CHALLENGING THE MONOLOGUES: TOWARD AN INTERCULTURAL APPROACH TO ABORIGINAL RIGHTS

by

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ABSTRACT

The author critiques various strands of liberal moral and political theory as they relate to Aboriginal rights. In particular, he rejects the formulation of liberal theory by philosopher Will Kymlicka, as failing to respond to the unique realities and perspectives of First Nations. He then draws on the insights of philosophers Charles Taylor and James Tully to argue for a new approach to Aboriginal rights, premised on principles of dialogue, recognition and the willingness to engage in an "intercultural journey" in which a middle ground of law, informed by Canadian and indigenous norms, is created.

In chapters two through four, the author employs Wittgenstein's "perspicuous contrast" in order to reveal the dialogical basis of Gitksan and Wet'suwet'en legal and political structures, as well as to reveal the dominant role that "monologues" play in the Canadian law of Aboriginal rights. He identifies three monologues: discovery, sovereignty and the "authentic Indian," by which Canadian law marginalizes and subjugates First Nations and their legal systems. Such monologues depend for their coherence and success upon Aboriginal silence.

In chapter five, the author argues that notwithstanding the persistence of monologues, Canadian law can be open to dialogue and to the broadening of understanding that is required for the construction of an intercultural legal middle ground. He issues a strong call for the legal system to turn to Aboriginal law as a major source for the middle ground, and argues that doing so will help preserve the ability of First Nations to participate in the intercultural dialogue in their own voices and ways of knowing, which is essential to the successful deployment of the approach argued for in chapter one.

The author concludes that the middle ground will best be achieved through treaties, backed by an intercultural legal duty on all parties to negotiate in good faith. He also argues that a rethinking of sovereignty is necessary, in order to preserve the ability of First Nations to participate in intercultural dialogue secure in their autonomy and self-determination. To that end, he argues that courts can provide a useful "backdrop" to the intercultural middle ground, by continuously identifying intercultural legal norms which respect bedrock principles of each community's legal system in order to preserve the autonomy and self-determination of each.

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Chapter One
Philosophical Approaches

What sets the world in motion is the interplay of differences, their attractions and repulsions. Life is plurality, death is uniformity. By suppressing differences and peculiarities, by eliminating different civilizations and cultures, progress weakens life and favors death. The idea of a single civilization for everyone, implicit in the cult of progress of technique, impoverishes and mutilates us. Every view of the world that becomes extinct, every culture that disappears, diminishes a possibility.

Octavio Paz, quoted by James Tully.

Part One — Liberalism and Beyond.

A. Introduction.

North American First Nations have been asserting their legal and political autonomy since the first arrival of European powers. Natalie Oman's observation about the Gitksan and Wet'suwet'en generally holds true for most indigenous peoples in North America, that since contact, First Nations have engaged in a complex process of interaction and resistance in their efforts to maintain political, territorial and cultural sovereignty.[1] Non-indigenous legal, political and moral philosophy has been heavily engaged during the same period of time in denying indigenous defenses of their political and territorial sovereignty.[2]

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[1]See Natalie Oman, *Sharing Horizons: A Paradigm for Political Accommodation in Intercultural Settings*, Ph.D. Dissertation (unpublished) (Montréal: McGill University, 1997), especially chapter four (hereinafter *Sharing Horizons*).

[2]Much of this literature, which dates back to the fifteenth century and even earlier, is critically analyzed by scholars who are in interested in the "Doctrine of Discovery", by which many colonial powers purported to extend title and jurisdiction over indigenous territories. The finest work in this regard is that of Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990) (hereinafter *Discourses of Conquest*).

However, a series of major Canadian judicial decisions, starting generally with *Calder*,[3] along with a proliferation of scholarly, governmental and popular discourse about Aboriginal rights, have thrust the issue of Aboriginal rights to the forefront of the political and popular agenda. Indeed, many Canadians feel that the issue of Aboriginal rights, which include rights to specific activities,[4] rights to specific activities on specific sites,[5] rights to exclusive use and occupation of certain territories,[6] and rights of self-governance,[7] are a new and pressing concern.

As Patrick Macklem argues, "Canadians increasingly are seeking explanations of the justice of recognizing Aboriginal" rights.[8] Macklem also notes that much of the discourse aimed at addressing this question focuses on a mode of argument known as legal positivism, by which rights are defended simply because they exist in either legislatively- or judicially-made law.[9] But as Macklem rightly argues, the mere existence of rights is not enough to establish their normative justification. This chapter will develop philosophical justifications for Aboriginal rights and will develop an approach which should be used to address the intercultural conflict that exists

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[3]*Calder* v. *A.G. B.C.*, [1973] S.C.R. 313, [1973] 4 W.W.R. 1 (hereinafter *Calder* cited to WWR) is often regarded as being the beginning of a new era of recognition of Aboriginal rights.

[4]See for instance *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, 70 D.L.R. (4th) 385 (hereinafter *Sparrow* cited to DLR).

[5]*Saanichton Marina Ltd.* v. *Tsawout Indian Band* (1989), 57 D.L.R. (4th) 161 (B.C.C.A.).

[6]*Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, [1997] S.C.J. No. 108 (Q.L.) (hereinafter *Delgamuukw — S.C.C.*).

[7]See for instance the argument advanced in: Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: RCAP 1993). The most recent Supreme Court of Canada pronouncement on the issue of an inherent right of self-government, which opposed defining such a right in general terms, is *R.* v. *Pamajewon*, [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 205 (hereinafter *Pamajewon*).

[8]Patrick Macklem, "Normative Dimensions of an Aboriginal Right to Self-Government" (1995) 21 Queen's L.J. 173 at 174 (hereinafter "Normative Dimensions").

[9]Macklem, "Normative Dimensions" *supra* note 8 at 175.

between Canada and First Nations.

I will start by identifying and critiquing two strands of liberal philosophy. The first I call "current liberalism," and argue that, along with historic prejudice and biased opinions about Aboriginal people, it is the source of a vaguely-defined, but widely-held principled opposition to Aboriginal rights. The second strand is developed by philosopher Will Kymlicka, who tries to reformulate liberal theory in such a way as to argue that a special regime of Aboriginal rights is not only permitted under liberal theory, but is *required* by it.

The problem with both formulations is that they proceed from atomistic assumptions of the subject, which liberal theory calls the "individual," and which it claims has a universal, *a priori* claim to being the most rational conception of the subject. I will argue that in fact, liberal theory is culture-specific in its assumptions and its positions, and as such, fails to resonate with First Nations such as the Gitksan and Wet'suwet'en, on whom this thesis will focus. Indeed, by denying that indigenous peoples can conceive of themselves and act in ways other than those commonly associated with the "atomized" individual, liberal moral and political philosophy presents one important source of the oppression of First Nations, because it not only fails to account for the rich effects of indigenous world view, but actively *denies* them by claiming its superiority.

I will argue that what is needed is a fundamentally different approach, which can recognize the fact that different cultural communities present profoundly different world views, and that these must be accounted for *on their own terms*, because the subsuming of ideas to a single, totalizing world view or theory is untenable. Indeed, I will follow James Tully in rejecting the notion that any theory of cultural interaction can be subsumed to totalizing Western

philosophical discourses, such as liberalism.

Therefore, I will draw upon the work of Charles Taylor to argue that cultural groups which present profoundly different world views, must be engaged in a *dialogue*, in which they are able to participate in their own terms, rather than being forced to subsume their world view within a dominant non-indigenous philosophy like liberalism. Such dialogue proceeds on the recognition that indigenous world views present important things to say not only about themselves, but about non-indigenous communities, as well. I will draw upon Taylor's notion of the "fusion of horizons," in which cultures attempt to understand each other's ways of knowing, in an effort to create a new, horizon of intercultural values against which to discuss and mediate differences and issues between the two. In this way, my approach valorizes intercultural understanding as the best way to address intercultural conflict.

B. Current Liberal Philosophy and the Subject.

"Current" liberal philosophy betrays a certain hostility to Aboriginal rights based primarily in an equality analysis. Aboriginal rights are seen as offending liberal conceptions of equality. Jeremy Webber has argued that any intelligible legal analysis must make some distinctions.[10] Indeed, the legal system, if not our entire way of categorizing and understanding reality, is replete with distinctions.[11] Many distinctions are considered unobjectionable because they are regarded as being rational. That is, they are drawn in order to address a real difference

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[10]Jeremy Webber, "Individuality, Equality and Difference: Justifications for a Parallel System of Aboriginal Justice" in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: RCAP, 1993) 133 at 147-148.

[11]For instance, the very poor of Canadian society receive social assistance; children are treated differently from adults in all sorts of areas from contractual capacity to criminal responsibility; and so on.

whence comes some sort of disadvantage.[12]

Liberal analysis opposes *ir*rational distinctions. Current liberalism operates valorizes the "colour blind constitution," which holds that it is not only inappropriate for the state to recognize distinctions made on the basis of race or culture, but that the state ought to actively oppose them. This formulation takes at face value a strong version of John Rawls's famous formulation of the individual as the "self-originating source of valid claims."[13] Current liberalism betrays deep suspicion toward group rights, and opposes the very idea that rights might attach to anything other than individuals. In this way, any notion of special status for groups is rejected out of hand.

This is because current liberalism views state recognition of difference on the basis of race or cultural affiliation as a denial of the moral agency and primacy of the individual, which is the "self-originating source" of rights and moral claims; current liberalism regards such recognition and protection as forcing the individual to subsume her identity into that of the group, and by doing so, deprives her of the ability to set, revise and pursue the "good life" "from the inside," which liberals identify as the central normative goal of liberalism.[14] According to this formulation, state recognition of group rights along lines of race or culture would accomplish, in Charles Fried's provocative phrase, the "balkanization" of the human spirit.[15]

This formulation of liberalism relies very heavily on the notion of the individual as the

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[12]It should be noted that not all liberals permit distinctions, but that it seems settled that Canadian law, for instance, does. See for instance the explication of the "rational connection" test: *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

[13]John Rawls, quoted in Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon Press, 1989) at 140 (hereinafter *Liberalism, Community and Culture*).

[14]Will Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 10.

[15]Charles Fried, "Comment — *Metro Broadcasting, Inc.* v. *F.C.C.*: Two Concepts of Equality" (1990) 104 Harvard L. Rev. 107 at 109.

basic moral unit of agency, or as the essential subject. She cannot be "broken down" into any constituent parts, and any attempt to force her into larger aggregations denies her agency, which is essential to formulating and pursuing the good life. Indeed, the only aggregations of individuals that liberal theory is willing to permit are those that are voluntarily chosen. One could even go so far as to regard this formulation of the liberal subject as "atomist."

Indeed, the atom provides an apt metaphor for the liberal individual: it conveys the sense of a basic, indivisible unit, and although such units may combine with others, they do not surrender their individual identity.[16] Under this conception of the individual, the state would of course permit voluntary association with others of the same language, ethnic background or "culture", but should be intensely hostile to encouraging such association, or facilitating it by providing some kind of special protection. This is the formulation of liberal theory that I think enjoys a certain resonance with many Canadians, and even a cursory review of different sources of policy, law and popular writing reveals the pervasiveness of current liberal philosophy.

i. Government Policy.

What I have been describing as "current liberal" philosophy is certainly the formulation that underlay the Canadian government's ill-fated 1969 *White Paper*,[17] in which the government

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[16]Most liberals, even those that argue for a strong notion of individual, reject the atomist metaphor. See Kymlicka's spirited attack on those who employ the atomist metaphor: *Liberalism, Community and Culture*, *supra* note 13 at 22 *ff.* Charles Taylor, in "Atomism" in *Philosophical Papers, Volume II: Philosophy and the Human Sciences* (New York: Cambridge University Press, 1985) at 188 (hereinafter "Atomism"), notes the antipathy liberals have for the atomist metaphor but effectively demonstrates that a close analysis of values which liberalism protects reveals that liberals are working with just such a metaphor, even if they do not explicitly recognize this. Taylor argues that this conception of the subject is inadequate to many of the goals liberals set out, and calls for philosophical attention to be turned to the nature of the subject.

[17]Jean Chrétien, *White Paper 1969*, Department of Indian Affairs and Northern Development (Ottawa: Queen's Printer, 1969) (hereinafter *White Paper 1969*).

proposed to eradicate the special status accorded to Indians under the *Indian Act*; to dismantle the Reserve system by parceling land out to individual Indians in fee simple; to enfranchise all Indians; and to generally "assimilate" status Indians into "mainstream" Canadian culture. Indeed, the *White Paper* stated in its opening line its fundamental premise: "To be an Indian is to be a man, with all a man's needs and values."[18] The *White Paper* identified special status for Indians as a principal source of the myriad of social, health and political problems affecting indigenous communities, and resolved to restore prosperity, equality and pride to Aboriginal Canadians by eradicating that special status.[19]

ii. Case Law.

The *White Paper* is not the only example of such a formulation of the subject and the essential nature of citizenship and the role of the state. MacGuigan J. of the Federal Court of Appeal supplied a succinct articulation of this liberal view in *Boyer*[20] in which the Court considered a dispute between the Batchewana Indian Band and one of its members, in which an attempt by the member to develop a plot of land to which he held a certificate of possession, was opposed by the Band Council. The Court held for the individual member, and in his concurring judgement, MacGuigan J. referred to the Western philosophical tradition of liberalism in arguing that the right to *individual* freedom is integral to the constitution, and that "the freedom of the individual person in Canada ... is prior to the exigencies of the community."

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[18] *White Paper 1969*, *supra* note 17 at 3.

[19] *White Paper 1969*, *supra* note 17 at 8-9.

[20] *Boyer* v. *Canada*, [1986] 4 C.N.L.R. 53 (F.C.A.).

MacGuigan J. argued that group rights are exceptional, and are always explicitly laid out in legislation. With this argument, and observing that the *Charter of Rights and Freedoms* "is itself a fundamental affirmation of the rights and freedoms of the individual person,"[21] MacGuigan J. argued that, "in the absence of legal provisions to the contrary, the interests of individual persons will be deemed to have precedence over collective rights. In the absence of law to the contrary, this must be as true of Indian Canadians as others."

MacGuigan J. is not the first or only judge to attack the notion of group rights or special status for Aboriginal groups. In *Sawridge*,[22] Muldoon J. made numerous references to what he called the "fascist"[23] regime of special status for Canadian Indians which resembled apartheid more than an honourable system.[24] His decision dismissing the Band's application to determine its own membership was overturned and returned to trial on the grounds that these comments raised a "reasonable apprehension of bias,"[25] and Muldoon J. was strongly criticized by the Canadian Judicial Council, which hears complaints about judicial misconduct.[26]

It is not only at the lower courts, however, that group rights have been subsumed in

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[21]He failed to note that s. 23 of the *Charter* protects minority language education rights; that s. 25 is a non-derogation clause protecting *Aboriginal*, treaty or other rights or freedoms; that s. 27 entrenches the preservation and enhancement of Canada's "multicultural heritage"; that s. 28 protects the rights of women; and that s. 35, which is part of the *Constitution Act, 1982*, of which the *Charter* forms one part, "recognizes and affirms" Aboriginal and treaty rights.

[22]*Sawridge Band* v. *Canada* (1995), [1996] 1 F.C. 3, [1995] F.C.J. No. 1013 (Q.L.) (T.D.) (hereinafter *Sawridge*).

[23]See for instance *Sawridge*, *supra* note 22 at paragraph 165, in which Muldoon J., commenting upon the Band's criterion of blood quantum in determining Band membership, stated that, " 'Blood quantum' is a highly fascist and racist notion, and puts its practitioners on the path of the Nazi Party led by the late, most unlamented Adolf Hitler."

[24]*Sawridge*, *supra* note 22 at paragraph 90.

[25]*Sawridge Band* v. *Canada*, [1997] F.C.J. No. 794 (Q.L.) (F.C.A.).

[26]"Judges Are Warned to Pick Their Words Carefully" *Vancouver Sun*, Thursday May 21, 1998, page A1.

favour of individual rights. In the famous Supreme Court of Canada case of *Lavell*, Laskin J., dissenting in favour of the individual applicants, rejected the authority of the Six Nations Indian Band to determine its own membership, arguing that the Band had absolutely no right of self-determination.[27] Although the women litigants who opposed their Bands certainly wanted to limit the Bands' ability to discriminate on the basis of sex, they surely were not seeking a judicial invalidation of their peoples' sovereign right to self-government.

iii. Popular Writing.

Hostility to group rights is not limited to judicial pronouncements or academic writing. It can be found in newspaper reports and commentary,[28] and also in popular writing and speaking exemplified by such commentators as Mel Smith. Typically the argument is that the proper response to Aboriginal rights is to implement something like the *White Paper*.[29] Indeed, some recent popular and journalistic writing on the completion of the Nisga'a Final Agreement is harshly critical of the treaty's restoration of certain powers of self-government to the Nisga'a, and is framed in terms of opposition to "racially-based government."[30]

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[27] *Attorney-General of Canada* v. *Lavell, Isaac et al.* v. *Bedard* (1973), 38 D.L.R. (3d) 481 (S.C.C.) at 506.

[28] See for instance Gordon Gibson, "Where the Aboriginal Report Takes a Wrong Turn," *Globe and Mail*, November 26, 1996; or much of the commentary by columnists like Trevor Lautens in the *Vancouver Sun* in the days and weeks following the Supreme Court of Canada's decision in *Delgamuukw — S.C.C.*, *supra* note 6. See also the flurry of commentary and opposition to the Nisga'a Final Agreement, which was initialed in August, 1998.

[29] See Mel Smith, *Our Home Or Native Land: What Governments' Aboriginal Policy is Doing to Canada* (Victoria, B.C.: Crown Western Publishing, 1995) (hereinafter *Home Or Native Land*), especially the final chapter in which Smith not only proposes a neo-*White Paper* response, but also demonstrates a breathtakingly ill-informed view of what the nature and purpose of this country's Aboriginal policy has been.

[30] Following the announcement of the Final Agreement, there was a flurry of local opposition to it, from letter-writers, talk-show hosts and callers and provincial and federal elected officials. See for instance, "The Nisga'a Deal: Cause for Celebration and Criticism," *Vancouver Sun*, Monday July 27, 1998, p. A11 (letters); and "[Provincial Opposition Leader] Campbell urges federal referendum on treaty," *Vancouver Sun*, Tuesday July 28, 1998, p. A3.

What is evident is that any claims by First Nations to spheres of autonomy in which their ways of living can be protected meet vocal opposition from a philosophy that refuses to see culture as an important element of identity or subjectivity. "Current liberalism" views culture as a voluntarily chosen aspect of *individual* identity, and always opposes protection of culture because such protection can be seen as having the potential to impair individual choice. In my discussion and critique of the liberalism of Will Kymlicka, it will become apparent that I regard the liberal individual as, contrary to the claim of liberal moral philosophy, a culture-specific concept which does not resonate with First Nations and cannot lay claim to universal applicability. For these reasons, "current liberal" theory is highly problematic, and should be discarded in favour of the approach outlined in part two of this chapter.

C. Kymlicka's Reformulation of Liberalism.

i. Individual vs. Group Rights.

Must we accept current liberal theory's formulation of the subject, the citizen and the role of the state as authoritatively representing liberal philosophy? Will Kymlicka argues in the negative, and asserts that these current liberal formulations present a false opposition between "individual" and "collective" rights. Kymlicka links the development of the "blind constitution" and the dichotomy of individual versus group rights to twentieth century American liberalism, which created a particular notion of equality, in which "equal treatment" came to be equated with "same treatment."[31]

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[31]See generally, Will Kymlicka, "Liberalism and the Politicization of Ethnicity" (1991) 4 Canadian J. of L. & Jurisprudence 239 at 245 *ff.*

Kymlicka responds by reformulating liberal philosophy so as to accommodate cultural pluralism and to devise rationales by which cultural identity can be protected, even by special measures, within a liberal state that continues a commitment to the individual. Kymlicka's unique innovation is his claim that regimes of special protection for Aboriginal peoples do not sacrifice the individual to the group, which current liberalism fears, but that in fact they protect and *enhance* individual freedom.

In order to substantiate this rather ambitious claim, Kymlicka sets out to show two things. First is to demonstrate that, contrary to current liberalism, cultural membership has an important status within liberal philosophy; and second, that members of certain minority cultures face "particular disadvantages" with respect to the "good" of cultural membership, in such a way as to justify protection of minority rights by the state.[32] To make these arguments, Kymlicka borrows from the work of other philosophical traditions to argue for the importance of the individual's culture to liberal moral philosophy. He argues that for the liberal goal of permitting the individual to set, revise and pursue the good life "from the inside," liberal theory must recognize the importance of the individual's cultural background. He argues that while individuals must choose for themselves how to lead their lives, their choices must nonetheless be selected from a range of options, each of which has different relative importance or value.

It is culture, according to Kymlicka, that both provides the range of options and allows the liberal individual to distinguish and choose between those options and infuse her choice with meaning.[33] While liberal theory might posit freedoms such as physical movement, it is the

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[32]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 163.

[33]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 164-165.

matrix of values, beliefs and symbols which are generated and given meaning by cultural heritage, that make freedoms and rights important and meaningful. Indeed, Kymlicka eloquently establishes that not only does culture provide the "horizons of significance" against which subjects can assess their goals and values, but establishes also that culture is intimately bound to *agency* itself, in that an individual who is robbed of her culture may feel powerless to set, revise and pursue the good life. Because of that, and because of culture's asserted importance, Kymlicka argues that liberals ought to regard culture as a "primary good" of liberal theory.

ii. Chosen vs. Arbitrary Inequality.

Kymlicka's next step is to distinguish between two types of inequality, which he identifies as "chosen" and "arbitrary." The state is enjoined from ameliorating chosen inequality, and is morally bound to address arbitrary inequality. That is, if I spend all my money on cars, the state has no role feeding me. However, if an inequality or, as Kymlicka puts it, "disadvantage," is caused by *circumstances* and *not* choice, then liberal theory *will* speak to the inequality. That is how theorists such as Rawls are able to argue that those who suffer from physical disability, or even "defects" in natural talent, ought to be compensated by the state. That is because liberal theory regards things like physical ability and natural talents to be *arbitrarily determined*, rather than *deserved.* It is in this way as well that liberals can justify the provision of assistance to, say, victims of floods or earthquakes — as victims of circumstance, they are entitled to a type of "transfer payment" from those who were lucky enough to avoid misfortune.[34]

Kymlicka then notes that certain people, such as Canadians of British or French decent,

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[34]Kymlicka uses these examples: *Liberalism, Community and Culture*, *supra* note 13 at 192.

go forth into the world secure in their cultural identity, which he has already defined as a liberal good. As such, they can unproblematically set, revise and pursue the good life. By contrast, Kymlicka argues that Aboriginal individuals suffer from an arbitrarily selected *disadvantage*, in that their minority status and the context of colonialism threatens the very integrity of their culture, and therefore their ability to set, revise and pursue the good life. Thus, the liberal state should "compensate" Aboriginal individuals for the arbitrarily chosen "subsidy" that Canadians of British and French decent enjoy — security of culture.

Thus, in Kymlicka's example, a little Inuit girl's culture might be seriously impaired by the influx of non-Inuit into her homeland, who vote to alter cultural institutions, before she is ever old enough to become a fully competent identity-choosing individual. Thus, Kymlicka argues that special measures can be "demanded by Aboriginal people ... to correct an advantage that non-Aboriginal people have before anyone makes their choices."[35] In that example, Inuit can impose onerous residency requirements on the ability to vote or participate in decision-making.

Thus Kymlicka purports to demonstrate that special measures to protect culture do not represent *group rights*; rather they are motivated by a concern for the individual, and promote the central liberal project of enabling the individual to set, revise and pursue the good life "from within." Thus, contrary to what Fried, Trudeau, MacGuigan J., Muldoon J., Laskin J., Gordon Gibson, Trevor Lautens or Mel Smith might say, the protection of minority rights is *not* the "trumping" of the individual by the group. Rather, it is simply the recognition of the importance of culture *to individuals*, and the assurance that those whose cultures suffer vulnerability in the

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[35]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 189.

"cultural marketplace" will have that arbitrarily selected "disadvantage" corrected.[36]

Initially, Kymlicka's arguments, which are well crafted and tightly argued, seem profoundly revolutionary and appealing. He claims to have reformulated liberal philosophy to rebut critiques that it ignores context; to have broken the intellectual logjam between individual and group rights; and to have provided a principled basis for cultural pluralism within liberal regimes, all of which he claims is supported by the heart of liberal theory.

D. Critique of Kymlicka's Formulation.

i. The Role of Community.

But is it so? I wish now to inquire more deeply into these claims, because I think that Kymlicka rests his arguments on unrecognized assumptions which, once revealed, suggest that notwithstanding his statements regarding the importance of culture, his liberalism is based in a conception of an atomized individual. This analysis also reveals that his theory cannot adequately account for the importance and role of community and culture to the subject.

The first step is to look at the nature of the subject that Kymlicka is working with. For all his claims to have reformulated the individual to respond to criticism that liberal theory ignores context, it is still difficult to ascertain *exactly how* he conceives of the subject. The reason for this difficulty is that it is very hard to pin down exactly how Kymlicka conceives of *culture*. He has set a task of "embedding" the subject meaningfully within her context, while at the same time maintaining the primacy of the "self-originating" individual. The challenge presented by simultaneously presenting pursuing both these aims leads to a certain amount of conceptual

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[36]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 167.

"slippage" is Kymlicka's theory.

Communitarian critics [37] take issue with the absence of social context in liberal theory. They argue that the subject is deeply embedded in and constituted by her surrounding social environment, to the extent that choices and formulations of the good life are *impossible* without her[38] surrounding matrix of cultural values, beliefs and knowledge.[39] This is because without that matrix, choices are meaningless. We cannot decide, for instance, whether a life dedicated to acquiring wealth is superior to a life dedicated to volunteering, without this essential background. It might seem then, that there is little to distinguish communitarians' focus on context from Kymlicka's emphasis on the importance of culture to the individual's ability to set, revise and pursue the good life. I would argue, however, that there is a deep level of divergence between the two traditions' conception of community and culture and its role in the subject's development.

Communitarians present a sophisticated and complex conception of community in which the subject is "embedded" in a dialectical relationship which continues to inform and infuse not

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[37]A useful criticism of the liberal-communitarian debate can be found in Charles Taylor, "Cross-Purposes: The Liberal-Communitarian Debate" in Charles Taylor, *Philosophical Arguments* (Cambridge, Mass., Harvard University Press, 1995) 181. Taylor is critical of the use of global terms that presume that, because one starts from an ontological position which stresses context, one is "locked into" accepting a pre-ordained series of arguments (the "communitarian position"); similarly, he is critical that the acceptance of an ontological starting point of atomism necessarily predetermines liberals' views (the "liberal position"). In this section, however, I will oversimplify by referring to "communitarians" and "liberals", because I think there is deep disagreement at the ontological level, and it is that level which I am addressing.

