to prevent the exercise of self-determination; and that any action to deprive peoples under foreign rule of such economic, social and cultural rights, amounts to a violation of the UN Charter.[31]

The UN Covenants on Civil and Political Rights and Economic, Social and Cultural Rights (1966) carried forward the language of these decolonizing instruments. Articles 1(1) of both Covenants state:

> All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

In 1970, the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* GA Resolution 2625 (XXV),[32] ("Resolution 2625") laid to rest any inquiry whether there existed a legal right to self-determination vested in "peoples". As the right to self-determination is applicable to

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> society into a producer and consumer society like that of the white man presupposed the introduction in the colonies of the white man's methods and means of labour. The ILO was supporting the model of colonization. Indigenous Peoples could not be allowed to exist in their territories. The intent was to change Indigenous Peoples and their rights rather than respecting their rights.

Venne, *supra* note 12 at 51.

[31] See generally the UN's General Assembly Resolutions: 2105 (XX), 1965; 2131 (XX) (1965); 2160 (XXI) (1966).

[32] 24 October 1970, UN GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1971).

'peoples' only, and not states, the boundary line between the sphere of the sovereignty equality, territorial integrity and non-interference of states and the sphere of self-determination for 'peoples' would have to be established. In other words, the differentiation between the 'power of the state' and the 'power of peoples' would compete for space in the international fora.[33] The question then arose as to what would be the scope and content of the right to self-determination? Do indigenous peoples living under colonization and alien occupation have the right to self-determination? As states grappled with the scope and content of the right to self-determination, indigenous peoples for the next three decades, would focus their efforts on being a beneficiary of the right as a 'people' at international law with subject status. Efforts also focused on what political entity indigenous peoples would transit into ranging from independent statehood, free association with the colonizing state, integration with the state or be-lated state-building.[34]

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[33] Some authors argue that to equate peoples with states would lead to a meaningless right and that the right to self-determination has its own independent meaning:

> First, of all, a purely 'external' right of self-determination would, in order to have independent meaning, have to imply some right of secession (which is usually denied, except for most historical instances of decolonization). Otherwise it would come very close to equating the people with the State (the right to of peoples and States to 'sovereign equality' and freedom from outside intervention), which is the interpretation Hans Kelsen has, among others, given to Article 1, paragraph 2, of the UN Charter. This alternative, it seems to me, would make the whole principle, standing on its own merits, almost meaningless. One should not easily assume that a principle, which has already received so much attention, also in legal texts, does not have independent meaning. Of course, if self-determination also means secession, the situation may be different.

A. Rosas, "Internal Self-Determination" in Tomuschat, *supra* note 25 at 228 [hereinafter "Internal Self-Determination"]. Tomuschat explains the tension states have with recognizing the self-determination of peoples at international law:

> Some authors have tried to dispute this conclusion by drawing attention to the fact that the Friendly Relations Declaration lists different forms in which self-determination can be fulfilled, namely, in addition to statehood, through free association or integration with an independent State or through emergence into any other political status. That sort of reasoning, however, does not sufficiently separate (positivist) legal arguments from arguments of legal policy. A simple reading of the text makes it quite clear that a free choice is given to the people concerned. They are entitled to decide what way they want to go. In each and every case all the possible options are open to them. They cannot be prevented from choosing independent statehood. It is for this reason that States are normally so anxious to eschew calling a given ethnic group a "people".

"Self-Determination in a Post-Colonial World" in Tomuschat, *supra* note 25 at 12.

[34] The range of political autonomy for indigenous peoples is discussed below. Belated-state building is discussed in chapter 4.

**1970's**

Resolution 2625 on the one hand formulated the right to self-determination to apply to all peoples (not just colonized peoples) yet subjected the exercise (as expressed by the will of the people) of the right to the colonizing state's territorial-based jurisdiction and the principle of non-intervention. Sanders takes note of state's unacceptance of an absolute right to self-determination if states uphold human rights and the participation of such peoples regarding their affairs:

> The rather circular language of the 1970 Declaration had affirmed both the territorial integrity of states and the self-determination of peoples, but saw the latter trumping the former if the state denied democratic participation and equal human rights to the segment of the state's population claiming the right to self-determination.[35]

If a state complies with human rights and is capable of representing peoples' claiming the right to self-determination, the state can qualify and limit a people's right through defining the scope and content of the right, its domestic status, and how to implement the right.

The following provisions of Resolution 2625 show the inherent limit of the right to self-determination imposed by states on people claiming the right:

> By virtue of the ***principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine without external interference their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.***
> ...
> The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.
>
> The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it, and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.
>
> ***Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which***

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[35] D. Sanders, "Self-Determination and Indigenous Peoples" in Tomuschat, *supra* note 25 at 77 [hereinafter "Self-Determination and Indigenous Peoples"].

> ***would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.***
>
> ***Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or county.***[36]

The reconciliation of a **people's** right to self-determination with a **states'** right to territorial integrity and sovereign equality has sparked political and scholarly debate since Resolution 2625 was adopted by the General Assembly in 1970. For the next three decades, international actors would grapple with whether or not states and peoples could co-exist, how such rights could be reconciled or accommodated, and in a practical sense how difficult it is to implement the rights in the face of rapid growth of resource scarcity and globalization.

At this point in history, the Cold War[37] was still influencing political world orders and the process of decolonization. Peoples with socialist political orderings and Third World countries posited that the right to self-determination was 'external' only and therefore implied the right of a people to secede. States in the West bloc saw such determinations as heeding the spread of democracy worldwide.[38]

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[36] *Declaration of Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, Oct. 24, 1970, U.N. GAOR, 25th Sess., Supp. No. 28, at 21, U.N. Doc. A/8028 (1971).

[37] Hannum takes note of early communist understandings of the principle of self-determination during World War 1 and the Peace Conference:

> Both Lenin and Stalin saw self-determination in the context of the 'national question" which surrounded World War 1 and the Peace Conference. They were strong proponents of the principle of national self-determination, but only insofar as its exercise would promote the interests of the class struggle; secession (the primary form of self-determination in the post 1919 period) was to be promoted as a tactic to fight oppressor nations, not to support bourgeois nationalists in oppressed nations....Thus, communist support for national self-determination and decolonization was a tactical rather than a philosophical decision...

Hannum, *supra* note 2 at 32-33.

[38] Allan Rosas states:

> During the period of decolonization, many socialist and Third World States, in particular, tried to limit the effects of the right to self-determination to external self-determination, and more specifically to the right of colonies and independent territories to shake off the colonial yoke and

The reconciliation of the rights of peoples and states at international law triggered subsequent debates. First, debates took place regarding Resolution 2625's support for the globalization of democracy and the rights of states to sovereign equality and territorial integrity. In particular, discourses focused on a possible internal and external right to self-determination.[39] Unfortunately, this discourse also maintains the 'object status' of indigenous peoples as well by not recognizing indigenous peoples as a colonized people with the possible right to secede outright or select their own political subject status internationally free from outside interference by colonizing states. The internal/external self-determination formulation reduces indigenous peoples' claims from international matters to unsupervised domestic or municipal matters, despite indigenous peoples' efforts to gain international subject status at international law.[40]

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> achieve independent Statehood. For new entities which had already obtained Statehood, the principle of the 'territorial integrity or political unity of sovereign and independent States was brought in to deter secessionists and in many cases also democratic aspirations.

"Internal Self-Determination", in Tomuschat, *supra* note 25 at 228.

[39] Jean Salmon takes note that the first reference to internal/external self-determination was in the 1975 *Helsinki Declaration*:

> "By virtue of the principles of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development"

J. Salmon, "Internal Aspects of the Right to Self-Determination" in Tomuschat, *supra* note 25 at 268. Note that in 1990, the right to self-determination as expressed in the 1975 *Helsinki Declaration* was reaffirmed in the 1990 Charter of Paris. See *Charter of Paris for a New Europe, A New Era of Democracy, Peace, and Unity* (1990), 30 I.L.M. 190.

[40] Within this overall debate on the scope of the right to self-determination is the question of what to do with the assertions of indigenous peoples. In Canada, during this period, federal policies continued to advocate the assimilation of indigenous peoples into Canada with no special status or rights. In 1960 the right to vote in federal elections was extended without qualification to all status Indians. There was, however, no attempt to solicit the will of indigenous peoples such as the ned'u'ten for the purpose of self-determination. The *Indian Act* continued to govern Indians. So the question of whether indigenous peoples are included as beneficiaries of this universal human right will depend on whether or not states will recognize the subject status that they assert. If indigenous peoples argue that legitimacy upon which colonizing states rest is questionable at international law, and for this reason assert the right to secede from colonizing states, will such states abide such application of the right? State practice thus far has told us no, not in the name of peace and stability for states and certainly not in the developing legal principle of democratic means to solely achieve self-determination which most states denied to indigenous peoples including Canada.

Second, simultaneous debates took place over who was a people to benefit from the right of self-determination.[41] As debates over the scope, content, and beneficiaries of the right to self-determination took place in the 1970's, the right to self-determination in the context of 'decolonization' was given greater interpretation by the International Court of Justice in 1975.[42]

**2. Peoples (Indigenous peoples with subject status)**

> Affirming that indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such.[43]

As states tried to limit the right to self-determination to only apply in situations of classic colonialism,[44] indigenous peoples presented their perspective on the right to self-determination to

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[41] Patrick Thornberry states:

> Changing notions of democracy change our view of "the people". The UNESCO Experts describe people as a mutable concept, possibly carrying different meanings for different rights. The difficulty with that view is - who is to be excluded in the computation of rights? Is there one kind of "people" who shall not be "deprived of its own means of subsistence", while another "people" will decide on the formation of governments and political destinies? The only qualifying adjective so far accepted in international law for "people" is "Indigenous"...

P. Thornberry, "The Democratic or Internal Aspect of Self-Determination" in Tomuschat, *supra* note 25 at 125. Thornberry makes note of the working definition of people by UNESCO Experts to includes the following characteristic: a) a common historical tradition; b) racial or ethnic identity; c) cultural homogeneity; d) linguistic unity; e) religious or ideological affinity; f) territorial connection; g) common economic life.

[42] See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* (1970), Advisory Opinion., [1971] I.C.J. Rep. 16. and *Western Sahara* Advisory Opinion, [1975] I.C.J. Rep. 12.

[43] See first preambular provision of the *Draft Declaration as Agreed Upon By The Members of the Working Group at its Eleventh Session.* UN Doc. E/CN.4/Sub.2/1993/29.

[44] In 1995 the International Court of Justice reviewed the right to self-determination once again in the *Case Concerning East Timor (Portugal v. Australia), supra* note 10, but solely within the context of non-Self-Governing Territories that are scheduled for decolonization by the UN. The ICJ did not decide substantive issues regarding the right of East Timor, a non-self-governing territory, to self-determination other than to affirm such a right exists. Indonesia had contravened Security Council and General Assembly Resolutions when it annexed East Timor pursuant to an unlawful treaty negotiated between Australia and Indonesia over the territory including East Timor. Although the people of East Timor still have not been able to freely exercise their right to self-determination, they do have the support of the international community to do so given their status as a non-self-governing territory under the United Nations Charter. In practice, the right of self-determination as practiced by states has only applied to mandated or non-self-governing territories scheduled for decolonization and it is still questioned by states at international law whether the right of self-determination applies to indigenous peoples as well.

include recognition of their subject status at the 1977 NGO Conference on Discrimination Against Indigenous Populations in Geneva. At this Conference, the indigenous participants drafted the *Draft Declaration of Principles For The Defense of the Indigenous Nations and Peoples of the Western Hemisphere*[45] which stated if indigenous peoples, could meet the fundamental requirements of nationhood (permanent population, defined territory, a government, able to enter into relations with other states) or (bonds of language, heritage, tradition, or other common identity), they should be recognized as "nations, and proper subjects of international law". The Declaration also lists indigenous affirmations including the guarantee of their rights; independence; treaties and agreements have international status; abrogation of treaty and other rights; jurisdiction; claims to territory shall not be made on right of discovery; settlement of disputes; national and cultural integrity; environmental protection; and indigenous membership. The right to self-determination was expressed under the article 7:

> Jurisdiction
>
> No States shall assert or claim or exercise any right of jurisdiction over any indigenous nation or group or territory of such indigenous nation or group unless pursuant to a valid treaty or other agreement freely made with the lawful representatives of the indigenous nation or group concerned. All actions on the part of any State which derogate from the indigenous nations' or groups' right to exercise self-determination shall be the proper concern of existing international bodies.[46]

In 1978, the World Conference to Combat Racism and Racial Discrimination was held in Geneva. Indigenous issues were discussed which included the endorsement of indigenous peoples' right to "maintain their traditional structure of economy and culture, including their own language, and also recognized the special relationship of indigenous peoples to their land and

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[45] Reprinted in UN Doc. E/CN.4/Sub.2/476/Add.5, Annex 4 (1981).

[46] *Ibid.* Reprinted also in Anaya, *supra* note 4 at 185.

stressed that their land, land rights and natural resources should not be taken away from them."[47]

Indigenous peoples throughout the 1960's and 1970's have consistently asserted that they, as "peoples", are entitled to exercise the right to self-determination. The international order, during this time still treated indigenous peoples as objects, however, with the *Western Sahara* case, energy sparked indigenous peoples to increase lobby efforts and turn their assertions of subject status into realities. Riding on the wave of the United Nations "eliminate discrimination/protect human rights" platform, indigenous issues received attention in studies and reviews,[48] reports and conferences. While indigenous peoples efforts to gain subject recognition in the international order occurred mainly outside the international system since the turn of the 20th century, active participation in the international fora through non-governmental organizations, and the Working Group on Indigenous Peoples during the 1980's and 1990's has set the foundation for future conventions and treaties on the rights of indigenous peoples at international law, including the realization of the right of indigenous self-determination.

**1980's**

The right to self-determination,[49] as indigenous peoples argue and assert, is the legal,

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[47] R. Barsh, "Current Developments: Indigenous Peoples: An Emerging Object of International Law" 80 Am. J. Int. L., 369 at 371 [hereinafter "Current Developments"].

[48] Studies that supported the view that the principle of self-determination was now a right recognizable at international law attributed to 'peoples' include: Aureliu Cristescu, Spec. Rapp., *The historical and current development of the right of self-determination on the basis of the Charter of the United Nations and other instruments adopted by United Nations organs, with particular reference to the promotion and protection of human rights and fundamental freedom* (8 July 1976) E/CN.4/Sub.2. L.641 at 4; *The Right to Self-determination Implementation of United Nations Resolutions* (New York: United Nations, 1980) E/CN.4/Sub.2/405/Rev.1; and F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities* (New York: United Nations 1979) E/CN.4/Sub.2/384/Rev. iii.

[49] Anaya describes this fundamental principle in relation to indigenous peoples:

> ...self-determination is widely acknowledged to be a principle of customary international law and even *jus cogens*, a peremptory norm...the concept underlying the term entails a certain nexus of widely values...self-determination is identified as a universe of human rights precepts concerned broadly, with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies...The concept of self-determination derives from

moral and just basis from which to launch challenges to state territorial sovereignty and nationality that deny their subject status in international fora; that have unjustly dispossessed indigenous peoples from their homelands; and that have allowed the seeds of colonialism to flourish and grow to either erase indigenous peoples or assimilate indigenous peoples' cultural identities into the state.

In Canada, indigenous peoples were defined by the state as 'aboriginal peoples' and received constitutional protection of this domestic status. Constitutional recognition was also afforded to existing aboriginal rights and treaty rights.[50] The Canadian Constitution does not

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> philosophical affirmation of the human drive to translate aspiration into reality, coupled with postulates of inherent human equality...In its most prominent modern manifestations within the international system, self-determination has promoted the demise of colonial institutions of government and the emergence of a new political order for subject peoples...In each of these contexts, values linked with self-determination comprised a standard of legitimacy against which institutions of government were measured. Self-determination was not separate from other human right norms; rather self-determination is a configurative principle or framework complemented by the more specific human right norms that in their totality enjoin the governing institutional order.

Anaya, *supra* note 4 at 75-77.

[50] S.35 of the *Constitution Act, 1982* states that aboriginal peoples include Indians, Metis and Inuit. Canada did not officially recognize indigenous peoples' right to self-determination until 1996. Canada's position in 1989 was that although it had recognized 'aboriginal peoples of Canada" in its constitution, Canada has never intended "peoples" to have international status so as benefit from the 'rights of people' at international law. International Labour Office, *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No.107)*, Report VI(2A), Geneva, 1989, at 9. See Grand Council of the Crees (of Quebec), *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska: Eeyou Astchee, 1995) at 13, fn.35. Since 1989, Canada's position has been to recognize a singular term for indigenous peoples, so as to be consistent where Canada's non-recognition of the right to self-determination. See "From Object to Subject", *supra* note 2 at 49, 54. Canada at this time posited that indigenous peoples can negotiate their relationships with states and determine jurisdictional arrangements through which they exercise control over their internal/ own affairs with the cooperation of states. See G. Alfredsson, "The Right of Self-Determination and Indigenous Peoples", in Tomuschat, *supra* note 25 at 44. Sanders attributes Canada's problems with recognizing the right to self-determination of indigenous peoples to Quebec nationalism and dating as far back as 1972. Canada would not entertain indigenous peoples' assertions of sovereignty or self-determination, but only domestic self-government of 'first nations' rather than 'peoples'. By 1992, Canada's position on indigenous peoples' right to self-determination was accepted so long as it was "exercised (a) within a framework of existing nation-States, and (b) in a manner which recognized an interrelationship between the jurisdiction of the existing State and that of indigenous communities, where the parametres of jurisdiction were mutually agreed upon. "Self-determination and Indigenous Peoples" in Tomuschat, *supra* note 25 at 76-77. By 1996, Canada officially recognized indigenous peoples' 'internal right to self-determination in its statement at the Second Session of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, E/CN.4/1996/WG.15/CRP.7. Chairperson-Rapporteur, Mr. Jose Urrutia reported the representative of the Government of Canada statement to the Working Group:

> ... Canada accepts a right to self-determination for indigenous peoples which respects the political,

explicitly recognize the Ned'u'ten as a people at international law with international rights and powers. Since the Ned'u'ten did not have subject status at international law, their rights to self-determination would be domesticized and not absolute. Any modern treaties created in Canada are to be constitutionally protected under this provision. Such protection is domestic, however, and requires aboriginal peoples to basically extinguish their continued pre-contact rights to land and governance over their traditional territories in exchange for defined or ascertained rights deduced in a modern treaty.

In the 1970's, a special rapporteur was authorized by the United Nations Economic and Social Council (ECOSOC) and under direction of the Sub-Commission on the Preventions of Discrimination and the Protection of Minorities to conduct a study on indigenous populations, their social conditions, to see if they experienced discrimination, to identify who are indigenous peoples, etc.[51] The study was to form the basis from which recommendations could be made to

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> constitutional and territorial integrity of democratic States and that it supported provisions in the draft declaration on the implementation of this right. With respect to article 31, he stated that Canada interprets a right to self-determination in internal and local affairs as a right of indigenous peoples to govern themselves and accepts the proposed range of matters over which self-government should extend. He pointed out that Canada is prepared to recognize a role for the State, together with indigenous peoples, in financing the implementation of self-government.

See also Grand Council of the Crees, *Never without consent: James Bay Crees' Stand Against Forcible Inclusion into an Independent Quebec* (Toronto: ECW Press, 1998) at 42 where the Cree highlight Canada's position on the right to self-determination:

> ...the question of self-determination is central to the [draft *United Nations Declaration on the Rights of Indigenous Peoples*]. It is a right which is fundamental to the international community...As a state party to the UN Charter and the Covenants, Canada is therefore legally and morally committed to the observance and protection of this right. We recognize that this right applies equally to all collectivities, indigenous and non-Indigenous, which qualify as peoples under international law.

Cited from "Statements of the Canadian Delegation," Commission on Human Rights, 53rd Sess., Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 Mar. 1995, 2nd Sess., Geneva (31 October, 1996).

[51] NOTE: this is not the first time that the General Assembly through resolution authorized the Sub-Commission for the Prevention of Discrimination and the Protection of Minorities to conduct studies on Indigenous Peoples. Due to state opposition, the 1949 UN Res. 275(111) which proposed to study indigenous peoples was never conducted. For discussion of UN Res. 275(111), see Erica-Irene Daes, "A Concise Overview of the United Nations System's Activities Regarding Indigenous Peoples" U.N. Doc. HR/Whitehorse/1996/Sem/2. 7 March 1996 [hereinafter "A Concise Overview"].

the United Nations regarding the elimination of any discrimination that was identified in the Report. The study was completed in 1984 and was available to the public by 1987.[52]

The ILO revisited its 1957 Convention 107 regarding indigenous peoples rights in the 1980's due to increase dissatisfaction by indigenous organizations that rejected its integrationist goals and the failure of colonizing states to assimilate indigenous peoples into mainstream society. Committed to the increased control of indigenous peoples over their economic, social and cultural developments, reports were submitted to the 75th and 76th Sessions of the ILO's International Labour Conferences in 1988/89 for the partial revisions of the *Indigenous and Tribal Populations Convention, 1957 (No. 107).* By 1989, *Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*[53] was completed by the ILO and formally adopted in 1991 and stands to date as the only instrument that evidences positive international law and customary international law on indigenous rights.[54] Canada has not signed

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[52] This study describes "indigenous peoples" as:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

See UN Subcommission on Prevention of Discrimination and Protection of Minorities Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1986/7/Add. 4, para. 379 (1986). NOTE: indigenous peoples are considered to have different 'object' status than minorities at international law. At the time the Cobo study was completed, the Sub-commission on the Prevention of Discrimination and Protection of Minorities, authorized a study to be conducted on the definition of minorities at international law. See *Promotion, Protection and Restoration of Human Rights at the National, Regional and International Level Prevention of Discrimination and Protection of Minorities, Proposal concerning a definition of the term "minority"* UN Doc. E/CN.4/Sub.2/1985/31 and Corr.1.

[53] *International Labour Organisation Convention on Indigenous Populations No, 169 of 27 June 1989.* Reprinted in ILO, Provisional Record, International Labour Conference, 76th Sess., No. 25; (1989) 28 I.L.M. 1382; Anaya, *supra* note 4 at 193.