[38]Readers, especially those critical of liberal philosophy, might find it problematic that I employ "gender reversal" (using the female pronoun rather than the male when speaking in a gender-neutral sense) when paraphrasing liberal theorists such as Kymlicka. They might feel, justifiably, that liberal philosophy is deeply gendered, with an assumption that the (public) subject is gendered male. Interestingly, Kymlicka employs gender reversal throughout his work. Somewhat arbitrarily, I always employ gender reversal in order to draw attention to the "deep background" assumptions of our very grammar and vocabulary.

[39]Taylor, "Atomism", *supra* note 16 at 204.

only the subject's choices, but her *very identity*. That is, the subject *can never get away* from her culture.[40] In all her actions, choices and deployment of knowledge, she constructs her community, and is, in return, constructed *by* it in a similar fashion.[41] As such, communitarians present what we might call a "deep" understanding of the role that culture plays in the construction of the subject.

a. The "Strong Claim."

Kymlicka claims that two conclusions can be drawn from communitarian theorists. The first (the "strong claim"), which is an absurdity, is that choice is impossible because our context *determines* what kind of life we will lead. In his example, the heterosexual, monogamous, married housewife cannot challenge her position in life, because she cannot deny that which constitutes her identity. In essence, the strong claim eradicates the subject's agency.

Not surprisingly, communitarians do not make that claim. Michael Sandel argues that, "the boundaries of the self, although constituted by its ends, are none the less flexible and can be redrawn, incorporating new ends and excluding others."[42] A similar argument is made by Natalie Oman, when she discusses the constitutive role of language and dialogical development. She argues that, "The common conceptual tools and experiences of meaning that are shared by

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[40]Taylor makes this point quite nicely in discussing the dialogical nature of existence: Charles Taylor, Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton, N.J.: Princeton University Press, 1994) at 32 *ff* (hereinafter "The Politics of Recognition").

[41]This point is nicely made by Martha-Marie Kleinhans and Roderick A. Macdonald, in "What is a *Critical* Legal Pluralism?" (1998) 12 C.J.L.S. Another nice explication of the processes by which subjects simultaneously construct while they are being constructed is found in John Brigham, "Legal Forms: Toward a Constitutive Theory" in John Brigham, *The Constitution of Interests: Beyond the Politics of Rights* (New York: New York University Press, 1996) 1 (hereinafter *The Constitution of Interests*).

[42]Quoted in Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 55.

members of cultural-linguistic communities have a profound influence upon the identities shaped by those individuals, but not in any sense a *determinative* one."[43] That is, communitarians argue that the self is not only constituted, but *constitutes back.*

b. The "Weak Claim."

To continue Sandel's language of boundaries, the subject is characterized by ever-shifting boundaries and contours, which are made meaningful by the context, or culture, in which she finds herself. Thus, while the subject can know and change various, even many, aspects of her identity, it is nonsensical to suggest that she can completely "step out" of the web of significance which her community has spun for her (and which she has helped to spin herself). This notion of "partial agency" is the second possible result of communitarian theory, which Kymlicka identifies (the "weak claim").

Kymlicka argues that if communitarians wish to seriously assert the weak claim (which they do), then the distinction between liberal and communitarian theory "collapses entirely."[44] He makes this assertion because he claims that as long as communitarians reject the "strong claim," and opt for the "weak claim", which allows for the self to both constitute and be constituted, then communitarian theory is indistinguishable from liberal theory in its conception of the subject. In a subtle slippage, Kymlicka attempts to show that the communitarian notion of

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[43]Oman, *Sharing Horizons*, *supra* note 1 at 39 (emphasis in original).

[44]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 55.

partial agency is indistinguishable from the liberal notion of full agency.[45] Thus, if one accepts Kymlicka's assertion that he distinction "collapses entirely," then Kymlicka succeeds in colonizing not only communitarian theory, but agency itself, by quickly converting it from being partial to unconstrained.

c. Culture as a "Toolbox."

Thus, what I think to be a fatal weakness in Kymlicka's argument becomes apparent: he can accept only an unambiguous, simplistic role for community or culture. Either it totally forestalls choice, which he rejects out of hand, or it allows it, and allows it fully. Thus, culture, which he argues is a primary liberal good, is something which is fundamentally *separate* from the individual. What communitarians argue, of course, is for a more subtle, in-between position, which neither denies the subject's agency, nor that her social construction.

By contrast, for Kymlicka, culture is something which can virtually be *possessed* by the subject. Rather than being a context which defines horizons of possibilities (through ideas, values and structures of power which cultures generate), culture is something closer to what I would call a "toolbox," from which the individual can choose those elements, such as language, art or whatever, that help her to set, revise and pursue the good life. Indeed, Kymlicka is explicit on this point when he states that, "It is of sovereign importance to this argument that the cultural

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[45]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 56. He moves to "colonize" communitarian theory by arguing at 58 that, "... the sense in which communitarians view us embedded in communal roles incorporates the sense in which liberals view us as independent of them, and the sense in which communitarians view practical reasoning as a process of self-discovery incorporates the sense in which liberals view practical reasoning as a process of judgement and choice. The differences would appear to be entirely semantic."

structure is being recognized *as a context of choice*."[46] This allows Kymlicka's "toolbox" notion of culture and restores, all of Kymlicka's efforts notwithstanding, the notion of the atomized individual, who is fundamentally *separate from*, not *embedded within*, her culture.

ii. "Minimalist" Conceptions of Culture.

Just what is wrong with Kymlicka's treatment of culture? Recall that his claim is that culture is constitutive of identity; her argues that liberal theory ought to maintain the integrity of the individual's culture, so that she might be secure to set, revise and pursue the good life. Kymlicka treats culture as some sort of ironically acontextual, unproblematically reified category in whose definition we all presumably agree. Nowhere in his discussion is there a sense of contested, shifting, and problematic notions of culture. Oman argues, following Eric Wolf and Margarita Díaz-Andreu, that culture is in fact a much more problematic notion, and that, according to Wolf,

> Once we locate the reality of society in historically changing, imperfectly bounded, multiple and branching social alignments ... the concept of a fixed, unitary and bounded culture must give way to a sense of the fluidity and permeability of cultural sets ... a culture is better seen as a series of processes that construct, reconstruct and dismantle cultural materials, in response to identifiable determinants.[47]

Oman argues that the concept of bounded, identifiable culture was in fact developed to legitimate the process by which European powers dominated non-Europeans. The same point has been made eloquently by Edward Said, who closes *Culture and Imperialism* with the plea that we recognize the constructed nature of our own identities:

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[46]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 166 (emphasis in original).

[47]Eric Wolf, *Europe and the People Without a History* (Berkeley: University of California Press, 1982) at 387, quoted in Oman, *Sharing Horizons*, *supra* note 1 at 43. Oman's discussion of the conflation of culture and nation appears at 41-45.

> Imperialism consolidated the mixture of cultures and identities on a global scale. But its worst and most paradoxical gift was to allow people to believe that they were only, mainly, exclusively, white, or Black, or Western, or Oriental. Yet just as human beings make their own history, they also make their cultures and ethnic identities.[48]

One would expect that, given the vast and sophisticated theoretical literature which addresses culture, Kymlicka would engage in a nuanced discussion of how *he* sees culture, especially given that it is a category important enough to figure in the title of his book (*Liberalism, Community and Culture*).

But Kymlicka's most comprehensive definition is that culture consists in "terms of the existence of a viable community of individuals with a shared heritage (language, history, etc.)."[49] He elaborates by referring to a dichotomy he perceives in culture, which guides what may be protected in the liberal state, and what may not. Kymlicka distinguishes between "characteristics" or "structures" of culture, such as the Roman Catholic religion and Church in mid-twentieth century Québec; and some sort of "core" cultural identity that persists notwithstanding the "natural" evolution of cultural characteristics and structures. Structures cannot be protected by special measures, because that would deny the ability of cultures to evolve and change values; but the core should be, because its loss would disable individuals to naturally evolve their culture.[50]

Kymlicka's dichotomy between what might be called peripheral and core elements of culture is sharply criticized in a different context by Barsh and Henderson[51] and his discussion of

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[48]Edward W. Said, *Culture and Imperialism* (New York: Vintage Books, 1993) at 336 (hereinafter *Culture and Imperialism*).

[49]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 168 (parenthetical statement in original).

[50]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 168.

[51]Russel Lawrence Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 1993 (hereinafter "Ropes of Sand").

culture is especially dissatisfying, given the contested nature of each element in his definition (community, individuals, shared heritage, language, history). James Clifford, in his fascinating account of the Mashpee Indian Tribe's attempt to prove that it was a tribe, suggests that traditional "markers" of "culture", such as language and history, are products of dominant Euro-American culture, and that even a group of people who do not share a distinctive language; who wear the same clothes as everyone else; and who no longer regularly perform traditional dances, can be considered to be a cultural entity not wholly assimilated.[52]

The point of this critique is not to deny that culture is constitutive of identity. Indeed, I believe that it is. What I criticize is Kymlicka's problematic "toolbox" notion of culture which allows the individual to be fundamentally *separate* from culture, and allows her to take or leave different aspects of culture, like language, history, traditions, art, literature, and so on. That notion does not contain a sense that any of these things actively make the subject *who she is*, and that she is therefore "embedded" within culture itself. Nor is there a sense that the supposed "elements" of culture are both contested and produced by subjects themselves — that is, that there is a dialectical relationship in which, while culture produces subjects, subjects simultaneously produce culture.

Once culture is problematized, the individual is revealed to be much more embedded than Kymlicka's theory can ever accept. Serious analysis of "culture" also reveals that it is not a bounded, hermetically-sealed entity. Rather, it is messy and ill-defined. But a serious challenge to the hermetically-sealed character of culture would also entail a challenge to the atomized

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[52]James Clifford, *The Predicament of Culture: Twentieth-Century Ethnography, Literature and Art* (Cambridge: Harvard University Press, 1988) (hereinafter *The Predicament of Culture*). See especially chapter twelve, "Identity in Mashpee."

individual, which liberal theory *cannot* do, but which I will do below in my discussion of "Other Notions of the Subject."

Kymlicka also treats culture as being somehow separate and sanitized from structures of oppression, empire and domination. As well as myths, stories and art, culture features ideologies and material structures, or at least rationalizations for those things, which have a material impact upon people's lives and create categories such as class, race, gender, sexuality and even physical ability. Indeed, it is to those things I now turn.

iii. Why "Only" Culture?

As a way of coming to a discussion of alternative conceptions of the subject, which I will address below, one might ask why Kymlicka selects *only* culture as a "background" constituent of identity. Who is to say that culture is the *only* "background" reality that contributes to authoritative horizons of significance?

The first thing to note is that Kymlicka does not spend much time addressing issues such as race, gender and sexuality. Indeed his only real reference to sexuality is to observe that liberal theory should oppose discrimination on the basis of sexuality. Nowhere is there the sense that things like race, gender, sexuality and physical ability produce and position racialized or sexed and gendered subjects. Sexual identity provides a useful example. Most lesbians and gay men would probably agree that their sexual orientation is constitutive of their identity. Indeed, their identity is at least in part produced, and then positioned, by structures of homophobia. Kymlicka rightly notes that liberal theory should not countenance discrimination against lesbians and gay men on the basis of their sexual identity, but could he not be taken further?

Following Kymlicka, lesbians and gay men might argue that heterosexual Canadians, whose identities are also in part produced and then positioned by structures of heterosexism, enjoy a certain "security of identity" not unlike British and French Canadians. Thus, far from a position of simply opposing discrimination, liberalism should justify a regime of special protection for lesbians and gay men. Similar arguments can be made for other constituents of identity, such as gender, race, class, religion and so on, but Kymlicka does not discuss any of them, apparently because they do not fall within his privileged category of "culture."

I do not present such examples as a "slippery slope" argument against extending state recognition and protection for marginalized communities. Far from it. What I am trying to show is that *Kymlicka* is on a slippery slope when he first asserts that context is critical to the subject, but then inexplicably stops at "culture" (which is already problematically minimal in definition). Serious analysis of culture, as well as serious attention to *other* factors of subjectivity, such as the ways in which race, gender, sexual identity and so on produce and position subjects in a certain way, put unbearable strain on the concept of the atomized individual, and reveal that it is an idea that can only work if things like culture are treated simplistically (as, for instance, a tool box), and if the ways in which structures of oppression produce and position subjects are ignored.

Indeed, Kymlicka's failure to address the real complexities of culture reveal a common but false dichotomy between "cultural" and "non-cultural", in which culture is thought to be the "soft background" of history, language and so on, fundamentally distinct from colonialism, oppression and empire. In reality, culture also includes things like ideology, power, and material

structures which form a part of and interact with colonialism, oppression and empire.[53]

In the following section I will argue that not only does liberal theory fail to adequately problematize culture and these other factors, but that it is itself a culture-specific philosophy that protects and produces culturally specific values. That conclusion, along with the ones just canvassed, will thus be used to argue against the claim that liberal theory's atomized subject is culturally neutral and universally applicable. I will then address some alternative notions of the subject in order to demonstrate both that liberal theory does not resonate with First Nations, and to show that they offer contrary and rational notions of the subject.

iv. A Culturally Neutral Concept of Culture?

Another common defense that liberals present for their moral philosophy is its advertised cultural neutrality. That is, liberals suggest that the genius of the "tool box", which valorizes choice, is that liberal theory expresses no preference for one set of values over another; whatever regime most enhances the individual's ability to set, revise and pursue the good life, will be favoured by liberal theory. Therefore while Delgam Uukw can believe in reincarnation and an unbroken link to the past and future (which shall be discussed below), his grandson can "walk away" and "assimilate" to "mainstream" Canadian culture, if he wishes. But does liberal philosophy's claim to cultural indifference survive scrutiny?

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[53]For an excellent discussion of the symbiotic relationship between things normally seen as "cultural" and larger structures of power and domination, such as empire, see Said, *Culture and Imperialism*, *supra* note 48.

a. Intuitions of Fairness.

Critics of liberalism have claimed that the ultimate indicator of liberal theory's failure to account for the way in which the subject is embedded is the so-called "mountain top" approach to moral philosophy, which ignores the realities of everyday human life. Kymlicka notes that the real target is Rawls's "original position", from which Rawls derives the primary goods of liberalism. And as Kymlicka astutely points out, Rawls *does not* start from the mountain top; he actually "starts on the ground, with our widely shared intuitions about fairness," which are admittedly vague and must be teased out.[54]

While Rawls and Kymlicka may be correct in recognizing and problematizing the vagueness of these "intuitions of fairness", what is more problematic is the assertion that they are "widely held." The *very problem* of intercultural conflict is the *diversity* of basic norms. The proposition is that we *do not necessarily share* widely held intuitions of fairness. Like Kymlicka's resort to a vaguely-defined "culture," Rawls's resort to "widely held intuitions of fairness" is highly problematic.

b. A Liberal Value.

The suspicion that liberal theory does not actually start with universally or even very widely shared intuitions of fairness, but rather with intuitions particular to the Western culture is borne out by reference to widely cherished values of liberalism. We could examine, for instance, the free exercise of religion, which is championed by liberal theory.

The free exercise of religion purports to neither support one religion over the other, nor

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[54]Kymlicka, *Liberalism, Community and Culture*, *supra* note 13 at 67.

the exercise over non-exercise of religion. That is, liberal protection of the free exercise of religion is designed to allow the individual to follow whatever religion she chooses, or, if she finds religion to be useless and futile, to follow *no* religion at all. Indeed, liberals might point to religion as the quintessentially neutral protection. Yet I would suggest that the very *selection of that category* belies a cultural value. That cultural value is the separation of the moral universe into the sacred and the profane. Theoretically, once that separation is made, the protection of one or the other can be ensured.

Yet the very categorization fails to resonate with many First Nations. Among the Gitksan and Wet'suwet'en, the human, animal and spiritual worlds are intertwined in an ethic of balance and interrelation, which is demonstrated in such institutions as the feast and reincarnation and which is exemplified throughout the Gitksan *adaawk* and the Wet'suwet'en *kungax*. Distinctions like the sacred and profane, basic to Western culture, become problematic for those cultures which do not make the same ones, especially when they are entrenched into law. For instance, cases such as *Lyng* and *Smith,*[55] demonstrate the observation that

> The very dichotomy suggested by the separate treatment of "religion" and "culture" reflects the inadequacies of the dominant society's categories in trying to accommodate Native peoples' belief and value systems. For most tribal Indians, culture is conterminous with religion, both in terms of encompassing the spiritual dimension of a human being living in harmony with all persons and nature ... The institutions of the United States political and legal system ... were not designed to ensure the vitality of a culture whose essential spirituality pervades all aspects of being and understanding.[56]

The result is that, in the case of *Lyng*, California was permitted to virtually destroy a habitat important to spiritual reflection; and in *Smith*, the ceremonial use of peyote failed to attract an

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[55]*Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 108 S.Ct. 1319 (1988), *Employment Division, Department of Human Resources of Oregon* v. *Smith*, 494 U.S. 872, 110 S.Ct. 1595 (1990).

[56]David H. Getches, Charles F. Wilkinson, Robert A. Williams Jr., eds., *Federal Indian Law: Cases and Materials*, 3d ed. (St. Paul, Minn.: West Publishing 1993) at 740 (hereinafter *Federal Indian Law*).

exemption from the general criminal law against drug use.

In a political and legal system that protects the practice (or non-practice) of *organized* religion, there is a conceptual inability to understand or *unwillingness to accommodate* Aboriginal spiritual beliefs, because they can be classified either, neither or both as "religion" and/or "culture." Unfortunately for American First Nations, there is protection for the latter, but not the former, thus demonstrating the falsity of liberalism's claim that its categories are neutral, allowing simply choice or passivity. Instead, they channel analysis along certain lines, and, unfortunately for cultures which do not share the same "widely held intuitions of fairness", those categorical lines of analysis are culturally constructed.

E. Other Notions of the Subject.

The foregoing discussion thus raises a number of challenges and questions. My analysis has challenged Kymlicka's claim that he can simultaneously maintain the primacy of the individual while embedding her within her context so as to defend special protections for Aboriginal peoples. Similarly, I have shown that only by ignoring structures of oppression is Kymlicka able to ignore the ways in which race, gender, sexual identity and so on produce and position subjects that do not fit easily with the atomized individual. In addition, I have suggested that liberal theory itself is merely one theory, which is culture-specific, especially in its most emphatic claims of cultural neutrality.

These are more than mere oversights. Kymlicka *cannot* seriously address the complexities of culture and the way in which the subject is embedded in and constituted by it; nor can he seriously address the ways in which structures of oppression produce and position

subjects; and nor can he address the cultural content of liberal theory's "widely shared intuitions of fairness." Doing these things entails conceding the non-viability of the atomized subject, and the non-neutrality of liberal philosophy, both of which strike at the heart of liberal philosophy.

We are thus left to ask, if the atomized individual is only one culturally-specific notion of the subject, are there others? For many Canadians, the liberal individual seems like the natural or self-evident prototype of the moral agent. I argue however, that this does not have to be. In this portion of chapter one, I will describe other notions of subjectivity, each of which demonstrates the limitation of the liberal "individual" while also pointing towards possibilities of other notions.

i. Feminist Scholarship and the Notion of "Intersectionality".

In beginning to examine other notions of subjectivity, it might be useful to look first at feminist scholarship, particularly that which addresses the phenomenon of "intersectionality." Intersectional analysis was to provide more sophisticated accounts of the discrimination felt by people who experience oppression under more than one "category." One result of such analysis is a more sophisticated notion of the subject herself. Attention is focused, for instance, on people who are women, as well as being black or Aboriginal; men who are gay as well as being disabled and poor, and so on.

Intersectional theory analyzes how different categories of oppression *combine* to create complex experiences that cannot be explained simply by reference to any one of those categories. In so doing, it does two things. First, it complicates the notion of the atomistic subject by insisting that people be seen as black women, gay men with a disability, and so on, rather than

simply interchangeable moral units; and second, it reinforces the notion that the subject is embedded in her context, by drawing attention to complex structures of oppression which *position* people in society with certain labels, which they *cannot* simply decline or opt out of, such as being poor, Aboriginal, lesbian and so on.

Angela Harris criticizes liberal feminist theory's inability to account for the experience of black women, because of its focus on only one site of oppression, that is, gender or sex, while most black women, for instance, experience discrimination as black people as well.[57] She argues that it is inadequate to account for this fact simply by "adding together" various types of discrimination, because doing so will only

> reduce [their] . . . multiple forms of oppression to additional problems: "racism + sexism = straight black woman's experience," or "racism + sexism + homophobia = black lesbian experience." Thus in an essentialist world, black women's experience will always be forcibly fragmented before being subjected to analysis . . .[58]

Instead, she argues that theory must account for the complicated ways in which these categories of oppression combine or *intersect*, in order to produce hybrid categories *and subjectivities* that can not be reduced, such as the black woman's experience which is different from that of women in general or black people in general.

Such women thus exhibit "multiple selves" that cannot be pulled apart, but rather should be "woven" together into changing, shifting wholes that are neither woman nor black, but "both-

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[57]Angela Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stanford L.R. 581 at 586 (hereinafter "Race and Essentialism"). Very similar arguments were advanced prior to Harris's by Marlee Kline, "Race, Racism and Feminist Legal Theory" 12 Harv. Women's L.J. 115.

[58]Harris, "Race and Essentialism," *supra* note 57 at 588-589.

and."[59] Kimberle Crenshaw[60] and Nitya Iyer[61] both demonstrate that anti-discrimination law, which is firmly based in a liberal conception of the subject, has been incapable of "stepping out" of rigid categories, such as sex or race, in order to recognize the unique forms of discrimination experienced by such "intersected" people.

In theorizing these so-called "intersections," Harris suggests that people who occupy such in-between, "both-and" positions, are not born with, "a 'self', but rather are composed of a welter of partial, sometimes contradictory, or even antithetical 'selves'."[62] These "selves" are capable of experiencing a number of different kinds of disadvantage and discrimination at different times and places.

Just when and how people at the intersections exhibit different aspects of their "self-hood" is a product of the context in which they find themselves. It is important to the analysis, then, to employ a perspective of "positionality," which Radha Jhappan says,

> ... places women in a context and looks at how they are constructed and treated. It allows a woman's identity to shift with shifting contexts and allows analysis of the relationship to others, objective economic conditions, cultural and political institutions and ideologies, etc. All of this can work to reveal their position within a network that lacks power and mobility and requires radical change.[63]

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[59]Harris, "Race and Essentialism," *supra* note 57 at 604.

[60]Kimberle Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Anti-Racist Politics" (1989) U. Chi. Leg. Forum 139.

[61]Nitya Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179 (hereinafter "Categorical Denials").

[62]Harris "Race and Essentialism," *supra* note 57 at 584. See similar arguments put forward by See Mari Matsuda, "When the First Quail Calls: Multiple Consciousness as Jurisprudential Method" (1989) 11 Women's Rights L.R. 7 and Pat Williams, "Response to Mari Matsuda" (1989) 11 Women's Rights L.R. 11.

[63]Radha Jhappan, "Post-Modern Race and Gender Essentialism or a Post-Mortem of Scholarship" (1996) Studies in Poli. Econ. 15 at 21. This is a concept Jhappan quotes from Alcoff. While Jhappan regards positionality as an interesting path, she argues it is open to criticism as implying gender essentialism. I think that if one were to include racism and other forms of disadvantage as things to be considered in the quote above, then this approach is similar to, although not identical to that which Jhappan advocates at 52.

Thus Jhappan draws attention to the ways in which subjects are *positioned* and produced by their surrounding context. Contrary to Kymlicka's toolbox, these intersected identities cannot pick and choose aspects of their identity, given the way in which they are labeled by their context. Nor is it easy to conceive of them as interchangeable, context-independent "atoms."

Thus, according to intersectional theorists, and directly contrary to the reliance of liberal theory on the metaphor of the irreducible atom, identity *can be* "broken down" further than the individual, and reconstituted depending upon context. Multiple aspects of identity can cohere and indeed *shift* in emphasis. This is no simple concept, and it might be instructive to turn to an example.

ii. Teresa Nahanee and the "Intersected" Aboriginal Woman.

An excellent example of the complexities of intersectionality is presented by Teresa Nahanee, who argues that the *Charter of Rights* ought to apply to First Nations self-government and any parallel system of justice.[64] She expresses fear that the "white patriarchy" of the Canadian state will be replaced by "brown patriarchies" of Aboriginal leaders who not only do little to stop the appalling levels of physical and sexual abuse against women and children on reserve, but also participate in that abuse.

From the perspective of modernist theory, her essay might seem incoherent. On the one hand she presents First Nations as robust collectives, then asserts the primacy of individuals as

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[64]Teresa Nahanee, "Dancing With a Gorilla: Aboriginal Women, Justice and the Charter" in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System* (Ottawa: RCAP, 1993) 359 (hereinafter "Dancing With a Gorilla").

the "building blocks" of any group.[65] Similarly, she expresses fear of self-government yet argues passionately for it.[66] In fact, Nahanee demonstrates her "intersected" position as an Aboriginal woman with on-reserve experience. She presents a complicated picture of identity in which, depending upon her context, she asserts her identity as an Aboriginal person, a woman, or as a complex amalgam of the two. By stubbornly resisting characterizations from Aboriginal leadership that hers is a "foreign feminism,"[67] and by insisting that even though she speaks as a woman she retains her identity as a First Nations person, Nahanee complicates the very notion of Aboriginal identity by suggesting that the mainstream First Nations leadership presents a (male) gendered identity which is obscured by its claim of universality.[68]

A reading of Nahanee that responds to only one aspect of her identity does not adequately account for the complexity of her argument. For instance, if it were assumed that, because she is Aboriginal, she shares calls by Aboriginal leaders to replace incarceration with healing circles, she would respond that such a "solution" does not properly protect her safety as a woman. Indeed, she demonstrates her "intersection" by charging that such a solution would not only be sexist, but racist as well, because it would permit Aboriginal women to be subjected to less protection from physical and sexual abuse than white women.[69]

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[65]Nahanee, "Dancing With a Gorilla," *supra* note 64 at 368 & 370.

[66]Nahanee, "Dancing With a Gorilla," *supra* note 64 at 363.

[67]For a discussion of such allegations, see Jo-Anne Fiske, "The Supreme Law and the Grand Law: Changing Significance of Customary Law for Aboriginal Women of British Columbia" (1995) 105 & 106 B.C. Studies 183 at 198 (hereinafter "Supreme Law").

[68]For an explicit argument to this effect, see Jo-Anne Fiske, "The Womb is to the Nation as the Heart is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement" (1996) 51 Studies in Pol. Economy 65 at 80.

[69]Nahanee, "Dancing With a Gorilla," *supra* note 64 at 361.

Indeed, Nahanee "shifts" her identity, depending upon her context. In relation to a male-dominated Aboriginal leadership, for instance, she asserts her gender, defiantly warning that self-government without Aboriginal women's participation will be a "motherless beast" and an "abomination" rejected by Aboriginal women.[70] Yet in relation to non-Aboriginal Canadians, she asserts her Aboriginal identity by being equally passionate in her insistence that Aboriginal self-government and separate justice are necessary to decolonization.[71]

The purpose of this analysis is to demonstrate the notion of "multiple subjectivity", and the inadequacy of the liberal individual to account for some people's experience. Contrary to the notion that culture and, presumably, gender, are akin to items in a tool box that can be taken or left, culture, gender and a host of other elements are *constitutive* of identity. These, along with the way in which people are *positioned* by structures of oppression, such as sexism, racism, homophobia and so on, as well as unique *combinations* of such structures of oppression,[72] mean that while people do have choices and can play a role in their own construction, they are not free to pick and choose their identity in the way that liberal moral philosophy implies.

Nahanee is not the only Aboriginal person to exhibit such a complicated notion of the subject. Indeed, I would assert that most Aboriginal people and nations can. Another example, this time drawn from the Gitksan, will be instructive. Liberalism's atomized individual is an essentially independent entity. While Kymlicka's formulation recognizes that culture plays a role

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[70]Nahanee, "Dancing With a Gorilla," *supra* note 64 at 371.

[71]Nahanee, "Dancing With a Gorilla," *supra* note 64 at 359 & 372.

[72]See for instance the case of Coreen Thomas, a 21-year old Carrier First Nations woman from the Stoney Creek reserve in British Columbia, who was killed, while pregnant, by a white man in a motor vehicle accident. The various ways in which Aboriginal women (as opposed to Aboriginal people generally, or women generally) are constructed and marginalized is well-documented by Bridget Moran, *Judgement at Stoney Creek* (Vancouver: Tillacum Books, 1990).

in forming the individual and her "authoritative horizons", it also sees various "constituents" such as culture and community, as essentially "items" that contribute to the "range of options," from which the individual can choose in "assembling" her identity. Any connection with culture must be voluntary, to allow full freedom and choice. Yet, as the following discussion of the Gitksan will demonstrate, one's culture does profoundly affect the subject and her identity, in this case, as integral components of larger entities, such as lineages, and the land itself.

iii. Reincarnation and Marriage to the Land.

a. Reincarnation.

Gitksan subjectivity departs from that of the mainstream liberal account in two important respects. The first is the phenomenon of Gitksan reincarnation; second is the Gitksan relationship with the land. Antonia Mills reports that reincarnation is an integral part of Gitksan and Wet'suwet'en cultures, noting that they presented evidence of it in *Delgamuukw*[73] precisely *because* of that importance, stating that, "It was important to them to convey to [the Court] their belief in reincarnation because their sense of self-worth, identity and identification with the land is intimately connected to their perception of themselves as the ancestors who are reborn."[74]

Thus, for example, the Gitksan presented a witness at trial who was able to testify that her son, who as an infant was extremely agitated, was recognized by a *halayt*,[75] as the *halayt*'s

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[73] *Delgamuukw* v. *British Columbia*, [1991] 3 W.W.R. 97 (B.C.S.C.) [hereinafter *Delgamuukw — Trial*].

[74] Antonia Mills, "Cultural Contrast: the British Columbia Court's Evaluation of the Gitksan and Wetsuwet'en and Their Own Sense of Self-Worth as Revealed in Cases of Reported Reincarnation" (1994) 104 B.C. Studies 149 at 151 (hereinafter "Cultural Contrast").

[75] For a discussion of the *halayt*, see Gitksan and Wet'suwet'en First Nations, "Transcript Evidence in the trial of *Delgamuukw* v. *The Queen in Right of British Columbia*," May, 1987 - June, 1988 (Volumes 2 - 111) (storage files: Faculty of Law, University of British Columbia, Vancouver, British Columbia) (hereinafter "Transcript Evidence"

deceased husband, reincarnated as an infant. In order to prove this, the *halayt* gave the infant her husband's beloved cowboy hat. The child became calm and well-mannered,[76] thus proving the veracity of what the *halayt* was saying.

In another case, given under pseudonym, a young girl, "Anne", was recognized as a returned young woman, "Josephine", because of a birthmark.

> They say when there is a scar they recognize the person from it. Anne had a thumbnail similar to Josephine's, and a unique one at that. She was similar to Josephine in her strength and in the way she recognized places she was taken when she was very young — places Josephine had been.[77]

According to Mills, "Anne" also reported having a very "easy life" when it came to her duties, which Mills argues is reminiscent of Lévi-Strauss's observation as to the ease with which those who are related to the supernatural find their roles in life.[78]

The phenomenon of reincarnation is not just an interesting "oddity" of Gitksan culture. It is in fact integral to the health and prosperity of the entire First Nation. Said Virginia in 1990, of reincarnation:

> Intuition plays a very important role in our spiritual beliefs. When you look at our history you find answers and information received from our spiritual guides and our spiritual leaders. Intuition is recognized as an important part of our development: to be able to pay attention to the intuitive messages that are given you from the spirit level. Our people did not have universities a long time ago and yet when you look very closely at the kinds of information that they received for their survival you can't help but be impressed at the type of knowledge that they received for their survival on this planet. And when you document it you can see parallels to what science courses are telling us, to many of the other courses at the university level and the high school level as well. That's part of how it works: you have your foundation of knowledge from the spirit level before you return as the reincarnated person and you build on that knowledge, you're expected to build on that knowledge as you live your life on this planet, and everyone around you is supposed to give you the opportunity to build up those skills. ... Then, when you return to this earth, it will be up to you to spend as much time as possible to

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followed by Witness's Name), Gyoluugyat (Mary McKenzie), May 19, 1987 (Volume 6) (pages 388-389). In this case the *halayt* was a woman who specialized in understanding the speech of infants.

[76]Mills, "Cultural Contrast", *supra* note 74 at 153.

[77]Mills, "Cultural Contrast", *supra* note 74 at 156.

[78]Mills, "Cultural Contrast", *supra* note 74 at 158.

> develop those values, or it could be the physical skills you need to develop.[79]

Thus, the accumulated knowledge of generations of the same subjects, who reincarnate themselves randomly and unpredictably, but continuously, is what permits and has permitted the Gitksan to remain in harmony and balance with their surrounding environment.[80] Indeed, one of the most consistent elements in cases of reincarnation is the otherwise-inexplicable ability of children, in certain territories for the "first" time in their lives, to lead the way and demonstrate obviously intimate knowledge of that territory. Reincarnation is also important politically, playing an instrumental role in the complex interrelation between "membership in a lineage, accession to titles, and the experience of the individual persona in everyday experience."[81]

Reincarnation thus further complicates the notion of the atomistic liberal individual. Where feminist intersectional theory and Nahanee's essay demonstrate that the irreducible atom can indeed be "broken down" into multiple, shifting and intersecting subjectivities, reincarnation demonstrates the converse proposition: that the group, which liberal theory holds must be an aggregation of individuals, can in fact be the irreducible entity of a single ancestor, continuously reincarnated in several distinct individuals over time. That is because,

> In the Gitksan view, an individual's subconscious contains the memories of past lives, ultimately reaching back to the time of the original myths which situate the ancestors on the land. To the Gitksan, reincarnation means the ancestors are themselves ... The Gitksan expect that new experiences at the old sites and with the familiar people will eventually eclipse the initial experience of remembering them from a previous life, but that the characteristics of the previous person will persist even after the memories have faded.[82]

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[79]Mills, "Cultural Contrast", *supra* note 74 at 160.

[80]For the importance of reincarnation see also"Transcript Evidence," Gyoluugyat (Mary McKenzie), May 20, 1987 (Volume 7) (pages 388 *ff*); and Txemsin (Alfred Mitchell), (February 10, 1988) Volume 55 (pages 3331 *ff*).

[81]Mills, "Cultural Contrast", *supra* note 74 at 162.

[82]Mills, "Cultural Contrast", *supra* note 74 at 162.

b. Marriage to the Land.

The Gitksan further complicate the notion of subjectivity through their connection with the land and with both the animal and supernatural worlds. As Chief Delgam Uukw stated, "For us, the ownership of territory is a marriage of the Chief and the land. Each Chief had an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit — they all must be shown respect. That is the basis of our law."[83] The Chiefs also demonstrated their close connection with the land in the following way, while describing the long history of their claims against European settlers,

> We would liken this district to an animal, and our village, which is situated in it, to its heart. ... We feel that the white men by occupying [our land] are, as it were, cutting off a foot. We know that an animal may live without one foot, or even without both feet; but we also know that every such loss renders him more helpless ...[84]

Their lawyers continued:

> To the Gitksan and Wet'suwet'en, human beings are part of an interacting continuum which includes animals and spirits. Animals and fish are viewed as members of societies which have intelligence and power, and can influence the course of events in terms of their interrelationship with human beings. In Western society causality is viewed as direct and linear. That is to say, that an event has the ability to cause or produce another event as time moves forward. To the Gitksan and Wet'suwet'en, time is not linear, but cyclical. The events of the "past" are not simply history, but are something that directly effects the present and the future.
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> The nature of the continuum between humans, animals, and the spirit world, within cycles of existence, underpins much of the evidence. The Gitksan and Wet'suwet'en believe that both humans and animals, when they die, have the potential to be reincarnated. But only if the spirit is treated with the appropriate respect. If bones of animals and fish are not treated with that respect, they will not return to give themselves up to humans.[85]

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[83]Gisday Wa and Delgam Uukw, *The Spirit in the Land: The opening Statement of the Gitksan and Wetsuwet'en Hereditary Chiefs in the Supreme Court of British Columbia* (Gabriola, B.C.: Reflections, 1989) at 7 (hereinafter *Spirit in the Land*).

[84]Gisday Wa and Delgam Uukw, *The Spirit in the Land, supra* note 83 at 12.

[85]Gisday Wa and Delgam Uukw, *The Spirit in the Land, supra* note 83 at 23. See also "Transcript Evidence," Txemsin (Alfred Mitchell), February 10, 1988 (Volume 55) and his insights on the connection between the Wet'suwet'en and the animal world.

iv. Conclusions.

The point of the preceding examples from feminist theory, Teresa Nahanee's negotiation of multiple selves, the Gitksan interrelatedness of present, past and future generations, and the inseparable nature of human, animal and supernatural worlds in the Gitksan and Wet'suwet'en world views, has been to show that the liberal conception of the subject is *not exclusive*. It fundamentally fails to capture the experience, or resonate with the realities, of many people, from many different cultures. Contrary to the liberal conception of the subject, Nahanee cannot be exclusively described as an individual, even if in some contexts she is; the Gitksan and Wet'suwet'en who experience reincarnation cannot always be reduced from a continuous line of one ancestor to a mere atomized individual; and Gitksan and Wet'suwet'en Chiefs cannot be separated from the land, the animals and the supernatural world, because *to be a Chief* means that an inseparable connection to those things *inheres* in your identity.

Kymlicka's liberal philosophy, though it represents an effort to be more nuanced and tolerant than the "current" liberal theory, is quite simply unable to adequately account for the subjectivity presented in each of these examples, because central to it is the primacy of the atomistic individual who is fundamentally separate from her social, physical and metaphysical context. Thus, neither current liberalism, nor Kymlicka's "improved" version, adequately account for alternate conceptions of selfhood and identity.

F. Conclusions.

In discussing the "current" and Kymlicka strands of liberal theory, my aim has been to debunk the notion that the liberal individual can lay claim to some sort of exclusive, universal, *a*

priori validity as the best way to conceive of *all* people. I have tried to show, through reference to feminist theory and Nahanee's negotiation of her experience as an on-reserve, feminist Aboriginal woman, that the subject can, and does, break down into *coherent* intersecting subjectivities. Likewise, by reference to Gitksan reincarnation, and their connections to the land, animals and supernatural beings, I have tried to show that there can be subjectivities which *cannot* be broken down to the level of the individual, which again strikes at the heart of liberalism's claim as to what the essential moral actor is and must be. I have also tried to demonstrate that for most people these subjectivities are *not* wholly chosen and cannot be.

Rather, people are "always already" embedded within and constituted by their cultures, as well as being positioned by structures of oppression that, for instance, racialize or gender them. This stands in contradistinction to the liberal argument that these things can be taken or left. This "tool box" notion of identity, which holds the subject apart from her culture and other elements of context, falls apart when seriously questioned, and when alternate examples are given.

Indeed, while Kymlicka *claims* to accept and account for the fact that the subject is constituted by her culture, the only way that he can make that claim while simultaneously upholding the primacy of the individual, is to leave culture as an unproblematic category. Taylor argues that liberals would prefer to leave the question of the subject unexamined; I argue the same for culture with respect to Kymlicka's work. In addition, I have challenged the way in which Kymlicka *limits* his analysis to culture as a constituent of identity. Even if we do accept that culture can be seen as a bounded, identifiable entity, Kymlicka provides no justification for why only culture, and not other constituents of identity, such as sexual identity, ability, class, race is privileged.

I have also tried to suggest, by reference to the free exercise of religion, that liberal claims to cultural neutrality are in fact problematic. When the very categories selected for protection, as well as the undisclosed "widely shared intuitions of fairness", are exposed to be culturally constructed and contingent, then the usefulness of liberal analysis for *inter*cultural analysis becomes much more limited.

One might ask why I have spilled so much ink criticizing Kymlicka, when he is rightly seen as an advocate for Aboriginal rights. One reason is that in purporting to include First Nations, while really essentially re-colonizing them, his theory can actually be *more* dangerous than blatantly intolerant theories. In addition, his reformulation of liberalism does not respond to many concerns of First Nations, because it does not take into account their perspectives in the formulation of the theory itself. While his theory makes room for the procedural accommodation of First Nations' values, it does not take into account those values themselves. Indeed, liberal theory is culled from non-indigenous cultural traditions, but claims to be able to subsume all experience within its epistemology. Demonstrably, that is not so. I will therefore suggest an alternate approach, which is philosophically grounded and practically workable, which will require not a "cross-cultural" but an *inter*cultural approach. It is an approach that *requires* the presence of First Nations voices, traditions and perspectives.

Part Two — Toward a New Approach.

A. The Discourse of Modern Constitutionalism.

The first step in developing an intercultural approach to Aboriginal rights is to recognize that the problem with Kymlicka's approach is its attempt to subsume all analysis to a single,

totalizing theory of human subjectivity and interaction. As noted at the outset, Kymlicka's formulation is distinctly lacking in First Nations voices and perspectives.[86] James Tully suggests that discourses such as liberalism are features of what he terms the discourse of "modern constitutionalism," in which it is thought that constitutional order should be governed by recourse to unifying principles which can be first deduced, then applied to all situations.

Tully traces the development of modern constitutionalism to the thinking of modern contractarians such as Thomas Paine and Thomas Hobbes, who reconceived political association and constitutions as processes "whereby a people frees itself from custom and imposes a new form of association on itself by an act of will, reason and agreement."[87] According to Tully, modern constitutionalism is marked by uniformity and the subordination of particular situations to general principles, regardless of actual diversity.[88] The modern constitution is contrasted by its supporters with an earlier, "less civilized" or "less rational" time, which was dominated by "ancient constitutions", which were marked by the irregularity of different elements of the community working out issues in an ongoing dialogue of sorts. As such, they were seen as being less civilized, owing to their earlier stage of historical development.[89]

One of the most important features of the discourse of modern constitutionalism is the

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[86]This point is made very effectively by Dale A. Turner, " 'This is Not a Peace Pipe': Towards An Understanding of Aboriginal Sovereignty" Ph.D. Dissertation (unpublished) (Montréal: McGill University, 1997), in chapter one, in which he also critiques Kymlicka's work.

[87]James Tully, *Strange Multiplicity: Constitutionalism In An Age of Diversity* (Cambridge: Cambridge University Press, 1995) at 60 (hereinafter *Strange Multiplicity*).

[88]Tully, *Strange Multiplicity*, *supra* note 87 at 63-67.

[89]Tully, *Strange Multiplicity*, *supra* note 87 at 64-65.

way it is designed to "exclude or assimilate cultural diversity and justify uniformity."[90] Indeed, Kymlicka's theory, even though it attempts to protect cultural diversity, tends more toward assimilation, due to its insistence on the primacy of the individual, and its insistence that culture is a resource to be used by the subject, rather than being open to the alternative subjectivities we saw and their nuanced interaction with "culture."

Totalizing theories attempt to develop comprehensive accounts of subjectivity that operate for all people, at all times. Propositions that cannot flow from the first principles of such theories are characterized as not just different, but irrational. Tully argues that such discourses typically have one of two possible responses to normatively divergent groups or world views, such as First Nations.

The first views demands for recognition of cultural diversity as incompatible with and therefore threatening to, the dominant discourse, as exemplified in the discussion of current liberalism above; the second tries to reformulate both the dominant theory and the demands for recognition so that they are seen to be compatible, as seen in the discussion of Kymlicka's liberalism. But subsuming indigenous demands for recognition within a discourse such as liberalism will *never* properly accommodate demands for recognition, because such demands represent a threat to the "hegemony of these ... traditions and ... their language of constitutional recognition."[91] This is apparent even in the discussion above, which presents potentially fatal challenges to liberal theory's core values of an atomized subject and claims to neutrality.

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[90]Tully, *Strange Multiplicity*, *supra* note 87 at 58.

[91]Tully, *Strange Multiplicity*, *supra* note 87 at 44.

i. Perspicuous Contrast.

In his discussion of Wittgenstein, Tully argues that current philosophy is marked by a "craving for generality" which sacrifices the particular case to the general.[92] Tully demonstrates that such a craving actually produces empty results. Indeed, as Wittgenstein notes, it is a trend that has "shackled philosophy", due to its contempt for the concrete case in favour of theory.[93] Wittgenstein argues that it is much more profitable to understand the relationship between phenomena not as subparts of applicable rules, but in terms of similarities and differences that can only come to light through a process of comparison which he calls "perspicuous contrast."

To illustrate, Wittgenstein uses the example of games, and argues that if we:

> look and see whether there is anything common to all games, we will not see something that is common to all, but similarities, relationships, and a whole series of them at that ... I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, colour of eyes, gait, temperament ... overlap and criss-cross in the same way.[94]

As Tully notes, "Games form a family," in which it is the similarities and differences of members, rather than elements of a rule or principle, that determine how they are classified and understood.[95]

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[92]Tully, *Strange Multiplicity*, *supra* note 87 at 105.

[93]Quoted by Tully, *Strange Multiplicity*, *supra* note 87 at 105. Taylor argues a similar point when he criticizes the "epistemological construal," of modern philosophy, which presumes the ability of the subject to withdraw not only from the natural and social worlds, but even "from his own body, which he is able to look on as an object." This occurs, notwithstanding the impossibility of completely "stepping out" of phenomena. Thus, philosophy must be reformulated to grapple with the fact that the scholar is an indivisible part of that which she addresses: Charles Taylor, "Overcoming Epistemology" in Charles Taylor, *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) 1.

[94]Quoted in Thomas Morawetz, "The Epistemology of Judging: Wittgenstein and Deliberative Practices" (1990) 3:2 Can. J. of Law and Juris. 35 at 45, f.n. 48. Morawetz argues strenuously against the widespread trend in legal theory to analogize law and judicial reasoning to "language games," which trend he sees as a serious misreading of Wittgenstein. I do not use Wittgenstein's insight in order to enter into that debate, but rather to demonstrate, in his rich example, the futility of searching for unifying principles instead of noticing the concrete case.

[95]Tully discusses Wittgenstein's example at length: *Strange Multiplicity*, *supra* note 87 at 112 *ff.*

The process of perspicuous contrast, in which other ways of organizing experience and categorizing thought are presented side by side with our own ways, demonstrates that other ways are possible, and demonstrates the background assumptions of our own ways that we might not have appreciated, so taken for granted were they. Indeed, it is through perspicuous contrast that Tully identifies many of the elements of the discourse of modern constitutionalism.

These observations are important, because Tully argues that as long as normatively divergent cultural groups are forced, even for well-meaning reasons, to present their claims and world views from within the dominant mode of argumentation and understanding, they will be forced to distort their knowledge and experience in a way that not only misrepresents its meaning, but continues their colonial domination.[96]

The importance of identifying and challenging categories such as the discourse of modern constitutionalism through the process of perspicuous contrast is that doing so demonstrates that even seemingly self-evident concepts and "facts," such as the existence of the state, the "founding moment" notion of constitutions, and so forth, are merely some from among a *range* of possible interpretations of how communities can be ordered. For example, the discussion of Nahanee and of Gitksan subjectivity presented above demonstrates that the atomized liberal individual is not self-evident, but is in fact *one of among a range* of possibilities.

With these insights, and those of post-modern contributions to interpretation, it might

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[96]Tully, *Strange Multiplicity*, *supra* note 87 at 97. In a similar and related way, Nitya Iyer argues that ignoring difference and insisting on "same" treatment either allows people to "slip through the cracks" or forces them to be "pushed through the cracks" of dominant conceptual categories. In either case, they are misrecognized and their experience is distorted: Iyer, "Categorical Denials," *supra* note 61.

seem that interpretation is both theoretically infinite and also radically indeterminate.[97] It is important, however, to acknowledge Rosemary Coombe's argument that interpretation is in fact strongly *constrained* by the context in which it is made. That context includes not only the history of past interpretations about the same or similar phenomena, as well as present considerations, but also the "profile" of the interpreters, which "condition and delimit [the] interpretations."[98] Just what is the "profile" of the interpreters of modern constitutional discourse? Instead of trying to identify who it is that *does* dominate legal interpretation in the field of Aboriginal rights for instance, perhaps it would be more appropriate to identify who does *not* dominate it, nor even participate very heavily in it, namely First Nations themselves.

This is no small point, because, as Coombe argues, the language in which we describe this world "constructs it, rather than reflects it, by dividing it up in a culturally distinct manner."[99] That is, language does not consist in simple signifiers of *a priori* concepts and objects, which exist independently of human interpretation. As Coombe notes, linguists have demonstrated that "our most basic perceptual categories including colour, time and space [are] not universal, but culturally filtered through the contingent categories of language. The distinct languages of different societies constitute unique worlds for those who live within them. *These are distinct worlds, not merely the same world with differing names for the same phenomena.*"[100]

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[97]For a discussion of the post-modern contributions to interpretation, see both Tully, *Strange Multiplicity*, *supra* note 87 at 45 *ff*, and Rosemary J. Coombe, " 'Same As It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 McGill L.J. 604 at 617 (hereinafter " 'Same As It Ever Was' "), in which she discusses the "nihilist" conclusions that such contributions can lead to.

[98]Coombe, " 'Same As It Ever Was'," *supra* note 97 at 622.

[99]Coombe, " 'Same As It Ever Was'," *supra* note 97 at 611.

[100]Coombe, " 'Same As It Ever Was'," *supra* note 97 at 611 (emphasis added).

Thus, when, as Tully argues, "a relatively narrow range of familiar uses of [the terms within the discourse of modern constitutionalism] ... come to be accepted as the authoritative political traditions of interpretation,"[101] then what happens is that we "affirm the legitimacy of the understandings that are generated by certain varieties of experience and deny the legitimacy of others."[102] As both Tully and Coombe demonstrate, such understandings are not only privileged over others, but are *culturally* specific to non-indigenous "knowledge communities."

It is cultural pluralism that demonstrates this point and its importance. When the Gitksan and Wet'suwet'en describe their relationships with the past and future, with the spiritual, animal and human universes, and with the land itself, they are not merely presenting knowledge in a different medium, oral versus written, but are in fact presenting *different ways of knowing*. That is why Gitksan informants can present cases of reincarnation and connect it unproblematically to familial, material and spiritual relations and well-being; crucially, it is also why a trial judge can reject such information as irrelevant to the case for Aboriginal title.

B. Intercultural Communication and Understanding.

i. The Problem of Translation.

If knowledge and reality are culturally specific, and are constructed by distinct languages and systems of signification, which vary from culture to culture, does that then mean that intercultural interpretation is impossible? If that is true, and totalizing discourses such as liberalism are simply the product of one knowledge community, with no special claim to

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[101]Tully, *Strange Multiplicity*, *supra* note 87 at 36.

[102]Coombe, " 'Same As It Ever Was'," *supra* note 97 at 631-2.

authority, what is to be done?

Some thinkers argue that understanding across cultural "boundaries" is next to impossible, or, if so, can only be done in "thin" ways. Oman discusses Richard Rorty, who acknowledges the profound influence of linguistic-cultural patterns of learning. According to Oman, Rorty "believes that the force of cultural embeddedness is so fundamental a detriment to our conceptual frameworks that we cannot expect to easily bridge cultural boundaries in order to achieve understanding and avoid conflict."[103] Rorty argues that at best, we are able to generate "thin" descriptions of other cultures based on narratives about them, in which we are able to notice similarities with other cultures, and empathize with their "sad stories." That is, we are able to recognize the suffering of other people.[104]

By this view, we can see and partially understand others, without changing our own self-perceptions, as though, like watching a documentary, we can observe without interacting.[105] This observation is important, because I will argue that *true* intercultural understanding involves a significant change in each interlocutor: each party's world view *must* occur. Another important dimension of Rorty's argument is his conclusion that because we cannot come to genuine cross-cultural understanding, then the imposition of Western values is justified, not because of their superiority, but because Westerners are "culturally-constituted to believe in the standard of value associated with [their] home conceptual system (which is contingent), and cannot authentically ignore the moral imperative ... to act upon that view", especially when so-called "hard cases"

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[103]Oman, *Sharing Horizons*, *supra* note 1 at 67.

[104]Oman discusses this in *Sharing Horizons*, *supra* note 1 at 69.

[105]Oman makes the same observation: *Sharing Horizons*, *supra* note 1 at 70

arise.[106]

But must it be? Rorty's interpretation is disputed by an opposite pole who deny the constructive role of language, and who see it as a self-evidently objective signifier of objects, concepts, and so on. They argue that although different cultures might have different *words* for the same things, those words can be translated with relative ease.[107] But as Coombe and Oman note, philosophers like Wittgenstein have shown that it is impossible to conceive of language as consisting simply in a set of signifiers that objectively identify objects and ideas. Rather, language only "works" with "those who accept the conventions of the language game in which [the] systems and rules [of language] operate."[108] As Wittgenstein puts it, "one has already to know (or be able to do) something in order to be capable of asking a thing's name."[109] Thus, following on such insights, it would seem that the issue of "translation" is much more difficult than the "instrumentalists" would care to admit, and presents many of Rorty's challenges.

a. Dialogue.

Needless to say, neither Rorty's nor the instrumentalists' conclusions are embraced by all.

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[106]Oman, *Sharing Horizons*, *supra* note 1 at 71. By "hard cases", I refer to those scenarios such as when a First Nation's political leadership asserts the right to address an issue in a way that is deeply problematic to the world view of non-First Nations cultures. For example, the attempt by the Sawridge Indian Band to deny Band membership to Status Indians based on their sex was held to be incommensurable with liberal dictates of equality, and therefore was denied. See *Sawridge*, *supra* note 8 at 22.

[107]Charles Taylor refers to such an approach as the "instrumental" view of language, and traces its origins to Hobbes, Locke and others. He identifies the opposite approach (the constitutive), which originated with the Romantics: Charles Taylor, "Preface" in *Philosophical Arguments* (Cambridge, Mass.: Harvard University Press, 1995) at ix-x. Oman also identifies St. Augustine's writings on language and language acquisition as an important source of the instrumental view: Oman, *Sharing Horizons*, *supra* note 1 at 25.