[54] ILO Convention 169 recognizes indigenous rights in the areas of respecting indigenous protocols; land; recruitment and conditions of employment; social security and health; education and means of communication; contracts and co-operation across borders; administration, etc.

this Convention. Retracting previous standards of assimilation that shaped I.L.O. Convention 107, this Convention tried to reflect indigenous views of controlling their lives but within the confines of the colonizing state. The general policy provisions of the I.L.O. Convention 169 recognizes indigenous peoples as "peoples", but not as subjects at international law to benefit from the right of self-determination.[55]

Even though the growth of indigenous participation in the international fora during the 1980's was increasing, indigenous peoples did not fully participate[56] in the drafting of Convention 169. For these reasons there are provisions that can negatively affect indigenous peoples. Dalee Sambo Dorough encourages that some provisions may be helpful for those indigenous peoples living in colonizing states that have ratified the ILO treaty as well as those indigenous peoples who live in states such as Canada who have not ratified the convention:

> For those of you are interested, I would really urge that First Nations peoples review the text of ILO Convention 169 and consider how it might be helpful to their communities. There is some opposition to ILO Convention 169 and there are some people who have stated that it is the "language of assimilation." But if you look at some of the provisions in context, it can be used by Indigenous peoples, and not only those indigenous peoples who are within a state which has ratified ILO Convention 169. The Convention has now come into force, having been ratified by ten states, but clearly it hasn't been ratified. The reason I say that it still can be used by indigenous peoples is that as an international treaty, and despite non-ratification, it is customary international law. It has begun to impact state behaviour. For those indigenous peoples who live in states that have ratified the convention it creates legally binding obligations for signatory states. But it can also be used by indigenous peoples who would like to invoke the standards as customary international law. That's an important fact to be aware of. The convention established human rights standards that are now being invoked by indigenous peoples. For example, the most recent petition that has been filed with the Organization of American States (OAS) Inter-American Human Rights Commission invoking the ILO Convention 169 and also the United Nations Draft Declaration on the Rights

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[55] I.L.O. Convention 169 states:

> Art.1
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> ...
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> 3. The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

*Ibid.*

[56] The Cree did participate in the making of ILO Convention 169. Dr. Ted Moses, Cree Ambassador to the United Nations, has stated that the Cree "took a very active role in the consultations and negotiations, and were participants in the final meeting in Geneva that approved this convention." T. Moses, "The Use of International Fora To Promote Our Rights" (22 January 1998), Speech to Le Conseil des Relations Internationales de Montreal.

of Indigenous Peoples.[57]

Some indigenous peoples in Canada are currently lobbying Canada to ratify this convention.

At the same time the Cobo study was being conducted by the special rapporteur, the Sub-Commission of ECOSOC established the Working Group on Indigenous Populations ("W.G.I.P.") in 1982.[58] The W.G.I.P.'s general purpose was to set standards regarding rights of indigenous peoples in the international fora. The W.G.I.P. was mandated to 1) review developments in all areas regarding the promotion and protection of the human rights and fundamental freedoms of indigenous populations, analyze materials gathered in review, and make conclusions; and 2) pay attention to evolution of standards concerning the rights of indigenous populations worldwide.[59] Since 1982, the W.G.I.P. has conducted fourteen sessions where it received materials and presentations by indigenous peoples, drafted principles for the Draft Declaration on the Rights of Indigenous Peoples, and submitted the *United Nations Draft Declaration on the Rights of Indigenous Peoples*[60] to the Sub-Commission in 1993. The Draft Declaration was adopted in 1994 by the Sub-Commission. It has to work its way through the United Nations protocols for resolution setting by the General Assembly. The W.G.I.P. recommended to the Sub-Commission that the Draft Declaration be reviewed by the Commission on Human Rights. An inter-sessional working group was created to "elaborate" on the principles

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[57] See presentation by Dalee Sambo Dorough in the Proceedings of "Making Peace and Sharing Power: A National Gathering on Aboriginal Peoples & Dispute Resolution" (April 30-May 3 1996) at 238. This conference was organized by the University of Victoria, Institute for Dispute Resolution.

[58] The recommendation to establish a working group on indigenous populations was called for at the second international NGO meeting in 1981 in Geneva where the purpose of the working group was to gather knowledge regarding indigenous peoples complaints and demands. See "Current Developments", *supra* note 47 at 372.

[59] ECOSOC Resolution 2 (XXXIV) 1982/34 of 7 May 1982.

[60] U.N. Doc. E/CN.4/Sub.2/1993/29.

and standards set out in the Draft Declaration. The revision of the Draft Declaration is still at this stage and is hoped to be completed by 2004, which marks the end of the international decade for indigenous peoples. Once revised, the Draft Declaration will be submitted to the Commission on Human Rights and then to organs of the United Nations such as the General Assembly.[61]

The Draft Declaration states that indigenous peoples have the right to self-determination:

> **Article 3**
> **Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.**[62]

Anaya states that both the ILO Convention 169 and the Draft Declaration evidence a new common ground of opinion by experts regarding indigenous peoples and their relationship to respective colonizing states:

> The draft UN Declaration goes beyond Convention No. 169, especially in its bold statements in areas of indigenous self-determination, land and resource rights, and rights of political autonomy. It is clear that not *all* are satisfied with *all* aspects of the draft declaration developed by the subcommission working group. Some indigenous peoples' representatives have criticized the draft for not going far enough, while governments typically have held that it goes to far. Nonetheless, a new common ground of opinion exists among experts, indigenous peoples, and governments about indigenous peoples' rights and attendant standards of government behaviour, and that widening common ground is in some measure reflected in the sub-commission draft.[63]

**1990's**

Since 1989, indigenous peoples have been successful in their efforts to get on

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[61] Special Rapporteur and Chairperson for the Working Group in Indigenous Peoples, Erica-Irene Daes, has reported on the efforts of the Working Group. See Erica-Irene A. Daes, "The Right of Indigenous Peoples to Self-Determination in the Contemporary World Order", in D. Clark and R. Williamson, eds., *Self-Determination: International Perspectives* (London: MacMillan Press, 1996) at 47; "Some Considerations on the Right of Indigenous Peoples to Self-Determination", (1993) 3 Transnational Law and Contemporary Problems, 1; "A Concise Overview", *supra* note 51; and "Equality of Indigenous Peoples Under the Auspices of the United Nations -- The Draft Declaration on the Rights of Indigenous Peoples" (1995) 7 St. Thomas L. R. 493.

[62] U.N. Doc. E/CN.4/1995/2, E/CN.4/Sub.2/1994/56, at 105 (1994).

[63] Anaya, *supra* note 4 at 53.

international agenda's concerning rights they assert. In their respective collective endeavors to set the foundation down for the implementation of the right to self-determination, one can look to the latest developments by indigenous peoples in the international fora: indigenous peoples and governments have participated in proposing similar indigenous rights instruments like the Draft Declaration;[64] commissions were set up regarding indigenous affairs;[65] funds were established to meet the development needs of indigenous peoples as well as to increase participation by indigenous peoples in developing the draft declaration; the World Bank's policies regarding the projects they fund reflect sensitivity to impacts on indigenous peoples;[66] indigenous peoples rights are reflected in environmental declarations and policy statements;[67] studies are being conducted on the types of agreements that can be made between indigenous peoples and the colonizing states as well as measure to that could be taken to strengthen respect for the cultural and intellectual property of indigenous peoples;[68] as well as specific conferences and Seminars

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[64] See *The Inter-American Draft Declaration on the Rights of Indigenous Peoples* proposal: AG/RES. 1022 (XIX-0/89); *Annual Report of the Inter-American Commission on Human Rights, 1988-89*, OAS, Doc. OEA/Ser.L./V/II.83, Doc. 14, corr.1 (1993); and approval by Inter-American Commission on Human Rights in 1995: OAS Doc OEA/Ser/L/V/II.90, Doc.9 rev. 1 (1995) where, the right to self-determination is asserted but only within the context of internal and local affairs.

[65] Anaya notes that in 1989 the state parties to the Amazonian Cooperation Treaty agreed to establish a Special Commission on Indigenous Affairs with the objective of ensuring the effective participation by each Amazonian Country's indigenous populations in all phases of the characterization of indigenous affairs, especially in regard to development programs. Anaya, *supra* note 4 at 54.

[66] See the International Bank for Reconstruction and Development's Operational Directive 4.20. This Directive applies universally to all state members that the World Bank makes loans to and is used as a guide for staff receiving state loan applications for the purposes of development. States that receive loans from this global institutional organization must comply with the objectives of the Directive that seek to ensure development occurs without adverse effects for indigenous peoples' rights and with indigenous peoples' informed participation.

[67] See Rio Declaration and Agenda 21, UN Conference on Environment and Development, Rio de Janeiro, June 13, 1992, UN Doc. A/CONF.151/26 (1992); see also Conventions on Biological Diversity (1992) 31 ILM 818 and United Nations Framework Convention on Climate Change (1992) 31 ILM 849; Indigenous Peoples Earth Charter, E/CN.4/Sub.2/AC.4/1994/12; Daes, E., Spec. Rapp., *Human Rights of Indigenous Peoples: Indigenous people and their relationship to land* ECOSOC, CHR E/CN/Sub.2/1997/17, (20 June 1997).

[68] In 1989, ECOSOC appointed Miguel Alfonso-Martinez to conduct a study on this topic. To date three progress reports have been submitted by Martinez which include case studies in various regions of the world. See United Nations (ECOSOC), Commission on Human Rights, Sub-Commission on Prevention of Discrimination and

or United Nations Expert Meetings were held on self-government, sustainable development, population and indigenous land rights;[69] discussions have taken place around establishing a Permanent Forum;[70] and declarations that evidence concerns for indigenous rights at international law.[71] As the Draft Declaration is being reviewed by the Inter-sessional Working Group of the

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Protection of Minorities), *Study on treaties, agreements and other constructive arrangements between states and indigenous populations, First Progress Report* (Miguel Alfonso-Martinez, Special Rapporteur), E/CN.4/Sub.2/1992/31; *Study on treaties, agreements and other constructive arrangements between states and indigenous populations, Second Progress Report* (Miguel Alfonso-Martinez, Special Rapporteur), E/CN.4/Sub.2/1995/27; *Study on treaties, agreements and other constructive arrangements between states and indigenous populations, Third Progress Report* (Miguel Alfonso-Martinez, Special Rapporteur), UN Doc. E/CN.4/Sub.2/1996/23 and *Study of treaties, agreements and other constructive arrangements between states and indigenous populations, Final Report* (Miguel Alfonso-Martinez, Special Rapporteur, UN Doc. E/CN.4/Sub.2/AC.4/1998/CRP.1. It should be noted that Canada viewed this study as a direct attack on its national interests and tried to block the Commission on Human Rights from approving the study. See "From Object to Subject",*supra* note 2 at 77, fn 206. See Study on protection of the heritage of indigenous peoples, E/CN.4/Sub.2/1993/28. Such studies are usually followed by draft principles and guidelines which are submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[69] See *Advisory Services in the Field of Human Rights: Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations Between Indigenous Peoples and States*, U.N. ESCOR, Comm'n on Human Rts., 45th Sess., U.N. Doc. E/CN.4/1989/22 (1989), a report of the 1989 meeting regarding the combat of racism and racial discrimination. In 1991, a conference was held on indigenous self-government in Nuuk, Greenland where indigenous peoples articulated the right to internal self-government was part of the right to self-determination as well as the right to autonomy and the right to self-identification. See *Report of the Meeting of Experts to Review the Experience of Countries in the Operation of Schemes of Internal Self-Government for Indigenous Peoples*, Nuuk, Greenland, E/CN.4/1992/42. See also *Report of the United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmental Sound Self-Development of Indigenous Peoples, Santiago, Chile*, E/CN.4/Sub.2/1992/31; UN Conference on Population and Development, Cairo, 5-13 September, 1994 (ST/ESA/SER.A/149 1995) and *Report of the Expert Seminar on Practical Experience Regarding Indigenous land Rights and Claims, Whitehorse* (1996), E/CN.4/Sub.2/AC.4/1996/6.

[70] In 1993, a recommendation was made by indigenous peoples at the World Conference on Human Rights for the General Assembly to consider the establishment of a permanent forum for indigenous people in the United Nations system. In 1995, the General Assembly considered the "permanent forum" recommendation and discussed the following issues: the scope of the permanent forum; the United Nations body to which the proposed forum would report, the mandate and terms of reference; the activities it might undertake; membership; and indigenous participation; the relationship with the Working Group on Indigenous Populations; and financial and secretariat implications. See High Commissioner/Centre for Human Rights, UN, "The Rights of Indigenous Peoples" Human Rights Fact Sheet No. 9. GE.97-16799-July 1997-14,285. The establishment of a Permanent Forum would provide a space in the United Nations hierarchy for indigenous peoples to continue their efforts to become subjects of international law. See "From Object to Subject", *supra* note 2 at 70.

[71] Vienna Declaration and Program for Action, Report of the World Conference on Human Rights, A/Conf. 157/23 (1993) 25 June 1993; the Helsinki Document - The Challenges of Change, July 10, 1992 in UN GAOR, 47th Sess., UN Doc. A/47/361 (1992). See also Resolution on Action Required Internally to Provide Effective Protection for Indigenous Peoples, European Parliament, Doc. (PV 58) 2, (1994) at 3.

Commission on Human Rights, the debate on the application of the right to self-determination to indigenous peoples assertions is on-going, including debates over frameworks for self-determination.

This historical accounting of the right to self-determination is important for contextualizing the right from an indigenous perspective. It provides a road map to reach current self-determination standpoints and why indigenous peoples assert decolonization. We now examine contemporary debates surrounding right to self-determination.

**C. Frameworks For Implementing The Right To Self-Determination**

> When we distinguish between nationhood and self-government, we speak of two different positions in the world. Nationhood implies a process of decision making that is free and uninhabited within the community, a community in fact that is almost completely insulated from external factors as it considers its possible options. Self-government, on the other hand, implies a recognition by the superior political power that some measure of local decision making is necessary but that this process must be monitored very carefully so that its products are compatible with the goals and policies of the larger political power. Self-government implies that people were previously incapable of making any decisions for themselves and are now ready to assume some, but not all, of the responsibilities of a municipality. Under self-government, however, the larger moral issues that affect a peoples' relationship with other people are presumed to be included within the responsibilities of the larger nation. It should be self-evident why the term sovereignty (and nationhood) is the political reference of many First Nations and other Aboriginal people. As most First Nations reject the notion of municipal style governments as insufficient, the language of self-determination is preferred.[72]

As the new millennium will see conventions and treaties on the rights of indigenous peoples, approaches to implementing the right to self-determination through state-peoples agreements are currently being formulated by indigenous peoples. If indigenous peoples want to consent to a treaty with the colonizing state, what form of political status will they assert?

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[72] RCAP, *The Familiar Face of Colonial Oppression: An Examination of Canadian Law and Judicial Decision Making* (Research Report) by P. Monture-Angus (Ottawa: Supply and Services Canada, 1994) at chapter one.

Statehood? Free Association with an independent state? Integration with an independent state? New conceptualizations of political entities (independent and sovereign) as determined by the people?[73] Frameworks for self-determination can answer these questions.

This chapter concentrates on two frameworks: the internal/external framework and the substantive/remedial framework. The internal/external framework provides an example of how the right to self-determination could be implemented. This approach to conceptualizing the right to self-determination, is more in line with how states and scholarly writings have formulated the scope and content of the right to self-determination in the decolonizing context. The James Bay Cree have used the internal/external framework to evidence their right to self-determination. Some indigenous peoples, however, have also formulated their understanding of the right to self-determination. Anaya has authored the substantive/remedial framework as an appropriate way to understand self-determination and to restore the subject status of indigenous peoples.

**1. Internal/external framework**

Protecting the territorial integrity of the state

The right to self-determination, at its heart, is a universal human right, that fosters peoples through their expressed will, to determine their destiny as subjects at international law. This may include restoration of their rights sovereign equality and the exercise of autonomy over their traditional territories. The exercise of the right to self-determination by indigenous peoples is to be recognized by states acting 'internally' in compliance with the principle of equal rights

[73] The options available to indigenous peoples to determine their own political status in the colonizing context should include those referred to in G.A. Resolution 2625. Anaya, however, posits that the colonization context is too limiting. He criticizes the decolonization model of Resolution 2625 because it is grounded in western statehood concepts, serves only remedial self-determination and not substantive self-determination, but mainly because Resolution 2625 focuses on the colonial territorial unit and 'by-passes spheres of community or tribal/ethnic groupings' such as clan systems and where decolonization would take place at the preference of the colonizing state. Anaya, *supra* note 4 at 77-88. Anaya's critique of limiting aspirations of self-determination to the colonization context will be discussed below in the substantive/remedial framework of self-determination.

and self-determination and without discrimination. Non-compliance with such standards by states would afford peoples remedies, including, recognition of rights that attach to 'external' self-determination, such as the right to secede. For example, if human rights are violated by states in which peoples have rights, then international law holds that peoples should be entitled to redress these violations with available options to determine their political status without foreign interference.

Allan Ross sets out a continuum of the internal/external elements[74] of self-determination where the first three situations may be seen as 'external' self-determination and the fourth and fifth situations may be seen as 'internal' self-determination:

> 1) The right of a people of an existing State to determine freely their status without *outside* interference;
> 2) The right of a people which has been subjugated to *foreign* occupation or domination to free itself from this occupation or domination;
> 3) The right of a people, including a colonial people, to *secede* from a State and set up their own State or join another State;
> 4) The right of a people to determine its *constitution* (*pouvoir constituent*), including an autonomous status within the confines of a bigger State;
> 5) The right of a people to *govern*, that is, to have a democratic system of government.[75]

Some authors have characterized the internal right to self-determination as a 'federal right' for peoples within an existing state. It is a right for peoples in existing states to ensure that they are substantially represented by the state and enjoy participatory rights in governmental affairs. It is a right that includes peoples in states to determine internally their own democratic representative governments. This requires constitutional restructuring of the State. So self-determination reads

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[74] NOTE: there has been other articulations of the internal/external elements of self-determination. See Tomuschat, *supra* note 25.

[75] "Internal Self-Determination", in Tomuschat, *supra* note 25 at 230. The object status of indigenous peoples during the 1990's does not afford indigenous peoples the right to 'external' self-determination as set out above (1-3). Rather, indigenous peoples such as my people would be limited to 'internal' self-determination as dictated by Canada.

as self-government[76] or national reconciliation[77]. The Supreme Court of Canada has recently held that the right to self-determination of peoples in Canada is indeed internal.

In the *Secession Reference*, the Supreme Court of Canada pronounced its interpretation of the right to self-determination and whether this right at international law could give Quebec the authority to unilaterally secede from Canada. The Court acknowledged that the right to secession can arise under the right to self-determination in exceptional circumstances, such as the situation where a people are oppressed and colonized. The Court then goes on to cite numerous international treaties and conventions that evidence the right to self-determination at international law.[78] The Court endorses the state formulation of the right to self-determination, including its internal and external components.[79]

The Court did not find it necessary to determine whether Quebec, nor indigenous peoples constituted a "people" for the purposes of the right to self-determination. Rather, it placed emphasis on the discussion of the scope of the right to self-determination in order to reach the conclusion that the right of self-determination could not ground a right to unilateral secession in

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[76] Barsh predicts that a "government hijacking of the Draft Declaration probably would result in a text that equates self-determination with self-government, or does not refer to self-determination at all." See "From Objects to Subjects", *supra* note 2 at 76. Canada has recognizes the "inherent right to self-government" of aboriginal peoples, however, the scope of self-government is confined to Canada and this kind of autonomous entity has no international status.

[77] *Ibid.* at 41. It could be argued that Canada's endorsement of self-government of aboriginal peoples is closer to Australia equating self-determination to national reconciliation.

[78] The Court refers to some sources of the right to self-determination in the following international instruments: the *UN Charter*; the *International Covenant on Civil and Political Rights*; the *International Covenant on Economic, Social and Cultural Rights*; the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*; the *Vienna Declaration and Programme of Action*; and the *Final Act of the Conference on Security and Co-operation in Europe.* See *Secession* Reference, *supra* note 5 at paras. 113-121.

[79] "...international law expects that the right to self-determination will be exercised by peoples within the framework of existing sovereign states and consistently with the maintenance of the territorial integrity of those states. Where this is not possible, in exceptional circumstances...a right of secession may arise." *Ibid.* at para. 122.

the context of Quebec.

The Court describes the scope of the right as follows:

> The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination -- a people's pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.[80]

The Court accepts the internal/external framework for the right to self-determination without question or debate. The Court placed the reconciliation of state rights and peoples rights[81] firmly in the framework of protecting its territorial integrity as a state.[82] This is consistent with state formulations of the right, and state interpretations of international decolonizing instruments from the 1960's. The right to self-determination is therefore not absolute and state formulations do not find a balance of protecting a "peoples" right to self-determination with equal fortitude.

According to the Supreme Court of Canada, the "external" right of self-determination

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[80] *Ibid.* at para. 126. The Court accepts the *Declaration on Friendly Relations'* prescription of what external self-determination would look like: a sovereign or independent state; the free association or integration with an independent state; the emergence into any other political status freely determined by people asserting the external right to self-determination.

[81] The competition between state rights and peoples rights may never be equalized, for in the Courts' view, this would lead to duplication:

> It is clear that "a people" may include only a portion of the population of an existing state. The right to self-determination has developed largely as a human right, and is generally used in documents that simultaneously contain references to "nation" and "state." The juxtaposition of these terms is indicative that the reference to "people" does not necessarily mean the entirety of a state's population. To restrict the definition of the term to the population of existing states would render the granting of a right to self-determination largely duplicative, given the parallel emphasis within the majority of the source documents on the need to protect the territorial integrity of existing states, and would frustrate its remedial purpose.

*Ibid.* at para. 124. Recall this debate by scholars, *supra* note 33.

[82] The Court states::

> The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a peoples' right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.

*Ibid.* at para. 127.

must first be determined domestically by the state:

> Accordingly, the reference in the *Helsinki Final Act* to a people determining its external political status is interpreted to mean the expression of a people's external political status through the government of the existing state, save in the exceptional circumstances discussed below...given the history and textual structure of this document, its reference to external self-determination simply means that "no territorial or other change can be brought about by the central authorities of a State that is contrary to the will of the whole people of that State."

There is no consideration by the Court for international scrutiny or supervision of a people exercising their external right to self-determination.

While indigenous peoples could argue that this is an unbalanced reconciliation of protecting state rights and people rights, the Court states that such rights are not necessarily incompatible:

> While the *International Covenant on Economic, Social and Cultural Rights, supra*, and the *International Covenant on Civil and Political Rights, supra*, do not specifically refer to the protection of territorial integrity, they both define the ambit of the right to self-determination in terms that are normally attainable within the framework of an existing state. There is no necessary incompatibility between the maintenance of the territorial integrity of existing states, including Canada, and the right of a "people" to achieve a full measure of self-determination. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its own internal arrangements, is entitled to the protection under international law of its territorial integrity.[83]

Now that the Court has firmly entrenched the territorial integrity shield against the self-determining aspirations of prospective peoples, it turns its attention to *who* can exercise an external right to self-determination.

The Court sees the application of the external right to self-determination arising in two, possibly, three situations where a people's exercise of the right to self-determination is totally frustrated: 1) where a people in the state are a "colonized people"[84]; 2) where a people within a

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[83] *Ibid.* at para. 130.

[84] The Court accepts scholarly authority that where a people are under colonial rule, they could secede and restore their independence. It would have to be shown that their 'territorial integrity' was all but destroyed by a colonialist or occupying power. *Ibid.* at para. 131.

state are an "oppressed people";[85] and 3) when a people are blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.[86] The Court concedes that in such circumstances, the "breaking away from the "imperial" power is now undisputed, but is irrelevant to this Reference."

The Court summarizes its position on the scope of the right to self-determination as follows:

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination. Such exceptional circumstances are manifestly inapplicable to Quebec under existing conditions. Accordingly, neither the population of the province of Quebec, even if characterized in terms of "people" or "peoples", nor its representative institutions, the National Assembly, the legislature or government of Quebec, possess a right, under international law, to secede unilaterally from Canada.[87]

Since the Court did not find that there is Canadian or international authority for a unilateral secession of Quebec from Canada, it did not find it necessary to address indigenous peoples concerns in this reference, and in particular regarding the right to self-determination.[88] The Courts' acceptance of the internal/external framework is not juxtaposed against indigenous formulations of the right to self-determination. It is questionable whether the same consistency in interpreting the right to self-determination could be met when indigenous peoples, who are both colonized and oppressed, are asserting an external right to self-determination, including

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[85] The Courts accepts that a right to secede will accrue where a people are subject to alien subjugation, domination or exploitation outside a colonial context. *Ibid.* at para. 133.

[86] *Ibid.* at para.134.

[87] *Ibid.* at para. 138.

[88] Analysis of this implication for indigenous peoples such as the Cree will be discussed in chapter 4.

secession and such an issue is before the Court.

According to the internal/external framework, the Ned'u'ten, who are people, could exercise internal self-determination. In Canada, the right to self-government is tantamount to internal self-determination. Any treaty that codifies such internal autonomy is domestic and *sui generis*. It is not international. The Ned'u'ten would have to respect the territorial integrity of Canada. At the same time, Canada would have to treat the Ned'u'ten without discrimination and would have to ensure that the Ned'u'ten are represented in the governing institutions and political life of Canada. A violation of these requirements by Canada or where the Ned'u'ten continue to be colonized and oppressed in whatever form, would trigger the Ned'u'tens' external right to self-determination. Indigenous peoples such as the Ned'u'ten should be aware of how state formulations of the right to self-determination may hinder their goals of decolonization.

Indigenous scholars have critiqued the internal/external framework not only for its practical implications for indigenous peoples, but for its inherent description of the scope and content of the right to self-determination in the indigenous context. Anaya sets out its shortcomings and inappropriateness for indigenous assertions of the right to self-determination:

> The internal/external dichotomy views self-determination as having two discrete domains: one having to do with matters entirely internal to a people (such as rights and political participation) and the other having to do exclusively with a people's status or dealings vis-a-vis other peoples (such as freedom from alien rule). The internal/external dichotomy effectively is premised on the conception, rejected earlier, of a limited universe of "peoples" comprising mutually exclusive spheres of community (ie. states). Given the reality of multiple human associational patterns in today's world, including but not exclusively those organized around the state, it is distorting to attempt to organize self-determination precepts into discrete internal vs. external spheres defined by reference to presumptively mutually exclusive peoples.[89]

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[89] Anaya, *supra* note 4 at 81. Barsh also finds limiting self-determination to the decolonization context does not help desensitize states to indigenous peoples' who do not seek to secede from the state so as to exercise their respective rights to self-determination:

> While "the application of the right to self-determination in the strict decolonization context is coming to an end," the world requires a new and more "dynamic" version that recognizes "the continuing right of all peoples and individuals within each nation state to participate fully in the political process by which they are governed.

"From Object to Subject", *supra* note 2 at 42.

The Ned'u'ten political ordering is not state-like. It would indeed be a presumption to conceptualize relationships with neighbouring peoples as only state-like.

Anaya also takes issue with the internal/external dichotomy of self-determination because it places too much emphasis on equating the right with the decolonizing regime. Further, he finds the remedies or prescriptions available under this regime inappropriate in contemporary times as it does not reflect non-western forms of independence or political ordering:

> Given its prominence in the international practice of self-determination, decolonization indeed provides a point of reference for understanding the scope and content of self-determination. As already indicated, however, it is a mistake to equate self-determination with the decolonisation regime, which has entailed a limited category of subjects, prescriptions, and procedures. Decolonization prescriptions do not themselves embody the *substance* of the principle of self-determination; rather, they correspond with measures to *remedy* a sui generis deviation from the principle existing in the prior condition of colonialism in its classical form.[90]

By characterizing decolonization as a means to remedy violations of substantive self-determination, Anaya promotes the position that remedies should reflect the aspirations of the groups concerned and should not be limited to classic colonial remedies such as a) the emergence to a sovereign independent state; b) free association with an independent state; or c) integration with an independent state.[91]

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[90] *Ibid.* at 80.

[91] Anaya does recognize secession as a remedy but not a right:

> To the extent the international community is generally concerned with promoting self-determination precepts, and as it develops and expands its common understanding about those precepts, it may identify contextual deviations from self-determination beyond classical colonialism and promote appropriate remedies in accordance with the aspirations of the groups concerned. With appropriate attentiveness to the particular character of deviant conditions or events, and with an understanding of the interconnected character of virtually all forms of modern human association, these remedies need not entail the formation of new states. Secession, however, may be an appropriate remedial option in limited contexts (as opposed to a generally available "right") where substantive self-determination for a particular group otherwise be assured or where there is a net gain in the overall welfare of all concerned. In most cases in the postcolonial world, however, secession would most likely be a cure worse than the disease from the standpoint of all concerned.

In theory, the internal/external framework for understanding the scope and content of the right to self-determination can be used by indigenous peoples to exercise internal autonomy *within* a state. In theory, this dichotomization of the right to self-determination presumes that principles of sovereignty (territorial integrity and non-interference, and sovereign equality) can be reconciled with indigenous self-determination. In practice, Canada has prevented the indigenous peoples from decolonizing and establishing internal self-determination under the internal/external framework.[92] The successes of this framework may prove fruitful for the Inuit peoples in the newly created territory of Nunavut in Canada. It is much too early to assess whether or not the Inuit peoples right to self-determination will be respected in an on-going manner. The framework is compatible with indigenous peoples that will to adopt western ideas of governance, institutions, laws and democracy, thereby transforming traditional systems of governance.[93]

As Canada continues to hold the position that indigenous peoples are only entitled to "internal" self-determination[94] as prescribed by Canada, Canada continues to treat all indigenous peoples as homogeneous "aboriginal peoples"and applies the same prescriptions for "internal" self-determination for the Crees, Inuit, Salish and Ned'u'ten, etc.

The internal/external framework for self-determination may not be appropriate for all indigenous peoples, especially if such peoples do not intend to integrate into Canada's hegemony of institutions, governance and state. Further, the internal/external framework limits the

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*Ibid.* at 84.

[92] See discussion of the Cree in chapter four.

[93] Indigenous peoples have also included free association, regional autonomy, home rule, associate statehood, assemblies or parliaments as examples of internal self-determination.

[94] See Canada's position, *supra* note 50.

remedies available to indigenous peoples that desire to see non-western forms of autonomy or entities as evidenced by their own systems of governance being restored for today's generations and those to follow. Such an interpretation of the right to self-determination legitimates the state's existence without the state having to justify how it legally became a state.[95] The state can shield itself from challenges to its legitimacy by claiming such challenges violate the UN Charter; the principles of territorial integrity and the non-interference of state sovereignty. While this understanding of the right to self-determination may facilitate some practical objectives of indigenous peoples, I suggest that this interpretation renders the right to self-determination meaningless especially if indigenous peoples challenge a states' illegal acquisition of indigenous territories through doctrines of dispossessions. Indigenous peoples run the risk of legitimating imperialism and colonization at the global level. Further, this framework would render the right to self-determination only enforceable by states, such as Canada. In contemporary times, I suggest that there has been very little development of the right from World War 1 conceptions discussed earlier in this chapter. Peoples such as 'indigenous peoples', who are forced to accept self-determination under these conditions, should have the right to raise an external right to self-determination.

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[95] It has been argued that the legitimacy of the State rests upon 1) respect for human rights; 2) effective participation of all segments of the population in the economic and political decision-making process, and 3) commitments that go beyond mere rule by the numerical majority. See Hannum, *supra* note 2. This articulation of legitimacy may be suitable as standards *after* a state has been properly constituted according to international law. I suggest that processes, methods and means of *how* a state is formed require standards of legitimacy as well. In this respect, I am questioning the legitimacy of settler/colonizing states *before* they are created as subjects of international law. Peoples that assert self-determination as a matter of right premise this assertion on the illegitimacy of the government or the state itself. While indigenous peoples deem settler/colonial states illegitimate, they must convince states of the same. Hannum states:

> The concept of the illegitimate *state* underlies the right to self-determination in its anti-colonial manifestation. Because the governing authority is deemed by the international community to have no right to govern, the territory in question has the right of independence (or to any other status it freely chooses); the issue is not one of autonomy or secession, but of the internal self-determination of an entire nascent state.

*Ibid.* at 469.

## 2. The Substantive/remedial framework

Protecting the territorial integrity of peoples

Anaya has articulated that the theoretical scope and content of the right to self-determination must be expanded to include peoples outside the decolonization regime context. At the same time he argues that self-determination for indigenous peoples means the abandonment of existing conceptualizations of sovereignty, statehood and decolonization processes. He posits that these concepts are out of date given a world where state boundaries mean less and less and are by no means coextensive with all relevant spheres of community.

Anaya states that a decolonization process represents just one arm of the right to self-determination, that being remedial, the other arm of self-determination, being substantive:

> Self-determination precepts comprise a world order standard with which colonialism was at odds and with which other institutions of government also may conflict. The substantive content of the principle of self-determination, therefore, inheres in the precepts by which the international community has held colonialism illegitimate and which apply universally to benefit all human beings individually and collectively. The *substance* of the norm -the precepts that define the standard-must be distinguished from the *remedial* prescriptions that may follow a violation of the norm, such as those developed to undo colonization. In the decolonization context, procedures that resulted in independent statehood were means of discarding alien rule that had been contrary to the enjoyment of self-determination. Remedial prescriptions in other contexts will vary according to the relevant circumstances and need not inevitably result in the formation of new states.
>
> Accordingly, while the substantive elements of self-determination apply broadly to benefit all segments of humanity, self-determination applies more narrowly in its remedial aspect. Remedial prescriptions and mechanisms developed by the international community necessarily only benefit groups that have suffered violations of substantive self-determination.[96]

According to this indigenous formulation of the right to self-determination, the exercise of Ned'u'ten *bah'lats* in conjunction with the Ned'u'ten clan system would be an example of the substantive arm of self-determination. The colonization of the Ned'u'ten by Canada would trigger the remedial arm of self-determination, as through colonization, the Ned'u'ten have been unable to effectively exercise full control, ownership and jurisdiction over their territories, as

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[96] Anaya, *supra* note 4 at 80.

they did less than a hundred years ago. Before determining the whether this framework is appropriate for Ned'u'ten self-determination, a fuller understanding of this model is necessary.

**a. Substantive Self-determination**

Anaya sees the essence of substantive self-determination to be legitimate governmental entities that are subjected to human rights standards both in its constitution and its functioning thereafter. In particular, substantive self-determination is described by Anaya to have two normative strains, *constitutive*[97] and *on-going*[98]. Constitutive self-determination means the creation of a political identity by a people and on-going self-determination is the maintenance of this political status. If the Ned'u'ten were to accept the substantive/remedial framework for self-determination, the constitutive aspect of substantive self-determination would be how the *bah'lats* came to be and the organization of our clan systems. This political ordering reflects the will of the Ned'u'ten to live in this way. The on-going aspect of substantive self-determination

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[97] Anaya describes constitutive self-determination as:

> First, in what may be called its *constitutive* aspect, self-determination requires that the governing institutional order be substantially the creation of processes guided by the will of the people, or peoples, governed. Second, in what may be called its *ongoing* aspect, self-determination requires that the governing institutional order, independently of the processes leading to its creation or alteration, be one under which people may live and develop freely on a continuous basis.
>
> ...
>
> In its constitutive aspect, self-determination comprises a standard that enjoins the occasional or episodic procedures leading to the creation of or change in institutions of government within any given sphere of community. When institutions are born or merged with others, when their constitutions are altered, or when they endeavor to extend the scope of their authority, these phenomena are the domain of constitutive self-determination. Constitutive self-determination does not itself dictate the outcome of such procedures; but where they occur it imposes requirements of participation and consent such that the end result in the political order can be said to reflect the collective will of the people, or peoples concerned.

*Ibid.* at 82.

[98] Anaya describes on-going self-determination as:

> Apart from self-determination's constitutive aspect, which applies to discrete episodes of institutional birth or change, *ongoing* self-determination continuously enjoins the form and functioning of the governing institutional order under which individuals and groups are able to make meaningful choices in matters touching upon all spheres of life on a continuous basis.

*Ibid.*

for the Ned'u'ten would be the continuation of the *bah'lats* and the free adaptability of this political regime to meet the contemporary needs of Ned'u'ten.

**b. Remedial Self-determination**

The decolonization regime has been the traditional remedy available for peoples who have been denied substantive self-determination. As colonialism created a deviation from substantive self-determination (both constitutive and ongoing), prescriptions to decolonize were developed under the UN Charter to remedy this deviation. Anaya understands the remedial aspect of self-determination to be retroactive to address the imposition of colonial regimes over peoples:

> The modern international law of self-determination, however, forges exceptions to or alters the doctrines of effectiveness and intertemporal law. Pursuant to the principle of self-determination, the international community has deemed illegitimate historical patterns giving rise to colonial rule and has promoted corresponding remedial measures, irrespective of the effective control exercised by the colonial power and notwithstanding the law contemporaneous with the historical colonial patterns. Decolonization demonstrates that constitutional processes may be judged retroactively in light of self-determination values-notwithstanding effective control or contemporaneous legal doctrine -where such processes remain relevant to the legitimacy of governmental authority or otherwise manifest themselves in contemporary inequities.[99]

It is questionable whether the internal/external framework would remedy the imposition of colonization over the Ned'u'ten on a retroactive basis. The modern treaty process in British Columbia is based on the understanding that solutions to outstanding claims start from today and are designed for the future relations between bands and the state. It does not remedy contemporary inequities that have deep roots in the past. Anaya's articulation that the remedial arm of self-determination has a retroactive application would be accepted by many indigenous peoples and most likely dismissed by most states.

Examples of governing orders that could remedy the ongoing aspect of self-determination

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[99] *Ibid.* at 83.

denied to colonized peoples (targeted by the United Nations) included independent statehood, free-association with the state, or integration into the state. Where the express will of the peoples to create a governing order was denied by the state, a remedy would be created to address the deviation from the constitutive aspect of self-determination for such peoples. Colonized peoples targeted by the United Nations, to decolonize, could not dismantle the territorial boundaries created by the colonizing state and resurrect pre-colonial boundaries that were originally constituted by diverse peoples. Anaya criticizes the inability of colonized peoples to dismantle imposed state boundaries on their traditional territories:

> In its focus on the colonial territorial unit, this model of decolonization bypassed spheres of community - that is, tribal and ethnic groupings - that existed prior to colonialism; but also largely ignored the ethnic and tribal identities that *continued* to exist and hold meaning in the lives of people. Hence, as to some enclave groups or groups divided by colonial frontiers, decolonization procedures alone may not have allowed for a sufficient range of choice or otherwise may not have constituted a complete remedy. In any event, as far as they went toward the objective of purging colonial territories of alien rule, decolonization procedures adhered to the preferences of living human beings - if only the preferences of the majority voice in the colonial territories.[100]

Under the U.N. decolonization regime, if the Ned'u'ten were slated for decolonization, neither the boundaries of Canada nor British Columbia would change. The legitimacy of these boundaries would not be challenged. The decolonization of the Ned'u'ten would be limited under this regime and state formulations of decolonization would not remedy Ned'u'ten substantive self-determination. Under the substantive/remedial framework, boundaries would restore Ned'u'ten territories.

It remains to be seen how self-determination, where denied, can be remedied outside the U.N. colonial context. If remedial self-determination is understood to be utilized as an off-setting device for presumptions of territorial integrity of existing states that are used to deny

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[100] *Ibid.* at 84.

peoples self-determination or human rights, as Anaya argues, then the effectiveness of the appropriate remedy fashioned to create the off-set will have to be measured carefully in tandem with a peoples attempt to implement or sustain substantive self-determination. In other words, peoples asserting the right to self-determination must understand that in contemporary times, the rights of states and peoples are not on a level playing field and exist in a hierarchical relationship.[101] Whether one articulates self-determination as remedial or substantive, the effect that self-determination will have on state sovereignty presumptions today, will be as Anaya accurately states, a "limited suspension of state sovereignty" against the backdrop of heightened international scrutiny over situations where such rights are denied by states and are not reflective of the express will of the people.

Presumptions of state sovereignty have sanctioned states to treat indigenous peoples as not being targeted for the decolonization regime, and thus indigenous peoples could not decolonize as other peoples have. Although indigenous peoples continue to assert that they are a 'colonized' peoples, and have the right to decolonize, it remains to be seen whether remedies will be apportioned reflecting this colonial status or not.[102] At this point in the history of international law, indigenous peoples' asserted right to self-determination is subjected to a hierarchical

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[101] Indigenous peoples have asserted that the rights of peoples and the rights of states is a racist distinction:

> An interpretation of the right to self-determination that encourages democratic development and discourages territorial disruption might obtain the support of a majority of states and meet the practical objectives of most indigenous peoples. Such an interpretation, however, would perpetuate the distinction between the rights of indigenous peoples and the rights of other peoples- a distinction which indigenous leaders have long condemned as racist.

"From Object to Subject", *supra* note 2 at 36. So in other words, Canadian peoples' rights are positioned hierarchically to the rights of the Ned'u'ten. Even though the Ned'u'ten have never been conquered by force, Canada has, through "a might is right" interpretation of sovereignty, been able to assert 'state rights' that are to be reconciled with ned'u'ten rights. The ned'u'ten are precluded from challenging the legitimacy of how Canada acquired it rights as a state, both at the national level and internationally.

[102] Anaya states that human rights norms and standards at international law provide indigenous peoples with a remedial regime (outside classic colonial structures) to address historical and contemporary inequities and violations of self-determination. Anaya, *supra* note 4 at 86.

relationship where the rights of states will determine the scope and content of self-determination. It is for this reason that the internal/external framework is inadequate for indigenous self-determination. What the substantive/remedial framework theoretically does, is equates state rights with peoples rights.

Despite the continuation of state dominance over indigenous peoples, the conceptualization of the right of self-determination as containing substantive and remedial spheres, can be seen as a creative and imaginative way to maneuver around the existing obstacles of state practice that has not historically, since the United Nations came into existence, extended the right to self-determination to peoples that are indigenous and colonized in their homelands. This framework has a wider universal application for peoples and is consistent with the right to self-determination as applying to *all* peoples, whether colonized or not. The internal/external framework discussed above has been formulated in the context of decolonization procedures established by the United Nations and has yet to be extended to non-colonized peoples as evidenced by state practice. The substantive/remedial framework is suitable for a self-determination framework for my people.

**D. Ned'u'ten Self-Determination Framework**

> The legal order, known to us as the bah'lats, the way of the Babine people, espoused principles of respect, generosity, reconciliation, and compensation.[103]

The political relationship that I propose for the Ned'u'ten and Canada is an international one. In order for the Ned'u'ten to have their subject status restored at international law, Ned'u'ten subject status must be politically and legally equal to Canada's status as a state and recognized as so by the international community. This is the only way to resolve conflicting and

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[103] Lake Babine Nation, *supra* note 1 at 406.

competing rights on a level playing field. The argument that duplication would arise is not sound once state legitimacy is challenged. In other words, the restoration of subject status will remove the current hierarchical relationship that now exists between the Ned'u'ten and Canada. Once respect for political and legal equality satisfies the Ned'u'ten, negotiations can begin to dismantle Canadian claims of legitimacy over Ned'u'ten territories. This is the primary way for the Ned'u'ten and Canada to eliminate colonization and remedy the dispossession of the Ned'u'ten in all its forms and manifestations. Where does this leave us then? At a place where both the Ned'u'ten and Canada can start again with equal respect for each other as human beings.

For reasons stated above, the internal/external framework or state formulation of self-determination is not appropriate for ned'u'ten self-determination. To domesticize Ned'u'ten as a people within Canada would be tantamount to the concession that Canada has legitimacy in Ned'u'ten territories without even obtaining the consent of the Ned'u'ten. As will be discussed in chapter 4, the internal/external framework does not eliminate colonization. The internal/external framework is built upon doctrines of dispossession. With this foundation, states can use modern masks of dispossession to limit and in some instances prevent Ned'u'ten self-determination. The Cree have already faced challenges by accepting the internal/external framework for self-determination. Their experience with Canada can teach the Ned'u'ten not to embark on the same path. Rather, the substantive/remedial framework would provide for the restoration of Ned'u'ten self-determination. For example, the restoration of the Ned'u'ten *bah'lats* and the dismantling of the imposed reserve system and *Indian Act* government accomplishes both substantive and remedial self-determination. The Ned'u'ten self-determination framework that I propose endorses the substantive/remedial framework.