[108]Coombe, " 'Same As It Ever Was'," *supra* note 97 at 612. Oman makes the argument in chapter one of *Sharing Horizons*, *supra* note 1.

[109]Oman, *Sharing Horizons*, *supra* note 1 at 26.

In trying to chart a route through the conceptual problem of intercultural understanding, Oman, who argues for a "middle road" between the Rorty interpretation and that of the instrumentalists, relies on the groundbreaking work of Wittgenstein, Heidegger and Bakhtin, and their intellectual heirs, who include Clifford Geertz and Charles Taylor.

In particular, Oman draws on their notion of "dialogical" understanding. In showing that reality itself is constructed by language and its symbols and rules, Wittgenstein, Heidegger and Bakhtin also argue that language is learned in a very specific way. Contrary to what might first be assumed, that mere presence in a linguistic environment is enough to ensure that language is learned, all three argue that human beings need a "dialogical environment" in order to learn language and thus learn and construct their very reality. In discussing the work of Oliver Sacks, who conducted research on the learning patterns of children with misdiagnosed deafness,[110] Oman puts it the following way:

> directed communicative interaction with other language users in the form of a *dialogue* is the stimulus that is necessary for the flowering of metaphorical conceptualization, the power to propositionalize, and the other capacities that are so markedly lacking in the formerly language-less children ...[111]

Quite simply put, those who do not benefit from a dialogical environment are profoundly hampered in their ability to think and do, in ways that are characteristically human.

In albeit different ways, Wittgenstein, Heidegger and Bakhtin all employ a notion of "addressivity," by which human beings are always oriented toward one another. Bakhtin argues that in every thought, we are engaged in a process of explicit or implicit dialogue, in which we attempt to first predict, and then read the reaction of the "person" to whom we direct our

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[110]And who therefore lacked a dialogical environment due to the failure of caregivers to notice that the children could not hear those speaking to them.

[111]Oman, *Sharing Horizons*, *supra* note 1 at 21.

thoughts or communication.[112]

For Taylor, dialogicality represents the crucial character of human life. He argues that, "We become full human agents, capable of understanding ourselves, and hence of defining our identity, through our acquisition of rich human languages of expression."[113] For Taylor, "language" has a broad meaning, which includes not only words and speech, but all sorts of modes of expression from body language to art. As Taylor notes, the only way to learn such modes of expression is through others.[114] It is for this reason that Wittgenstein argues the impossibility of "private languages", in which there is a fully grammaticized and textured language unique to one individual.[115] As Taylor summarizes it, "The genesis of the human mind is in this sense not monological, not something each person accomplishes on his or her own, but dialogical."[116] He argues that the lifelong process of defining our own identities is dialogical — it is always carried on "in conversation" with important significant others in our lives, whether those others are still with us, or long gone, and present only for the purposes of metaphorical "conversations."[117]

b. The Ontological vs. Cultural Dimensions.

Crucial to these observations, is what Oman identifies as the "ontological predisposition"

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[112]Oman discusses Bakhtin's concept of addressivity, *Sharing Horizons*, *supra* note 1 at 31.

[113]Taylor, "The Politics of Recognition," *supra* note 40 at 32.

[114]Taylor, "The Politics of Recognition", *supra* note 40 at 32.

[115]See Oman, *Sharing Horizons*, *supra* note 1 at 27.

[116]Taylor, "The Politics of Recognition", *supra* note 40 at 32.

[117]Taylor, "The Politics of Recognition", *supra* note 40 at 32-33.

of human beings to understand. That is, human beings, being dialogical in nature, and beings who actively construct their reality through the medium of language, are "trained up", at the earliest stages to enter into relationships in which they attempt to understand that which the other communicates. Indeed, they learn language in the wider sense alluded to by Taylor, above. Thus, *they understand by learning to understand.* And in so doing, they actively construct their own reality. And as Taylor notes, the dialogical component is not limited to merely the process of being "trained up." It is a crucial part of continuous development, as human beings are always growing, learning and interacting.

However, it is not so simple as noting that human beings are dialogical by nature and ontologically predisposed to understanding. For, as Coombe has noted, different languages do not simply select different sounds for the same objects and ideas, but construct unique worlds of significance and meaning. As Wittgenstein observed, one can only understand a given language (broadly conceived), if one is already aware of the complex set of background symbols, systems and meanings. That is the crucial factor which allows one to determine whether the rapid contraction of the right eyelid is simply an involuntary twitch, a conspiratorial wink, or a "malicious" parody of the first wink.[118]

Different cultures have *profoundly* different world views and systems of meaning. This "cultural dimension" is juxtaposed by Oman next to the "ontological dimension", in which she argues for the predisposition toward understanding.[119] Taylor identifies cultural-linguistic

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[118]This famous example, first proposed by Gilbert Ryle, is discussed by Clifford Geertz in "Thick Description: Toward an Interpretive Theory of Culture" in Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (New York: Basic Books, 1973) 3 at 6 *ff.*

[119]Oman, *Sharing Horizons*, *supra* note 1 at 35 *ff.*

systems as the *particular context* within which any human being becomes an agent. As Oman puts it, "Taylor argues that our potentialities for certain kinds of experiences of meaning are developed through (dialogical) participation in specific cultures."[120]

Oman thus sketches a picture of what both enables and constrains intercultural understanding: the ontological predisposition of all human beings toward understanding; and the cultural dimension, which constrains that initial tendency by virtue of the elaborate world views that different cultures construct, which are only fully comprehensible to those that "speak the language." Oman argues that the degree to which one believes that intercultural communication is possible will be dictated by how much weight one gives to the ontological or the cultural dimension.

Oman identifies two extremes, represented by Rorty and Nussbaum, in which Rorty gives preeminent weight to the cultural dimension, and Nussbaum to the ontological. Thus, Rorty is driven to the conclusion that we are incapable of more than "thin" descriptions, and Nussbaum to the result that we can develop universal norms. Ironically, argues Oman, Rorty and Nussbaum, who hold polar opposite views as to the possibility of meaningful intercultural dialogue, both end up denying the importance of affirming the difference of others.[121]

Oman notes that, in contrast to Rorty and Nussbaum, Geertz and Taylor present more nuanced pictures of the possibility of intercultural understanding, tempered by an appreciation of its difficulty. She rejects Rorty's "radical incommensurability" thesis. She does so especially on

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[120]Oman, *Sharing Horizons*, *supra* note 1 at 35.

[121]Oman, *Sharing Horizons*, *supra* note 1 at 84. For Nussbaum, it dissolves once universal norms are identified, and for Rorty, it is recognized, but dismissed due to the dictate that cultures must impose their own world views, notwithstanding the fact that those world views are not inherently superior.

the grounds that Rorty's notion of culture is problematic for many of the same reasons advanced in my critique of Kymlicka.[122] Instead of seeing culture as a shifting, contested, ill-defined context and struggle in which values and counter-values are generated and compete, Rorty has an altogether too neat, bounded, easy-to-identify picture of a "thing" called culture which can be possessed by people.

In this sense, it seems that Rorty is susceptible to K. Anthony Appiah's criticism of multiculturalists, that they "presuppose conceptions of collective identity that are remarkably unsubtle in their understandings of the processes by which identities, both individual and collective, develop."[123] By contrast, Geertz, Taylor and Oman regard culture as being more contingent and more open to influence from "other cultures."

I think that their conclusion is defensible by reference to lived experience. For instance, I can point to the existence of what I would call "intercultural citizens", those who live in and are able to draw upon a plurality of cultural knowledges and experience. Intercultural citizens whom I know include June McCue,[124] and John Borrows, who argues that he is able to "write from inside the galaxy of knowledge learned through ... experiences as a First Nation person. [Once he has so written, he can] compare and contrast [his] self-understanding with other voices from different spaces" which include the discourse of professional academic writing and

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[122]See note 47 above and accompanying text.

[123]K. Anthony Appiah, "Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction" in Amy Gutmann, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton, N.J.: Princeton University Press, 1994) 149 at 156.

[124]See for instance, June McCue, "A *Ned'u'ten* Perspective on Legal Theory" paper presented at the U.B.C. Faculty of Law Graduate Students' Conference, "Inter/National Intersections", Vancouver, B.C., April 30-May 2, 1998, in which McCue discusses the various ways in which different knowledges, indigenous and non-indigenous, construct her identity as an Aboriginal or Indian or Indigenous woman, products of colonial discourse, or *Ned'u'ten* woman, a product of indigenous discourse. Importantly, each "identity" consists in McCue at the same time.

argumentation.[125] Nahanee, discussed above, is similar, in the way that she draws upon traditional indigenous discourses to argue for a renewed role for Aboriginal women in the self-governing of First Nations; on contemporary Aboriginal discourse of self-determination and alternate systems of justice; and on non-indigenous legal and political theory for the need of a *Charter* to protect fundamental individual liberties.

Notwithstanding the identification of these so-called "intercultural citizens," and the philosophical argument that there is an ontological predisposition to understanding, much doubt has been expressed as to the ability of people from one tradition or culture, to understand those of another. As Charles Taylor succinctly argues

> One of the striking faults of transcultural and comparative social science has been its tendency to ethnocentrism [because] it invites scientists of the dominant culture to 'correct' the self-understandings of the less dominant ones by substituting their own. What is really going on then becomes simply what *we* can recognize in our own terms; and their self-descriptions are wrong to the extent that they deviate from ours.[126]

Taylor notes that, in reaction to that problem of ethnocentrism, many researchers might naturally opt for what he calls the "incorrigibility thesis," which holds that because a culture can only be understood on its own terms, understanding and judgement on any other terms are invalid and ethnocentric. If we do not understand other cultures in *their* own language and terms, what other language or terms can we do so, but our own?[127]

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[125]John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 at 6 (hereinafter "Constitutional Law From a First Nation Perspective").

[126]Charles Taylor, "Understanding and Ethnocentricity" in *Philosophical Papers, Volume II: Philosophy and the Human Sciences* (New York: Cambridge University Press, 1985) 116 at 124 (emphasis in original) (hereinafter "Understanding and Ethnocentricity").

[127]Taylor, "Understanding and Ethnocentricity", *supra* note 126 at 125.

ii. The Fusion of Horizons.

In a crucial contribution to the social sciences and philosophy of interpretation, Taylor argues that this dilemma is false, because it presupposes that there is nothing "midway between the inauthentic and homogenizing demand for recognition of cultural worth, on the one hand, and the self-immurement within ethnocentric standards, on the other."[128] It is false to assume that criticism and understanding of the other has to occur in one of two languages: "theirs" or "ours." Taylor suggests that in the process of challenging the language of another's self-understanding, we will often have to challenge *our own* language and self-understanding,[129] and in so doing, develop a *third* language which is informed by *both* "theirs" and "ours."

In order to properly accomplish this, Taylor argues for

> what Gadamer has called a "fusion of horizons." We learn to move in a broader horizon, within which what we have formerly taken for granted as the background to valuation can be situated as one possibility alongside the different background of the formerly unfamiliar culture. The "fusion of horizons" operates through our developing new vocabularies of comparison, by means of which we can articulate these contrasts. [Our new understanding] is on the basis of an understanding of what constitutes worth we couldn't possibly have had at the beginning. *We have reached the judgement partly through transforming our standards.*[130]

This immensely rich and complex idea, which I think forms a core element of Taylor's thinking on intercultural understanding, calls for an "intercultural journey" of sorts.

a. The Intercultural Journey.

This intercultural journey is into what we might term the "knowledge community" of other cultures, in our case the Gitksan and Wet'suwet'en. By "knowledge community" I mean to

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[128]Taylor, "The Politics of Recognition," *supra* note 40 at 72.

[129]Taylor, "Understanding and Ethnocentricity", *supra* note 126 at 125.

[130]Taylor, "The Politics of Recognition", *supra* note 40 at 67 (emphasis added).

suggest that First Nations like the Gitksan and Wet'suwet'en, have not only a different corpus of knowledge as to their territories, governance, political organization, land tenure and so on, but also different *ways of knowing what they know*, which was demonstrated in my discussion of Gitksan subjectivity above.

We must take a step into the "unknown" and take seriously the ways of knowing of the other knowledge community, in order to truly understand its approach to important issues such as identity and, in our case, land and rights. This process is undertaken through Wittgenstein's "perspicuous contrast", in which disparate and even seemingly incommensurable examples, for instance about subjectivity, sovereignty, or law, are placed "side by side," so as to reveal both connections and differences between them, *and* so as to reveal previously-unrealized assumptions *within* each one. That is, we learn about ourselves.

Borrows argues that the result is that

> In generating this new language or vocabulary, one neither speaks wholly in the language of the dominant society nor does one speak 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.[131]

He goes on to suggest that the resulting "language" will be neither wholly indigenous, nor wholly non-indigenous. Rather, informed as it is by both perspectives, it is an "in between" language, with roots in both traditions.

Crucially, once one seriously engages in such a process, one's perspectives can never belong wholly to one tradition or the other. Thus, we try to navigate the tricky and treacherous waters between, on the one hand, the ethnocentric dismissal or colonization of other cultural beliefs; and on the other, the helpless resignation of the incorrigibility thesis, which Rorty argues

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[131]Borrows, "Constitutional Law From A First Nation Perspective", *supra* note 125 at 6.

leads inevitably to the arbitrary selection of one set of values over the other, but not a dynamic mingling and reconstruction of the two together.

Also important to the exercise, Tully argues, is the maintenance of the *dialogical* spirit which inspires it in the first place.[132] That is, perspicuous contrast, or the development of new vocabularies of comparison, must always occur in *dialogue* with those other cultures involved. True and equal dialogue also presumes that the participants speak in *their* language, broadly conceived; that is, they speak "in their own way."

This is an absolutely critical aspect of the exercise, because it seriously addresses the concerns raised in my critique of Kymlicka, which is the subsuming of all phenomena, ideas, activities, traditions, and so on, to the principles of a totalizing theory. In particular, it avoids the ethnocentric practice of judging indigenous beliefs and practices within the constructs of non-indigenous history and philosophy. As Tully argues, it "provides a way of understanding others that does not entail comprehending what they say within one's own language of redescription."[133] Rather, it allows the participants to speak in their own languages, and thus does not force them, prior even to entering the dialogue, to subsume their self-understanding to alien categories of understanding, which carries with it the substantial danger of distorting or marginalizing their world views and values, as demonstrated in the discussion of religion earlier. This of course raises questions of power, which will be addressed below.

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[132]Tully, *Strange Multiplicity*, *supra* note 87 at 109.

[133]Tully, *Strange Multiplicity*, *supra* note 87 at 111.

b. Willingness and Hybrid Result.

I argue that two important and related criteria must be met before Taylor's "fusion of horizons" can be seriously contemplated. The first is a *willingness* on the part of one community to accept the possibility of the other's presenting a value system as legitimate as one's own. Because no world view is inherently superior to alternate conceptions, one must be willing to engage the other, by "journeying" toward the other. That is, one must be prepared to open oneself and one's world view to the influence of the other.[134] In a sense, one must be willing to open one's paradigm to the other's.[135] In order to do so, of course, one must open oneself to *dialogue*, because the only way to truly broaden horizons is to allow other interlocutors to speak in their own voices, so as not to force them into a single totalizing theory.

The second criterion is what we might call the "hybrid result." That is, whatever the end result of that journey might be, it will not be grounded solely in the values that one had when one initially embarked on the journey. That is, by successfully opening one's own structure of values and understanding to the influence of another, one is profoundly and fundamentally changed. In

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[134]In a remarkably similar argument to Taylor's, but which proceeds on different grounds, Jennifer Nedelsky suggests that to seriously account for diversity, judging must feature the continual "generating" and "shifting" of "affectivities", that is, "gut-level" empathy with the experiences and realities of others. This is done by self-consciously encouraging diversity among adjudicators. Thus, Nedelsky also calls for a broadening of horizons, with the difference that her call includes a corporal, body-oriented focus that addresses some of feminist theory's most cogent critiques of the ways in which reason and impartiality are "disembodied" and re-located to society's elites. Interestingly, and also in a sense similar to Taylor's, Nedelsky argues that it is not enough to have shared or apprehended another's experience. Stopping at that, according to Taylor, risks the extension of inauthentic recognition (which is tantamount to misrecognition), and according to Nedelsky, runs the risk of clouding judgement. In different ways, both argue that the initial journey or empathy must then be processed with information and other faculties of reasoning, in order to reach a more enlightened state: Jennifer Nedelsky, "Embodied Diversity and Challenges to Law" (1997) 42 McGill L.J. 91.

[135]I do not mean to suggest here that it is ever possible to completely step out of one's way of knowing. Of course we are all, in sense, "trapped" in Weber's "iron cage" (see Max Weber, trans. by Talcott Parsons, *The Protestant Ethic and the Spirit of Capitalism*, (New York: Charles Scribner's Sons, 1958)); and of course, the moment one does "step out" of any paradigm, one steps right into another, as Kuhn has noticed (see Thomas S. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (Chicago: University of Chicago Press, 1970)). Indeed, Taylor explicitly argues that the result of such a process is *not* to step into the shoes or understanding of another, but rather is an expanded horizon, which includes *both* the starting point, *and* the new understanding gained from the "journey" to the other's world view.

this way, Taylor's approach is profoundly opposed to Rorty's conclusion that we can "watch" without interacting.

The two criteria, willingness and "hybrid result," are thus integrally linked, because the less willing one is to open oneself to the world view of the other, the less likely there will be the true "fusion of horizons" that Taylor calls for. And the further any result is from such a "fusion of horizons", the less it will resonate with both communities. Indeed, achieving results that are "owned" by both communities is a key goal of intercultural understanding, and of this thesis.

An excellent example of the two criteria is found in *Delgamuukw*.[136] When the Court seriously attempted to listen to the world view of the Gitksan and Wet'suwet'en, for instance with respect to oral histories, it produced a remarkably sensitive intercultural accommodation in which the law of evidence was changed in a way that can be "owned" by both indigenous and non-indigenous communities, because it draws upon the traditions of both. By contrast, its discussion of Aboriginal title, particularly with respect to infringement, was marked by a *monological* approach which turned to Anglo-Canadian jurisprudence to inform the "content" of title, to the exclusion of Gitksan and Wet'suwet'en law.[137]

c. Recognition.

What we also have in this dialogical approach is an emerging value of *recognition*. Taylor argues that communities, like individuals, existing as they do in *relationships*, extend identity claims that can either be *recognized* or *mis*recognized. He observes that one key

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[136] *Delgamuukw — S.C.C., supra* note 6.

[137] These conclusions are extensively discussed in chapter five, part three.

problem in the area of intercultural conflict is that all too often, recognition is unreasonably withheld by the dominant community, or *mis*recognition is extended. Taylor argues that misrecognition can cause "real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Misrecognition can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being."[138] It can also have a very material *external* effect that goes beyond the construction of a demeaned identity. It can lead to the physical, legal, economic and social domination of the misrecognized community by the dominant one which fails to extend recognition of the claim. Such is the case with respect to First Nations in the context of colonialism.

C. Shedding Old Approaches For New.

What we have then, in what I call the "dialogical approach," is radically different from that advanced by Western moral and political philosophies, which require that everything be reduced and explained by reference to a set of first principles. Having recognized that such an approach is itself culturally and historically bounded and fails to resonate with First Nations, we move towards a principled alternative. Indeed, as Tully argues, although most mainstream Western philosophies have turned their mind to accommodating cultural plurality and indigenous rights, none of them adequately accounts for indigenous positions, because doing so imports

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[138]Taylor, "The Politics of Recognition," *supra* note 40 at 25.

radically different starting points from those which underpin "mainstream theories."[139] A context-specific, dialogically-oriented quest for understanding is also "a view of how understanding occurs in the real world of overlapping, interacting and negotiated cultural diversity in which we speak, act and associate together."[140]

This thesis argues for an approach to intercultural conflict which valorizes intercultural *understanding* as the best way to address to go forward. True intercultural understanding requires a serious and unrelenting commitment to recognition and *dialogue* that not only *listens* to First Nations, but also allows them to speak in their own ways. Such an approach meets the first criterion of Taylor's "fusion of horizons" notion, and immeasurably improves the prospect that the results of the intercultural journey will be hybrid — shared by both communities, and therefore will enjoy a moral claim on both.

D. The Problem of Power.

This approach to intercultural conflict is designed to provide a new way of getting around some of the profound critiques that have been leveled against the way that intercultural relations are practiced in Canada. For instance, to Mary Ellen Turpel's charge that, "We are faced with a

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[139]See James Tully, "Aboriginal Property and Western Theory: Recovering a Middle Ground" in Ellen Franken Paul, Fred D. Miller, Jr. and Jeffrey Paul, eds., *Property Rights* (New York: Cambridge University Press, 1994) 153 at 153 (hereinafter "Middle Ground"). Furthermore, Tully argues that, "The language of modern constitutionalism that has been forged in constitutional theory and practice over the last three hundred years is a partial forgery. While masquerading as universal it is imperial in three respects: in serving to justify European imperialism, imperial rule of former colonies over indigenous peoples, and cultural imperialism over the diverse citizens of contemporary societies.": *Strange Multiplicity*, *supra* note 87 at 96.

[140]Tully, *Strange Multiplicity*, *supra* note 87 at 111.

story of monocultural dominance,"[141] Taylor and Tully can rightly respond that the "fusion of horizons" approach, which calls for dialogue between communities, is designed to minimize the problems caused by monocultural presumptions, by explicitly recognizing intercultural perspectives, and by opening a dialogue in which it is presumed that the perspectives of both parties will be enriched and changed by the perspectives of the other.

When Turpel argues that cultural difference has to be regarded by the Canadian law not as a "gap in knowledge" which can be bridged, but an "imperative which may loosen or shift the paradigm of knowledge,"[142] proponents of the approach just outlined may argue that such an "imperative" is met by the loosening of power which dialogue implies. Although Taylor's response to Turpel's charge that,"The first question should be 'can I judge', or self-judgement,"[143] is a resounding, "Yes," it is a question whose significance is not lost on him, and which animates his approach and infuses it with the sensitivity and seriousness that must be apparent to any who read Taylor.

But is this enough? Neither Taylor nor Tully says much about power. The aspect of power that I am referring to is what Turpel terms the "interpretive monopoly," in which judging of Aboriginal peoples and their rights is done largely by non-Aboriginal peoples. As she notes:

> This concern involves both the issue of the cultural difference which arises because such a formalized adversarial and impersonal institution is unknown amongst Aboriginal peoples, and the political problem of cultural hegemony raised by the fact that the representatives of the dominant (settler) communities write and 'interpret' the law for all Canadians ...[144]

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[141]Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences" (1989-1990) 6 C.H.R.Y.B. 3 at 7 (hereinafter "Interpretive Monopolies").

[142]Turpel, "Interpretive Monopolies" *supra* note 141 at 13.

[143]Turpel, "Interpretive Monopolies", *supra* note 141 at 25.

[144]Turpel, "Interpretive Communities", *supra* note 141 at 23.

Indeed, Turpel charges that, "the ... significance of cultural difference ... is the extent to which it reveals a lack of interpretive authority in legal reasoning and decision making and the extent to which it problematizes the rule of law as one particular expression of social life. As a consequence, judging is a problem, not simply an accepted institutional function."[145]

These challenges are profound, because Taylor and Tully's careful and thoughtful approaches not only presuppose, but *require* a measure of equality between indigenous and non-indigenous communities in their intercultural dialogue. A serious imbalance in power threatens the first criterion of the Taylor approach, namely, the *willingness* to "journey" to the other knowledge community. Indeed, it places First Nations *at the mercy* of that willingness.

To complicate matters further, Turpel argues that although indigenous and non-indigenous communities might share many values, there are major areas of incommensurability between the two. She challenges that

> The opening of a space for considering cultural differences in Canadian legal analysis involves the loss of a cultural monopoly over the generation of law and its interpretation, a loss of universality which, undoubtedly, sits uncomfortably with lawyers committed to the rule of law. If irreconcilable conceptions of law exist within the imagined confines of one 'state', what is to be done? One possibility is the denial of cultural difference which would continue oppression through the maintenance of the cultural monopoly or hegemony. There is also the possibility for toleration of differences and the recognition of autonomous or incommensurable communities. This choice has profound implications for the style of legal analysis and judging now practiced. If nothing else, it forces us to question the cultural legitimacy and authority of the judiciary as an institution competent to choose between and among varying cultural images.[146]

The arguments developed in this chapter suggest that there may be a *third* option. It is about the creation of a new language, neither fully in the tradition of the interpretive monopoly, which rejects difference and imposes uniformity; nor fully in the tradition of separation and incommensurability. It is one that must recognize and try to correct power imbalances in the area

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[145]Turpel, "Interpretive Communities", *supra* note 141 at 25.

[146]Turpel, "Interpretive Monopolies", *supra* note 141 at 45.

of interpretive *power*, which is something that is within human power to address. Indeed, the issue of power is one that will require the most vigilance of all, because greater equality means that, in the spirit of a true conversation, neither participant controls the dialogue — they can attempt to shape and fashion it, but as long as it is a dialogue, its shape must be *shared.*

This philosophical approach is also optimistic about the deeper concern: the ability of different traditions and world views to speak to one another, and to account for diversity and plurality. A pessimistic reading of Turpel and Rorty suggests that this is *outside* human power to accomplish, but I believe it possible, equipped with mutual respect and a commitment to *true dia*logue, to take some first tentative steps toward challenging that conclusion.

To take those steps, I develop my own perspicuous contrast, by learning more about the Gitksan and Wet'suwet'en, as well as revealing elements of *Canadian* law which might be obscured by the overwhelming silence of indigenous voices. In chapter two, I present some of the most important norms of the Gitksan and Wet'suwet'en, as well as some of their foundational historical narratives. In addition, I discuss their unique *ways of knowing* such norms and narratives, principally through the specialized oral traditions of the *adaawk* and *kungax*.

I do so for two reasons. The first is to reveal the deep commitment that Gitksan and Wet'suwet'en political and legal institutions have to dialogue and understanding, *within* those First Nations, and with *other* communities, such as other First Nations, animals, the supernatural world, and the Canadian state. The second reason is to develop a corpus of knowledge that can be used to continue the perspicuous contrast in chapters three and four. In those chapters, I present some of the most important doctrines of Canadian law on Aboriginal rights as *monologues*, because they develop with little or no reference to First Nations' knowledge, values

or laws, as understood by First Nations themselves.

I am able to identify the monologues of discovery, sovereignty and the "authentic Indian" because I am equipped with the knowledge and conclusions of chapter two. In chapter four, I also focus on the trial decision of *Delgamuukw* and demonstrate the subtle but pervasive ways that the three monologues interact to produce a judgement that is so utterly lacking in Gitksan and Wet'suwet'en perspectives that it constitutes an act of almost total misrecognition.