**1. Ned'u'ten Substantive self-determination**

The Ned'u'ten self-determined their relations amongst themselves and with neighbouring nations pre-contact. Although the Ned'u'ten were forcibly subjected to the colonizing process, they still exercise a limited form of self-determination through their traditional governing institutions. It must be kept in mind that even though my people's governing order is still operating, it is not a strong as it used to be. The spirit of my people, in my opinion, is low, and the impact of foreign economic forces on Ned'u'ten way of life is one of the major causes. The restoration of this spirit is a fundamental part of self-determination. When I speak of the right to self-determination, states translate this into legal rights that afford remedies if violated, without the understanding that I also share a responsibility with my people to maintain our connection with the spirit of the land. The Ned'u'ten have a choice of whether to nourish this spirit or not. Any treaty relationship between the Ned'u'ten and Canada must be respect and honour the spiritual relationship that we have to our territories.

For the Ned'u'ten to restore their substantive self-determination, they could re-constitute the *bah'lats* to govern all aspects of the Ned'u'ten. The clan system, unlike the *bah'lats* is strongly intact and is reflective of the *on-going* element of substantive self-determination. The band council governing system would have to be dismantled before the Ned'u'ten could effectively exercise their jurisdiction in Ned'u'ten territory. At the same time, Canadian governing orders now present on Ned'u'ten territory that have not passed a legitimizing process would have to be dismantled as well. This includes municipalities, provincial and federal governments. Since the *bah'lats* was also designed to create peace between neighbouring nations, the same process and mechanisms can be used to create peace and space for Canadians.

Restoring substantive self-determination means the recognition of Ned'u'ten territories by

international actors, including Canada. This includes not only the physical boundaries but spiritual ones as well. Control and jurisdiction over resources in Ned'u'ten territories would be governed by the clan system, house institutions, and the deneeza and dzakaza. Ned'u'ten law, customs, traditions and practice will provide the legal framework for managing the territory as a whole. To the extent that the Ned'u'ten and Canadians can work together and share technologies with respect to replenishing the land, the Ned'u'ten can incorporate this knowledge into their overall management of the territory.

**2. Ned'u'ten Remedial Self-Determination**

The restoration of Ned'u'ten substantive self-determination is known as the *remedial* element of self-determination. Basically, this is a decolonization process that prescribes remedies for the colonization and oppression that the Ned'u'ten have experienced.[104] This remedy is a retroactive remedy and is available to the Ned'u'ten at the date when the dispossession of the Ned'u'ten by Canada began to take place. This date could be 1846 when Canada claims sovereignty assertion over Ned'u'ten territories. The requisite autonomy or independence needed by the Ned'u'ten to restore self-determination will depend on the extent to which the Ned'u'ten feel it necessary to protect their governing institutions and territories. If they require state-like autonomy for the period of restoration, then exclusivity and non-interference by Canada could be the remedy. If neighbouring nations (with similar clan structures and governing institutions) are also restoring their substantive self-determination, then

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[104] The Ned'u'ten have been colonized by successive waves of colonization brought about by a progression of colonial orders:

> Since the nineteenth century foreign legal orders have been introduced to the Babine that have altered and/or supplanted the *bah'lats* law. In order of imposition these were: the Hudson's Bay Company, whose charter gave it sweeping legal powers; the Durieu system, a quasi-judicial system imposed by the Oblates of Mary Immaculate; British Common Law, which was frequently combined with indigenous law as interpreted by stipendiary magistrates; the summary powers of Indian Agents who ruled on statutory and common law; and finally, the full complex of the Canadian federal/provincial legal orders.

Lake Babine Nation, *supra* note 1at 264.

a remedy could be fashioned to meet mutual goals. Integration into Canada as a remedy has been resisted since contact. While some indigenous peoples have recently "negotiated their way into Canada" on a domestic level, this would not remedy, in my opinion, colonization. According to Ned'u'ten tradition, a *bah'lats* would be held to restore order amongst individual clan members, clans and relations with neighbouring nations. The shaming *bah'lats* could be used to shame Canada. Adherence to compensation and reconciliation principles and implementation to ceremonies such as the wiping away of this shame could be used as part of the remedial self-determinaton process.[105] In my opinion, the *bah'lats* is the place to begin deciding how to decolonize. The following principles are essential to Ned'u'ten self-determination in an international setting and require elaboration by the Ned'uten. These principles are to build upon principles already stated in chapter two.

**Principles for Ned'u'ten Self-determination**

- **international treaty recognizing the Ned'u'ten as having subject status at international law;**
- **a treaty relationship that is based on the recognition and affirmation of Ned'u'ten self-determination (substantive and remedial) and political orderings;**
- **a treaty relationship that accords identical reciprocal rights and obligations to the Ned'u'ten people and Canada and where such rights and obligations are expressed in both nations' languages, protocols, and forms of laws (this avoids unilateralism where one nation seeks domination by claiming rights without fulfilling obligations agreed to);**
- **a treaty relationship that is established on positive equality of sovereigns;**
- **a Ned'u'ten - Canada treaty relationship recognizable at international law;**
- **a Ned'u'ten - Canada treaty relationship based on sovereign co-existence;**
- **a Ned'u'ten - Canada relationship that is living and not final;**

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[105] This will be discussed in chapter 4.

- **a Ned'uten - Canada relationship that recognizes Ned'u'ten land tenure systems;**
- **a Ned'u'ten - Canada treaty relationship that is sacred, solemn and spiritual;**
- **a Ned'u'ten - Canada treaty that restores the dispossession of lands and resources to the Ned'u'ten;**
- **a Ned'u'ten - Canada treaty that recognizes Ned'u'ten collective rights, including human rights;**
- **a Ned'u'ten - Canada treaty process that is negotiated at an international level and supervised and monitored by an independent international treaty body or tribunal;**
- **to give the international treaty body or tribunal jurisdiction to hear applications for breach or violation of the Ned'u'ten - Canada treaty; to order restitution and compensation where applicable or to restore parties to original equal bargaining position; and**
- **to implement a remedial self-determination process for the Ned'u'ten and Canada and a substantive self-determination process when the former is complete.**

I have found the substantive/remedial self-determination framework useful for shaping the Ned'u'ten self-determination framework and principles above. By building on the principles regarding dispossession in chapter two and the principles to govern a treaty that is reflective of what ned'u'ten self-determination could look like, it now is appropriate to begin discussions for establishing the Ned'u'ten-Canada treaty process for the purpose of negotiating a treaty and to design and implement a decolonization regime.

**E. Conclusion**

This chapter has focused on the right to self-determination in its universal application as well as its application in the indigenous context. State formulations and indigenous formulations of the right to self-determination have also been discussed. As state rights and people rights continue to compete for international recognition, indigenous peoples are asserting the right to

decolonize with either formulation. Indigenous formulations need further development in order to challenge the legitimacy of states that continue to colonize and oppress indigenous peoples. This goal of this chapter is to set down a possible foundation for the Ned'u'ten to have their subject status at international law restored. This is essential for any new relationship with Canada. This business begins at home.

Once the Ned'u'ten have achieved the restoration of substantive self-determination, where the *bah'lats* is fully operable over all matters (domestic and foreign), negotiations can begin to establish a relationship with Canada that fosters a new political co-existence. Canada and the Ned'u'ten will have to enter into a remedial self-determination process that will bring about such restoration. This is the essence of chapter four. What will it take to restore Ned'u'ten substantive self-determination? What will it take to "undo colonialism" in the Ned'u'ten context. The remedies should vary and will no doubt be generational. There is a lot of business to do.

> In the *bah'lats,* spokespersons for the clans would discuss and consider this business over a period of time. To show generosity for guests witnessing this business, their is a distribution of gifts.

Gift Giving

As the specific type of business is about to be concluded, the host clan assembles and distributes gifts[1] and/or makes reciprocal payments[2] to the guests. Gifts are distributed to the guests according to rank and status. Sugar, blankets, hides, traditional meats, cotton, scarves, kitchen utensils, perishable and non-perishable foods, etc. are distributed to the guests while the host clan makes concluding speeches. There are strict rules for gift distribution: no guest can be missed; nothing can be spilled; and no disrespect can be shown to the recipient.[3] A deneeza or dzakaza who can "pile up" their gifts to distribute to the guests is respecting their respective rank and status amongst the clans.

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## A NED'U'TEN- CANADA PEACE TREATY MODEL

### A. Introduction

There is no treaty process for indigenous peoples and states to foster relationships that facilitate decolonization and the implementation of the right to self-determination. Many processes are currently underway to complete what I have referred to earlier as "conquest treaties", including in my opinion, the British Columbia Treaty Commission Process. For indigenous peoples, self-determination and sovereignty have not been on the negotiating table.[4]

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[1] A deneeza or dzakaza that bestows wealth to the clans respects his or her name. "By contributing large sums of money a chief, or an aspiring chief, is upholding a traditional obligation to help others and to redistribute wealth throughout the nation. Gifts of money signify a personal commitment to the traditional territory and to people of the past, present, and future. Money donated to the cost of a casket or headstone pays for more than these items. It pays for the privileges associated with a name and for all the entitlements of that name: territory, respect, ceremonial regalia. Of these none is more significant than the traditional territory that the name has carried from time immemorial. Given the social significance of the payments, it is not surprising to find that several thousands to tens of thousands of dollars might exchange hands at the memorial potlatch of a high ranking hereditary chief." Lake Babine Nation, *C'iz dideen khat, When the Plumes Rise: The Way of the Lake Babine Nation* (Lake Babine Justice Report) by J. Fiske and B. Patrick (Lake Babine: Lake Babine Nation, 1996) at 95.

[2] "Reciprocal payments are the essence of the potlatch. What is donated will be repaid with "something on top," that is, "with interest," and a thank you gift. The "pay back" shows "how you respect yourself." "If there is no family the clan will pay it." *Ibid.* at 118.

[3] "Any violation is an embarrassment to the host clan and could cost money. Great care is taken to ensure that no one is missed, nothing is spilled and that no disrespect is shown to any recipient. In principle errors or disregard could cost the clan dearly. If protocol is broken, a witness can "shame" a clan by "throwing money" at the person who had erred or misbehaved. If this happens gifts and money must be raised to "wipe away the shame" in order to restore the honour of the witness and the host clan." *Ibid.*

[4] In the context of the *James Bay and Northern Quebec Agreement, 1975,* Editeur officiel du Quebec, 1976,

States such as Canada, have yet to recognize indigenous peoples as a 'colonized people'. Any form of the right to self-determination is unilaterally prescribed by Canada. The lack of political will and deliberate attempts by Canadians to preclude some kind of level of reconciliation with indigenous peoples is a shame. It is reflective of ignorance, racism, and Canada's successful attempt to brainwash its citizens into believing that it has constituted the state, the Canadian identity and Canadian boundaries in a just and legitimate manner. Canadians in British Columbia are led to believe that their rights are unquestionable and that indigenous rights are subject to the pleasure of the Canadian Crown. It is not hard to see that the power relations between the Canadian state and indigenous peoples are unbalanced. Establishing a treaty process or some kind of process to eliminate these unbalanced relationships is crucial for indigenous decolonization and self-determination.

This chapter sets out to establish a peace treaty process for the Ned'u'ten and Canada to decolonize together and to implement Ned'u'ten self-determination. Inherent to the proposed peace treaty process is the necessity for balance between the right of Canada as a state and the right of the Ned'u'ten as a people. It is also a process that restores the substantive right to self-determination of the Ned'u'ten through remedies that bring the Ned'u'ten back to their original status at the time of contact with British and Canadian Crowns. In other words, through the restoration of Ned'u'ten self-determination, the line between the rights of states and peoples will no longer exist, for they will be equal and reflective of different international subject actors. The decolonization principles prescribed in chapter two are the foundation for the establishing remedial Ned'u'ten self-determination. The self-determination principles prescribed in chapter

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("*J.B.N.Q.A.*") a modern comprehensive land claim, Grand Chief Matthew Coon Come has stated that the Cree right to self-determination and sovereignty were not negotiable under this agreement and that in the context of Quebec secession, these rights are still intact. Interview with Matthew Coon Come (1 February 1997).

three are vital for Ned'u'ten substantive self-determination. This chapter also prescribes negotiating principles to shape the Ned'u'ten-Canada treaty model that I propose and the process to implement this treaty.

Although this peace treaty model and process is unique to the Ned'u'ten context, hopefully, this decolonization framework can assist other indigenous peoples who are attempting to decolonize and implement their respective rights to self-determination. First, this chapter shows how the degree of indigenous participation in creating relationships with states will determine the level of self-determination that states will recognize. Where there is no participation in the development of treaty policies, processes, and principles to guide negotiations between indigenous peoples and states, there is no self-determination. A case study of the James Bay Cree's attempt to create a relationship with the Canadian state provides us with an example of minimal participation and a low degree of self-determination. A case study of "First Nations" in the British Columbia Treaty Commission Process provides us with an example where there is participation by these groups in this treaty process. Although there has been no concluded treaty under this process at the time of this writing, the degree of participation by First Nations has challenged Canada's status quo policies for negotiating modern land claim agreements. The level of participation the Ned'u'ten require for the peace treaty process I propose in this chapter is not determined by Canada and therefore already marks a departure from current modern land claims agreement processes. Second, an internationally supervised remedial or decolonization process is prescribed based on the Ned'u'ten *bah'lats*. Third, negotiating principles are prescribed for negotiating a Ned'u'ten-Canada treaty model. Finally, this chapter concludes with a compilation of principles prescribed throughout this thesis to shape the Ned'u'ten-Canada peace treaty model.

It is my sovereign belief that this is the starting point from which the Ned'u'ten should begin negotiating a new relationship with Canada. This peace treaty model and process is my gift to Ned'u'ten to consider in their efforts to create a relationship with Canada. It is principled and just and will protect future generations from the continuance of colonialism and dispossession of their homelands and identities. It also brings healing to my ancestors, for the injustices inflicted upon them will be rectified. A balanced negotiating field can also provide an opportunity to Canada to be a leader amongst states and legitimate its presence amongst the Ned'u'ten in a new relationship. Simply, the time has come to replace conquest treaty-making with peace treaty-making. The space is then created to imagine new political orderings that will see the Ned'u'ten as Ned'u'ten and not indigenous and Canada as not a colonizing state but Canada as a legitimate political entity living in peace with the Ned'u'ten.

**B. Indigenous Participation Is Self-Determination**

> Article 19
> Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> Article 20
> Indigenous peoples have the right to participate fully, if they choose, through procedures determined by them, in devising legislative or administrative measures that may affect them. States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures.[5]

It is essential that indigenous peoples participate in any agreements or treaties that are made to represent a restructured relationship with states. Indigenous peoples must participate fully in the procedural framework for negotiating such agreements or treaties, the policies for

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[5] *United Nations Draft Declaration on the Rights of Indigenous Peoples* UN Doc. E/CN.4/Sub.2/1993/29 [hereinafter *Draft Declaration*]. Reprinted in J. Anaya, *Indigenous Peoples in International Law* (New York: Oxford University Press, 1996) at 212.

treaty-making, the implementation of the substantive aspects of self-determination, etc. Participation by all parties to the formation of a new relationship can provide a check to see if bargaining positions are leveled. Bringing balance to the immediate inherent inequality between 'people rights' and 'state rights', is a good place to begin. Unqualified participation by peoples in designing and implementing their respective political and legal rights can lead to the elimination of unilateral state practice to define the people-state relationship. The requirement to obtain the consent of the people is also fundamental to indigenous participation at every level of creating a new relationship.

Turpel, has come to the conclusion, that because indigenous peoples possibilities to decolonize politically and culturally is not like processes under international trusteeship, indigenous peoples in the Americas may have to choose processes that are reflective of indigenous peoples as being nations within states.[6] In this context, Turpel examines the rights of indigenous peoples to participate politically in state decision-making and government as a necessary component of the right to self-determination:

> ...I see political participation as an essential element of a long-term strategy to achieve autonomy. This is because recognition of indigenous self-determination will require domestic public support as well as international debate and, ideally, international supervision. Political participation is necessary to educate both the state population and the international community about indigenous peoples' human rights problems

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[6] Turpel states:

> Institutionally, the international trusteeship and decolonisation process did not address indigenous claims. Indigenous peoples, especially in the Americas, have yet to witness political decolonisation, and cultural decolonisation is now nearly impossible. Moreover, politically, indigenous claims challenge a nations state's assertion of complete political and territorial sovereignty.
>
> Indigenous peoples are entrapped peoples- enclaves with distinct cultural, linguistic, political and spiritual attributes surrounded by the dominant society. Indigenous peoples find themselves caught in the confines of a subsuming, and frequently hostile, state political apparatus imposed by an immigrant or settler society following colonization. Moreover, indigenous peoples, particularly in the Americas, are surrounded by a dominant consumer culture that threatens their very way of life. Indigenous peoples are truly "nations within".

M. E. Turpel, " Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l L.J. 579 at 579-80.

> and political goals.
> ...
> Moreover, for indigenous peoples who do not wish to become independent states, or who wish to retain an association or affiliation with larger settler states, rights of political participation are critical for maintaining a relationship of mutual support and respect. Without some political participation in national policy formulation, public decision-making and public-opinion formation, the autonomy or self-government of indigenous peoples in affiliation with larger settler states will be structured without the input and consent of the indigenous peoples. [7]

Through political participation in settler states, indigenous peoples can ensure that their efforts to internally decolonize or internally self-determine their political status is understood by dominant society.

Turpel emphasizes that there must be a change in state institutions for internal self-determination to be operable so as to provide both room for participation and a forum for realizing self-determination:

> Effective political participation would require greater elaboration and, most likely, structural changes to national political institutions. This is because indigenous peoples may view participation rights as an unattractive political option if to exercise their rights they must integrate into a dominant nation state and relinquish their distinctiveness without hope of real influence in the national political processes because of their small numbers. As one author suggests of the imbalance in such arrangements: "There is a strong suspicion that a colonial power negotiating with a colonized people will enjoy greater bargaining power, and be able to exact whatever concessions it wishes." This is probably accurate in most circumstances, however, the possibilities cannot be assessed without looking at the particular state context and indigenous objectives.[8]

Although Turpel has impressed the importance of participation in the "internal/external" formulation of self-determination, her points are equally applicable in the "substantive/remedial" framework for self-determination that I have chosen to shape a Ned'u'ten self-determination framework.

Participation is the core element of the concept of "belated state-building". Belated-state building has been proposed by the United Nations Working Group On Indigenous Populations ("W.G.I.P.") as a process for implementing the right to self-determination and one that has

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[7] *Ibid.* at 593.

[8] *Ibid.* at 394.

participation of indigenous peoples at its heart. By comparing the exercise of self-determination to the historic process of nation-building in democratic societies, Barsh takes note that the concept of "belated-state building," was based on the compromise between states' interest in territorial integrity and indigenous peoples' demand for representation reflected in the Declaration on Friendly Relations.[9] Erica I. Daes, Chairperson for the W.G.I.P., advocates that through constitutional reform, the accommodation by states of the aspirations of indigenous peoples can be achieved, through good faith negotiations that can form agreements where states and indigenous peoples share power by democratic means.[10] Barsh advocates that "belated-state building" can reverse political discrimination suffered by indigenous peoples:

> This right "to negotiate freely their status and representation in the State in which they live" would constitute a "a kind of 'belated-State building' aimed at reversing the political discrimination experienced by indigenous peoples in the past and strengthening, rather than weakening, national unity. Secession should be considered only as a "last resort."[11]

To qualm the uneasiness of states regarding indigenous assertions of the right to self-determination, some indigenous peoples, including Anaya, also advocate the concept of "belated-state building" as a means for indigenous peoples to create autonomy *within* the state. He sees "belated-state building" as a process for achieving remedial self-determination. By increasing indigenous peoples' participation in establishing state/people agreements, Anaya states that political as well administrative autonomy within[12] the existing state will be advanced:

> Professor Erica-Irene Daes, the chair of the working group, describes the requirement of self-determination

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[9] R. Barsh, "Indigenous Peoples in the 1990's: From Object to Subject of International Law?" (1994) 7 Harv. H.R.J. 33 at 39.

[10] See Working Group on Indigenous Populations, *Explanatory Note Concerning the Draft Declaration on the Rights of Indigenous Peoples* E/CN.4/Sub.2/1993/26/Add.1 (1993). See also Barsh, *ibid.*

[11] Barsh, *ibid.* (footnotes omitted).

[12] See Articles 19, 20, 31 of the *Draft Declaration, supra* note 5, which could envision belated state building.

> in the context of indigenous peoples as entailing a form of "belated state-building" through negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups. According to Professor Daes, self-determination entails a process
>
> > through which indigenous peoples are able to join with all peoples that make up the State on mutual-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.[13]

While I have epistemological problems with the exercise of self-determination being confined to the "internal" aspect or *within* a state, and with the concept of belated-state building being premised on "internal" self-determination, I have found it useful to use the concept of belated-state building to describe and compare two examples where indigenous peoples and groupings have attempted to create new relationships with Canada, *within* Canada, through agreement. In other words, the belated-state building concept is a construct that I can use to compare how the degree of participation by indigenous peoples in establishing an agreement with the state can seriously impact the agreement that is reached by all parties.

The negotiations leading to *James Bay and Northern Quebec Agreement, 1975* ("*J.B.N.Q.A.*") will be discussed to exemplify how minimal participation by the Cree in negotiating the modern treaty has not produced an agreement that would foster decolonization or implemented Cree internal self-determination. Current negotiations that involve re-vitalizing the British Columbia Treaty Commission Process in the aftermath of *Delgamuukw*[14], will be discussed to show how participation by indigenous groups, can have influential impacts on this treaty-making process.[15] Participation principles for designing a process to create better

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[13] Anaya, *supra* note 5 at 87. See also E. I. Daes, "The Right of Indigenous Peoples to Self-Determination in the Contemporary World Order" in D. Clark and R. Williamson eds. *Self-Determination in the Contemporary World Order* (London: MacMillan Press, 1996).

[14] *Delgamuukw* v. *British Columbia,* [1997] 3 S.C.R. 1010.

[15] To illustrate "belated state-building" elsewhere, Anaya discusses the self-determining attempts of the Miskito Indians to decolonize from Nicaragua. Civil war ensued when the indigenous communities of the Atlantic Coast, including the Miskito Indians, demanded political autonomy. The Inter-American Human Rights Commission

relationships are proposed by both the Cree and "First Nations" in the British Columbia Treaty process. These principles could be useful for consideration in determining negotiation principles for a Ned'u'ten-Canada treaty.

**1. Without indigenous participation: there is no self-determination**

In practice, the internal/external framework for the right to self-determination has been difficult to implement. By observing the Cree's efforts to have their treaty rights recognized and respected by the Canadian state, it is not hard to imagine that with no forum to supervise treaty/agreement formation (outside domestic Canadian courts and independent from Canada); no forum for the Cree to redress violations of their treaty or oversee how their treaty is implemented other than domestic Canadian courts;[16] with no adequate political participation and representation in state decision-making that may effect their rights and jurisdiction, obstacles will arise in any attempts to be self-determining 'within the state'.

In the context of Quebec independence, the Cree have argued before Canadian courts and international fora, that such assertions will have serious impacts on their ability to be

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on Human Rights was asked to review the situation. The Commission noted that by equating self-determination with decolonizing procedures, the Indians would not be able to benefit from self-determination as the state governed decolonization. It recommended a new political order (which Anaya refers to as a remedy to implement an ongoing condition of self-determination where it had been denied) that would involve broad consultation and direct participation by indigenous communities of the Atlantic Coast to determine a new political order. After the decision by the Commission Anaya states:

> ...the Nicaraguan government entered into negotiations with Indian leaders and eventually developed a constitutional and legislative regime of political and administrative autonomy for the Indian-populated Atlantic Coast region of the country. Although the autonomy regime is widely acknowledged to be faulty, and its implementation has been difficult, it nonetheless is by most accounts a step in the right direction. More significantly for the present purposes, it represents the kind of context-specific effort at belated state building now promoted by the international community to remedy the long-standing denial of indigenous peoples' self-determination.

Anaya, *supra* note 5 at 88.

[16] See *Kanatewat* v. *James Bay Development Corp.*, [1975] C.A. 166, rev'g [1974] R.P. 38, leave to appeal to Supreme Court of Canada dismissed, [1975] 1 S.C.R. 48; *Hydro Quebec* v. *Canada (A.G.) and Matthew Coon Come*, [1991] 3 C.N.L.R. 40 (Que. C.A.); *Cree Regional Authority et.al.* v. *Attorney-Gen. of Quebec* (1991), 42 F.T.R. 168 (F.C.T.D.); 43 F.T.R. 240 (F.C.A.); *Eastmain Band* v. *Canada*, [1993] 3 C.N.L.R. 55 (F.C.A.) as examples where the Cree were forced to litigate over the non-implementation of the *J.B.N.Q.A.*

autonomous 'within the state'; to implement existing constitutionally protected treaty rights; and realize "internal" self-determination as a people. Should Quebec gain independence by secession, the Cree have, by referendum, self-determined or 'willed' to stay in Canada.[17]

While is has been difficult for the Cree to implement their internal right to self-determination in Canada, some indigenous peoples such as the Eastern Arctic Inuit, who are the majority in their traditional territories, have enjoyed greater participation in designing and implementing what can be called their internal right to self-determination in Canada.[18] It is too early to assess the effectiveness of the Nunavut Agreement between Canada and the Inuit, yet compared to the Cree's experience, it can be argued that this agreement is an example that the internal/external framework for self-determination could be used successfully by indigenous peoples who desire to be autonomous *within* a state. The Inuit were able to participate substantively in how to create their relationship with Canada more so than the Cree. The Inuit have also benefited from Canada's minimal change in policies on land claim agreements; judicial pronouncements that constitutionalize aboriginal rights; and a more sensitive Canadian populace that desires the resolution of land claims. The Inuit also represent a majority in the newly created territory of Nunavut. For the purpose of this thesis, I have chosen to focus on treaty-making

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[17] In relation to Canada and an independent Quebec, the Cree do not, however, foreclose their option to become a state. In fact they have argued that as a people, they meet the requirements of the Montevideo Convention on the Rights and Duties of States (1933). The Cree have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states. Given these facts, the Cree argue that should they opt to secede from Canada or Quebec and form a new state, they have the *legal capacity* to do so at international law:

> The James Bay Cree people (Eenouch) reserve all our rights to exercise external self-determination of one form or another in respect to our traditional territory. In the context, of Quebec secession it is especially important to establish the fact that the Crees have the *legal capacity* to form a state.

Grand Council of the Cree, *Status and Rights of the James Bay Crees in the Context of Quebec's Secession From Canada,* Submission to the Commission on Human Rights, 48th Session, (1992) at 52 [hereinafter *James Bay Cree*].

[18] See Canada, *Agreement Between the Inuit of the Nunavut Settlement Area and Her Majesty the Queen in right of Canada* (Ottawa: Indian and Northern Affairs Canada, 1993).

between the Cree, Canada and Quebec as an example where participatory rights by indigenous peoples in negotiating and implementing their "internal" right to self-determination has been restricted by the state and continues to present obstacles for the Cree.

In their Submission to the UN Commission on Human Rights, the Eeyouch or James Bay Cree[19] submitted that despite the *J.B.N.Q.A.*[20], Canada and Quebec have violated Cree's human rights and right to self-determination by not honouring this agreement. Even though the Cree signed this comprehensive or modern land claim agreement "within" the state, the Cree continue to be 'internally colonized" by Canada.[21] For this reason, the Cree presented to the UN

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[19] The Cree assert that they meet all the objective and subjective criteria to constitute a 'people' for the purposes of self-determination: "The Cree people (Eeyouch) have a common history, language, culture, racial and ethnic origin, defined territory, and common economic base. Moreover, the Cree people have their own institutions for political, economic, social and cultural purposes...In terms of the *subjective* conditions that are generally required, we have shown that we are conscious of our own identity and have sought to play a political role both nationally and internationally. We, the James Bay Crees, have asserted our right to self-determination and have identified ourselves as a "people". Self-identification is our right and is increasingly being recognised internationally. In Canada, Crees have consistently insisted that our right to self-government be entrenched in Canada's Constitution as a means of exercising internal self-determination within Canada. *James Bay Cree, supra* note 17 at 21-22. This position was argued before the Supreme Court of Canada in *Reference re: Secession of Quebec* (20 August, 1998) unreported [hereinafter *Secession Reference*].

[20] The James Bay Cree describe their treaty as follows:

> The *James Bay and Northern Quebec Agreement* (JBNQA) is a treaty and the rights of the Crees and Inuit are recognized and protected as treaty rights under Canada's Constitution. This treaty arose as a result of a wide range of threats to Cree rights, communities, territory, and way of life, because of the declaration of the Quebec government to proceed unilaterally with the construction of the largest hydroelectric project in North America.

Grand Council of the Crees, *Sovereign Injustice: Forcible Inclusion of the James Bay Crees and Cree Territory into a Sovereign Quebec* (Nemaska: Eeyou Astchee, 1995) at 250 [hereinafter *Sovereign Injustice*]. Harvey Feit examines the representation of Cree leaders and the goals and strategies employed by the Cree throughout the negotiations for the *JBNQA*. From 1974-1976, the Cree, Inuit, Quebec and Canada negotiated "modifications to the project; the protection and development of the indigenous society, culture, and economy; allocations of rights to the territory and its resources; indigenous control of Cree communities, services and organizations; indigenous participation in the government, administration and development of the territory; financial benefits; and new structures of articulation between indigenous peoples and senior governments." See H. A. Feit, " Legitimation and Autonomy in James Bay Cree Responses to Hydro-Electric Development" in N. Dyck, ed., *Indigenous Peoples and the Nation-State: 'Fourth World' Politics in Canada, Australia and Norway* (Institute of Social and Economic Research: Memorial University of Newfoundland, 1985) at 31.

[21] The Cree stated to the Subcommission that indigenous peoples in Canada, including themselves, are internally colonized by Canada because aspects of colonialism exist, including indigenous peoples' traditional territories are systematically exploited by Canada, the development of such territories leaves the people further dependent on the state as the benefits from use of indigenous lands flow directly to Canada causing inequitable distribution of wealth. Further, indigenous peoples are subordinated under, discriminated against and marginalized within the Canadian state. "In reference to the Crees of Quebec, our communities continue to suffer from a wide

Commission on Human Rights that they also have an equal right to external self-determination if Quebec's secession becomes a reality.[22]

In their Submission, the Cree suggest that the content of the right to self-determination includes internal and external elements. Internal self-determination is understood by the Crees to mean "our right to exercise control over matters affecting us and our traditional territory within the existing state of Canada." External self-determination is described in the Submission as "the act by which a people determines its future international status and liberates itself from 'alien rule', an act that indigenous peoples like the Cree could act upon if Quebec's secession leads to any violations of the Cree's internal rights to self-determination"[23]. The Cree also submit that self-government of peoples can be both representative of internal and external elements of the overall right to self-determination. Cree formulations of internal/external elements of self-determination were also presented in their Submission.[24]

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range of problems that constitute for the most part a violation of fundamental human rights. These include: (i) inadequate rights of self-government; (ii) insufficient participation in the political life of the state; (iii) economic inequalities; (iv) lack of respect by the state for our customary practices; (v) attempts to impose hydroelectric projects without proper environmental and social impact assessment and our free and informed consent; (vi) destruction of cultural sites and sacred burial grounds of great significance; (vii) destruction of hunting and fishing areas and traplines; (viii) overall lack of respect by federal and Quebec governments for our treaty rights; and (xi) inadequate recognition of Cree offshore rights. *James Bay Cree, supra* note 17 at 28.

[22] *Ibid.*

[23] *Sovereign Injustice, supra* note 20 at 10.

[24] These formulations included:
Internal self-determination has been described as including the following elements:

i) right of peoples to choose freely their own form of government;
ii) right to determine their economic, social and cultural development;
iii) right to share in the natural wealth of the state;
iv) right not to be deprived of their own means of subsistence;
v) right to participate in the political life of the state; and
vi) right to approve all territorial changes that directly concern them; and
vii) right to enjoy fundamental human rights and equal treatment and be free from discrimination on grounds of race, colour, creed or political conviction.
...

The *J.B.N.Q.A.* could have been an agreement that realized the Cree's right to internal self-determination within Canada; that facilitated Cree autonomy in Canada; and Cree decolonization. The Cree state that while the *J.B.N.Q.A.* was intended to foster economic development, protect existing Cree autonomy, and restructure the relationship between the Cree and Canadian governments,[25] Canada and Quebec use it to deny their obligations to the Cree. Such denial has caused the Cree to reassess the modern treaty in light of Canada and Quebec's lack of respect for Cree values, priorities and concerns:

> Although the Quebec and federal governments refer to the *JBNQA* as a land claims agreement (which is intended to significantly enhance the development of the Crees), it is increasingly being used to diminish or deny Cree fundamental rights. It is particularly disturbing that the *JBNQA* has become an instrument of suppression and oppression in the hands of non-Aboriginal government...The ongoing attempts of Quebec to use the *JBNQA* to deny or minimize Cree fundamental rights both under Canadian and international law are seriously eroding any remnants of Cree confidence in the *James Bay and Northern Quebec Agreement*.[26]

Canadian state relations with the Cree as governed by the treaty does not exemplify the dismantling of unequal or hierarchical balances of power between the state and a people. Rather, such relations are reflective of the struggle that states have with reconciling their rights with the rights of peoples. The Cree have been able to communicate to the Canada that the atmosphere for negotiating, implementing and protecting the treaty in the event of secession by Quebec has not been open. The atmosphere for negotiating has been adversarial, hostile, and one where in order for the Cree to have meaningful and equal participation in any decisions by the state that

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"External" self-determination has been described as including the following elements:

i) right of peoples to choose freely from foreign interference their political status;
ii) right to permanent sovereignty over natural resources;
ii) right to adopt the economic and social system that is most appropriate for their development;
iv) right to develop own culture.

*Ibid.* at 8-10.

[25] See Feit, *supra* note 20 at 57.

[26] *Sovereign Injustice, supra* note 20 at 250-251.

will affect their affairs, litigation must be pursued to protect their way of life. By looking at the history of their relationship with Canada and Quebec and the *J.B.N.Q.A.,* the Cree have established that there is lack of respect by the state for their participatory rights in decision-making, which has prevented the Cree from potentially realizing internal self-determination. Although there is a treaty to mark what could be called belated-state building, the Cree argue that the treaty must be revisited and amended to achieve internal self-determination. It is helpful to briefly canvass this history in order to understand why the Cree have yet to benefit from belated-state building.

Belated-state building proposes equal partnership by peoples and states in establishing agreements to foster self-determination. By looking to the negotiations of the *J.B.N.Q.A.* and the implementation of the *J.B.N.Q.A.,* the Cree have demonstrated that while equal participation did not materialize in early attempts to achieve autonomy, equal participation will be mandatory for any secession framework, agreement or implementation. Failure of Canada and Quebec to meet this evolving international standard could render the Cree to assert external self-determination as a people and subject of the international fora.

**a. Negotiating the *J.B.N.Q.A.***

The *J.B.N.Q.A.* was the first modern land claim agreement in Canada. While the Cree did participate in negotiating the treaty, they did not do so as an equal party. For example, the Cree did not participate in the development and maintenance of Canada's land claims policy[27] for

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[27] Since 1973, it has been the policy of the federal government that aboriginal peoples must surrender all aboriginal rights and title through a blanket extinguishment by the Crown in exchange for rights granted back by the Crown to the aboriginal people and set out by agreement. In response to rejections of this policy by aboriginal peoples, the policy was revised in 1981 and 1986. (See Canada, *In All Fairness: A Native Claims Policy - Comprehensive Claims* (Ottawa: Department of Indian & Northern Affairs. 1981; amended 1986). Federal policy now requires *partial* surrender or extinguishment of existing aboriginal rights and title in comprehensive land claims. So while aboriginal peoples may retain their rights and title as recognized at common law on reserve lands, they would have to extinguish rights and title to non-reserve lands that are traditionally part of their territories. In 1987,

negotiating modern treaties; the Cree did not participate in the process designed for negotiations; the Cree had no say in who could be a party to the *J.B.N.Q.A.*; and the Cree were pressured to negotiate under extreme time pressures with little time to mobilize long term strategies for the protection of aboriginal rights now exchanged for treaty rights recognized in the agreement. Despite the unequal and unbalanced negotiating process in which the Cree were compelled to participate, the Cree were able to realize two goals during negotiations: 1) modification of the hydroelectric project so that development would not harm their traditional ways on the land, hunting, fishing and trapping, etc., and 2) the establishment of a new relationship with governments where recognition of Cree in participating and determining the development of their land was essential.[28]

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the comprehensive claims policy was amended again to reflect a semantic alternative to the extinguishment of aboriginal rights, aboriginal peoples could negotiate self-government arrangements with the Crown, but such agreements would not receive constitutional protection. (See also *Federal Policy for the Settlement of Native Claims*, (Ottawa: Department of Indian Affairs and Northern Development. 1993)). To date, the federal policy of extinguishment, now called certainty, has not changed and requires that the comprehensive land claim agreement define all rights completely and exhaustively. The Nisga'a Agreement in Principle (1996) is an example of federal policy on certainty. While it could be argued that federal policy regarding "extinguishment" has improved since the Cree have signed their modern treaty in 1975, scholars M. Asch and N. Zlotkin state otherwise and posit that "certainty" is tantamount to "extinguishment":

> The Agreement in Principle between the Nisga'a and the federal and British Columbia governments represents a recent application of this approach. The agreement does not formally call for extinguishment and it does recognize Nisga'a Aboriginal title. Should similar language survive in the final agreement, the approach does indicate a change in federal policy away from extinguishment. However, the approach remains consistent with federal policy on certainty in that the parties agree that the agreement defines these rights completely. In particular it states: 'The Final Agreement will constitute the full and final settlement, and will exhaustively set forth the aboriginal title, rights and interests within Canada of the Nisga'a Nation and its people in respect of the Nisga'a Nation's rights recognized and affirmed by s. 35...in and to Nisga'a lands and other lands and resources in Canada, and the scope and geographical extent of all treaty rights of the Nisga'a Nation, including all jurisdictions, powers rights, and obligations of Nisga'a government'...Given the actual terms of the settlement, this agreement effectively extinguishes Nisga'a Aboriginal and treaty rights with respect to fundamental matters concerning jurisdiction and power, as well as ownership. Furthermore, given that the agreement is said to exhaustively set forth rights and obligations, the approach also precludes flexibility in fulfilling treaty and Aboriginal rights relationships as circumstances change.

See M. Asch and N. Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) at fn. 41.

[28] Feit, *supra* note 20 at 57. The agreement established a land regime dividing the territory into three categories of land, which determined the kind and nature of native property rights and hunting rights throughout the

The lack of Cree participation in *all* aspects of treaty-making contributes to the current status of the Cree as still being colonized by the Canadian state.[29] The following arguments[30] were made in their Submission to the Commission on Human Rights and expanded upon in *Sovereign Injustice* and *Never without consent*[31] to show how the negotiating process for the *JBNQA* was oppressive, inappropriate, inequitable, unconscionable and tantamount to unlawful coercion, but foremost a denial of Cree self-determination:

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territory. Native hunting rights are set out in detail in section 24 of the Agreement (and later by an Act respecting hunting and fishing rights in the James Bay and New Quebec Territories). In Category 1 and 2 lands for example, the Cree and the Inuit have the exclusive right to hunt, fish and trap. See also W. Moss, "The Implementation of the James Bay and Northern Agreement" in B. Morse, ed., *Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada* (Ottawa, Carleton University Press, 1991) at 686. The Cree negotiated a guaranteed annual income scheme or hunting incentive program to promote people going back to the land as well as $225 million compensation package. For a Cree perspective on the main aspects of the agreement, see R. Macgregor, *Chief: The Fearless Vision of Billy Diamond* (Canada: Penguin Books, 1990) at 141-144.

[29] The Cree continue to be internally colonized because they have been unable to prevent Canada and Quebec from violating treaty terms especially with respect to their traditional territories:

> We do not enjoy an equitable share of the natural resources of our own traditional territory. Except in relation to small areas of land surrounding our communities, the Quebec and federal governments continue to oppose the principle of Cree control over matters affecting Cree traditional territory. As long as our rights to safeguard our territory, resources and environment are opposed by governments, internal colonialism will continue to dominate our relations with governments in Ottawa and Quebec.
>
> Hydro-electric projects are causing our rivers, wildlife and ourselves to be contaminated with mercury and subject to other far-reaching deleterious impacts. Our right to food and our means of subsistence are being severely undermined. Clear-cutting of forests is imposed upon us without our consent. We have been and are continuing to be denied our right to approve territorial changes that directly concern us. Despite the signing of the 1975 *James Bay and Northern Quebec Agreement*, reasonable economic opportunities have not been made readily available to Cree communities (even when billions of dollars of funding have been provided to Quebec for regional development by the federal government). In this regard, the terms of the treaty itself in relation to economic and social development have been largely violated. Nor have we been afforded sufficient opportunities to participate in the political life of the state.
>
> The harsh reality is that we face constant interference and a never-ending assault from both the Quebec and federal government on all aspects of our daily existence. Consequently, our status and fundamental rights are continually being eroded. The integrity of Cree society is being seriously threatened. Above all, it is our integrity as a people (not only our specific rights) that must be guaranteed.

*James Bay Cree, supra* note 17 at 36-38.

[30] See *James Bay Cree, supra* note 17 at 94-102; *Sovereign Injustice supra* note 20 at 249-262; and *Never without consent, infra* note 31 at 119-126.

[31] Grand Council of the Crees (Eeyou Astchee), *Never without consent: James Bay Crees' Stand Against Forcible Inclusion into an Independent Quebec* (Toronto: ECW Press, 1998) [hereinafter *Never without consent*].

1. **Duress:** Phase I of the James Bay Hydroelectric Project was allowed to proceed without consent of the Cree *during* negotiations of *JBNQA*. Cree rights to lands, waters and way of life were taken away during negotiations. Canadian governments threatened unilateral extinguishment or surrender by legislation of Cree rights if the Cree did not continue in the negotiating process. In other words, extinguishment was a condition to the agreement and not negotiable. If the Cree defended rights, the federal government threatened to cut off funds for social programs. Canadian governments made arguments that Cree rights and title did not exist. The Cree were forced to accept structures, institutions and principles that did not reflect Cree law, culture or belief but rather those of the dominant societies. The Cree were forced to negotiate with 3 development corporations instead of just political representatives of the Canadian state. The federal government failed to assert its fiduciary obligation to protect Cree rights and interests throughout the negotiations.

2. **Uncerntainty over Aboriginal Rights:** The Crees were forced to negotiate under "false premises" or assumptions where Canadian governments denied the existence of aboriginal rights as well as Indian rights set out in the *Quebec Boundaries Extensions Act, 1912*. When aboriginal rights received constitution protection in 1982, Canadian governments maintained the position that the Cree had reduced all rights to the treaty and any undefined aboriginal rights were extinguished in the *JBNQA*.

3. **Erroneous information:** The Quebec government while negotiating the agreement, relied on the prejudicial, unreliable and erroneous findings of the 1971 Dorion Commission that denied any Cree/aboriginal territorial rights existed in Quebec except for limited hunting, fishing and trapping rights.

4. **Land selection criteria violated basic rights:** The Quebec government imposed land selection criteria on the Cree. Land selected under the *JBNQA* did not include resource or specifically, *mineral potential.* Since the Canadian governments did not recognize that the Cree owned land, the Cree would only have managerial rights over resources in category 1 lands with no right to autonomously develop resources in their traditional territory.

5. **Corporations or third parties were *a party* to the agreement:** Hydro Quebec, Societe d' energie de la Baie James and Societe de development de la Baie James were 3 development corporations each with equal status as a negotiating party to the agreement as the Canadian governments and the Cree. Positions taken by these third parties had significant influence regarding decisions over resource development. These third parties would stand to benefit from the agreement more than the Cree.

6. **Rights of Aboriginal third parties extinguished:** Land rights of indigenous peoples that were not a party to the agreement were extinguished unilaterally by the Canadian governments.