In chapter five, I argue that, notwithstanding the dominant *tendency* of Canadian law to undertake a monological approach to First Nations, it is *capable* of dialogue, in which true intercultural understanding can be sought and achieved. Equipped with *that* perspicuous contrast, I analyze in detail the Supreme Court's decision in *Delgamuukw* and demonstrate that it contains elements of *both* dialogue and monologue, and that, insofar as the former is present, the Court achieves a truly "hybrid result"; whereas when the latter is present, its conclusions are highly problematic and fail to resonate with First Nations.

I conclude with a strong call on both the colonial state and First Nations to engage in negotiations, which must undertaken by both in good faith. To that end, I identify an intercultural norm of good faith dialogue and negotiation that binds *both* communities. I also draw attention to the necessity of challenging the monologue of sovereignty as perhaps the only way to achieve the kind of equality that this approach requires, and that Turpel laments. Ultimately, I conclude that a serious and robust deployment of another intercultural norm — recognition — is required if the future of Canada and First Nations, whose futures are already destined to be intertwined, is to be marked by the kind of fairness and justice that *both* communities recognize.

Chapter Two
Different Voices: the Gitksan and Wet'suwet'en Model

"They all – all resided in the same area and then we today still live in the same territory. We never came from anywhere but where we are today."

-Elder Txemsin (Alfred Mitchell), February 10, 1988.

Part One — Introduction.

A. Situating the Analysis.

Situated in Northwestern British Columbia, among the headwaters of the Nass and Skeena Rivers, some distance from the Pacific Coast, the Gitksan and Wet'suwet'en are indigenous First Nations who claim that they have owned, occupied, used and governed a territory of almost 22,000 square miles since "time immemorial."[147] In 1984 they commenced an action against British Columbia and Canada in the British Columbia Supreme Court, seeking a declaration to that effect.[148]

In presenting their case, the Gitksan and Wet'suwet'en sought an intercultural accommodation with Canada, by seeking a "process to place Gitksan and Wet'suwet'en ownership and jurisdiction within the context of Canada."[149] In order to do so, the plaintiffs pursued an innovative strategy in which they presented evidence designed to satisfy common law requirements to prove Aboriginal title, while at the same time presenting it in such a way as to prove their title under Gitksan and Wet'suwet'en law. In particular, the Gitksan and

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[147]Gisday Wa and Delgam Uukw, *The Spirit in the Land, supra* note 83 at 7.

[148]*Delgamuukw — Trial, supra* note 73 at 121-122.

[149]Gisday Wa and Delgam Uukw, *The Spirit in the Land, supra* note 83 at 10.

Wet'suwet'en endeavored to establish their system of land tenure, governance and unique connection to the land, as well as to demonstrate a chain of unbroken occupation and use of the claimed territories since "time immemorial."

In order to pursue such an intercultural approach, the Gitksan and Wet'suwet'en presented historical evidence from their own cultural historians — elders and hereditary chiefs; in their own language — Gitksan and Wet'suwet'en; and in the intellectual tradition which enjoys legitimacy in their First Nations — the oral histories known as the *adaawk* and *kungax*. By doing so, the plaintiffs took a major step toward the kind of intercultural approach described and called for in chapter one of this thesis: they initiated a process of broadening horizons of understanding, while at the same time maintaining the integrity of each culture involved in the process, by demonstrating their respect for the Canadian legal system, while also insisting on the equality and legitimacy of their own.

Gitksan oral histories recount their migration into the territories they presently occupy from an area to the North, in a process starting as long as 9,000 years ago;[150] by contrast, Wet'suwet'en oral accounts do not contain information about migration,[151] and claim that the Wet'suwet'en have always occupied the territory which they presently claim. Speaking of Wet'suwet'en ancestors, Txemsin (Alfred Mitchell), a member of both nations, said, "They all – all resided in the same area and then we today still live in the same territory. We never came

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[150]See Antonia Mills, *Eagle Down Is Our Law: Witsuwit'en Law, Feasts and Land Claims* (Vancouver: U.B.C. Press, 1994) at 37 (hereinafter *Eagle Down*); and Neil J. Sterrit, Susan Marsden, Peter R. Grant, Robert Galois and Richard Overstall, *Tribal Boundaries in the Nass Watershed* (Gitanmaax, B.C.: Gitxsan Treaty Office, 1995) at 16 (hereinafter *Tribal Boundaries*).

[151]Mills, *Eagle Down*, *supra* note 150 at 37.

from anywhere but where we are today."[152]

Although the Gitksan and Wet'suwet'en share the same external boundary separating their traditional territories, they are in fact very distinct First Nations. For instance, the Gitksan language is part of the Tsimshian family, and along with other Tsimshian-speaking First Nations such as the Tsimshian and the Nishga'a, the Gitksan share many features of material, legal and spiritual life.[153] For instance, the basis of Gitksan, Gitanyow[154] and Nisga'a traditional legal systems is the same — the *adaawk*,[155] a special brand of oral tradition which shall be discussed in detail throughout this thesis. By contrast, the Wet'suwet'en speak a language that is part of the Athabaskan language family. This they share with their close neighbours, most notably the Naadut'en (meaning "people from another place) and the Tatl'aht'een, meaning people of Takla Lake.[156] Generally, profound differences in language also carry with them profound differences in world view, social structure and legal systems.

But as Arthur Ray has noted for indigenous North America, "Linguistic divisions did not create insurmountable communication barriers: European accounts of early contact relate that most of the groups living near [major linguistic boundaries] had members who were bilingual as

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[152]Gitksan and Wet'suwet'en First Nations, "Transcript Evidence in the trial of *Delgamuukw* v. *The Queen in Right of British Columbia*," May, 1987 - June, 1988 (Volumes 2 - 111) (storage files: Faculty of Law, University of British Columbia, Vancouver, British Columbia) (hereinafter "Transcript Evidence" followed by Witness's Name), Txemsin (Alfred Mitchell), February 10, 1988 (Volume 55).

[153]Mills, *Eagle Down*, *supra* note 150 at 189 f.n. 4.

[154]The Gitanyow are Gitksan-speakers who declined to join the *Delgamuukw* action, and who have generally declined to participate in Gitksan and Wet'suwet'en attempts to settle land claims, preferring to pursue their claims independently: Sterrit *et al.*, *Tribal Boundaries*, *supra* note 150 at 3.

[155]Sterrit *et al.*, *Tribal Boundaries*, *supra* note 150 at 3.

[156]Mills, *Eagle Down*, *supra* note 150 at 37.

a consequence of centuries-old trading, warring and diplomatic traditions."[157] The Gitksan and Wet'suwet'en were no different. Speaking of pre-contact Gitksan relations with their Tsetsau neighbours, Sterrit notes that the Tsetsau, "were the northern neighbours of the Gitksan and traded extensively with them. There were also periods of war between the Gitksan and the Eastern Tsetsau as well as periods in which extensive intermarriage fostered peaceful relations."[158]

As for the Gitksan and Wet'suwet'en, despite their different linguistic backgrounds and distinct cultures, "the Wet'suwet'en and their Gitksan neighbours share the same basic structure of social and political organization,"[159] and their cultures both indicate long contact with one another.[160] In the last several decades, their mutual cooperation has increased to the point that they jointly participate in the Gitksan and Wet'suwet'en Office of Hereditary Chiefs to pursue their claims.

This chapter will be divided into two major sections. The first sets out some of the basic political, social and legal structures and institutions of the Gitksan and Wet'suwet'en, and discusses some of the most fundamental concepts within their world view. This is done in order to accomplish a number of goals. The first is to counter a number of explicit and implicit assumptions of the trial judge in *Delgamuukw*, which will be discussed in chapter four. In particular, I will argue that the Gitksan and Wet'suwet'en do have and always have had

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[157]Arthur J. Ray, *I Have Lived Here Since the World Began: An Illustrated History of Canada's Native Peoples* (Toronto: Lester Publishing, 1996) at 5-6.

[158]Sterrit *et al.*, *Tribal Boundaries*, *supra* note 150 at 20.

[159]Michael Kew, "Preface" in Mills, *Eagle Down*, *supra* note 150 at150 xiv.

[160]Mills, *Eagle Down*, *supra* note 150 at 37.

sophisticated social and political structures, even though those structures might not share features commonly associated with the modern state. I will also argue that the Gitksan and Wet'suwet'en do govern, and always have governed, their territory according to distinctive indigenous legal norms, which are introduced, explained, rationalized and validated in the context of their social and political structures such as the Feast, the *adaawk* and *kungax*, totem poles and crests.

The second section will briefly canvass some representative examples of norms and historical narratives of the Gitksan and Wet'suwet'en, especially as are found in the *adaawk* and *kungax*, oral traditions which shall be introduced in the first section. I will argue that many of these norms ought to be regarded as legal, and not "just" "customs" or "traditions". I will focus especially on oral traditions, both generally, and specifically as they exist in Gitksan and Wet'suwet'en cultures, and attempt to draw out some of the foundational legal norms and historical narratives that they contain. This is the first half of assembling the "perspicuous contrast" I called for in chapter one, by placing examples of indigenous norms and approaches next to Canadian ones, which shall be done in chapters three and four. Chapter five will then highlight some similarities, dissimilarities and insights as to where to go from there.

B. Methodology — The Use of the *Adaawk* and *Kungax*.

i. Use of Transcripts.

Concerned with establishing guidelines for ethical research, the Royal Commission on Aboriginal Peoples has stated that, "Research that has Aboriginal experience as its subject matter must reflect [the] perspectives and understandings ... [which are gleaned from the] distinctive perspectives and understandings deriving from [Aboriginal] cultures and histories ..." The

RCAP went on to state that, "The means of validating knowledge in the particular traditions under study should normally be applied to establish authenticity of orally transmitted knowledge."[161] With that in mind, my principal source for the institutions and norms that I will discuss will be Gitksan and Wet'suwet'en elders and hereditary chiefs. Much of my data will be drawn from the voluminous transcript evidence from the *Delgamuukw* action, which produced one hundred and eleven volumes of evidence from those witnesses alone (that is, excluding experts and witnesses for B.C. and Canada). I follow the view of Michael Kew that the "true experts in any cultural system are those experienced and wise leaders who have been taught to know their own laws and values and to understand how they fit together to serve their communities. In this case, the true experts are the [Gitksan and] Wet'suwet'en chiefs,"[162] and I suggest that recourse to their knowledge, *as they communicate it*, is one important step toward meeting the goal of the RCAP laid out above, as well as the approach developed in chapter one.

The transcript evidence represents perhaps the most comprehensive and certainly the most remarkable collection of data on any North American First Nation. It is particulary remarkable due to the fact that, notwithstanding the highly artificial atmosphere of a trial, the evidence was given by, and in many instances in the language of, the elders and hereditary chiefs, rather than by cultural intermediaries such as anthropologists. In addition, as Natalie Oman has remarked, the Gitksan and Wet'suwet'en were able to draw a parallel between the trial and their Feast, which is the proper venue for the presentation and validation of official histories, rights and legal principles. This was possible because the elders and chiefs were able to attend court

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[161]Royal Commission on Aboriginal Peoples, *Ethical Guidelines for Research* (Ottawa: RCAP, 1993) at 2 (hereinafter *Ethical Guidelines*).

[162]Kew, "Preface" in Mills, *Eagle Down*, *supra* note 150 at xiv.

and witness statements made by their fellow elders and chiefs while testifying.[163]

Thus, the reader will note that, wherever possible, I substantiate statements about Gitksan and Wet'suwet'en social and political structures, world view and legal systems, by reference to Gitksan and Wet'suwet'en elders and chiefs themselves. This of course raises issues of both accuracy and honesty of witnesses, many of whom were interested parties to the litigation. This latter issue is of course always a concern, notwithstanding that the Gitksan and Wet'suwet'en witnesses were found by the trial judge to be honest and forthright,[164] and notwithstanding Culhane's observation as to the general honesty of indigenous elders.[165]

I suggest that the issue of witnesses' honesty will be satisfactorily dealt with in my treatment of the accuracy of the *adaawk* and *kungax*. In section II of this chapter, I describe ways in which the information presented in the *adaawk* and *kungax* can be, and is, "triangulated", so as to provide various circumstantial guarantees of trustworthiness, such as the rigorous training that story-tellers go through; the demands of public authentication on veracity; and the "corroboration" of the *adaawk* and *kungax* by documentary and physical evidence.

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[163]Oman, *Sharing Horizons*, *supra* note 1 at 132 (hereinafter *Sharing Horizons*). However, it should be noted that the trial judge dealt a serious blow to this intercultural, or bi-juridical, function by moving the trial from Smithers, in Gitksan and Wet'suwet'en territory, to Vancouver in June 1987, just six weeks into the marathon trial (there were more than 80 days of testimony from elders and chiefs remaining). Counsel for the Gitksan and Wet'suwet'en argued strenuously that the trial should remain in Smithers, at least for that portion, in order to preserve the legitimacy of the process under Gitksan and Wet'suwet'en law, as well as due to the frailness of many of the witnesses, many of whom were elderly. Their requests were denied. Their argument appears in "Transcript Evidence", pages 1820-1821 and is an excellent example of "perspicuous contrast" being employed — the lawyers were able to draw upon principles of common law and the indigenous Feast to produce an intercultural norm of an open and transparent process within the territory in which it has an impact.

[164]*Delgamuukw — Trial*, *supra* note 73 at 168.

[165]Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Vancouver: Talon Books, 1998) at 262 (hereinafter *The Pleasure of the Crown*).

ii. The Scope of the Description.

For practical and theoretical reasons, I will not attempt in this chapter to provide a comprehensive ethnological account of the Gitksan and Wet'suwet'en First Nations either today or historically. Practical reasons include the obvious constraints on space available within a project of this kind, which aims to discuss intercultural relations, rather than the intricacies of particular cultures; and more importantly, my personal ignorance of those intricacies. Although I have begun to "delve" into the world of the Gitksan and Wet'suwet'en, my exposure is necessarily partial — in many ways, I have hardly "scratched the surface." As Michael Jackson has argued, the Western intellectual tradition

> starts with the premise that you have already graduated from a place of learning, usually with high honours, and are trained to observe and document what you are about to see and hear. The Aboriginal perspective sees you as a person who is at the beginning of your understanding. You are but a child who, like a child, must be shown the ways and instructed by those who have knowledge based on the accumulated teachings of many generations. As you demonstrate your ability to understand and respect, you are entrusted with yet more knowledge. Layer by layer you become a person of knowledge and power.[166]

Such learning does not come quickly or easily. As Hanamuxw (Joan Ryan) stated of her own learning within her culture, "And it's still going on today. But I don't think, or at least I wouldn't for one minute pretend, that I know all there is to know about our own traditions ... [My learning] certainly will [continue] until the day I die."[167] She received her high chief's name in the 1960's.

Notwithstanding those words of caution, however, chapter one of this thesis argued that, with diligence and a *willingness* to open one's world view to that of others, one *can* expand one's horizons by learning about other cultures. This thesis not only *argues* for that kind of journey, but tries to *demonstrate* how it is done. By "delving" into the transcript evidence of

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[166]Michael Jackson, "Preface" in Mills, *Eagle Down*, *supra* note 150 at xix.

[167]Transcript Evidence, Hanamuxw (Joan Ryan), March 23, 1988 (Volume 79).

Delgamuukw, along with thinking and learning about First Nations' history and legal issues for several years, I argue that my conclusions, as tentative as they might be from time to time, are based upon reasonable interpretations of the evidence. I suggest that many Canadian courts could benefit from the enhanced understanding that I have gained.

More importantly, however, I think it problematic to attempt a comprehensive theoretical account of any culture. Indeed, the idea that anyone could produce an account which claimed to exhaustively detail the world view, cultural, political and legal norms of the Canadian people, seems ludicrous. The sheer diversity of the Canadian population (not to mention its size) renders such a task impossible, and reveals that any claim to do so is likely a thinly veiled attempt to privilege the account of some over others. Similarly, my account of the Gitksan and Wet'suwet'en must be seen as partial.

This raises a problem, however, with my claim that I will sketch out *some* of the features of Gitksan and Wet'suwet'en political and social structures, legal norms and world view. This is because the "informants" of most of these views come from the chiefly class of these nations and thus represent, to some extent, an Aboriginal elite. Jo-Anne Fiske has argued that an ironic result of litigating First Nations claims, might be that the inherent flexibility of indigenous legal systems can be compromised, due to the emergence of a "law-making class" whose account of indigenous law receives the imprimatur of the colonial state through the court system.[168]

While the challenges are serious, I believe that it is still possible to rely on the elders' and chiefs' testimony as long as it is maintained that such accounts are not universal, are not frozen

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[168]See Jo-Anne Fiske, "From Customary Law to Oral Traditions: Discursive Formation of Plural Legalisms in Northern British Columbia, 1857-1993" (1997/1998) 115 & 116 B.C. Studies 267 at 287-288. She raises similar concerns in "Supreme Law," *supra* note 67.

in time, and exist in a field of multiple and contested meanings. Moreover, they represent a useful "official" account of aspects of Gitksan and Wet'suwet'en political, social and legal structure, and arguably enjoy much stronger legitimacy and consensus within those First Nations than do accounts from outside the community. One way to avoid the problem of "freezing" norms, as well as to avoid the normalizing force of adjudicating norms in Canadian courts, is to recognize and affirm a sphere of autonomy for First Nations, so that while many Aboriginal norms, values, rights and histories will continue to be contested, those contests can occur, as much as possible, within the context of indigenous institutions, such as the Feast. As well, I follow Oman when she argues that

> it seems appropriate to adopt the language of the Gitksan and Wet'suwet'en themselves to describe their relationship and their distinctiveness from non-native Canadians ... In order to discuss the continuing hegemony of the Canadian legal and political systems over Aboriginal peoples without obscuring the key issue of their oppression, speaking in general terms of ... the predominant Gitksan and Wet'suwet'en conceptual framework is sometimes a reasonable oversimplification.[169]

It is thus that I will offer this brief outline of the Feast, the *adaawk* and *kungax*, the system of territorial governance, and the roles and responsibilities of chiefs within the Gitksan and Wet'suwet'en First Nations.

iii. Use of Knowledge That Is Owned.

Finally, some words about the *adaawk* and the *kungax*. The *adaawk* and the *kungax*, as integral parts not only of Houses and their identities (and, by extension, the identities of Gitksan and Wet'suwet'en people, as well), but also territories themselves, are private property. It is

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[169]Oman, *supra* note 1 at 109, f.n. 6.

often considered akin to a trespass to tell a story that is not your own.[170] Indeed, the plaintiffs in *Delgamuukw* unsuccessfully asked the court to restrict access to transcripts, which would contain many *adaawk* and the *kungax*, due to their fear that, "scholars and researchers would use transcripts of the trial to publish articles retelling their *adaawk* [and *kungax*]."[171] Their fear is serious and well-grounded. For centuries anthropologists and ethnologists have "mined" First Nations' stories, histories, laws, legends and sacred knowledge in order to publish ethnological accounts of "exotic" indigenous cultures.[172] First Nations have also seen such collections used against them, generations after the stories were collected, in the modern context of land claims trials, by people such as the cultural anthropologist called by B.C. and Canada as their expert.[173]

My thesis argument is two-pronged. I argue that the law must make room for indigenous accounts of law and political organization in order to truly pursue an intercultural approach to Aboriginal rights, title and self-government; and I argue that such an approach is possible, based upon the "fusion of horizons" introduced by Taylor. In order to accomplish this second goal, it is necessary for me to attempt the "journey" that I argued for in chapter one, and to do so, consideration of some of the most important sources of Gitksan and Wet'suwet'en "horizons",

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[170]Gisday Wa and Delgam Uukw, *The Spirit in the Land, supra* note 83 at 39. See also the reluctance of Gyoluugyat (Mary McKenzie) to elaborate on the next in a sequence of events that was included in her House's *adaawk*, because it formed part of another House's *adaawk*: "Transcript Evidence", May 14, 1987 (Volume 4) (page 229).

[171]Deborah Brauer, "Chief testifies on Gitksan culture", the Hazelton Sentinel, May 28, 1987, quoted in Don Monet and Skanu'u (Ardythe Wilson), *Colonialism On Trial: Indigenous Land Rights and the Gitksan and Wet'suwet'en Sovereignty Case* (Montpelier, Vermont: New Society Publishers, 1992) at 36 (hereinafter *Colonialism on Trial*).

[172]To the proposition that, "we have been researched to death," an Aboriginal elder suggested that, "maybe it's time that we started researching ourselves back to life." Quoted in David Hawkes and Marlene Brant Castellano, "Ethical Guidelines for Research" (April 1993) *The Circle* 5 at 5. Implicit in his suggestion is that control over that process return to First Nations communities.

[173]For a sustained and devastating critique of Sheila Robinson, the Crown's anthropologist, see Culhane, *The Pleasure of the Crown, supra* note 165; and Dara Culhane, "Adding Insult to Injury: Her Majesty's Loyal Anthropologist" (1992) 95 B.C. Studies 66 (hereinafter "Insult to Injury").

the *adaawk* and *kungax*, seems crucial.

Given that I have not obtained the permission of hereditary chiefs to retell their House's sacred *adaawk* and *kungax*, I have resolved to minimize the amount on which I have to rely on the *adaawk* and *kungax* proper, keeping in mind that to achieve the goal of the thesis it will be necessary to give some consideration to these official histories and important sources of Gitksan and Wet'suwet'en law. To achieve that, I first make a distinction between that testimony which does, and that testimony which does not, form part of the *adaawk* and *kungax*. Testimony which describes the political, social and legal structures and norms of the Gitksan and Wet'suwet'en First Nations, but which is not part of the *adaawk* or *kungax*, is more generally available through published anthropological and ethnographic texts; however, as stated above, I regard it far more desirable to hear that information described in the words the elders and hereditary chiefs who testified. Thus, the reader will note that section two of this chapter relies quite heavily on the transcripts, very little on the *adaawk* or *kungax*.

In addition, while I will address and discuss aspects of the *adaawk* and *kungax*, I will refrain from *retelling* them, which is what the elders and hereditary chiefs so opposed. Rather, I will endeavour to describe them in a way that does not appropriate them or claim to offer *the* authoritative interpretation of them. Furthermore, my descriptions of the *adaawk* and *kungax* will be for a limited purpose — that is, to draw out what they say about the legal norms and historical narratives of the Gitksan and Wet'suwet'en First Nations; wherever possible, I will also rely upon commentary as to their meaning and significance that is either indigenous in

origin, or authorized by the teller.[174]

It has been stated that "A text in which no one speaks is almost certainly just a report of how a story goes, not an actual telling of it."[175] While this is a useful starting point in ensuring that cultural property is not appropriated, it is just that: a starting point. Another approach that I will employ is to use, as much as possible, already-published versions of the *adaawk* or *kungax*, such as Kenneth Harris's *Visitors Who Never Left*; or the discussion surrounding the *adaawk* of the Seeley Lake *Medeek* in the trial decision of *Delgamuukw*. What must be maintained, however, is the constant awareness that these accounts, too, deserve careful consideration and must not be *retold* without the proper observation of etiquette. In these ways, I hope to strike a delicate balance between the scholarly task of advancing an argument, along with sufficient evidence to make it persuasive, and the ever-present concern to ensure that a thesis which advocates a more sensitive approach to indigenous cultures and sources of law does not become simply another source of oppression and appropriation of indigenous culture.

Part Two — Political, Social and Legal Institutions of the Gitksan and Wet'suwet'en.

A. The Feast.

For both the Gitksan and Wet'suwet'en, the Feast is an absolutely central institution to political, legal, social and cultural life. As Mills notes, "From ancient history to the present day,

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[174]For instance, Frances M.P. Robinson provides an introduction to and running commentary throughout Kenneth Harris's *Visitors Who Never Left: The Origin of the People of Damelahamid* (Vancouver: UBC Press, 1974) (hereinafter *Visitors Who Never Left*); and the fascinating discussion of and contextualization of Gitksan, Gitanyow and Nisga'a *adaawk* in Sterrit *et al.*, *supra* note 150 provides an instructive example of how the *adaawk* can be respectfully integrated with other, non-oral types of knowledge.

[175]Dell Hymes, "Mythology" in Wayne Suttles, ed., *Handbook of North American Indians, Vol 7: Northwest Coast* (Washington: Smithsonian Institution, 1990) 593 at 596 (hereinafter "Mythology").

the feast system stands as the central structure of Wet'suwet'en society."[176] In many respects, the Gitksan and Wet'suwet'en Feasts share features with the famous potlatch. For instance, like Northwest Coast potlatches, gifting from the host clan to visiting Chiefs forms an important part of the Gitksan and Wet'suwet'en Feasting, as a way of honouring them as well as a payment for witnessing the transactions at the Feast.[177] In another similarity, authorities historically targeted the Gitksan and Wet'suwet'en Feasts under the *Indian Act*.[178] But, "Despite concerted legislative effort to stamp out the Feast, it persisted through the twentieth century, and continues today to be the overarching institution of the Gitksan and Wet'suwet'en ."[179]

The Feast is the site of events that are, at the same time, political, legal, economic, social, spiritual and educational. As the hereditary chiefs informed the court in *Delgamuukw*:

> They are economic in that the Feast is the nexus of the management of credit and debt; they are social in that the Feast gives impetus to the ongoing network of reciprocity, and renews social contracts and alliances between kinship groups. The Feast is a legal forum for the witnessing of the transmission of Chief's names, the pubic delineation of territorial and fishing sites, and the confirmation of those territories and sites with the names of the hereditary Chiefs. The Feast can also operate as a dispute resolution process and orders peaceful relationships both nationally and internationally.[180]

Perhaps reflecting the multifarious roles that Feasts play, the Gitksan and Wet'suwet'en actually have a variety of different *kinds* of Feasts. For instance, there are the very important funeral feasts; totem pole raising feasts; shame feasts; marriage feasts; divorce feasts; and of course the

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[176]Mills, *Eagle Down*, *supra* note 150 at 42.

[177]"Transcript Evidence", Gyoluugyat (Mary McKenzie), May 15, 1987 (Volume 5). See also Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 26. For an interesting comparison and contrast between the Gitksan Feast and other Northwest Coast Feasts, see John W. Adams, *The Gitksan Potlatch: Population Flux, Resource Ownership and Reciprocity* (Toronto: Holt, Rinehart and Winston of Canada, 1974), especially chapter four, "Redistribution in the Potlatch" (hereinafter *Gitksan Potlatch*, in which Adams canvasses many of the interpretive frameworks developed out of the Northwest Coast potlatch.

[178]*Indian Act Amendment Act*, S.C. 1884, c. 27.

[179]Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 51.