7. **Abdication of federal fiduciary responsibility:** By not protecting and safeguarding the rights of the Cree at the negotiating table, the federal government reneged on its fiduciary responsibility to act as a "trustee" for the Cree. Rather the federal government was "neutral" to Quebec's positions that set the rules for the negotiating process. Canada would only provide loan funding to the Cree for legal actions to challenge Quebec's intrusion into federal jurisdictions over migratory birds, fisheries and navigable waters instead of asserting its federal jurisdiction in these areas that fundamentally affected Cree rights.

8. **Threats to withdraw essential services:** Canadian governments took the position that their governments would provide basic services (available to all Canadians) to the Cree only in return for the Cree if the agreed to forfeit certain Cree land rights.

For all of the above reasons, the Cree assert that the *J.B.N.Q.A.* should be amended or renegotiated with Canada and Quebec to foster internal self-determination. Belated-state building could process this renegotiation.

**b. Implementing the *J.B.N.Q.A.***

Since 1975, the Cree have been able to build infrastructure to a degree,[32] however, court action has been required where parties to the *J.B.N.Q.A.* have had problems in interpreting the provisions of the agreement. While the Cree have express rights to portions of their land in the agreement, the Quebec government interpreted their obligations to respect such rights minimally subject to provincial economic interests. The most recent example of the Cree defending their treaty rights was the Great Whale hydro project proposed by Quebec without any environmental or social assessment/ review on the Cree's way of life.[33] The Cree took the Quebec government to court and received an injunction to halt the project until assessments were completed. The project was no longer pursued by the Quebec government due to public backlash motivated by the successful strategic public relations campaign by the Cree and their allies. In 1992, in the context of secession, the Cree where able to set out express examples[34] in their Submission to the Commission on Human Rights, of non-compliance of the *J.B.N.Q.A.* by Canadian governments. At the implementation level, such non-compliance has amounted to a denial of self-determination:

> 1. **Self-government Never Adequately Nor Equitably Negotiated:** Ten years after the *JBNQA*, the Cree were able to have legislative jurisdiction over 2% of their traditional territory recognized by Canadian government. Local governments were constituted as municipalities corporations depending on whether

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[32] In 1978, the *Cree - Naskapi (of Quebec) Act*, S.C. 1984, c. 24 was negotiated between the Cree and Naskapi and Canada to replace the *Indian Act*. However, such legislation would only apply to category 1(a) lands for the Cree. On Category 1(b) and 2 lands, the Cree were forced to negotiate public corporations that conformed to Quebec's municipal legislation to serve as Cree local government. *Sovereign Injustice, supra* note 20 at 264.

[33] See *Cree Regional Authority et. al.* v. *A.G.. Quebec* (1991), 42 F.T.R. 160; (1991), 43 F.T.R. 240.

[34] *James Bay Cree, supra* note 17 at 103-114; *Sovereign Injustice, supra* note 20 at 263-275; and *Never without consent, supra* note 31 at 127-132.

lands are category 1A (federal band corporation) or 1B lands (municipal council). Category 2 lands are governed by the James Bay Regional Zone Council (made of 3 Cree/3 non-Cree members). The Cree have no jurisdiction in Category 3 lands. The Cree continue to assert self-government over all their traditional territory as part of the right to internal self-determination including the right to constitute Cree political institutions.[35]

2. **Integrity of Cree Traditional Territory Severely Undermined:** Before negotiations, Quebec unilaterally created a municipality in Cree territory resulting in territorial dispossession when the hydro project was constructed.

3. ***JBNQA* Used by Governments to Continue Colonial Forms of Domination:** The *JBNQA* does not provide for the right to autonomy or self-government and therefore does not confirm the empowerment and jurisdiction of the Cree nation.

4. ***JBNQA* does not meet minimum international standards:** The Cree provide numerous examples of how the *JBNQA* does not meet international standards and where Canadian governments fail to rectify this departure from international law and custom. For example, the Cree have not been able to retain their customs and institutions; there is insufficient regard for Cree customs and laws; rights to resources have not been safeguarded; the right to decide Cree priorities for development have not been recognized; participatory rights in formulation, implementation and evaluation of development plans and programs have not been assured; environmental and social impact assessments are not jointly made.

5. **Inequitable justice system not fundamentally altered:** The *JBNQA* does not provide for Cree control over the administration of a Cree justice system but rather Quebec maintains control over administering a Canadian justice system imposed on the Cree.

6. **Certain terms of the *JBNQA* promote cultural genocide:** The Cree are unable to oppose or prevent resource development projects on sociological grounds and can only do so on ecological grounds under the *JBNQA*. This provisional constraint does not allow for human rights protections for the survival of the Cree as a people and therefore amounts to cultural genocide.

7. **Key elements of "Control" and "Consent" lacking in most aspects of *JBNQA*:** The Cree mostly have powers to *advise* Canadian governments under the treaty. The Cree assert that by not obtaining their consent on matters that directly impact traditional territories, Canadian governments continue to undermine Cree self-determination.

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[35] The Cree have creatively argued that their right to external self-determination stems from 1) their internal right to self-determination that has been violated through the continuance of colonization in Canadian policies and practice and 2) that if Quebec has the right use self-determination as a basis for seceding, then the Cree, on the basis of the principles of equality and non-discrimination, also have this right to external self-determination. Canada nor Quebec could argue principles of territorial integrity to prevent the Crees assertions for these reasons. Regarding colonization, the Cree submit that regardless of the treaty they signed with the federal and provincial governments, they still do not exercise adequate self-government:

> It can be generally concluded that indigenous peoples are still treated in an abusive, colonized manner and that they do not exercise internal self-determination within Canada. In regard to the James Bay Crees, both the federal and Quebec governments have failed and continue to fail to respect the principle of equal rights and self-determination of peoples referred to in the 1970 **Declaration on Friendly Relations**. Therefore, the Canadian government cannot invoke the principle of territorial integrity against a Cree assertion of external self-determination (as Canada would likely be able to raise in the case of Quebec).
>
> Further, the colonial treatment and human rights violations still suffered by aboriginal peoples in Canada clearly strengthen the claims of First Nations to the right of external self-determination.

*James Bay Cree, supra* note 17 at 33.

> 8. ***JBNQA* repeatedly invoked by Quebec to promote extinguishment of rights:** In the context of secession, Quebec's positions is that the Cree have no rights to traditional territory not included in the *JBNQA* pursuant to the treaty's extinguishment clause. The same extinguishing provision is used by Quebec to deny Cree self-determination.

As the Cree have demonstrated, their internal right to self-determination has been violated by the state. Coupled with the assertion that Quebec does not represent the Cree, such violations can trigger Cree claims for the external self-determination.

It is essential to belated-state building, that creating processes that implement self-determination agreements for peoples in a state is a condition for negotiations. Through belated-state building, the Cree can include substantive provisions for resolving disputes and preventing outcomes where the state denies peoples' the right to self-determination through the continuance of colonization. The Cree have yet to compel Canadian governments to rectify the above noted examples that deny self-determination, through mutual peaceful negotiations and amendments to the *J.B.N.Q.A.* to facilitate self-determination.[36] Rather the Cree once again have to resort to litigation, (albeit as an intervenor and not a direct party) in the *Secession Reference*, to argue that they have a right to self-determine their relationship with the Canadian state; protect their traditional territories and to enforce their treaty rights that are constitutionally entrenched in Canada's supreme law.

### c. The *Secession Reference*[37]

The Cree intervened in the *Secession Reference*.[38] In their Factums, the Cree made

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[36] See *Sovereign Injustice, supra* note 20 at 274.

[37] For a general discussion about the *Secession Reference*, see H. Wade MacLauchlan, "Accounting for Democracy and the Rule of Law in the Quebec Secession Reference" (1997) 76 C.B.R. 155. Also see R. Howse and A. Malkin, "Canadians Are A Sovereign People: How the Supreme Court Should Approach the Reference on Quebec Secession" (1997) 76 C.B.R. 186.

[38] See SCC File No.: 25506: Factum of the Intervener Grand-Council of the Crees (17 April, 1997) [hereinafter Cree Factum]; Reply to Factum of Amicus Curiae (19 January, 1998) and Reply to Written Responses by the Attorney General of Canada and the Amicus Curiae to Questions Posed by the Supreme Court of Canada (19

arguments regarding the scope and content of self-determination; the proper amending procedure for modifying Cree treaty rights, in the event of secession by Quebec; and that domestic or Canadian law should decide the issue of a unilateral secession by Quebec over international law.

*Self-Determination*

The Cree referred to self-determination as a universal human right and as a standard applicable to domestic courts such as Canada for interpreting human rights at law. Self-

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February, 1998). This Reference was raised by the Governor in Council concerning certain questions relating to the secession of Quebec from Canada, as set out in Order in Council P.C. 1996-1947, dated the 30th day of September, 1996. The Governor in Council submitted three questions to the Supreme Court of Canada: 1) Under the Constitution of Canada, can the National Assembly, legislature or government of Quebec effect the secession of Quebec from Canada unilaterally?; 2) Does international law give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Quebec the right to effect the secession of Quebec from Canada unilaterally?; and 3) In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Quebec to effect the secession of Quebec from Canada unilaterally, which would take precedence in Canada? In their Intervenor Factum, the Cree argued that the nature and scope of the 'reference questions' were broad enough for the Court to deal with in a "fair and balanced manner" and that "all relevant constitutional dimensions should be given fair consideration". (para.13) In the addressing the reference questions, the Cree argued that the Attorney General's Factum failed to "refer to the aboriginal and treaty rights of aboriginal peoples" as well as did not "include Aboriginal peoples as constituent elements of the "federal principle", which the Constitution enshrines." (para.21) Further, when asked by the Court whether it was the position of the Attorney General of Canada that secession could take place only within compliance with the formal procedures set out in Part V of the Constitution or were there other ways in which a secession might also be carried out consistently with constitutional law as a whole, the Attorney General of Canada replied in its written response that she had a defined and detailed framework for effecting constitutional change, including the possible secession of a province. The Cree's reply to her response states:

> However, when proposed constitutional amendments directly affect Aboriginal peoples, the Attorney General modifies her views: "...although outside of Part V, the involvement of aboriginal Canadians is assured through the provisions of s.35.1 of the Constitution Act, 1982 where their interests are directly affected" (para.8)
>
> In regard to procedures for constitutional amendment, s.35.1(b) expressly provides for the participation of "representatives of the aboriginal peoples of Canada." It does not contemplate the involvement of "aboriginal Canadians", as stated by the Attorney General of Canada. In other words, Aboriginal peoples participate as recognized constitutional entities, that is, as distinct "peoples", and not as individual Canadians. In this way, s. 35.1 is a further affirmation that Aboriginal peoples are constituent elements of the federal principle under Canada's Constitution. (Para.9)

The Cree have argued that they have never treatied their sovereignty nor right to self-determination away. The *J.B.N.Q.A.* does contain provisions for amendments and requires the consent of the Cree to any amendments, especially with respect to territorial boundary issues. In the context of Quebec's secession, the Cree have argued that any framework designed to fashion this task will fundamentally change the *J.B.N.Q.A.* and will require the consent and participation of the Cree to do so.

determination was argued by the Cree to also have a universal application in "regard to both its external and internal aspects".[39] The Cree echoed their Submission to the Commission on Human Rights in their factum by arguing their Submission to the Commission on Human Rights in their factum by arguing that the right to self-determination must not be used in a discriminatory manner.

*Scope*

While being a principle of customary international law, *jus cogens* or preemptory norm, the Cree contextualized the right of self-determination to apply to all 'peoples' that live in Quebec. The Cree submitted that they are a people for the purpose of self-determination.[40] Further, the Cree argued that they have no common will to "identify, for purposes of self-determination or for secession, with Quebec as a single "Quebec people".[41] Rather, the Cree maintained their right to self-identification in tandem with their right to self-determination.

*Content*

Competing interpretations regarding the content of self-determination were raised during the *Secession Reference* reflecting state formulations as well as indigenous formulations. Canada argued that the "principle of self-determination does not permit unilateral secession as long as the state has a government representing its people on a basis of equality."[42] The Cree argued that the right to self-determination includes the right of peoples to secede from existing states where the state denies self-determination to the people through the following means: colonization; lack of

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[39] Cree Intervenor Factum, *ibid.* at para.75.

[40]The Cree assert that they meet objective and subjective criteria for peoples under international law and have the capacity to enter into treaties such as *J.B.N.Q.A.*

[41] Cree Intervenor Factum, *ibid.* at para. 85.

[42] *Ibid.* at para. 89.

representative government; severe oppression, ongoing discriminatory treatment and other persistent and serious human rights violations that could give rise to a right to secede.[43] The Cree, then argued that under the internal/external self-determination framework, Quebec cannot claim a right to secede:

> Quebecers are not being denied internal self-determination or representative government. Nor are they subjected to grave human rights violations. Therefore, Quebecers cannot successfully invoke any one of these conditions to claim a right to secede.[44]

The Cree also disagreed with the Attorney General's restrictive interpretation of the "internal" right to self-determination. The Attorney General of Canada argued that any conception of peoples should be restricted to the "internal" self-determination.[45] The Cree maintained their position[46] that indigenous peoples' right to self-determination is not "automatically internal" to the State, but rather, under exceptions such as colonized peoples or those under alien domination or subject to gross oppression, "external" self-determination is also available. The Cree argued

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[43] *Ibid.* at para. 88.

[44] *Ibid.* at para. 101. It was submitted to the Court by the amicus curiae that Quebec could claim a unilateral declaration of independence based on the principle of effectivity, effectiveness or effective control. The Cree submitted that the right to self-determination can deny effective control attempts between competing peoples in an existing state motivated by secessionist projects:

> Aboriginal peoples have access to the principle of effective control on the same terms as Quebec. In regard, to this principle, Aboriginal peoples in Quebec are not in any way required to establish a new state. Rather, they can fully maintain their relationship and association with the existing Canadian state and, through peaceful measures, deny "effective control" to any secessionist forces.

*Ibid.* at para. 112.

[45] See the Cree's Reply to Written Responses by the Attorney General of Canada and the Amicus Curiae to Questions posed by the Supreme Court of Canada on self-determination, *supra* note 38.

[46] The Cree argued throughout their factums that they do not just have an internal right to self-determination:

> It cannot be said that indigenous peoples, regardless of their circumstances, are automatically limited to "internal" self-determination within existing states. Circumstances can arise that give just claim to an external right to self-determination. Consistent with the principle of equal rights and non-discrimination, the right to self-determination in accordance with international law must be fully applicable to indigenous peoples as is applicable to non-indigenous peoples.

See the Cree Intervener Factum, *supra* note 38 at para. 94.

that self-determination includes the right to freely determine their political status and freely pursue their economic, social and cultural development and is *not* exercised "in a way that respects the political, constitutional and territorial integrity of democratic states" as the Attorney General states in its written response to the Courts' question on self-determination.

In the context of Quebec secession and a forcible inclusion of the Cree into an independent Quebec, the Cree submitted that they "reserve the right to claim a right to secede, in conformance with international law" and the right to choose not to be separated from Canada.[47] If extreme circumstances arise, the Cree reserve their right to secede from Canada as well. Should the Cree be faced with forcible inclusion into a sovereign Quebec, Canada's compliance or agreement with such human rights violations will trigger the Cree's rights as a people to trump Canada's right to assert territorial integrity as well:

> The principle of territorial integrity does not prevail over the right to self-determination and secession of the Crees. This is because the principle of equal rights and self-determination is not being recognized internally by either Canada or Quebec with respect to the Crees. Therefore, contrary to the 1970 **Declaration Concerning Friendly Relations**, Canada and Quebec are not "possessed of a government representing the whole people."[48]

*J.B.N.Q.A*

The Cree linked self-determination to the relevancy of the *J.B.N.Q.A.* throughout their factums in the *Secession Reference*. A unilateral secession would have a serious impact on their right to self-determination and would compromise, violate or prejudice the Cree's rights and interests in the process:

> The unilateral secession of Quebec, if carried out against the express will of the Cree and Inuit peoples in the manner described in the Factum of the amicus curiae (para.139), would have dire consequences: violation of the human rights of the Cree and Inuit peoples, particularly their right to self-determination; denial of their collective will to remain in Canada (as expressed in their own referendums); unilateral alteration of Aboriginal, treaty and other constitutionally-protected rights of the Crees and Inuit, so as to no

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[47] *Ibid.* at para. 97-99.

[48] *James Bay Cree, supra* note 17 at 44.

> longer apply within Canada; unilateral termination of the fiduciary relationship with the crown in right of Canada; and forcible separation of Crees and Inuit from Canada and their inclusion in a new Quebec "state".[49]

*Consent*

Consent is a necessary and a functional aspect of self-determination. It is also a constitutionally protected aboriginal right under s. 35(1) of the *Constitution Act, 1982*. The right to give or withhold consent to any proposed amendments to the *J.B.N.Q.A.* by the Cree must be obtained by the state, regardless of the circumstances. Unilateral secession would: unilaterally modify the *J.B.N.Q.A.;* render any process to facilitate a unilateral secession by Quebec from Canada as illegal and illegitimate; and would constitute a fundamental breach to the terms, conditions, spirit and intent of the *J.B.N.Q.A.* Cree consent in such circumstances should be respected given potential modification of treaty rights.

*S. 35 of the Constitution Act, 1982*

The Cree further argued that secession leading to the forcible inclusion of the Cree into a sovereign Quebec would fail to meet the test[50] for justifying infringements of s. 35 aboriginal and treaty rights as well as the reconciliation purpose of s. 35 of the *Constitution Act, 1982*. There is no valid and legislative objective or other objective that would enable federal and provincial governments to remove Aboriginal peoples and their traditional territories from Canada against their will.[51] Such an objective would be tantamount to neocolonialism and would: deny the Cree their right to self-determination; is inconsistent with existing treaty rights, fiduciary obligations and relationships between the Cree and the Crown; is most likely

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[49] See Reply, *supra* note 38 at para. 65.

[50] See the justification test set out in *R.* v. *Sparrow,* [1990] 1 S.C.R. 1076, *R.* v. *Gladstone,* [1996] 2 S.C.R. 723 , *R.* v. *Vander Peet,*[1996] 507 and *Delgamuukw*, *supra* note 14.

[51] Reply, *supra* note 38 at para.21.

irreversible and would lead to the infringement of such rights and vitiate the purpose of s. 35(1) which is reconciliation.[52]

Asserting that a "unilateral" secession is unconstitutional, the Cree focussed on the framework proposed for a constitutional amendment that would make secession by a province in Canada subject to court prescriptions and legal. The Cree submitted to the Court that if it were to prescribe "firm criteria" for secession, then the Court should confine such criteria to Quebecers or Quebec institutions. The Cree also submitted to the Court that any secession framework should be broadly considered; should not be selective;[53] and should not perpetuate the crime of colonialism by ignoring the Cree's rights through a transfer of title or confirmed possession by a state, as if the territory involved were vacant.

The Cree argued that their are various amendment procedures in the constitution of Canada, s. 35(1) being one of them, that must be taken into account by the Court while considering the amending provisions set out in Part V of the Constitution for a province to secede. S. 35(1) of the *Constitution Act, 1982* provides for an amending procedure which is ongoing and dynamic [54] and requires the consent of aboriginal peoples including the Cree, to

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[52] *Ibid.* at paras. 21-23.

[53] See Cree Reply to Factum of Amicus Curiae, *supra* note 38 at para. 13-14:

> For the most part, the Factum of the amicus curiae focuses on the unilateral secession of Quebec, in the context of a "successful" attainment of effective control by Quebec authorities. However, it virtually ignores all key stages of such a revolution leading up to the secession of independence.
>
> Except for the absurd argument that effective control is one of the unwritten norms under the Constitution of Canada, the Factum makes little or no attempt to examine the substantive and procedural elements of Canadian law relevant to unilateral secession in Quebec. In particular, the constitutional rights, procedures and norms pertaining to the James Bay Cree people in Quebec are ignored. Such an approach by the amicus curiae is wholly selective and precludes fair and balanced analysis. It runs counter to the interpretive rule established by the Supreme Court of Canada that the "Constitution is to be read as a unified whole".

[54] *Ibid.* at para. 50:

> In regard to treaty rights, the constitutionalization procedure in s.35.(1) is an ongoing and dynamic one. It confers constitutional protection not only on the treaty rights of Aboriginal peoples that

achieve: 1) treaty-making; 2) the modification of treaty rights; 3) making treaties null and void when acts such as unilateral secession would render a treaty breached; and perhaps 4) a new framework for the re-opening of the question of territorial rights of the aboriginal peoples concerned (ie/ partition of a province that wills to secede from Canada). The special[55] and fiduciary obligations that Canada has towards the Cree is also protected by s. 35(1) and was argued by the Cree to remain protected by Canada in any proposed framework for secession by the Court.

By reading the constitution of Canada as a whole, the Cree proposed that a flexible and balanced approach to Quebec's secession includes an amendment procedure that respects 1) the principle of federalism in which the Cree are a constituent element; 2) the principle of democracy; 3) the rule of law; and 4) the legitimacy of the Cree as equal partners in the balance of power between federal, provincial and Cree governments. To accomplish this goal, the Cree argued that full participatory rights is required to protect their rights and fiduciary relationship with the state:

> The various Aboriginal peoples affected by the division of the existing state of Canada would clearly have an appropriate participatory right in any negotiations, presumably as full and equal participants so far as their interests are at stake.[56]

Although the *J.B.Q.N.A.* deals with land rights and titles, it does not deal with self-determination or sovereignty :

> The right to self-determination is a human right of peoples and is inalienable. No compensation can erase

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> existed at the time of adoption of the Constitution Act, 1982, but also on those treaty rights acquired or modified at any time in the future.

[55] The Cree submitted that the *J.B.N.Q.A.* was signed within a federal constitutional framework where both Canada and Quebec have constitutionalized fiduciary obligations as well as a "special responsibility" to the Crees. See Cree Intervenor Factum, *supra* note 38 at para. 57-58 and 65.

[56] *Ibid.* at para. 15.

> the right to self-determination. No section in the JBNQA could be invoked to deny the James Bay Crees their right to self-determination. The text in section 2.1 of JBNQA refers to questions pertaining to land rights and titles. It does not address rights of self-determination or sovereignty.[57]

At the time of this writing, the Supreme Court of Canada has rendered its decision regarding the *Secession Reference*. Not only Canadians, Quebecers and indigenous peoples have waited for the courts pronouncement, but international actors have as well. Under state formulations of the framework for the right to self-determination, the rights of states and the rights of peoples at international law have to be reconciled in order to maintain peace at international law. We now turn to the Court's decision to see if the Cree's right to self-determination was respected by the Canadian judiciary.

The Supreme Court of Canada said very little about the right to self-determination for indigenous peoples such as the Cree. The Court did recognize that the right was a universal right applicable to peoples at international law. The Court interpreted 'peoples' as "only a portion of the population of an existing state".[58] The Court did not find it necessary to "explore the legal characterization" of whether the Quebec population was a "people" for the purposes of resolving whether or not Quebec could ground a unilateral secession on the right to self-determination. Holding that self-determination does not afford unilateral secession outright[59] to the Quebec population, the Court did not explore the legal characterization of the Cree as a "people", nor

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[57] *Ibid.* at para. 39.

[58] See *Secession Reference*, *supra* note 19 at para. 124.

[59]The Court affirmed that under international law, the right to self-determination would afford secession under specific circumstances:

> In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied the ability to exert internally their right to self-determination.

*Ibid.* at para. 138.

found it "necessary to examine the position of the Cree in Quebec."[60] The Court concluded that the concerns of indigenous peoples, such as the Cree, were "precipitated by the asserted right of Quebec to unilateral secession"[61] and since Quebec could not legally secede from Canada on a unilateral basis, it was unnecessary to explore the concerns of the Cree in the *Secession Reference*. In other words, the Court did not find it necessary to examine Cree self-determination both in scope and content.

The Court did state, however, that if the Quebec population is able to establish a "clear democratic expression of support for secession", and negotiations take place for a legal secession framework, then the interests of indigenous peoples, such as the Cree, would be "taken into account." Characterizing aboriginal and treaty rights protected under s. 35 of the *Constitution Act, 1982*, as an "underlying constitutional value", the Court held that respect for indigenous peoples' ancient occupation of the land, their contribution to the building of Canada, and the special commitments made to them by successive governments, are essential to negotiating a secession framework as are the principles of federalism, democracy, the rule of law, and the protection of minorities.[62]

Since the Court did not address the Cree right to self-determination, and gave little direction or guidance as to how Cree treaty rights and rights as a people will be protected if a negotiated secession takes place, the Crees' concern for secession criteria (not broadly considered; not selective; and the perpetuation of colonialism) still exists. The Court did not find it necessary to treat the Cree as legitimate equal partners in Confederation, but as minorities.

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[60] *Ibid.* at para. 125.

[61] *Ibid.* at para. 139.

[62] *Ibid.* at para. 82.

Despite this non-recognition, the Court did agree with the Cree as well as other parties to the *Secession Reference*, that Quebec does not have a unilateral right to secede under the Canadian constitution. The Court also confined the *Secession Reference* and criteria for negotiating secession to Quebec and Quebec institutions. This was the position of the Cree throughout the litigation. It now remains to be seen how the Cree will politically assert their rights and whether Canada and Quebec will respect these rights. The Cree could employ belated-state building to realize their political position and their right to self-determination in the context of a possible Quebec secession.

Belated-state building can provide a process where the Cree can be equal participants with balanced negotiating power in re-negotiating the *J.B.N.Q.A.* Belated-state building ensures that indigenous participation in subsequent processes to implement self-determination agreements are pursued as well. In the context of secession, the Cree must be a party to any constitutional amendment process that will effect their treaty rights and Cree traditional territory. In tandem with respecting and honouring Cree participatory rights, the Canadian state must obtain the consent of the Cree to any modifications of their treaty and territorial integrity. Perhaps, by accomplishing all of the above, internal self-determination can become a reality for the Cree.

Regardless of what political entity the Cree choose in exercising the right to self-determination, the Cree propose that any new relationship between Canada and an independent Quebec created out of secession, would have to: remedy violations of their existing efforts to decolonize internally; would require substantive amendments to the *J.B.N.Q.A.* to achieve self-determination (or more likely the creation of a new agreement); and an appropriate agreement on principles would have to be reached by all three political entities. The Cree submit that a

principled negotiation for the future of Canada, Quebec and themselves would include the following principles:

i) Upholding of International Standards;
ii) Recognition of Cree Right to Self-Determination;
iii) Recognition of Our Right to Self-Government;
iv) Cree Control Over Cree Traditional Territory;
v) Prohibition of Unilateral Action and Recognition of the Principle of Aboriginal Consent;
vi) Respect for the Integrity of Cree Values, Practices and Institutions;
vii) Promotion of Sustainable and Equitable Development; and
viii) Recognition and Use of Treaty-Making Powers.[63]

The internal/external framework presents one possible way to understand the scope of the right to self-determination. As with all models, there are advantages and disadvantages. In the context of indigenous 'peoples' rights to self-determination, and in particular, those indigenous peoples who have territories located in the superimposed boundaries of the Canadian state, the internal/external framework, in theory, can assist indigenous peoples who self-determine that decolonization will lead to the political autonomy, "within" the colonizing state they desire. Further, where the colonizing state remains to be oppressive over such indigenous peoples and/or fails to represent indigenous peoples that have chosen to integrate into the state, indigenous peoples under these circumstances can choose the various options that are available under the external element of the right to self-determination. Belated-state building can facilitate internal or external self-determination. It should not be used by states as a process to perpetuate state practice or usage of colonialism and oppression against indigenous peoples. As the Cree have demonstrated through all their political and legal battles, without full and equal participatory rights in all matters that affect them, they are not able to exercise self-determination. In order to achieve self-determination, Canada must respect the competing self-determining rights of peoples through balanced, open and flexible participation by all parties to a "self-determination"

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[63] *Ibid.* at 169-174.

agreement. Belated-state building is one way that Canada can respect such aspirations.

**2) British Columbia Treaty Commission Process**

A high percentage of indigenous peoples who have traditional territories in what is now called British Columbia are active in modern treaty-making with Canada. The British Columbia Treaty Commission Process (B.C.T.C.P.)[64] can be an example of "belated state-building" where the federal government, provincial governments and First Nations Summit are the principal parties. Treaty-making under this process is very process-oriented. Unlike the process for the *J.B.N.Q.A.*, First Nations have had participation in: recommending principles for negotiations, influencing federal/provincial policies on land claim agreements, and drafting and implementing legislation that recognizes the British Columbia Treaty Commission (a domestic body whose mandate is to monitor the negotiation processes and redress the imbalance of bargaining power between Canada and each First Nation[65]). To date, given recent court pronouncements regarding aboriginal title rights[66], principle parties are participating in tri-partite negotiations regarding the interpretation of aboriginal title rights and how Canadian treaty policy and the B.C.T.C.P. can be brought in line with substantive law.

The development of the B.C.T.C.P. began in 1990 when the province of British Columbia agreed to negotiate land claim agreements with the federal government. A task force was set up amongst indigenous peoples, British Columbia and Canada to develop the scope and process for

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[64] In British Columbia there is only one treaty process created jointly by the First Nations Summit, Canada and British Columbia in 1992. See *Agreement between the First Nations Summit, Her Majesty the Queen in Right of Canada and Her Majesty in Right of British Columbia*, 21 September, 1992 [hereinafter B.C.T.C. Agreement]. See also *British Columbia Treaty Commission Act*, S.C. 1995, C. 45.

[65] Under s. 1.1 of the B.C.T.C. Agreement and s. 2 of the *British Columbia Treaty Commission Act*, aboriginal governing bodies at the treaty table are called "First Nations" which means "an aboriginal governing body, however organized and established by aboriginal people with their traditional territory in British Columbia."

[66] See *Delgamuukw, supra* note 14.

negotiations. The 1991 British Columbia Task Force Report prescribed 19 principles or recommendations for creating a new relationship and resolving land claims.[67] Although a majority of these principles have been implemented, significant recommendations such as sufficient funding for negotiations; reaching interim measure agreements; and unclear mandates were not. This left a climate of uncertainty over aboriginal rights and title, a climate that would foster adversity with First Nations being forced to back to the courts as a strategy of last resort in order to resolve impasses at the negotiating table. Since 1993, aboriginal rights cases have inched their way to the Supreme Court of Canada creating some negotiating space. The *Delgamuukw* decision somewhat leveled the legal playing field for First Nations participating in the B.C.T.C.P. With the Supreme Court of Canada's recognition that aboriginal title does exist at common law and if proven to exist by the aboriginal claimant, is constitutionally protected under s. 35, First Nations could go to the bargaining table with increased power. Immediately after the *Delgamuukw* decision was handed down by the Court on 11 December, 1997, all principals in the B.C.T.C.P. halted treaty negotiations, so to speak, to allow time for interpretation of the decision. By March, 1998, a tripartite review of the B.C.T.C.P. by representatives of the First Nations Summit, the federal Crown, and the provincial Crown, was created to facilitate an interpretation of the decision that was acceptable to all principals.

In April, 1998, the three principals began tripartite negotiations to "provide an optional

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[67]The recommendations included: a broad and flexible scope for bringing issues to the table for negotiation; a voluntary and open treaty process that accepts First Nations when they are ready to negotiate; sufficient funding for all parties at the treaty table; practical agreements; commitment for all parties to reach an agreement; commitment by First Nations to resolve overlaps among themselves; the establishment of a British Columbia Treaty Commission that allocates negotiation funds to First Nations and provides advice and assistance in dispute resolution as agreed to by the parties; a six stage process to monitor treaty-making; ratification procedures for all parties; skilled negotiators with clear mandates; interim measure agreements; and a joint undertaking by all parties to disseminate public information on the process. While third party corporate interests where actual negotiating parties in the JBNQA, 1975, this is not the case with the B.C.T.C.P. Rather, the process is to be open and represent such interests through Canadian government committees. See British Columbia Claims Task Force, *The Report of The British Columbia Claims Task Force* (Vancouver, 28 June, 1991).

mechanism to First Nations to accelerate their treaty negotiations"[68]; to "give recognition to the Supreme Court decision in *Delgamuukw*"[69]; and to review the B.C.T.C.P. A six month plan was suggested to concentrate on 4 substantive issues: aboriginal title; acceleration of negotiations with respect to land, resources and the financial settlement (including cost-sharing items) component of treaties (outstanding issues such as interim measures, consultation and consent); certainty ; and capacity building. The main impetus behind the re-vitalization process campaign is to make economy interests certain through the reconciliation of aboriginal title interests and Crown interests. The role of parties also is being reassessed, including the B.C.T.C.[70]

At the Tripartite Principal's meeting, the three principals agreed to a political statement on aboriginal and crown title for the purposes of discussion:

> The parties agree to the negotiation of treaties respecting the following principles:
>
> 1. The parties recognize that Aboriginal title exists as a right protected under s. 35 of the Constitution Act, 1982.
> 2. Where Aboriginal title exists in British Columbia, it si a legal interest in land and is a burden on crown title.
> 3. Aboriginal title must be understood from both the common law and aboriginal perspective.
> 4. As acknowledged by the Supreme Court of Canada, aboriginal peoples derive their aboriginal title from their historic occupation, use and possession of their tribal lands.

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[68] See First Nations Summit, Press Release, "First Nations Summit Passes Resolution to Continue Tripartite Discussions with Canada and BC" (26 June 1998). The B.C.T.C.P. has been characterized as a long and cumbersome process in need of acceleration.

[69] *Ibid.*

[70] The role of the B.C.T.C. is to:

> facilitate the negotiation of treaties. It is also responsible for accepting First Nations into the treaty process and assessing when the parties are ready to start negotiations. It develops policies and procedures applicable to the six-stage treaty process, monitors and reports on the progress of negotiations, identifies problems, offers advice and may assist the parties in resolving disputes. It allocates funding, primarily in the form of loans, to First Nations. Commissioners and staff regularly travel to all regions in British Columbia to monitor treaty negotiations and the parties' compliance with commitments they have made to the treaty process.

See British Columbia Treaty Commission, *The Fifth Annual Report of the British Columbia Treaty Commission for the Year 1997-1998* at 7 [hereinafter "*The Fifth Annual Report*"]. Post-*Delgamuukw,* the B.C.T.C. has: facilitated the tri-partite negotiation process; made recommendations for disputes concerning overlaps; provided representative and administrative support for the development of First Nations' capacity building; and continues to disseminate information about the B.C.T.C.P. to Canadians and First Nations. Negotiations are still underway as to the role of the B.C.T.C. with respect to the acceleration process.

5. The parties agree that it is in their best interest that aboriginal and crown interests be reconciled through honourable, respectful and good faith negotiations.[71]

The First Nations Summit tabled political documents that prescribed principles for "good faith negotiations"[72] and the acceleration of lands and resources and cash negotiations.[73]

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[71]Tripartite Principal's Meeting, *"Action Plan for Revitalizing the Treaty Negotiation Process in BC"* (29 April 1998).

[72] Good Faith Negotiation Principles included:

-Negotiators will recognize that Aboriginal Title exist;
-Objectives must clear and identified up front;
-Mandates to achieve objectives must be clear;
-Negotiations must be held in a timely fashion;
-Negotiations should not be unduly impacted by factor, which are not direct, substantive negotiation issues;
-Results, and the negotiation process should bring honour to all;
-Government will continue to fulfill a Fiduciary Responsibility to the interests of First Nations while negotiations proceed;
-There must be a respect and relationship to the basic Principles of International Law;
-Negotiations will not restrict First Nations from exploring, developing or participating in any other community development process; and
-The Parties to each negotiation table should develop and maintain an effective evaluation process.

*Ibid.*

[73] These principles included:

1. Aboriginal title is a legal interest in the land and resources including waters, foreshore and all marine resources on an within a First Nations' Traditional Territory;
2. Where there is proposed infringement of Aboriginal Title and Rights within First Nations Traditional Territories, the following actions and principles must be incorporated into the decision making process:
   -First Nations' legal interest and rights must form the cornerstone of planning and decision making;
   -Governments must work with their partners, the First Nations, in land and resource decision-making prior to any involvement of third parties. No third party expectations will be accommodated prior to discussion/negotiations and agreement with First Nations regarding land and resource use including waters, foreshore and marine resources decision making;
   -First Nations must participate in an approve all land and resource use including waters, foreshore and marine resources decisions within their traditional territories;
   -First Nations must participate as partners in the decision-making process;
3. The current consultation system must be modified to reflect First Nations legal interests in the lands and resources, water, foreshore and marine resources within their traditional territory. For example, the current referral system must be redesigned to effect First Nation involvement in the decision making process;
4. First Nations will have immediate access to their lands and resources, waters, foreshore and marine resources within their traditional territories; prior to treaty settlements and in a manner which reflects their legal interest in lands and resources, waters, lands and marine resources. This may be achieved through land banking, interim measures, early implementation or accelerated negotiations.
5. First Nations will have the opportunity to acquire additional treaty settlement lands and resources before and after treaty settlements either through negotiation or direct purchase to be added to their settlement lands and resources, waters, foreshore and marine resources;

The principals have not been able to reach consensus on the issue of certainty, however, they have addressed the issue of capacity-building.[74] The above noted suggested principles for a new revitalized B.C.T.C.P. is not exclusive, however, building upon principles recommended in the 1991 British Columbia Task Force, First Nations in this process have had on-going participation and influence in the overall workings of the process since its inception.

Proposals were tabled by all parties to form the basis for subsequent discussions and proposals. The Province of British Columbia presented a'revitalization package'[75], however, this was not accepted by First Nations participants in May, 1998.[76] There should be no illusion that

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6. Aboriginal title shall remain on lands and resources, waters, foreshore and marine resources of all the First Nation's territories;
7. Compensation shall be made available where infringement of aboriginal title occured;
8. The First Nation shall participate in and benefit from royalties and taxation of the lands and resources, waters, foreshore and marine resources within its territories;
9. In order to reconcile titles (Crown and Aboriginal) land and resources, water, foreshore and marine resources use legislation must give effect to First Nations laws in decision-making;
10. All land and resource, water, foreshore and marine resource use referrals must be forwarded to and dealt with by affected treaty tables;
11. First Nations must be sufficiently funded to build their capacity.

*Ibid.*

[74] The B.C.T.C., in its fifth annual report, stated that initiatives for capacity-building are underway in the treaty process: "A group of First Nations leaders with an interest in capacity building met with the Treaty Commission in January 1998 to discuss the development of self-assessment tools for First Nations in the treaty process. The project, funded by the federal government, seeks to identify their own capacity needs and determine how best to meet these needs." See *The Fifth Annual Report, supra* note 70 at 4. In April, 1998, the Working Group on Capacity and Capacity Building (chaired by the B.C.T.C.), presented a report to the Tripartite principals that discussed the need for capacity-building "in the short-term to deal with the complexities of -Stage 4: Agreement-in-Principal- negotiations." The report also focussed on longer-term abilities to implement treaty settlements. "The report outlines work now being funded to develop capacity "self-assessment" tools for use by First Nations. It also describes planned future work to facilitate access to existing government programs, and access to federal initiatives linking capacity building to the "Gathering Strength" initiative." See First Nations Summit, Information Bulletin "Tripartite Treaty Action Plan: Summary & Description" (4 May 1998). Capacity-building is essential to bringing indigenous peoples to a leveled playing field for negotiations and marks a substantial departure from the Cree treaty process.

[75]The Province of British Columbia's proposal has informally been referred to as the "accelerated land, resources and cash negotiation proposal". See First Nations Summit, Press Release, "First Nations Summit Disappointed by Inaccurate Reports Regarding Tripartite Discussions on the BC Treaty Process" (14 May 1998).

[76] Media misreporting of the First Nations Summit's rejection of British Columbia's proposal was called a 'fallout': BC recommended a fixed package of cash and land. This was quickly rejected by the FNS for at least two reasons: 1) land and cash deals would restrict the negotiations of individual treaty talks (e.g. those tables which are looking for co-jurisdiction over their traditional territories); and 2) the request that First Nations not undertake any

Canadian principals recognized aboriginal title claims immediately after the *Delgamuukw* decision was handed down. Some First Nations in the B.C.T.C.P. initiated court actions with respect to aboriginal title infringements, overlaps, consultation, etc. and not all decisions were favourable to First Nations applicants. In other words, while the legal bargaining power of First Nations at the table had increased, politically and at the negotiating table this was not the case. Despite this setback, 51 negotiating tables are still active and discussions between the tri-partite principals are scheduled to resume in October, 1998.

The participation of First Nations in the B.C.T.C.P. is characterized by political action, direct action, litigation action and negotiations. Although this degree of participation is greater than the Cree had in the *J.B.N.Q.A.*, First Nations must still result to litigation as the most effective means to realize their entitlements in treaty negotiations. Canadian governments, even after court pronouncements on aboriginal title still maintain status quo policies with respect to land and resource use.[77] Despite this reality, the three principals are committed to revamping the

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"direct action or litigation" was unacceptable. This second issue is not possible, says the FNS, because BC had not yet dealt with the *Delgamuukw* decision, Aboriginal title, or the consultation process for use of land and resources. See "Treaty Update", online: Carrier-Sekani Tribal Council Homepage <http://www.cstc.bc.ca/treaty/treaty_update.html> (last modified: Fall 1998).

[77]The provincial government has recently designed 'Consultation Guidelines' for the staff of line ministries with respect to infringements of aboriginal rights and title:

> The operational guidelines were developed by the province following the Supreme Court of Canada's *Delgamuukw* decision in December 1997. The court's ruling established a number of principles about aboriginal title and identified a duty by the Crown to consult with First Nations on Crown land activities that may infringe aboriginal title. However, the court did not make a determination that any First Nation in British Columbia has aboriginal title.
>
> The guidelines will assist provincial staff in their consultations with First Nations, without making a determination as to whether aboriginal title exists. The onus for proving aboriginal title rests with First Nations.
>
> The guidelines used by government staff in conjunction with the province's existing Crown land activities and aboriginal rights policy, which was established in 1995 in response to earlier court decisions that identified aboriginal rights.

See Ministry of Aboriginal Affairs, News Release, "Provinces Releases First Nations Consultation Guidelines for Government Staff" (29 September 1998).

treaty process. As there is no treaty completed in the B.C.T.C.P. to date, we will not be able to effectively compare the *J.B.N.Q.A.* with a B.C.T.C.P. treaty, however, comparing the degree of participation at all levels of the treaty-making has been beneficial for the development of an alternative treaty model proposed in this thesis.

**C. Ned'u'ten-Canadian Treaty Process**

The treaty process that I envision for negotiating a Ned'u'ten-Canadian Treaty is based on the *bah'lats*, Ned'u'ten laws, customs, and protocols. This foundation and structure for designing a peace treaty, therefore requires Ned'u'ten participation at every level. Ned'u'ten traditional territories are the site location for negotiations[78] given the *bah'lats* nature of the process and that the proposed relationship is only between the Ned'u'ten and Canada. There is historical precedent for the Ned'u'ten and neighbouring peoples that hosted reciprocal *bah'lats* for the maintenance of peaceful relations. This is known as a special *bah'lats* or feast. It has also been referred to as an "All Clan *Bah'lats*". Depending on the "business", this international process for maintaining relations or resolving disputes could take place on either peoples' territories. This is because the *bah'lats* and clan systems are similar. Since Canada does not have the same social and political organization as the Ned'u'ten and given Canada's questionable territorial claim to Ned'u'ten territory, it only makes sense that the treaty process be based on Ned'u'ten territory.

The treaty process is also an international treaty process. This requires an independent, international supervisory body to monitor the treaty process.[79] An international body could

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[78] Salacuse and Rubin state that *where* bilateral negotiations take place or the setting for negotiations may have an impact on a negotiated outcome between parties. This includes: my place, your place, another place and no place for electronical negotiations. These authors suggest that negotiating at 'my place' offers a "home advantage" or "territorial dominance" because there is a familiarity with the environment, you know where everything is located, and you have control in various aspects of the negotiating environment. See J. Salacuse and J. Rubin, "Your Place or Mine? Site Location and Negotiation" (1990) 6:1 Negotiation Journal 5 at 5-6.