[180]Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 31.

burial feast.[181] At each of these feasts, important business is transacted. Indeed, the business is so important that it requires witnesses, which the Feast is structured to provide.[182] Depending on what type of Feast is going on, different kinds of business are transacted; for instance, in the Gitksan burial feast, titles are transferred from the recently-deceased to new title-holders. This is an important event, because with the transfer of names is also transferred ownership of and responsibility for territories, as well as the ownership of and responsibility for other property such as crests, histories and songs.[183] At the same time as the transfer of names and those things which go along with such transfers, is the reciting of the *adaawk* and the *kungax*, which shall be discussed below, which gives the assembled First Nation the opportunity to ensure that the territories being transferred are carefully delineated and correspond to the understanding of the whole First Nation. Indeed, as Mills has argued, the Feast validates authority and provides a forum for its exercise.[184]

In keeping with the importance of the Feast, each Feast is undertaken with great precision and care. One of the most important aspects of the Feast is the proper seating arrangement, which ideally describes people's relative rank, and the probable order of succession. The importance of seating was articulated by Gyoluugyat (Mary McKenzie):

> it's very, very important to have these seating correct, that no other person would be able to sit in these seats of the high chiefs. And then, again, while we are putting up the tables, we have to know just how many chairs there is for the one table so that one chief is not, is out of a chair, and that's a very embarrassing thing for a chief, is to just stand there and then there is no seat for him. The host of that feasting would be embarrassed just as well as the chief and the whole House of that Chief would be

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[181]"Transcript Evidence", Gyoluugyat (Mary McKenzie), May 14, 1987 (Volume Four) (pages 233-234).

[182]"Transcript Evidence", Gyoluugyat (Mary McKenzie), May 15, 1987 (Volume Five) (page 315).

[183]"Transcript Evidence", Gisday Wa (Alfred Joseph), June 18, 1987 (Volume 22) (page 1511).

[184]Mills, *Eagle Down*, *supra* note 150 at 43.

> embarrassed and there again, a feasting would be put on of the embarrassment of this chief not having the chair put for him.[185]

A similar sentiment as to the importance of proper protocol was expressed by Hanamuxw (Joan Ryan) and Gisday Wa for the Wet'suwet'en.[186]

An important feature of the Feast, as well as other aspects of Gitksan and Wet'suwet'en political and legal institutions and structures, is its openness to dialogue. Indeed, the Feast is explicitly dialogical in its operation, featuring as it does a series of speeches by host chiefs and the opportunity for visiting chiefs to respond in a variety of different ways, by either recognizing (and therefore accepting) what the hosts say, or not recognizing them, thus signaling a disagreement and a problem that must be addressed. As Oman observes, this unique function permits the First Nations to "recognize and honour the constellation of different points of view that characterize our living experience of complex events."[187] Thus, some of the important features of the intercultural approach outlined and called for in chapter one of this thesis are already present in Gitksan and Wet'suwet'en political, social and legal structures — there is a regular and respectful dialogue of issues which occurs within an institutional setting.

B. *Adaawk* and *Kungax.*

One of the most important aspects of the Feast is that it serves as a forum in which the

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[185]"Transcript Evidence", Gyoluugyat (Mary McKenzie), May 14, 1987 (Volume Four) (page 274). However, it appears that the method of seating in which so much information could be gleaned is no longer strictly followed. This is likely due to the moving of Feasts out of Longhouses and into community halls. For a discussion, albeit in an adversarial tone, see the cross-examination of Gyoluugyat by Her Majesty the Queen (in Right of British Columbia): "Transcript Evidence", Gyoluugyat (Mary McKenzie), May 21, 1987 (Volume 8) (pages 504 *ff*).

[186]"Transcript Evidence", Hanamuxw (Joan Ryan), March 23, 1988 (Volume 79) (page 4980); Gisday Wa (Alfred Joseph), June 19, 1987 (Volume 23) (page 1523).

[187]Oman, *Sharing Horizons*, *supra* note 1 at 113.

official histories and legal pronouncements of the Gitksan and Wet'suwet'en First Nations are made and heard. The *adaawk* and *kungax* are specialized oral traditions designed to record the histories and laws of the Gitksan and Wet'suwet'en Nations for the purposes of regulating conduct and the ownership and management of territories. As Sterrit argues, the *adaawk* is a system of "recording, validating and perpetuating important social, political and cultural information, including historical accounts of the acquisition and defence of territory."[188] The Wet'suwet'en *kungax*, which can translate to mean "our song", "spirit", "spirit power" or "trail of songs" serves the same function of recording, validating and perpetuating important information and values.[189]

The *adaawk* must be distinguished from the *andamahlasxw*,[190] which is sacred to the Gitksan, but which, unlike the *adaawk*, is not regarded as being literally true; rather, it "deals usually with moral, fable and creation." It might, for instance, explain how light came into the world.[191] Thus, it becomes clear that the Gitksan regard their *adaawk* as something different from what Western culture might regard as "custom"or mere stories. Indeed, according to Gyoluugyat (Mary McKenzie):

> The Adaawk is, as I worded, history, and it's the happening of how the Gitksan people have their names right from infant to a chief. The Adaawk refers to the songs that are made for the purpose of each chief to use. The Adaawk tells of the Nax nok, why it was created and how it's shown amongst the people in the Feast House. The Adaawk also tells of the territory of the chief. Now, when we say

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[188]Sterrit *et al.*, *supra* note 150 at 15.

[189]Gisday Wa and Delgam Uukw, *The Spirit in the Land, supra* note 83 at 30.

[190]Also spelt *antimahlaswx*: "Transcript Evidence" Gyoluugyat (Mary McKenzie), May 13, 1987 (Volume 3) (page 187).

[191]"Transcript Evidence," Gyoluugyat (Mary McKenzie), May 13, 1987 (Volume 3) (pages 187-188); Sterrit *et al.*, *supra* note 150 at 1.

Adaawk, this holds the whole four of the Adaawk world.[192]

What Gyoluugyat argues is that the *adaawk* is *literally* true — in the way that Western culture has books, maps, poems, and other literate devices to record its history, the Gitksan have the *adaawk*, which is singled out for distinction from other kinds of orally-transmitted information (such as the *andamahlasxw*), based on two things: its content and its accuracy.

i. Content of the Adaawk and Kungax.

The first aspect of the *adaawk* is its content. Generally, the *adaawk* tells the story of a particular House in the Gitksan First Nation. Along with the Clan, the House is the basic constituent unit of Gitksan and Wet'suwet'en society.[193] As shall be discussed below, the House is, in a sense, the title holder of territory within the legal systems of both First Nations. The *adaawk*, reputed to be literally true, discloses the details about whence Houses came, how they obtained the territories they now hold, and how they obtained other important property, such as crests, songs and the unique *nax nok*, or spirit power, that is connected to specific territories.

In an important sense, however, the *adaawk*, like the *nax nok*, does not merely *contain* information *about* the territories to which it refers, but is a dynamic, living *part* of those territories. Both are connected to the animal and spirit worlds, as well as to the present, past and

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[192]"Transcript Evidence", Gyoluugyat (Mary McKenzie), May 13, 1987 (Volume 3) (page 188).

[193]For a brief discussion of the House and Clan systems for the Gitksan and Wet'suwet'en, consult Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 25; see also Monet and Skanu'u, *Colonialism On Trial*, *supra* note 171 at 26. For the Gitksan specifically, see Adams, *The Gitksan Potlatch*, *supra* note 177, especially chapter two; or see Marjorie M. Halpin and Margaret Seguin, "Tsimshian Peoples: Southern Tsimshian, Coast Tsimshian, Nishga and Gitksan" in Wayne Suttles, ed., *Handbook of North American Indians, Vol 7: Northwest Coast* (Washington: Smithsonian Institution, 1990) 267 at 274 *ff.* For the Wet'suwet'en, see Mills, *Eagle Down*, *supra* note 150 at 102-106.

future generations of humans on that territory; they are also connected to the territory itself.[194] Thus, the *adaawk* has a complex link to the very subjectivity of the Gitksan. Like the animals, ancestors and territories that help to constitute the identity of Gitksan, the *adaawk* plays a role in defining them. At the same time, the Gitksan themselves define the *adaawk*, in their constant telling and retelling, and in the way that the *adaawk* is a narrative that is continually growing, with every event that affects traditional territories and the rights that attach to them.

Because of its integral link to the land itself, the *adaawk* is always referenced to particular territories. Gyoluugyat (Mary McKenzie) argues that the *adaawk*, unlike the allegations of the Province and Canada in *Delgamuukw* to the contrary, is not,

> just a story. Adaawk in Gitksan language is a very powerful word describing what the House stands for, what the chief stands for, what the territory stands for is the adaawk. And it's the most important thing in Gitksan is to have an adaawk. Without adaawk you can't very well say you're a chief or you own a territory. Without the adaawk, it has to come first, the adaawk, names come after, songs come afer, crests come after it and the territory that's held, fishing places, all those come into one and that's the adaawk.[195]

The *adaawk* and *kungax* also contain important norms and principles, which, as shall be demonstrated below, can be classified as legal in nature. Thus, the Seeley Lake *Medeek*, which was adduced to prove Gitksan use and occupation of the site for a period of time exceeding 3,000 years, also contains important indigenous laws regarding the relationship of humans to the spiritual world (in the retribution meted out by the supernatural grizzly bear); the relationship of humans to the animal world (in the treatment of fish bones and skin which provoked the grizzly's rage); and norms with respect to resource use more generally (in the "moral" which states that humans should only take what they need and no more).

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[194]"Transcript Evidence," Gyoluugyat (Mary McKenzie), May 20, 1987 (Volume 7) (page 383).

[195]"Transcript Evidence", Gyoluugyat (Mary McKenzie), May 14, 1987 (Volume 4).

As with other non-state cultures, there is no hard and fast way to distinguish between what parts of the story describe law and "other-than-law", such as relationships. It seems clear, however, that norms which emerge from the historical narratives, such as prohibitions against disrespecting the animal world, or against trespass, can be classified as legal, while the relationship of the human world to the supernatural, for instance, provides the explanation, rationalization or source of the rule itself. More will be said below about the issue of treating as legal the norms which emerge from indigenous knowledge.

ii. The Accuracy of the *Adaawk* and *Kungax*.

In the Introduction to this chapter I stated that concerns about the honesty of indigenous witnesses and the accuracy of the *adaawk* and *kungax* could both be substantially ameliorated by demonstrating the ways in which the information contained in the *adaawk* and *kungax* are "triangulated" through processes such as training, public retelling and corroboration, so as to provide circumstantial guarantees of trustworthiness.

a. Training.

According to the Gitksan and Wet'suwet'en, there are a number of factors which guarantee the literal truthfulness of the *adaawk* and the *kungax*. The first is the rigorous training which those who learn the oral traditions must undertake. Each oral tradition contains not only the story of how the House arrived where it did, and how it obtained the territories it owns, but also great detail about the territories themselves. For instance, the teller of the *adaawk* and *kungax* must know all of the creeks, the mountains, hills, trapping grounds, fishing sites and so

on of her or his House's territories, so that she or he will be able to defend those territories from literal encroachment and encroachment by way of dispute in the Feast Hall; and so that she or he can ensure that the totality of the First Nations' territorial record maintains accuracy.

This is done through the constant telling of the *adaawk* and the *kungax* to young members of the House, by their parents and grandparents, commencing at a very early age. Gisday Wa described how the Wet'suwet'en traditionally educate their young about the *kungax*:

> You have to get your training from your – first from your parents and then the grandparents, but the main part of your training comes from your grandparents because they are the people that lecture the House members. They lecture their sons, daughter-in-laws everyday. It starts in the morning and you can't help but listening to all these things and, if you happen to be a bit noisy, you are told that this is – this advice giving is directed at you also you have to listen, and there is visitors, elders visiting at our House visiting my grandparents, and they are also there as advisors. They get together and there are always these songs and, whenever they are finished with the song, they say that where the song came from, where the song was originated, and what he occasion was. And that's an ongoing thing with the Wet'suwet'en and if you try and get away from listening to the lecture and move over to your friend's house, the same thing will be happening there. So it is taking place in all Houses ... [196]

The same is true for the Gitksan *adaawk*; for instance, Gyoluugyat (Mary McKenzie) related that her training began when she was about seven years old, she attended Feasts and had to sit on the floor, learning each of the stories within the *adaawk* of Gyoluugyat as well as those of other Houses .[197] One of the most effective ways of teaching the *adaawk* and the *kungax* is to teach young Gitksan and Wet'suwet'en men and women while out on the territories themselves. Indeed, as Txemsin noted, his father and grandfather used to teach him the territories of his father's House in the Laksamshu Clan. Txemsin recalled that, "Not only that one night they teach me this – all this territory, lakes, peaks, boundaries, they keep telling us year after year. If – if I don't remember that mountain, I'd ask again to make sure."[198]

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[196]"Transcript Evidence," Gisday Wa (Alfred Joseph), June 18, 1987 (Volume 22).

[197]"Transcript Evidence", Gyoluugyat (Mary McKenzie), May 13, 1987 (Volume 3) (page 188).

[198]"Transcript Evidence," Txemsin (Alfred Mitchell), February 10, 1988 (Volume 55) (page 3331).

b. Circumstantial Guarantee of Trustworthiness.

Another aspect of the *adaawk* and the *kungax* said to ensure its accuracy are the circumstances under which each oral tradition is officially told. In Gitksan and Wet'suwet'en societies, the only venue for the official rendition of the *adaawk* and *kungax* is within the Feast Hall itself, in front of a public audience composed of chiefs from other Clans who witness not only the transfer of names, the assumption of new offices, marriages, adoptions and divorces, but also either validate or contest claims as to which territories belong to individual Houses.

The form in which this is done is to have either the highest ranking chief within a House or respected elders,[199] recite the *adaawk* of the House, in which the various territories are described, not only by reference to how they were obtained, but also their precise locations. The purpose of such speech-giving is to give an opportunity to others knowledgeable about territories a chance to agree or disagree. The most important guests in this context are those whose House territories border on those of the host House (and *adaawk* teller), because they are most likely to "spot" errors in borders, and are also most likely to share certain elements of the *adaawk* being given.

The description of Gitksan House territories often occurs in a totem pole raising feast, because such an occasion requires the telling of how various crests were obtained by Houses, as well. As Gyoluugyat (Mary McKenzie) tells it, there is a moment when the narrative is either validated or not. She described the telling of *adaawk* which describe the acquisition of crests:

> Now, there is a pause there somewhere, if one person thinks that one crest is not supposed to be on that totem pole, they say it right then. So if everything, all the crests are on there, everybody says, it's

[199]For instance, Hanamuxw (Joan Ryan) stated that it was perfectly natural to have lower-ranking, but more knowledgeable and respected elders recite territories. Indeed, she regards them to be the "historians and keepers of the Gitksan laws" of her house: "Transcript Evidence," Hanamuxw (Joan Ryan), March 24, 1988 (Volume 80) (page 5015).

> alright, that's when these chiefs come with their speeches, putting the power and the blessing on what this totem pole represents. This is the kinds of feasting. And this is done in a feasting house where the chiefs give their blessing and their power to the Chief who erects the totem pole.[200]

Thus, it is the very important role of the assembled knowledgeable chiefs to "police" the accuracy of the *adaawk*. Sometimes, the *adaawk* cannot be corrected then and there, which means that the contested portion is not regarded by the community at large as forming a part of the official *adaawk*. Such problems are often resolved at later Feasts. For instance, Hanamuxw (Joan Ryan) stated that she, "was not present at the feast when the error was made but I was present at the Feast where the correction was made."[201]

In this way, the *adaawk* and the *kungax* share an important feature of many oral traditions, which is that the accumulated *adaawk* of all of the Houses, policed as they are for accuracy and complementarity, constitute the "totality of the historical record"[202] of the whole First Nation — it tells the story of their migrations, their activities, the ways in which their paths have crossed and so on. Other First Nations similarly "divide" up their history among elders and keepers of the stories.[203] What is also characteristic of those First Nations is a proprietary sense over the portion of the "total story" that each story teller has. That is, story tellers are reluctant to tell a part of the story that does not "belong" to them, or over which they have no personal knowledge.[204]

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[200]"Transcript Evidence," Gyoluugyat (Mary McKenzie), May 14, 1987 (Volume 4).

[201]"Transcript Evidence," Hanamuxw (Joan Ryan), March 24, 1988 (Volume 80) (page 5010).

[202]Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 39.

[203]Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 173 at 176 *ff* (hereinafter "Understanding Treaty 6").

[204]Venne, "Understanding Treaty 6," *supra* note 203 at 176 *ff*.

As the hereditary chiefs noted, the Gitksan and Wet'suwet'en are little different, stating that, "Chiefs are reluctant to answer questions about histories or places that properly belong to someone else. It is as if to speak of another's territory were to constitute a trespass."[205] Illustrative examples occurred in the *Delgamuukw* trial, even outside the context of the *adaawk*, when the Crown, while trying to argue that the Gitksan and Wet'suwet'en had lost their "Indianness" by partaking of modern technology, cross-examined Gyoluugyat (Mary McKenzie) about the use and ownership of cars. When asked if people on her Gitksan reserve owned cars, she responded by saying that she couldn't say.[206] A similar incident occurred in the testimony of Gwaans (Olive Ryan). As anthropologist Dara Culhane explains, "These responses reflect the meticulous concern with the accuracy and truth of spoken statements, with a speaker's responsibility to only say what they know, and not to overstep their authority, that is characteristic of Elders in cultures based in oral tradition ... Gwaans appears to be saying that, just because people *occupy* and *use* these cars, they don't necessarily own them." As Culhane notes, Gwaans responded to the ownership question by stating that, "They will call me nosey if I ask them, the people there."[207]

What is again apparent is the explicitly dialogical nature of these accumulated histories of the Gitksan and Wet'suwet'en. No one has the right or the ability to state authoritatively the history of the people, nor even of their own House, if those statements are not validated through an institutionalized process in which all "stakeholders" are given an opportunity to voice

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[205]Gisday Wa and Delgam Uukw, *The Spirit in the Land, supra* note 83 at 39.

[206]"Transcript Evidence," Gyoluugyat (Mary McKenzie), May 25, 1987 (Volume 9) (page 508).

[207]Culhane, *The Pleasure of the Crown, supra* note 165 at 232, f.n. 31. The quote from Gwaans (Olive Ryan) appears at 230 (emphasis in quotes appears in original).

alternative views and perspectives. This feature of Gitksan and Wet'suwet'en Feasts and knowledge is ideal for their conduct of international relations, both today and throughout their history — disputes are mediated through the institution of the Feast and in such a way as to ensure that representatives always have an opportunity to speak and voice their perspective. Again, such an approach is a useful and positive example of how the intercultural approach described and argued for in chapter one of this thesis can be deployed.

C. Ownership of Territories and the Role and Responsibilities of Chiefs.

i. Ownership of Territories by Houses.

One of the focal points of the Gitksan and Wet'suwet'en political, social and legal systems is the role of the Houses and Clans as loci of ownership of territory, stories, crests, totemic images and spiritual power (*nax nok*). As noted above, the House and Clan system is the basic building block of each of these societies. Within both Gitksan and Wet'suwet'en law, territories are what one might call "quasi-private property." By that I mean that the territories are not actually owned by individuals in their capacity *as* individuals, but neither are the territories owned by the First Nations as a whole.

Rather, territory is owned by each House, which has the right to exclude non-members from access to those territories, both for the purpose of passing through them, and for the purpose of using resources on them. However, the territory is open, basically as of right, to those from a given House who wish to use them (as long as they observe certain formalities). This dual concept is paralleled by another dual concept of ownership that incorporates the connection of the people with the land. This second duality was described by anthropologist Richard Daly, in

the following way:

> On the one hand, the land is dealt with as a property object between two potentially competitive groups. As such it is subject to ownership. On the other hand, the land is non-property when it is viewed in terms of the people's relationship to the life force in the natural world.[208]

This observation built upon his contention that the Gitksan and Wet'suwet'en see themselves in a reciprocal relationship with the land in which the land provides for the people, but at the same time exacts the price of ageing and eventual death from them.

This description does not represent a new development for the Gitksan and Wet'suwet'en, as is demonstrated by an 1884 declaration made by Gitksan chiefs to the government:

> The district is not held unitedly by all the members of the Tribe but is portioned out among the several families, and no family has a right to trespass upon another's grounds: so that if any one family is hindered from hunting on their own ground, there is nowhere else for them to go — they lose all the benefits they derived from their hunting, as they cannot follow the animals across the bounds into their neighbour's grounds.[209]

A similar ethic governs and has governed Wet'suwet'en society, as well.[210]

The dual concept, by which territory is "private" as against other Houses, but held in common within Houses was expressed by Hanamuxw (Joan Ryan) in her testimony about the territories that are owned by the House of which she is the high chief:

> To me it means that the property is not given to you directly. In other words, it's not your personal property, but rather you are designated as the person to manage that property not just for yourself but all the members of your House. All of our members – all the members of our House have the right to use the territory whenever they need resources from the territory.[211]

Thus it can be seen that while Houses have wide powers of exclusion, they do not capriciously

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[208]Richard Daly, "Expert Report for the Plaintiffs", quoted in *Delgamuukw — Trial*, *supra* note 73 at 171.

[209]Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 12.

[210]Mills, *Eagle Down*, *supra* note 150 at 40 and 52.

[211]"Transcript Evidence," Hanamuxw (Joan Ryan), March 24, 1988 (Volume 80).

prevent others from being on their territory. Both nations have complex legal norms by which non-members might be present on, or able to use a House's territories. For instance, the husbands of House members are permitted to use the territory of their wives' Houses,[212] and the children of Gitksan and Wet'suwet'en men have "life interests" in using the territory of their fathers after their fathers' deaths.[213] Such "permits" reflect both the inherent generosity encouraged within Gitksan and Wet'suwet'en cultures,[214] and also the practical concern that children learn their territories by actually visiting them, usually with their fathers.

What they also reflect is the seriousness with which the Gitksan and Wet'suwet'en take boundaries, and unique connections to their land. While an ethic of generosity and practical recognition of the need to learn about territories operates within both First Nations, they are mediated by the emphasis placed on the proper manner in which someone is able to exercise the "licenses" or "permits" to use another's land. It is not enough to simply claim that one has the right — one *must* observe the proper etiquette and protocol, such as the sharing of produce from the land,[215] and reporting back to the House Chief as to the condition of and activities on the territory.

Reflecting the seriousness with which the Gitksan and Wet'suwet'en take territorial integrity and ownership of territories, both First Nations have always had very serious concepts of trespass. Indeed, in pre-contact times, it is believed that the consequence in Wet'suwet'en law

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[212]"Transcript Evidence," Gyoluugyat (Mary McKenzie), May 15, 1987 (Volume 5) (page 321).

[213]"Transcript Evidence," Gyoluugyat (Mary McKenzie), May 20, 1987 (Volume 7) (page 423).

[214]See for instance the description of the duties of the chief at "Transcript Evidence," Hanamuxw (Joan Ryan), March 24, 1988 (Volume 80).

[215]"Transcript Evidence," Gisday Wa (Alfred Joseph), June 19, 1987 (Volume 23) (page 1527).

for trespass was death.[216] Indeed, the plaintiffs very effectively underscored the importance of trespass and territorial integrity by demonstrating that, for instance, the Wet'suwet'en language contains separate words for: profiting from someone else's land; trapping out of your jurisdiction; stealing off the land; hunting or trapping on someone's territory without their knowledge and telling anyone; sneaking on the territory and using the land without permission.[217]

It is not only human beings and their Houses that have territory and property. Reflecting the connection that the Gitksan and Wet'suwet'en generally have with not only the spirit world, but also the animal world, Gisday Wa (Alfred Joseph) noted of the animal world that:

> They also have boundaries. A wolf has a boundary. A bear has a boundary. When that's wiped out, it really disturbs the animal population. All living creatures have boundaries and, once you disturb that, it is – it just makes it really hard for all living things to – there is conflict, so it makes it really hard for them.[218]

In this statement, we have one of the most insightful expressions of the importance of proper boundaries and autonomy within those boundaries. The Gitksan and Wet'suwet'en, who see themselves as a "neighbouring" population to those of the animal and supernatural worlds, recognize that all "peoples" need to have a sphere of autonomy in which they "own" not only physical resources, but the right to live in their own ways. Through his own "perspicuous contrast", Gisday Wa was able to articulate the consequences of unjust breaches of boundaries. Gisday Wa's statement thus communicates a foundational norm of Gitksan and Wet'suwet'en legal and social systems, which is the necessity of recognizing and respecting the spheres of others, as well as empathizing with the consequences of breaches of those spheres.

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[216]"Transcript Evidence," Gisday Wa (Alfred Joseph), June 25, 1987 (Volume 27) (page 1845).

[217]"Transcript Evidence," Gisday Wa (Alfred Joseph), June 19, 1987 (Volume 23) (page 1573).

[218]"Transcript Evidence," Gisday Wa (Alfred Joseph), June 19, 1987 (Volume 23).

ii. Responsibilities of Chiefs.

In this system of land tenure, which places so much importance on the integrity of territorial boundaries and the taboo against trespass and illicit profiting, the chiefs play an indispensable role of regulation. Consistent with many First Nations philosophies of the land and human beings' connection to it, the Gitksan and Wet'suwet'en see the relationship of chiefs to their territories less as a relationship of rights to territory, and more as a relationship of obligations to it.

Euro-Canadian legal systems express the relationship between land and people in the sense of a *right* of ownership, which might have exceptional obligations (such as the doctrine of equitable waste; or municipal zoning requirements) "tacked on." But the underlying relationship is one of *dominium*, which includes the right to use, occupy, alienate, destroy, and so on. By contrast, the relationship of people to the land in Gitksan and Wet'suwet'en law is not anthrocentric. People, like animals, use and occupy land, benefitting from its fruits, and "repaying" by returning to the land upon death. This gives rise to duties to maintain and protect the land, not only for the current generation, but also future and past generations, whence this generations comes.

The distinction between the two is crucial, because it helps to explain the insistence with which indigenous peoples assert their "ownership" of traditional territories. Oren Lyons puts it the following way:

> The Creator ... put us here with our families, and by that I mean the bears, the deer, and the other animals. We are the Aboriginal people and we have the right to look after all life on this earth. We share land in common, not only among ourselves but with the animals and everything that lives in our land. It is our responsibility. Each generation must fulfil its responsibility under the law of the Creator ... Aboriginal rights mean Aboriginal responsibility, and we were put here to fulfil that

responsibility.[219]

That First Nations describe their relationship as one of "ownership" or "title" is indeed somewhat of a concession to the non-indigenous legal system, and a demonstration of indigenous efforts to communicate across cultural forms by adopting the language of the colonizer, without necessarily abandoning their own perspective on what the words mean.[220] I shall return to this theme shortly, in my discussion of legal pluralism later in this chapter.

The hereditary chiefs in *Delgamuukw* expressed the"overseer" role of the chief in the following way:

> As the proprietary representative of the House, the Chief has a range of responsibilities dealing with the allocation and disposition of rights to use the territory among House members and non-House members. He also directs and safeguards the House's production components: the fruits of land, labor, knowledge, and skills, which are utilized in relation to the territory, so as to secure for its members and frequently for their relatives and in-laws, an appropriate standard of living.[221]

Like many aspects of Gitksan and Wet'suwet'en life, these responsibilities have what Western observers might regard as "spiritual" elements. Mills argues that the chiefs' responsibility to practice conservationist resource management emanates not only from the perspective of prudent management, but also out of respect for the animal world. She argues that a failure to properly manage what Western observers might call "resources" "would invite retribution from the spirits of the animals and would cause hunger or otherwise adversely affect the health of the offenders."[222]

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[219]Oren Lyons, "Traditional Native Philosophies Relating to Aboriginal Rights" in Menno Boldt, J. Anthony Long and Leroy Little Bear, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) 19 at 19-20.