[79]Indigenous peoples have called for an international body to monitor and supervise processes for creating relationships, agreements with States. See preambular provisions of the *Draft Declaration* which states: *Considering*

consist of members that hold or have held international supervisory posts, are representatives of peoples that have decolonized under international prescriptions, or have participated extensively in the W. G.I. P. and in the development of the Draft Declaration. For the purposes of this thesis, I will call this international treaty supervising body the "International Indigenous Self-Determination Commission" ("I.I.S.C."). The I.I.S.C. would oversee the negotiations and processes for establishing Ned'u'ten-Canadian peace treaty; the implementation of principles prescribed in chapters two, three and this chapter; international instruments regarding indigenous peoples and evolving human rights standards; and the decolonization regime for the Ned'u'ten and Canada. The I.I.S.C. would also have the jurisdictional powers to resolve disputes regarding

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that treaties, agreements, and other constructive arrangements between States and indigenous peoples are properly matters of international concern and responsibility. Miguel Martinez advocates an internationalized treaty process between States and indigenous peoples where domestic venues are incapable of resolving disputes due to the non-existence, malfunctioning, anti-Indigenous discriminatory approaches and the ineffectiveness of national institutions:

> While it is generally held that contentious issues arising from treaties or constructive arrangements involving Indigenous peoples should be discussed in the domestic realm, the international dimension of the treaty problematic nevertheless warrants proper consideration.
>
> A crucial question relates to the desirability of an international adjudication mechanism to handle claims or complaints from Indigenous peoples, in particular those arising from treaties and constructive arrangements of an international status.
>
> The Special Rapporteur is quite familiar with the reticence expressed time and again, by States toward the question of taking these issues back to open discussion and decision-making by international fora. In fact, he might even agree with them that, on certain issues (e.g. disputes not related to treaty implementation and observance ) it would be more productive to keep their review and decision exclusively within their domestic jurisdiction until this is completely exhausted.
>
> However, he is of the opinion that one should not dismiss outright the notion of possible benefits to be reaped via the establishment of an international body (e.g. the proposed Permanent Forum of Indigenous Peoples) that, under certain circumstances, might be empowered --with the previous blanket acquiescence (or on an *ad hoc* basis) of the State concerned -- to take charge of final decision in a dispute between Indigenous peoples living within the borders of a modern State and non-indigenous institutions, including State institutions.
>
> At any rate, the special Rapporteur recommends that a United Nations-sponsored workshop be convened -- at the earliest possible date, and within the framework of the International Decade of Indigenous Populations--, to open an educated discussion on the possible merits and demerits of the establishment of such an instance.

Miguel Martinez, Spec. Rapp., *Final Report on the Study of treaties, agreements and other constructive arrangements between States and indigenous populations*, (1998) E/CN.4/Sub.2/AC.4/1998/CPR.1 at paras. 108-109 at paras. 317-321.

negotiations, process, and state-people rights reconciliation. The I.I.S.C. would also have an on-going role to oversee the implementation of the peace treaty.

The Ned'u'ten-Canadian treaty process is a decolonization process. It has two stages: 1) a remedial self-determination stage which is based on the Ned'u'ten Shaming *bah'lats* and the Ned'u'ten Wiping Away Ceremony; and 2) a substantive self-determination stage that restores the international subject status of the Ned'u'ten and the *bah'lats* to full jurisdictional and governmental operation over the totality of the Ned'u'ten territory and people residing in that territory. The first stage incorporates the retroactive elimination of colonization in all its forms and remedies past and current dispossessions of the Ned'u'ten. This stage is designed to bring the Ned'u'ten and Canada back to square one so that stage two can begin with an honourable relationship that will foster negotiations of how Canada will exist in Ned'u'ten territories. If there is hostile resistance, non-commitment or political will to bring about this healing, then the Ned'u'ten will decide at this stage, what political status will realize this goal through the right to self-determination. This may include independence. The second stage sees the adaptability of the *bah'lats* to meet the needs of the Ned'u'ten and Canada in contemporary times (constitutive self-determination) and the processes to maintain these relations (on-going self-determination). The Ned'u'ten-Canadian treaty process advocated here requires time to heal and a commitment by the Ned'u'ten and Canada to decolonization.

### 1. Stage One: Remedial Self-Determination Process

The Ned'u'ten have ways for bringing order and respect back to deeneza and dzakaza, clan members and clans that have shamed their names through disrespectful conduct, violations of *bah'lats* protocols, Ned'u'ten laws and customs[80] or conduct that has brought disruption of

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[80]Lake Babine Nation, *supra* note 1 at 176. Such conduct includes the "loss of blood" from a fight. A

social relations, such as a dispute.[81] There is no inquiry into whether the act was intended as there is when determining the mens rea for a criminal offence in under Canadian criminal law. The act or conduct is sufficient enough to warrant shaming as in absolute liability determinations under Canadian criminal law. The purpose of the shaming *bah'lats* is:

> ...to show regret and to apologize; to acknowledge wrongdoing and to make it right again. Payment is given in retribution for the wrong doing. Through retribution, social relations are brought back into balance and will remain so because the wrongdoing is to be forgotten and never mentioned again.[82]

Shaming is used to monitor, correct and shape the behaviour of the people. Accountability for all conduct is essential to maintaining balance and harmony. There are many ways to shame a deeneza, dzakaza, skezacho (children of big chiefs) for wrongful conduct that may cause humiliation. Depending on clan ritual protocols, the initiator may throw money or articles associated with a crest at the violator; or make a song to shame the violator.[83] Shaming is a process to deter future conduct of Ned'u'ten name holders that would prevent that person from living up to there name.[84] If the shame brought to a name is not "wiped clean", then that person will not be able to participate in the *bah'lats*.[85] The onus is on the violator to "announce their

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cleansing *bah'lats* will have to be held for the violator and bring him/her out of social isolation. *Ibid.* at 179.

[81] *Ibid.* at 181.

[82] *Ibid.* at 176.

[83] "Shaming can entail humiliating another by giving her/him a sum of money at the *bah'lats*. This display of wealth represents a challenge to the violator, who is expected to redress the wrong by returning the wealth in a potlatch...Return of wealth, of course, indicates that the shamed person acknowledges the error and wishes it to be "wiped away", that is, to be forgotten. It is a way of saying, "I know what I did was wrong. I have to make it right again, to say 'sorry' in public. This is how I respect my name."...Each clan has a ritual that no one else can use. It may be throwing money or other articles associated with a crest. In addition to actions such as "throwing money" an insulted chief can have a song made. The song will tell the story of the insult and how the insult was wiped away. *Ibid.* at 177, (paragraphs omitted).

[84] *Ibid.* at 179.

[85] *Ibid.*

intention of wiping away the shame" at a *bah'lats*.[86]

The Wiping Away Ceremony is fundamental to the shaming process for it brings about healing, harmony and balance to social relations. It is also important "for individual well-being and for the prestige of the potlatch system."[87] This retribution ceremony is the responsibility of the clans (mother and sponsoring clan of the violator), not just the violator.[88] The shaming *bah'lats,* in my opinion as a dzakaza, should be restored as part of substantive self-determination to bring balance to the social harmony of my people in contemporary times. Despite limitations on when the shaming *bah'lats* can be used and who can use it to restore respect to their names[89] , it is my proposal to have Canada undergo a shaming process and a wiping away ceremony to bring legitimacy to its name in Ned'u'ten territory. This is one way to achieve remedial self-determination.

**a. Canada's Shaming *Bah'lats***

Although Canada does not have a name in the *bah'lats* context, it has brought shame to its name through its conduct to oppress, colonize and dispossess the Ned'u'ten. Canada's name is not respected by the Ned'u'ten that are able to identify this disrespectful conduct. Canada's name has no legitimacy. Its' conduct continues to prevent the Ned'u'ten from realizing substantive self-determination. To remedy this behaviour and to create respectful relations between Canada and the Ned'u'ten, the shaming *bah'lats* can be used.

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[86]*Ibid.* at 180.

[87]*Ibid.* at 181.

[88]*Ibid.*

[89]"People without names are not shamed in the ceremonial manner, perhaps because they carry fewer social obligations and therefore do not bring disrepute to the clan in the same manner. Nor can persons without a name independently shame a chief; they can, however, appeal to their own chiefs to act on their behalf. Chiefs are obliged to treat everyone with respect and can be scolded for not doing so. They are to show pity for others; when they do not do so they bring shame to themselves." *Ibid.* at 182.

There will have to be an accounting of Canada's disrespectful and dehumanizing conduct. In the *bah'lats*, Canada's colonizing record would be heard by the Ned'u'ten. Canada would acknowledge this wrongdoing, make apologies, and be prepared to compensate or retribute the Ned'u'ten for such conduct with gifts. It may take a series of *bah'lats* for Canada to bring respect to its name. The gifts would be what it would take to remedy colonization, dispossession and oppression. It would not be limited to money. Jurisdictional, political and legal recognition of Ned'u'ten status over Ned'u'ten territory at an international level are gifts necessary by distribution. Replenishing Ned'u'ten territory through ecological restoration, vacating Canadian presumed jurisdictions (s. 91/s.92 of the *Constitution Act, 1982*) over Ned'u'ten territory and people; and providing the means to rebuild the infrastructure of the Ned'u'ten are also examples of gifts that would be required as part of the shaming process. With numerous *bah'lats* taking place, Canada will acquire an understanding of its workings. Canada and the Ned'u'ten will also feast together, sharing food from the land, thereby creating harmonious relations as well the language of the people. Once the Ned'u'ten are satisfied with the acknowledgment, apology and gifts required to de-shame Canada's name (including implementation of chapter two principles), the process will begin to "wipe Canada's name clean'.

**b. Canada's Wiping Away Ceremony**

A *bah'lats* would be held to acknowledge that Canada has been shamed. A song could be made to mark Canada's past conduct; its redress of this conduct; and its commitment not to disrespect its name in the same manner again. Once Canada's name is "wiped clean", Ned'u'ten respect for Canada can begin. This is the point that true healing is established. It is at this point, that decolonization should be complete and negotiations begin to establishing how the Ned'u'ten will co-exist together in Ned'u'ten territory in peace.

## 2. Stage Two: Substantive Self-Determination Process

The remedial self-determination stage could take decades, but the negotiating substantive self-determination should not. For Canada, it is a recognition stage and the birth of a new political existence in Ned'u'ten territory. For the Ned'u'ten, it entails restoring the *bah'lats* to meet contemporary governing needs; bringing stories to life again that hold our laws and customs; the restoration of deneeza and dzakaza office and ensuring that the clan system is in order.

The relationship between Canada and the Ned'u'ten is left to our collective visions of peace. The *bah'lats*, is inherently a peace process. Peace is reinvigorated every time a *bah'lats* is held. Perhaps Canada will be represented in Ned'u'ten territory as a clan, or hold special new names that entail Canadian responsibilities and Canadian rights. This will have to be discussed by the Ned'u'ten and in particular, deneeza and dzakaza. Although this may seem like a brief prescription on paper, it is undesirable to codify all the intricacies of the *bah'lats* at this point. This already exists in Ned'u'ten oral tradition. The *bah'lats* is conducted in Ned'u'ten language. The *bah'lats* is the Ned'u'ten peace process.

Substantive self-determination is simply being Ned'u'ten and taking care of Ned'u'ten territories in peace. For Canadians, self-determination would entail being Canadian in Ned'u'ten territory. Future relations marked by agreements between the Ned'u'ten and Canada will be international documents. This can be the basis for a Ned'u'ten-Canadian relationship. A treaty would just recognize this peace relationship. The I.I.S.C. would monitor stage one and stage two of the Ned'u'ten-Canadian peace treaty process on Ned'u'ten territory. Although principles for negotiating remedial and substantive self-determination have been prescribed in this chapter, the following principles are suggested for negotiating a Ned'u'ten-Canadian Peace treaty.

## D. Negotiation Principles

- **Ned'u'ten participation at all levels of treaty-making (policy, procedural, substantive, implementation, dispute resolution);**
- **Negotiations to take place on Ned'u'ten territory;**
- **Equal bargaining power between parties;**
- **Ned'u'ten consent to the peace treaty process;**
- **Prohibition of Unilateral Action by Canada;**
- **Adoption of principles prescribed in chapter two and three;**
- **An atmosphere where the Ned'u'ten can negotiate freely political status and rights;**
- **The establishment of Recognition principles;**
- **Respect for Ned'u'ten values for creating peace within and outside the *bah'lats*;**
- **International law and standards for negotiating international treaties honoured;**
- **Pre-Condition that negotiations will halt if current Ned'u'ten dispossession by Canada continues and immediate review by the International Indigenous Self-Determination Commission;**
- **Commitment to decolonization, healing and peace; and**
- **Costs for funding the peace treaty process negotiations to be borne by Canada at the remedial stage and substantive stage if required.**

## E. Conclusion: A Ned'u'ten-Canadian Peace Treaty Model

> The *bah'lats* is the knot of community ties; it is the strongest expression of common identity and the foundation of national unity. It transcends any other legal order that purports to divide the family, clan or community.[90]

> Elders' stories speak of the stewardship of the chiefs. It fell to the hereditary chiefs to ensure the land and resources were cared for and passed on the next generation.[91]

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[90]Lake Babine Nation, *supra* note 1 at 120.

[91]*Ibid.* at 234.

I have compiled the principles prescribed in this thesis to form the foundation for what I see is essential for a peace treaty between the Ned'u'ten and Canada. Peace and respect by Canada for the Ned'u'ten and their homelands has never been achieved. This treaty model attempts to bring justice and peace back to my people. It is based on respect and relationships that foster good conduct between international actors. It recognizes the dignity of the Ned'u'ten and the conditions necessary for Canada to gain legitimacy in Ned'u'ten territory.

## A NED'U'TEN-CANADIAN PEACE TREATY MODEL

***Whereas*** **the Ned'u'ten are a people recognizable at international law and entitled to benefit from the right to self-determination;**

***Whereas*** **the Ned'u'ten have lived since time immemorial in Ned'u'ten territories;**

***Whereas*** **the Ned'u'ten values of peace and respect are fundamental to any new relationship with Canada and neighbouring peoples;**

***Whereas*** **the *bah'lats* is the traditional governing system for the Ned'u'ten with jurisdiction held by deeneza and dzakaza who's legitimacy is derived from Ned'u'ten clan system;**

***Whereas*** **there is no treaty between Canada and the Ned'u'ten, except the Babine Barricades Treaty, 1906-7, which has not been honoured by Canada;**

***Whereas*** **the Ned'u'ten have been dispossessed, oppressed and colonized by Canada and are therefore entitled to have a decolonization regime created with the full participation by the Ned'u'ten and Canada;**

***Whereas*** **Canada has not legitimately acquired Ned'u'ten consent to exist in Ned'u'ten territory;**

***Whereas*** **there has never been any wars, conquest, purchase or cession involving the Ned'u'ten and Canada;**

***Whereas*** **a new relationship between the Ned'u'ten and Canada is essential for creating peace;**

***Whereas*** **this relationship is sacred and solemn and respects the sacred connection the Ned'u'ten have to their ancestral lands; and**

***Solemnly proclaims*** **the following peace treaty model for the Ned'u'ten and Canada to**

**consider for future relations:**

**PARTIES**
**The Ned'u'ten People**
**Canada**

**INTERNATIONAL TREATY SUPERVISORY BODY**
**International Indigenous Self-Determination Commission**

**OBJECTIVE**
**To create a peace treaty that prescribes a process; decolonization regime; and self-determination framework for Ned'u'ten and Canada**

**NEGOTIATION PRINCIPLES**

- **Ned'u'ten participation at all levels of treaty-making (policy, procedural, substantive, implementation, dispute resolution);**
- **Negotiations to take place on Ned'u'ten territory;**
- **Equal bargaining power between parties;**
- **Ned'u'ten consent to the peace treaty process;**
- **Prohibition of Unilateral Action by Canada;**
- **Adoption of remedial/substantive self-determination principles prescribed below;**
- **An atmosphere where the Ned'u'ten can negotiate freely political status and rights;**
- **The establishment of Recognition principles;**
- **Respect for Ned'u'ten values for creating peace within and outside the *bah'lats*;**
- **International law and standards for negotiating international treaties honoured;**
- **Pre-Condition that negotiations will halt if current Ned'u'ten dispossession by Canada continues and immediate review by the International Indigenous Self-Determination Commission;**
- **Commitment to decolonization, healing and peace; and**
- **Costs for funding the peace treaty process negotiations to be borne by Canada at the remedial stage and substantive stage if required.**

**DECOLONIZATION REGIME**

**STAGE ONE: PRINCIPLES FOR REMEDIAL SELF-DETERMINATION**

- **Declaration by Canada that the Ned'u'ten have always been sovereign and the true owners of their soil but that such recognition was denied to allow colonization to take place without the consent of the Ned'u'ten;**
- **Declaration by Canada that it has dispossessed the Ned'u'ten of their territories and their status as sovereign equals;**
- **Declaration by Canada that it has illegitimately acquired Ned'u'ten territories;**
- **Declaration by Canada that it has profited from rights of discovery; conquest; and their modern masks carved to domesticize indigenous relations;**
- **Declaration by Canada that dispossesion doctrines are illegal, racist and that the elimination of such doctrines in all its forms from treaty-making with the Ned'u'ten is a condition to establishing peace;**
- **Declaration by Canada that it has colonized, oppressed and subjugated the Ned'u'ten to alien domination and that the Ned'u'ten have the full right to decolonization;**
- **Declaration by Canada that the decolonization process should be monitored by an international entity to sever the internal regulatory power that it has used as a tool of colonialism and to foster extinguishment of rights and conquest;**
- **The repudiation of the act of state doctrine that has prevented indigenous peoples from challenging Canada's sovereign assertions and jurisdiction over indigenous peoples such as the Ned'u'ten;**
- **Ned'u'ten territories are Ned'u'ten and are not Canadian nor 'settled, conquered, or ceded' territories;**
- **Ned'u'ten rights are not subject to the justificatory test set out in s. 35 of the *Constitution Act, 1982;***
- **Declaration by Canada that it does not have "underlying title" to Ned'u'ten territories;**
- **A statement by Canada that its history with the Ned'u'ten has been a racist history and racialized to keep the Ned'u'ten inferior;**
- **An apology by Canada for the dispossession of the Ned'u'ten to establish liability**

**and remedies municipally and at international law;**

- **An accounting for Canada's dispossession of the Ned'u'ten that will compensate the Ned'u'ten for past injustices and genocide.**

- **The commitment by both Canada and the Ned'u'ten to establish a peace treaty and not a land cession treaty;**

- **The commitment to establish political co-existence that is not reflective of "state" formulations; and**

- **A joint-policy formation process for the peace treaty between Canada and the Ned'u'ten.**

**REMEDIAL SELF-DETERMINATION PROCESS:**

**CANADA'S SHAMING *BAH'LATS* and WIPING AWAY CEREMONY**

**NED'U'TEN RESTORATION OF *BAH'LATS* OVER NED'U'TEN TERRITORY**

**STAGE TWO: PRINCIPLES FOR SUBSTANTIVE SELF-DETERMINATION**

- **international treaty recognizing the Ned'u'ten as having subject status in international law;**

- **a treaty relationship that is based on the recognition and affirmation of Ned'u'ten self-determination (substantive and remedial) and political orderings;**

- **a treaty relationship that accords identical reciprocal rights and obligations to the Ned'u'ten people and Canada and where such rights and obligations are expressed in both nations' languages, protocols, and forms of laws (this avoids unilateralism where one nation seeks domination by claiming rights without fulfilling obligations agreed to);**

- **a treaty relationship that is established on positive equality of sovereigns;**

- **a Ned'u'ten - Canada treaty relationship recognizable at international law;**

- **a Ned'u'ten - Canada treaty relationship based on sovereign co-existence;**

- **a Ned'u'ten - Canada relationship that is living and not final;**

- **a Ned'uten - Canada relationship that recognizes Ned'u'ten land tenure systems;**

- **a Ned'u'ten - Canada treaty relationship that is sacred, solemn and spiritual;**

- **a Ned'u'ten - Canada treaty that restores the dispossession of lands and resources to the Ned'u'ten;**

- **a Ned'u'ten - Canada treaty that recognizes Ned'u'ten collective rights, including human rights;**

- **a Ned'u'ten - Canada treaty process that is negotiated at an international level and supervised and monitored by an independent international treaty body or tribunal;**

- **to give the international treaty body or tribunal jurisdiction to hear applications for breach or violation of the Ned'u'ten - Canada treaty; to order restitution and compensation where applicable or to restore parties to original equal bargaining position; and**

- **to implement a remedial self-determination process for the Ned'u'ten and Canada and a substantive self-determination process when the former is complete.**

**SUBSTANTIVE SELF-DETERMINATION PROCESS:**

**RESTORATION OF *BAH'LATS* OVER NED'U'TEN TERRITORY COMPLETED**

**LEGITIMACY OF CANADA IN NED'U'TEN TERRITORY**

**PEACE TREATY**

After the gifts are distributed to all the guests, speeches are made by clan deeneza or dzakaza about the business that has just taken place. Guests are thanked, stories may be told and a closing prayer is given by a head deeneza. The guests return home and the host clan is the last clan to leave the *bah'lats*.

## CONCLUSION

I believe that healing can take place between the Ned'u'ten and Canada. I believe that peace can be established through the peace treaty model advocated in this thesis. There are obstacles in our way that must be removed or dismantled. There are masks to take off so that we can see our true identities. Peace will only come to us by creating a healthy and respectful relationship. I hope that our children can walk side by side one day in happiness, with understanding and joy for the world that we could create for them. Perhaps they will hear our songs and take pity on us for our lack of human development. Perhaps they will respect the suffering and pain we have endured since contact, the price we paid for their liberation and freedom. We have responsibilities to pass on to our children and to take care of the land. In order to teach them peace, we must know this peace.

I also see my people healing. I also see my people's spirits high. I also see the *bah'lats* restored in Ned'u'ten territory, my people working hard to replenish and nurture the land. I also see my people no longer afraid of one another, order amongst the clans and the creation of new clans as our numbers grow. I see my people participating as an international actor with other peoples in the world. I do not see my people on Skid Row or children or elder abuse. I see my people being respectful to all their relations.

I also see Canada bringing justice to Ned'u'ten territory. I also see Canada's shame wiped clean by our joint efforts. I also see Canada being respectful to the Ned'u'ten. I also see Canada's existence in Ned'u'ten territory. I also see Canada's legitimacy. I see Canada respecting all her relations.

I see peace between you and me.

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