[220]Another example of using "ownership" words in an "obligation" context might occur if a concerned father says of his daughter, "I have a *right* to put her in such and such a school." The father is not asserting that he *owns* the child, but does assert a profoundly important right to take care of her.

[221]Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 32.

[222]Mills, *Eagle Down*, *supra* note 150 at 40.

Indeed, Wet'suwet'en hunters believe that there is a very close relationship with the animal world that even goes beyond the obvious importance that animals have to human beings. Txemsin (Alfred Mitchell) testified that he has communicated with animals on his territory, regarding very important matters, such as the health of his father.[223] The type of communication he was describing is common enough that the Wet'suwet'en have a separate word for it — *G'ii k'a'as niit'ayh.*[224]

Parallel with these relationships is the responsibility Gitksan and Wet'suwet'en chiefs are seen as having to past and future generations. That notion goes beyond simply taking care of territory for the "past generation" as a way of honouring it; and for the "future generation" as a prudent management technique, when it is recalled that there is a high degree of belief among the Gitksan and Wet'suwet'en in reincarnation. Thus, the role that the chief plays is not a discrete and time-bounded one in which she or he takes care of territory for a given amount of time before "moving on." Rather, chiefs are continually serving the present, past and future generations — which only enhances the responsibility and importance of their roles.

Part Three — Gitksan and Wet'suwet'en History and Law.

A. Introduction.

In this section of the chapter, I will analyze various aspects of Gitksan and Wet'suwet'en oral culture in an effort to better explicate the difference between stories and legal principles, and to demonstrate the role that the *adaawk* and *kungax* play as both historical narratives and

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[223]"Transcript Evidence," Txsemsin (Alfred Mitchell) February 10, 1988 (Volume 55) (page 3331 *ff*).

[224]"Transcript Evidence," Txsemsin (Alfred Mitchell) February 10, 1988 (Volume 55).

articulations of legal norms. My reliance on the *adaawk* rather than the *kungax* is principally a reflection of the sources which I visited, and I rely on the hereditary chiefs of both First Nations for the proposition that "what the *adaawk* are for the Gitksan, the *kungax* ... are for the Wet'suwet'en."[225] The conclusions of this chapter, and particularly this section of this chapter, will be used to fuel criticisms of dominant approaches in the law of Aboriginal rights, which will I will do in chapters three and four.

In his testimony in the trial of *Delgamuukw*, Wet'suwet'en hereditary chief Gisday Wa was asked how he knew that the Wet'suwet'en used to punish trespass on territory by death. He responded that, "To be reminded of the laws is much like the non-Indian laws. You are reminded of incidents that have happened in the past. This is the way – this is – this is the way we handle trespass and they tell you – give you an example of any way that trespass has been dealt with."[226] His response discloses an interesting similarity between indigenous legal systems and that of Canada, which is that many principles reside in "stories". In the case of the Gitksan and Wet'suwet'en, those stories are found principally in the *adaawk* and the *kungax*; and in the case of Canadian law many principles are found in the "stories" of the Common Law. Indeed, as John Borrows argues:

> First Nations laws are analogous to legal precedent because they attempt to provide reasons for, and reinforce consensus about, broad principles and justify or criticize certain deviations from generally accepted standards. Common law cases and Aboriginal stories are also similar because both record the fact patterns of past disputes and their related solutions.[227]

As Borrows has also noted, however, First Nations stories can be distinguished from non-

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[225]Gisday Wa and Delgam Uukw, *The Spirit in the Land, supra* note 83 at 30.

[226]"Transcript Evidence," Gisday Wa (Alfred Joseph), June 25, 1987 (Volume 27) (pages 1843-1844).

[227]John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41 McGill L.J. 629 at 647 (hereinafter "With or Without You").

Aboriginal stories such as common law cases in the way in which they are recorded and applied. What he refers to is the oral nature of First Nations stories and ways in which that differs from the predominantly literate nature of knowledge in non-Aboriginal Canadian society.[228]

Commentators have made other observations. For instance, Dell Hymes has argued that:

> no one purpose explains [indigenous peoples'] stories. Some ... account for general features of nature ... Others account for local phenomena ... But myths also invest the natural world with enriched meaning ... As narratives, myths explain in a far more pervasive way. They explain by creating, imbuing, and exploring a world. They both teach and discover the consequences of motive, relationship, or act.[229]

As such, First Nations stories can typically be analyzed on a number of different levels, and can, at the same time, perform a number of functions, as suggested by Hymes. In this section, I will demonstrate ways in which the Gitksan *adaawk* can serve as a form of history; and the way in which it can serve as a source of legal principles.

In so doing, I hope to demonstrate as well certain similarities, as well as differences, between First Nations stories and non-indigenous stories. For instance, it is typical of Western legal systems to be based in origins which are shrouded in legend and myth, and which are looked upon by Western cultures with pride. One could point to the *Magna Carta*, the Glorious Revolution and its Bill of Rights, and so on, as occupying mythical positions in Western law. Cloaked in antiquity and infused with a sense of struggles against tyranny and defining cultural moments, these developments in the law gain a certain legitimacy, and join the bedrock of the legal system. Indeed, they are so fundamental to Western legal and political culture that they are in fact rarely if ever explicitly referred to. However, it is undeniable that they inform many of the

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[228]Borrows, "With or Without You," *supra* note 227 at 648. He may also be referring to the fact that First Nations likely do not "apply" legal principles from precedent in the way that the "discourse of modern constitutionalism" calls for, and which is criticized by Tully: *Strange Multiplicity*, *supra* note 87.

[229]Hymes, "Mythology", *supra* note 175 at 595-596.

foundational principles of the common law.

James Zion argues that whether or not the myths which underlie the common law, which state that it is a product of the customs of the English People, are literally true, they have given judges the flexibility to mold the law and adapt it to the changes through history.[230] Thus, in an important sense, the literal veracity of the Common Law's "stories" is less important than the themes and values, and the "mode of argumentation"[231] that they present. This observation is important, because it permits other cultures to respect stories and cultural forms without having to use them themselves, or to accept them in their entirety.

B. Legal Pluralism.

I argue that the importance of treating the norms that emerge from many Gitksan stories as legal rather than "customary" is fundamental. Clifford Geertz has argued that, "the mischief done by the word 'custom' in anthropology, where it reduced thought to habit, is perhaps only exceeded by that which it has done in legal history, where it reduced thought to practice."[232] Yet, in a very important sense, focusing, and indeed classifying, indigenous knowledge as "legal" represents somewhat of a concession to a Western-European, statist categorization.

Legal pluralists have implored scholars to notice that conduct in society in general, as well as in sub-groups within societies, is regulated by a multiplicity of normative orders. From

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[230]James Zion, "Searching for Indian Common Law" in Bradford Morse and Gordon Woodman, eds, *Indigenous Law and the State* (Providence R.I.: Foris Publications, 1988) 121 at 123 (hereinafter "Indian Common Law").

[231]On the importance of cases as an example of argument rather than as binding precedent, see H. Patrick Glenn, "The Common Law in Canada" (1995) Can. Bar. Rev. 261 (hereinafter "The Common Law in Canada").

[232]Clifford Geertz, "Local Knowledge: Fact and Law in Comparative Perspective" in Clifford Geertz, *Local Knowledge* (New York: Basic Books, 1983) 167 at 208.

the grafting of state laws to customary property relations in Chagga villages, to the unofficial normative ordering on the shop floor in a dress-making factory,[233] pervade social ordering, and reveal that there is a multiplicity of normative fields operating, each of which Moore describes as "semi-autonomous" because of its ability to generate and enforce norms, while at the same time being susceptible to the wider context, which so often includes state-backed "official" law. Indeed, pluralists such as de Sousa Santos, Moore, Fitzpatrick and Merry implore us to notice that, "An emphasis on the capacity of the modern state to threaten to use physical force should not distract us from the other agencies and modes of inducing compliance."[234]

Such distraction is what John Griffiths identifies as the "ideology of legal centralism," which he defines as the belief that law, properly thought of, "should be the law of the state, uniform for all persons, exclusive of all other law, and administered by a single set of state institutions."[235] Legal pluralists thus call for attention to non-state law normative orderings, which, while always profoundly influenced by official state law, command great influence over people. It seems, however, that there is another sense of "legal centralism" which is not captured by the state/non-state dichotomy, and that is the identification of a set of norms as "legal", thus comparing them to state law and implicitly drawing the imprimatur of legal centralism.

Such a conceptualization implicitly disparages other forms of ordering, such as practices, stories or myths, as less dynamic, less evolved, or less *rational* than that which we can call

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[233]I am of course thinking here of Sally Falk Moore's memorable ethnography in Sally Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & K. Paul, 1978), in particular chapter two, "Law and social change: the semi-autonomous social field as an appropriate subject of study." (Hereinafter "Law and Social Change").

[234]Moore, "Law and Social Change" *supra* note 233.

[235]John Griffiths, "What is Legal Pluralism?" (1986) 24 J. of Legal Pluralism & Unofficial Law 1 at 1.

"law." In this sense, efforts by First Nations (and this thesis, which takes its cue from First Nations' strategies) to characterize part of their knowledge as "law" participates in a subtle and complicated categorization, in which there is the danger of other knowledge being divorced and re-categorized as something not only "other than", but perhaps "less than" law or legal norms.

It is thus important to recognize that when First Nations, from a strategic point of view, recharacterize knowledge as "legal", they are, by entering into a categorization fundamental to the non-indigenous state, taking a major step *toward* the non-indigenous state, in the project of the intercultural dialogue, by at least partially "translating" their world view into terms cognizable by non-indigenous culture. I have argued that intercultural understanding comes by way of a dialogue of sorts. True dialogue means that both parties move toward one another from time to time, in order to accommodate the other and to accommodate the goal of the exercise; as such, it is my argument that this move by First Nations should not go unreciprocated.

In another sense, however, recharacterizing First Nations knowledge as law or as expressing legal norms does not need to be seen as a *concession*. And that is if we understand First Nations to be appropriating the *form* of law, but not necessarily its traditional *content*. If First Nations bring an unfamiliar understanding to familiar terms, they succeed in advancing the dialogue by respecting the world view and "ways of doing" of their other interlocutor, while at the same time preserving their own.

A good example is given by Sally Engle Merry, who discusses the People's International Tribunal of 1993, in which indigenous Hawaiians "tried" the United States for its alleged illegal usurpation of the Queen of Hawaii's sovereign reign in 1893, through American support of a *coup d'état*, followed by its annexation of Hawaii. The trial was conducted in a manner familiar

to formal state law-oriented trials, but the tribunal drew on non-state sources of law, such as Kānaka Maoli law and international law, in addition to U.S. law, stating that, "It is our responsibility to tell the world that justice cannot employed without also including an indigenous vision of what justice means ... it's time for the West to integrate those principles into their law."[236]

Thus, while the appropriation of the form of law is, "framed in the language of the law ... this is a plural law in which the law of the nation is nested between indigenous law and global human rights law."[237] Merry notes that the process simultaneously reinforces the hegemony of the idea of law (which is legally centric), while at the same time disrupting the position of the state in that hegemony (the Griffiths notion of legal centralism). By disrupting the state from its position of "source of all (properly called) law", the ability to resist is enhanced.

What deserves attention is that indigenous societies operate systems which generate norms of behaviour and ways of inducing compliance with those norms. Recognizing that such systems are "semi-autonomous", should not detract from their power in their own right.[238] As well, by terming indigenous norms as "legal", I also hope to draw attention to the state-centric notions that words like "law" and "legal" normally privilege, such as property, the state and so on, and those which they do not, such as supernatural relationships and obligations.

Equally important, I suggest that by focusing upon Gitksan and Wet'suwet'en *law*, I think

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[236]Sally Engle Merry, "Resistance and the Cultural Power of Law" (1995) 29 Law & Soc. Rev. 11 at 22 (hereinafter "Resistance and the Cultural Power of Law").

[237]Merry, "Resistance and the Cultural Power of Law," *supra* note 236 at 21.

[238]Indeed, on a close analysis, one would have to characterize even state law as "semi-autonomous," as it, too, is a product of and is deeply implicated in society, and is affected by other spheres rather than standing separate from them. For a sophisticated and accessible review of this idea, see Brigham, *The Constitution of Interests*, *supra* note 41, especially chapter one, in which he discusses "law *in* society", rather than "law *and* society."

that we can imply Gitksan and Wet'suwet'en control over its *content*, now and in the future. That is indispensable to the project laid out in chapter one, because I argued that true dialogue, which is the prerequisite to the enhancement of intercultural understanding, must allow each interlocutor to speak *in their own ways*. In chapter four, I will demonstrate that Canadian courts' focus upon Aboriginal *practices*, rather than *laws*, simultaneously focuses upon First Nations, while at the same time depriving them of much of their ability to define themselves.

In this vein, then, I will discuss two examples of the Gitksan *adaawk*, in which I will demonstrate the ways in which such stories can be analyzed on a number of levels, as well as to demonstrate the historical narratives and legal principles that the *adaawk* contains.

C. The *Adaawk* of Gyoluugyat.

In the early stages of the *Delgamuukw* trial, Chief Gyoluugyat (Mary McKenzie) was asked to describe part of the *adaawk* of her House. In this subsection, I will describe part of her testimony in order to demonstrate the historical role that the *adaawk* plays for the Gitksan people. As well, the story, when contextualized with other *adaawk* and methods of historical analysis, demonstrates some Gitksan legal principles.[239]

The portion of the *adaawk* of Gyoluugyat which Mary McKenzie chose to recount was the story of Suuwiigos, who was in the House of Gyoluugyat before the arrival of Europeans "hundreds of years ago."[240] The *adaawk* tells of a turbulent time in the House of Gyoluugyat, in

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[239]The *adaawk* appears at"Transcript Evidence", Gyoluugyat (Mary McKenzie) May 14, 1987 (Volume 4) (pages 222 *ff*). It should be noted that, for the benefit of the trial judge, she gave a version of the *adaawk* somewhat shorter than that which she would have given in the Feast Hall.

[240]"Transcript Evidence", Gyoluugyat (Mary McKenzie) May 14, 1987 (Volume 4).

which Suuwiigos avenged the murder of his brother and defended his House's territories from rival peoples. In order to weaken the opposing forces, Suuwiigos donned the specially treated skin of a recently-killed grizzly bear, designed to withstand attacks by arrows and spears. He lumbered through a gully near his enemies' encampment, and lured them out by tempting them to attack the bear. In the course of telling the *adaawk*, Gyoluugyat (Mary McKenzie) detailed the location and physical characteristics of the gully, and then described how some warriors fell down it to their deaths, while the rest expended all of their arrows and spears, unable to kill the grizzly, which was really Suuwiigos in disguise. Once the arrows and spears were used up, Suuwiigos's party attacked the other force, and killed many of them.

Gyoluugyat (Mary McKenzie) tells us that Suuwiigos then joined forces with a very brave warrior by marrying that man to his beautiful sister, and the two went out on a series of adventures, in which they encountered and killed a "giant man" in a tree; foiled an attempt by their enemies to ambush them by spotting their enemies' shadows in a body of water; and fought and jointly killed a grizzly bear. The House of Gyoluugyat obtained from each of these adventures a crest for its House — the "giant man in the tree"; the shadow figure representing the enemies whose ambush was foiled; and the split grizzly bear, shared by Suuwiigos and his companion, Kuutkunuxws.

In keeping with the fact that each *adaawk* forms a portion of the Gitksan's entire history, the *adaawk* of Gyoluugyat can be contextualized and placed into a larger story by reference to other *adaawk*. This is precisely what Sterrit does.[241] He claims that the *adaawk* of Gyoluugyat takes place several hundred years ago, not long before the arrival of Europeans, in an era of

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[241]Sterrit *et al.*, *supra* note 150.

escalating hostilities with neighbouring Athabaskan speakers called the Tsetsau and Tahltan, who began hunting in the territories of Gitangasx. Reflecting the ancient laws of trespass, the intruders were killed, which started a series of escalating counter-killings, eventually proliferating into a major conflict. The conflict included the destruction of Gitksan and Tsetsau villages and appeared to end in the peaceful relocation of two villages, along with the successful defence of Gyoluugyat territories.[242]

This story forms part of the *adaawk* of the Gyoluugyat House, and thus, of the entire Gitksan First Nation. Recall that in the first section of this chapter I argued that the *adaawk* has two major elements. The first is that it is reputed to be a literal rendition of actual history; the second is that it contains important legal principles. From Gyoluugyat (Mary McKenzie)'s recounting, it is possible, first, to support Sterrit's dating of the story by noting that in the so-called "gully attack", the Tsetsau used arrows and spears, thus confirming that this occurred in an era which preceded the arrival of Europeans, and possibly before the influence of the fur trade, although the fur trade might explain why the Tsetsau began their incursions. The story also reveals intimate knowledge of Gyoluugyat's territory, in the recounting of features of the geographical landscape. The accuracy of Mary McKenzie's rendition of the *adaawk* is remarkable, when it is compared to that of Simon Gunanoot's, who told it under the authority of the House of Suuwiigos in 1923.

This *adaawk*, while brief, also reveals important data about Gitksan political, social and legal structure dating back to the time of this story, which persist to today. One example is the importance of crests, or *ayuuk*, to the Gitksan. These symbols (the "giant in the tree", the

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[242]This larger story is set out in Sterrit *et al.*, *supra* note 150 at 34 *ff.*

shadow figure and the shared grizzly) demonstrate the importance of the adventures to the House of Gyoluugyat, and also signify their spiritual and historical attachment to the territories whence the crests come: those of the House of Gyoluugyat. The close association between Suuwiigos and Kuutkunuxws, forged as it was in marriage and then solidified in battle, demonstrates an important aspect of Gitksan alliances — Houses, while semi-autonomous, are closely linked to other Houses in the same Clan, as well as to those in other Clans. It was the cooperation between these two brave warriors that made Gitksan success possible. Indeed, the *sharing* of the grizzly crest between the two is perhaps most emblematic of this fact. And finally, the insistence with which the Gitksan defended their territories against trespass, and the degree of violence they were prepared to incur to do so, is indicative of the spiritual, material and legal connection they experience with the land.

One legal principle which this *adaawk* does not appear to demonstrate, but which is central to Gitksan law, is the way that many of these types of international disputes are finally settled. In the trial of *Delgamuukw* the Crown tried to play up the violent aspects of Gitksan history for the purpose of characterizing the Gitksan as a "truculent" and unstable nation.[243] What such characterizations ignore is the extremely well-established practice in Gitksan history of Feasting in order to solidify relations with "foreign" nations and to end disputes. Indeed, Gitksan *adaawk* of early migrations include detailed descriptions of migrating Houses hosting Feasts for already-established Houses of the Gitanyow, Nisga'a and other Gitksan. Much

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[243]See for instance the passionate article written by Arthur J. Ray, historical geographer, who testified on behalf of the plaintiffs and who was engaged in a nasty exchange with Counsel for Canada over ethnocentric characterizations of First Nations as "bloodthirsty savages" and as "noble savages": Arthur J. Ray, "Creating the Image of the Savage in Defence of the Crown: The Ethnohistorian in Court" (1990) 6:2 Native Studies Review 13. A powerful review and discussion of that evidence can also be found in Culhane, *The Pleasure of the Crown*, *supra* note 165 at 145-146.

international feasting occurred between these nations and Athabaskans during the fur trade era as well, when opportunities presented by the trade caused many incursions on territory. Some of those "peace conferences" resulted in transfers of territory between various First Nations, proving that some kind of alienation is possible under Gitksan law.[244] This will be discussed further in chapter five, in the context of the Supreme Court of Canada's unilateral declaration that Aboriginal title is inalienable to any but the Crown. Interestingly, a dispute between the Gitksan and provincial officials in 1872, over the burning down of a Gitksan village, ended in a peace ceremony on a gunboat, which shared many features of a Gitksan Feast.[245]

D. The Seeley Lake *Medeek.*

The second example of the use and functions of the *adaawk* comes from one that was disclosed in trial by Antgulilibix (Mary Johnson) and received a great deal of comment by the trial judge (which shall be discussed in chapter four). The plaintiffs invested a great deal of resources in this *adaawk* as a representative example of the *adaawk* as actual history by employing a paleobotanist and a geomorphologist to corroborate the story (*not* the other way around, which the trial judge did). I will briefly describe it and discuss both its historical and its

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[244]For examples and discussion of early international Feasts, see Sterrit *et al.*, *supra* note 150 at 21-29. Feasting in the fur trade era is also detailed by Sterrit *et al.* at 39-56. These are corroborated by evidence from the Hudson's Bay Company: Arthur J. Ray, "Fur Trade History and the Gitksan-Wet'suwet'en Comprehensive Claim: Men of Property and the Exercise of Title" in Kerry Abel and Jean Friesen, eds., *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991) 301.(hereinafter "Men of Property), and governmental records: Sterrit *et al.*, chapter four.

[245]See: R.M. Galois, "The Burning of Kitsegukla, 1872" (1992) 94 B.C. Studies 59 (hereinafter "Kitsegukla"). Galois and Oman argue that the provincial officials were well aware that the ceremony on the gunboat had many similarities to a Gitksan Feast, and argue that they intentionally relied upon that fact to obtain the peace of the Gitksan: see also Oman, *Sharing Horizons*, *supra* note 1 at 117 *ff.*

legal elements.[246]

The *adaawk* tells of a group of Gitksan who, finished hunting mountain goats and ground hogs one day, took to the Lake at the base of Stekyooden Mountain to catch some grouse. One day, a young lady took the skin of a caught trout and placed on her head like a headdress. She looked at her reflection in the Lake and saw that she looked very beautiful and danced very gracefully with the headdress. The young woman got a number of other women to come and look, and they all did the same and began to dance, with the trout skins on their heads, to the general amusement and approval of those that looked on.

According to Antgulilibix (Mary Johnson), the people heard terrible noise coming from the direction of Seeley Lake after their return home, and upon investigation saw the throwing about of trees, rocks and great debris from a little stream beyond the Lake. Eventually, they saw a gigantic grizzly bear, of supernatural proportions, which they call *Medeek.* The bear was in a rage and was throwing the debris about. The village's warriors attempted to kill the *Medeek*, "with their spears and arrows and bow and arrow and hammers that are made with stone, all those from weapons that strong young men use."[247] However, Antgulilibix (Mary Johnson) informs us that the arrows flew into the air, and then came down upon the warriors themselves, killing many of them. Many others were trampled to death by the *Medeek.* After the carnage, the *Medeek* turned and retreated back up the mountain; when the survivors pursued him, they found he had disappeared. As Antgulilibix (Mary Johnson) herself noted at trial, "That's why the wise

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[246]The Seeley Lake *Medeek* was recounted by Antgulilibix (Mary Johnson), May 27, 1987 (Volume 11) (pages 667-669). The trial judge's account of it, along with his discussion of the corroborative testimony, appears in *Delgamuukw — Trial, supra* note 73 at 185 *ff.*

[247]"Transcript Evidence," Antgulilibix (Mary Johnson) May 27, 1987 (Volume 11) (page 668).

elders told the young people not to play around with fish or meat or anything because the – because the Sun God gave them food to eat and those who – just they should just take enough to eat and not to play with, that's why this tragedy happens to them."[248]

The skeptical reader might look at this story, raise an eyebrow and ask, "I thought this was part of the *adaawk*," recalling that the Gitksan purport that the *adaawk* is *literally* true. This brings us directly to an intercultural challenge in which, to the Western-trained, science-influenced mind, this story might seem fantastical and untrue — mythical at best, untrue at worst. In answering the challenge, we must first appreciate why the story was led at trial, and what the plaintiffs hoped to establish.

The plaintiffs claimed that the *adaawk* of the Seeley Lake *Medeek* discloses an actual historical occurrence: the major disturbance of earth on Stekyooden Mountain, causing a landslide which destroyed a village. Further, by the fact that the event is *remembered*, the Gitksan asked the court to infer that it happened when human beings occupied (and, presumably, used) the territory. Furthermore, by the fact that that remembrance occurred in the Gitksan *adaawk*, the plaintiffs asked the court to infer that the human beings that occupied and used the site were Gitksan — ancestors of the plaintiffs. To establish that this event occurred a long, long time ago, one can note that, within the story, the warriors used weapons of stone and technology of the pre-contact era.

In order to assist the court, the plaintiffs engaged the services of the paleobotanist and geomorphologist, as mentioned above, to establish that indeed, a major landslide had occurred on that site, more than 3,000 years ago. They confirmed that such a landslide would be heard by

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[248]"Transcript Evidence," Antgulilibix (Mary Johnson) May 27, 1987 (Volume 11) (page 668).

nearby residents, and that the debris disturbance would likely resemble that described in the story. Thus, the plaintiffs attempted, in an intercultural way, to establish a fundamental tenet of Gitksan and Canadian law — that long-term use and occupancy is indicative of title, by leading evidence which enjoys legitimacy in both legal systems: the *adaawk* in Gitksan law, and science in Canadian law. But what of the bear?

An observer might say that the Gitksan ought to lead evidence of the event, but not of the "obviously mythical" cause. To do so, however, would force the Gitksan to distort the *adaawk*, by presenting a so-called "fact" without its meaning or importance, which distinction is not known to the *adaawk*. Indeed, it is arguable that such a distinction is not really employed by *any* society — who would be satisfied with a description of the *Magna Carta* without a discussion of the power struggles between the Barons and the King? Who would recount the storming of the Bastilles without a discussion of the social and economic conditions of eighteenth century France? And who would merely describe the Boston Tea Party without an appreciation of the *Intolerable Acts*, the colonial economy and the development of the British Empire?

What is important is that, as Zion argued above, the legal/historical narrative contains sufficient flexibility to be of meaning and assistance to the listener. Indeed, it is a point fundamental to Taylor's "fusion of horizons" that one does not have to *accept* all of the propositions of another culture in order to learn from that culture. Indeed, to have forced the plaintiffs to make a distinction between factual and mythical elements would have constituted a grievous misrecognition of their *adaawk* and *kungax*. McEachern C.J. seems to have recognized this point in one context, when he stated of such a categorization that, "It would be overly simplistic to accept such a distinction, and I must accordingly reject mythology as a valid

distinction between what is and what is not part of an *adaawk* or *kungax*."[249] Yet, later, he criticized the testimony Mary McKenzie and *adaawk* of Gyoluugyat for containing several stories which he "would have classified generally as mythology."[250]

Thus, following upon the point made above, with respect to the Common law, it is not necessary, in order to enhance intercultural understanding and to extend genuine recognition and respect, to accept all of the cultural forms, stories, beliefs and ways of doing of other cultures, in order to recognize the importance and function of those things. Zion argues that the more important function of the Common law is not the truth of its myths, but the flexibility of its argumentation; a balanced and serious commitment to intercultural understanding would recognize that, in this context, it is not necessary to settle the literal appearance of the bear.

The *adaawk* of the Seeley Lake *Medeek* also demonstrates the dual nature of the *adaawk*, that is, that it discloses history and law. The story clearly attributes responsibility for the attack of the giant bear to the conduct of the Gitksan themselves, who wasted resources and disrespected the remains of animals by wearing them on their heads and using them in an egotistical dance. This reinforces the legal norm of respecting the relationship between people and animals, who make the ultimate sacrifice so that humans might live.[251] The story also underscores the interrelationship of the human, animal and spirit worlds — the actions of one component, the human, against another, the animal, invites retribution from the third, the spirit.

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[249] *Delgamuukw — Trial*, *supra* note 73 at 164.

[250] *Delgamuukw — Trial*, *supra* note 73at 179.

[251] That norm is present in *Hagbegwatku* (Ken Harris)'s ancient "People of *Damelahamid*" story, which describes the first punishment of the people of *Damelahamid*, for mocking the animal kingdom by using the stomach of a bear in order to use as a ball. The punishment that befell them was also serious, and supernatural in nature: *Hagbegwatku* (Ken Harris), *Visitors Who Never Left*, *supra* note 174 at 25-35.

Part Four — Conclusions.

In the second section of chapter two I have sought to demonstrate some of the basic political, social and legal structures and institutions of the Gitksan and Wet'suwet'en First Nations, as well as some fundamental aspects of their world view. I have presented them as politically and socially complex, with well-developed structures of governance, and norms which can be properly regarded as legal, especially as regards the ownership and management of, and responsibility to, territories and the land; the responsibilities of human beings toward the animal kingdom; and the importance and ever-presence of the supernatural world.

Many of these principles are displayed, developed, rationalized and validated in the central political institution, the Feast; an important feature of the Feast is its institutionalized openness to a diversity of voices and perspectives, and its institutionalized mechanism of consensus-building. All of this is true, I have argued, notwithstanding that the Gitksan and Wet'suwet'en have never possessed features of the modern state, such as an assembly, a police force, a separate judiciary and codified laws. Instead, they have the *adaawk* and the *kungax* which, in concert with the Feast, operate to faithfully maintain, and perpetuate and develop many of the critical norms of their communities.

The purpose of this chapter has been to introduce these concepts for two principal reasons. The first is to enable my critique in chapters three and four, which will discuss the monological tradition of the Western legal system that systematically devalues and marginalizes First Nations political, social and legal structures and normative systems. The second is to briefly discuss and acquaint the reader with one of the major sources of Gitksan and Wet'suwet'en world view — the *adaawk* and *kungax*, as well as some of the central norms, such as

responsibility to the land and animals; the proper etiquette of recognition; and the importance of dialogue; all of which I will use in chapter five to argue, by way of the perspicuous contrast discussed in chapter one, for a new approach to Aboriginal rights.

Chapter Three

Monologues, Part I: Discovery and Sovereignty

"Here stood Hamilton, First Land Commissioner, Canadian Pacific Railway 1885. In the silent solitude of the primeval forest he drove a wooden stake in the earth and commenced to measure empty land into the streets of Vancouver."

inscription on plaque at 300 West Hastings St., Vancouver, B.C.

Part One — Introduction.

In the first chapter of this thesis I made philosophical and moral arguments for an approach to Aboriginal rights in Canada that would be marked by an intercultural "journey" in which indigenous and non-indigenous "knowledge communities" should be prepared to go forth on a process in which they will open their horizons of knowledge to the influence of the knowledge and ways of knowing of the other community. In chapter two, in addition to demonstrating many of the most important features of Gitksan and Wet'suwet'en political, social and legal structures, institutions and world view, I demonstrated that there is an institutional predisposition, especially in the Feast, the *adaawk* and the *kungax*, toward many of the goals that I called for in chapter one, in particular recognition and dialogue.

In chapters three and four, I will argue that the mainstream of Canadian legal doctrine on Aboriginal rights, title and self-government has been developed in a largely *monological* environment. Indeed, I will demonstrate a *series* of distinct but related *monologues*, by which Canada has been able to ignore First Nations' unique political, social and legal structures and institutions. In so doing, Canada has failed to acknowledge important differences in world view,

as presented by many First Nations, such as the Gitksan and Wet'suwet'en, which, as presented in chapter two, is marked by a holistic concept of the natural, supernatural and human worlds; important bonds of obligation to the land; and strong communal identity. The result of such a failure in Canadian law has been the systematic marginalization and subjugation of First Nations and their rights from a very early time.

The first of three monologues which I will address is the "Doctrine of Discovery," by which colonial states purported to extend ownership and jurisdiction over the territories of indigenous peoples. The second I call the "monologue of sovereignty", by which courts unproblematically accept not only the effectiveness of colonial assertions of sovereignty, but also a curious *content* to that monologue, in which "sovereignty" is seen as giving to its "holder" wide-ranging powers to not only ignore indigenous interlocutors in the intercultural dialogue, but to "extinguish" indigenous rights at will. The third monologue, which I will discuss in chapter four, is what I call the "monologue of the authentic Indian." In that particular discourse, courts self-consciously attempt to acknowledge Aboriginal peoples and their inherent rights, but ultimately restrict those rights by pursuing an image of what it means to be "Indian", without a serious attempt to listen to what First Nations have to say on that topic.

Thus, what unites all three monologues is the fact that while *attention* is turned to indigenous peoples, indigenous peoples are not invited to participate meaningfully in a dialogue about the nature of Aboriginal life; the unique knowledge that First Nations possess; or the ways in which First Nations understand their connection to their territories and rights thereon. This is true, notwithstanding the "rumblings" of courts as to their desire to develop an "intersocietal"

approach to law,[252] because more often than not, non-indigenous thinkers and courts are informed by stereotypes, or information presented by "experts" such as anthropologists or historians, rather than by First Nations people themselves.

Indeed, chapters three and four are designed to be contrasted with chapter two. They are meant to demonstrate the grievous misrecognition that the law on Aboriginal rights perpetrates on First Nations. By showing how different the conclusions of that mainstream legal process are from the conclusions reached in chapter two, and by showing that those differences arise from the monological approach practiced all too often in Canadian law, I will segue into chapter five, and show that although the legal system does not take the intercultural route often enough, it is demonstrably capable of doing so. By doing so, it has the potential to develop norms that have a moral claim on both indigenous and non-indigenous societies. It will thus be argued that such an approach, which is based on mutual recognition, understanding and respect, is immeasurably superior to the one presented in these chapters, which rely on either the development of racial and cultural stereotypes; on the unchallenged power of one community over the other; and above all, on the silence of indigenous nations.

Part Two — The Monologue of Discovery.[253]

In his immensely influential and masterful work on the cultural extension of empire, Edward W. Said opens with a discussion of the importance of history to the analysis of present

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[252] *R.* v. *Van der Peet* (1996), 137 D.L.R. (4th) 289 at para. 42 (S.C.C.) (hereinafter *Van der Peet*).

[253] There are, of course, many shades of difference throughout the law when it comes to the Doctrine of Discovery, *terra nullius* and settlement. The purpose of this section is to present this monologue in broad brush strokes, rather than to exhaustively detail the many nuances.

phenomena. He observes that appeals to history are a common strategy in the interpretation of the present, and that often such appeals are due to rhetorical contest and to disagreement over what happened in the past. Much more importantly, however, he argues that often what motivates such analyses is "uncertainty about whether the past is really past, over and concluded, or whether it continues, albeit in different forms, perhaps."[254] Indeed, Said refers to the famous essay by poet T.S. Eliot, "Tradition and the Individual Talent" to build upon Eliot's observation that one needs to pay attention not only to the "pastness of the past, but of its presence."[255] This is surely true in the area of Aboriginal rights, which were first discussed and formulated by European philosophers and jurists more than four hundred years ago. Although the rationales upon which those thinkers relied are largely discredited and rejected today, their conclusions, which informed the nascence of international law, live on.

Indeed, a focus on the past is critical in order for us to understand the full meaning of such landmark cases as the Supreme Court of Canada's recent ruling in *Delgamuukw* v. *The Queen*,[256] because in reality it forms simply the latest installment of an extremely long line of treatises, pronouncements, proclamations, petitions and cases on the rights of indigenous peoples. Not all commentators recognize this important fact. Indeed, one recent observer stated that the quest for Aboriginal rights are of recent genesis — starting at the end of the Second World War.[257]

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[254]Said, *Culture and Imperialism*, *supra* note 48 at 3.

[255]T.S. Eliot, quoted in Said, *Culture and Imperialism*, *supra* note 48 at 4.

[256]*Delgamuukw — S.C.C.*, *supra* note 73.

[257]L.C. Green, "Claims to Territory in Colonial America" in L.C. Green and Olive P. Dickason, *The Law of Nations and the New World* (Winnipeg: University of Alberta Press, 1989) 1 at 3 (hereinafter "Claims to Territory").

One need only undertake cursory inquiry into the history of each indigenous First Nation, starting with their first contact with European traders and settlers to realize that in fact, virtually *every* First Nation has insisted upon its sovereignty; its ownership of its territories; and its right to participate in decisions affecting traditional territories.[258] Green is not the only to misapprehend the depth of history regarding Aboriginal rights, however. Much analysis of Aboriginal rights in the Canadian context starts with the landmark decision of the Judicial Committee of the Privy Council in *St. Catherine's Milling*,[259] when in fact the assumptions which underlay the tribunal's decision in that case were first developed in Europe many centuries earlier.

In this section I will demonstrate that the monologue of discovery rested upon characterizations of indigenous peoples as alternately the same as and different from Europeans, and that the similarities and differences were always relied upon to construct an image of indigenous peoples as inferior and primitive, and therefore either less worthy of sovereignty over North America than colonizing powers, or as incapable of possessing it. In so doing, Discovery rationalized the domination and subjugation of what Robert A. Williams has termed the "normative differences" presented by First Nations at the time of contact.[260]

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[258]For a few examples, I would refer the reader to the historical analysis in Michael Jackson, "A New Covenant Chain: An Alternative Model to Extinguishment for Land Claims Agreements: A Report Prepared for the Royal Commission on Aboriginal Peoples" (Vancouver, 1994) (unpublished) (hereinafter "Covenant Chain") which discusses seventeenth century treaties with Dutch and British representatives; to Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83; to Sterrit *et al.*, *Tribal Boundaries*, *supra* note 150 for a discussion of Gitksan and Wet'suwet'en attempts to assert their sovereignty and ownership; and to Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group Publishing, 1996) for a general comparative discussion.

[259]*St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46 (P.C.) (hereinafter *St. Catherine's Milling*).

[260]See Williams, *Discourses of Conquest*, *supra* note 2 at, for instance, 106, 195 or 298.

A. Papal Bulls and the Early Extension of European Power.[261]

Reflecting the emerging importance of the rule of law, as well as foreshadowing the importance that law would play in justifying the extension of colonial power over indigenous peoples of North America, colonizing powers such as Spain and Portugal in the medieval Europe of the fifteenth century sought legitimation of their plans to impose their wills and normative orders on newly "found" lands, beginning with the Canary Islands off Africa, and following that, South and North America. Reflecting the still-blurred lines between secular and sacred authority in the sixteenth century, Spanish and Portugese royalty sought approval for their New World forays from the Pope, who at that time claimed dominion over all matters, sacred and secular.

The expansion of European powers into the New World inspired the re-deployment of a body of theory and legal opinions generated during the Crusades of the eleventh and twelfth centuries. Those debates concerned the territorial and self-governing rights of infidel and non-Christian peoples. This body of theory and law had special relevance, as European powers began their "will to empire" over the New World.[262] During the Crusades, the extension of Papal and European authority over non-believers in the Crusades was justified on the basis of infidels' divergence from the norms of Christianity. Pope Innocent IV stated that, "if a gentile, who has no law except the law of nature [to guide him], does something contrary to the law of nature, the

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[261]Much of the information presented in this subsection is gathered from a variety of sources including Williams, *The Discourses of Conquest*, *supra* note2; Green, "Claims to Territory", *supra* note 257; Olive P. Dickason, "Concepts of Sovereignty at the Time of First Contacts" in L.C. Green and Olive P. Dickason, *The Law of Nations and the New World* (Winnipeg: University of Alberta Press, 1989) 141; Getches *et al.*, *supra* note 56; Donald Rojas, "Colonialism: The Root of the Problem" in Frank Cassidy, ed., *Aboriginal Title in British Columbia:* Delgamuukw *v.* The Queen (Lantzville, B.C.: Oolichan Books and The Institute for Research on Public Policy, 1992) 288, and Tully, "Middle Ground," *supra* note 139.

[262]Getches *et al.*, *Federal Indian Law*, *supra* note 56 at 43.

pope can lawfully punish him."[263] That indigenous peoples such as the Gitksan and Wet'suwet'en *did* have laws "other than the law of nature," and that those laws were sophisticated and well understood by the Gitksan and Wet'suwet'en, was thus clearly ignored from the earliest of times.

The first request for Papal approval came from the Portugese King Duarte, who sought the Pope's "permission" to conquer the Canary Islands, based upon a demonized description of indigenous peoples, of whom it was said that they, "are not unified by a common religion, nor are they bound by the chains of law, they are lacking normal social intercourse, living in the country like animals. They have no contact with each other by sea, no writing, no kind of metal or money ..."[264]

Such demonized characterizations of non-Europeans, which ignored the complex political, social and legal structures of First Nations like the Feast, *adaawk* and *kungax* of the Gitksan and Wet'suwet'en, would become the norm throughout the history of contact between indigenous North Americans and non-indigenous states like Canada and the United States.[265] The Pope responded to Duarte's request with *Romanus Pontifex*, a Papal Bull that confirmed the right of the Portugese monarch to conquer the Islands and the rest of non-Christian Africa, in order to bring the salvation of Christianity to "unbelievers."

These early justifications of the extension of European power over North America relied

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[263]Getches *et al.*, *Federal Indian Law*, *supra* note 56 at 43.

[264]Williams, *supra* note 2 at 69.

[265]See the seminal work of Robert Berkhoffer, Jr., *The White Man's Indian: Images of the American Indian from Columbus to the Present* (New York: Vintage Books, 1978) (hereinafter *White Man's Indian*). A similar account in the Canadian context is found in Daniel Francis, *The Imaginary Indian : The Image of the Indian in Canadian Culture* (Vancouver : Arsenal Pulp Press, 1992).

upon difference to assign inferiority to indigenous peoples and superiority to European conquerors. This monological use of difference reflects one part of a strategy of using both difference and sameness to justify the marginalization and subjugation of First Nations and their Aboriginal rights by Europeans throughout history.[266] This was accomplished by highlighting Aboriginal difference from Christian, European nations as inferior to the way of life practiced in Europe. Such focus on normative difference and inferiority continued for centuries as a principal justification for the denial of Aboriginal rights.

As the "discoveries" mounted, and other European powers became more active in seeking new territories, thinkers in Europe developed more detailed accounts of the rights of indigenous peoples to their land, possessions and self-government, and, critically, how they could be dispossessed of those things. That dispossession relied upon a complex interplay between sameness and difference, with the emergence of a body of "natural law", which purported to be "universally" binding on all peoples, Christian or non-Christian, due to their sameness, combined with the inevitable inability of indigenous peoples to maintain their sovereignty under that natural law, due to the incompatibility of their legal systems with it; that is, due to their difference. What of course united the sameness/difference monologue was its indifference to actual Aboriginal reality, and the ways in which First Nations understood their relationship to their territories, possessions and self-determination.

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[266]This dual strategy was identified and well described in the post-Confederation Canadian context by Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L.J. 382 (hereinafter "Legal Imagination").

B. From Religious Superiority to the "Law of Nations."

One of the earliest, and certainly one of the most prominent, of these thinkers was Franciscus de Victoria (1480-1546), a Dominican priest and scholar who taught at the University of Salamanca.[267] In his three-part 1532 lecture "On the Indians Lately Discovered", Victoria developed a nascent "law of nations", which he held to be founded on natural law, and binding on all princes and kings of all nations; all Christians and non-Christians; and all "discovered" and "un-discovered" peoples. In these lectures, Victoria made the important argument that all rational men, whether or not Christian, were entitled to own the property they possessed, and to govern themselves, whether or not they were Christian, but that all were subject to certain binding norms.

Victoria's lectures developed emerging international law and the rights of indigenous peoples to their property and self-governance in two important ways. First, he disrupted the notion that the normative divergence from Euro-Christian norms could serve as a justification for depriving indigenous peoples of their property rights and right to self-governance; and second, he held that all peoples, indigenous included, were bound by a universal Law of Nations. Thus, the potential for meaningful dialogue between First Nations and European arrivals in the Americas seemed to improve, given that Victoria insisted upon the rational character of all men, regardless of their religious beliefs.

However, Victoria also argued that transgression of the Law of Nations could justify violent suppression of indigenous peoples' rights. In so doing, Victoria successfully re-

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[267] A complete discussion of Victoria and his effect on the development of indigenous peoples' rights under international law can be found in Williams, *Discourses of Conquest*, *supra* note 2 at 96 *ff.* His name has been spelled alternately "Victoria" and "Vitoria." Arbitrarily, I choose the former.

introduced through the back door what he denied entry through the front: difference could be relied upon to assign superiority and thus legitimation to dominate. In developing his arguments, Victoria made three central propositions.

First, he argued that the inhabitants of the Americas possessed natural legal rights as free and rational people. As such, they held title to their land and possessions and were, "true owners alike in public and in private law before the advent of the Spaniards among them." The only way that their title to land and possessions, or their right to rule themselves, could be disputed was to show an "evident lack of reason."

Secondly, Victoria argued that as a result of the preceding argument, the Pope's grant to Spain of title to the Americas was "baseless" and could not affect the inherent rights of the Indian inhabitants. In so arguing, Victoria was, as Williams has noted, shifting the basis of international law from a "hierocratic" religious rationale to the more palatable Renaissance focus upon humanistic grounds.[268]

The problem for indigenous peoples came in the third proposition, in which Victoria argued that transgressions of the universally binding norms of the Law of Nations by the Indians might serve to justify a Christian nation's conquest and colonial empire in the Americas.[269] Through the supposedly universal content of the Law of Nations, duties and values that were informed by European world view and experience were introduced, while those of First Nations went ignored. Williams argues that the Law of Nations included three "sub-duties."

The first was a duty of "natural society and fellowship," by which indigenous peoples had

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[268]Williams, *Discourses of Conquest*, *supra* note 2 at 100.

[269]Williams, *Discourses of Conquest*, *supra* note 2 at 97.

to welcome Spaniards into their midst and to not impede with Spaniards' natural law right to travel where they wished. The second was a duty not to impede free and open commerce on the part of European nations.[270] Third was a recognition that any lands that were not privately held by indigenous nations, must also be held open to European visitors.

It will be immediately apparent that contrasting these three duties with the content of Gitksan and Wet'suwet'en law, canvassed in chapter two of this thesis, discloses a conflict. According to the laws of both First Nations, individuals *do not* have the right to travel where they wish, if so doing means passing over House territories. In order to do so, one must observe the proper etiquette both before and after entering onto House territory, which etiquette includes obtaining permission. If "free and open commerce" included the exploitation of natural resources, then, similarly, the laws of the Gitksan and Wet'suwet'en (and, presumably, many if not most, other First Nations) forbid such activity without similar observance of etiquette. And most First Nations would assert that every area of land within their territorial boundaries *is* privately held, although it might be held communally, such as by a House.[271]

According to Victoria, transgression of the Law of Nations entitled European nations to wage war on the indigenous, not only to secure these rights, but also the right to "despoil [indigenous peoples] of their goods, reduc[e] them to captivity, depos[e] their former lords and set up new ones."[272] Thus, notwithstanding the tentative steps toward intercultural dialogue that

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[270]This was also argued by John Locke and Immanuel Kant, who argued that a "right of hospitality" inheres in European traders and men of commerce, and that with it was the corollary right to defend that freedom against any indigenous nation that sought to deny or restrict it: Tully, "Middle Ground," *supra* note 139 at 167.

[271]These propositions of Gitksan and Wet'suwet'en law are canvassed *supra* chapter two, part two, section C ("Ownership of Territories and Roles and Responsibilities of Chiefs").

[272]Williams, *Discourses of Conquest*, *supra* note 2at 103.

Victoria might have made, it is not difficult to agree with Williams that, "Victoria was no radical proto-egalitarian seeking ultimately to free the Indian from Spanish Christian hegemony."[273]

C. The Anglo-American-Canadian Context.

In the Anglo-American-Canadian context, the developing monologue of discovery was influenced by modifications made to Victoria's theories by Alberto Gentili. The letters patent issued by the King of England to John Cabot directed him to bring the light of God, civilization and a settled government to the "infidel savages".[274] Case law was also developed in the same direction, such as in *Calvin's Case*, a decision by Lord Coke, which held that "all infidels are ... perpetual enemies" of Christian kingdoms, owing to the fact that, according to Lord Coke, the law presumes that they will not be converted, and that:

> if a Christian King should conquer a kingdom of an infidel, and bring them under his subjection, there *ipso facto* the laws of the infidel are abrogated ...[275]

Such a legal holding provided the perfect rationale for a monological approach to Aboriginal rights, by presuming First Nations' non-conversion, and presumably their hostility. Of course, the history of European-indigenous contact reveals quite the opposite, and confirms that, so long as both communities conducted their relations with the other in a respectful manner, that their relations were on the whole very peaceful, and often mutually profitable.

As colonization within the English sphere of influence proceeded, ideas such as those

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[273]Williams, *Discourses of Conquest*, *supra* note 2 at 97.

[274]Getches *et al.*, *Federal Indian Law*, *supra* note 56 at 56.

[275]*Calvin's Case* (1608), 77 Eng. Rep. 377 (K.B.), quoted in Getches *et al.*, *Federal Indian Law*, *supra* note 56 at 57. This case was overturned more than 150 years later by the House of Lords: *Campbell* v. *Hall* (1774), 98 E.R. 1045.

developed by philosopher Emer de Vattel (1714-1767) became more important. He added a new principle to the debate, which departed from the secular-sacred nexus that had marked the work of philosophers like Victoria and Gentili. Vattel developed a rationale for the denial of indigenous rights based upon what he perceived to be the inappropriate use of land by indigenous peoples. Indeed, based on their insufficient "alteration" or "domination" of the land, indigenous peoples were not seen as constituting "political bodies" capable of bearing rights. In this formulation, again we can see the complex interplay between sameness and difference: indigenous peoples are required to observe the "natural" laws of all people with regard to land (sameness), and when they inevitably fail (due to their difference), they can be dispossessed.

Vattel wrote that

> The cultivation of the soil ... is ... an obligation imposed upon man by nature ... Every nation is therefore bound by the natural law to cultivate the land which has fallen to its share ... those peoples who ... though dwelling in fertile countries, disdain the duty to themselves, injure their neighbours, and deserve to be exterminated like wild beasts of prey. ... Those who still pursue this idle life occupy more land than they would have need of under a system of honest labour.[276]

Indeed, in discussing the First Nations of North America, Vattel said that

> The peoples of those vast tracts of land rather roamed over them than inhabited them ... All men have an equal right to things which have not yet come in the possession of anyone, and these things belong to the person who first takes possession. When, therefore, a Nation finds a country uninhabited and without an owner, it may lawfully take possession of it, and after it has given sufficient signs of its intention in this respect, it may not be deprived of it by another Nation.[277]

The monological orientation of this statement is starkly apparent when one compares its assumptions of "wandering" and "ownerless" property, to the discussion in chapter two of Gitksan and Wet'suwet'en legal principles and ownership of their individual House territories. Chapter two demonstrated that the Gitksan and Wet'suwet'en have highly developed norms that

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[276]Green, "Claims to Territory", *supra* note 257 at 72.

[277]Green, "Claims to Territory", *supra* note 257 at 73-74.

govern the ownership, use and access of their territories, and that under their legal systems, those territories are "owned" even though the First Nations did not alter the land in the same ways as Europeans were beginning to do in the Industrial Revolution. Indeed, this fact is also due to Gitksan and Wet'suwet'en legal principles, relating to the proper relationship of humans to the land and the duty of House chiefs to maintain that land for the spiritual and animal worlds, as well as for past, present and future generations of the Gitksan and Wet'suwet'en.[278]

When the *adaawk* and *kungax* are referred to as disclosing historical facts, images and conclusions drawn by philosophers like Vattel and Locke also stand indicted. Where Vattel and Lock would suggest that indigenous peoples "wander" throughout the land clinging to a subsistence lifestyle and foraging wherever the land takes them, the *adaawk* of Gyoluugyat counters that in fact, high chiefs like Suuwiigos were willing to go to great lengths to fight for their land because of their ancient connection to it. And where philosophers would have readers believe that First Nations "roamed" about with little interaction with their environment, the *adaawk* of the Seeley Lake *Medeek* reveals that in fact misdeeds by one sector of the universe (human) towards another (animals/fish), invites retribution from a third (supernatural), thus demonstrating a level of integration that far outstrips the "domination" of the earth which Europeans lauded.

Vattel asserted that possession, which he argued was a prerequisite to the legitimate assertion of title, need not entail constant occupation of a given territory, although he said that it required more than a symbolic claim, such as the planting of a flag. Unfortunately, he did not apply this principle to First Nations, many of whom, although they might have occupied different

[278]See chapter two, part two, section C "Ownership of Territories and the Roles and Responsibilities of Chiefs."

portions of territory at different times, possessed that territory under their own legal systems, and had markers, such as crests, the *adaawk* and the *kungax*, which were much stronger in their connection to traditional territories than the flags and crosses which European powers claimed vested in them sovereignty over the territories. When Vattel turned his thoughts to any rights that indigenous peoples might have to their lands, he opined that

> We have already pointed out ... that these [wandering] tribes cannot take to themselves more land than they have need of or can inhabit and cultivate. Their uncertain occupancy of these vast regions cannot be held as a real and lawful taking of possession.[279]

It thus becomes clear that Vattel created a dichotomy of value between different *uses* of land, privileging the cultivation of soil, and its alteration to the use of it with less interference, as many First Nations in the Northeast did.

Vattel's arguments about indigenous peoples were reminiscent of those made by John Locke, who, in the *Second Treatise of Government*, described North American First Nations as

> rich in land and poor in all the comforts of life; whom nature having furnished as liberally as any other people with materials of plenty, i.e. a fruitful soil, apt to produce in abundance what might serve for good, raiment, and delight, yet for want of improving it by labor have not one-hundredth part of the conveniences we enjoy. And a king of large and fruitful territory there feeds, lodges, and is clad worse than a day-laborer in England.[280]

D. Toward the "Modern" Era: The Marshall Trilogy and Beyond.

Thus we can see that the monologue of discovery, once thought to afford European kings simply the right to exclude other Europeans from dealing with territories so "discovered," had taken on a new, ominous meaning for indigenous peoples. By the time of aggressive English colonization of North America, there was developing the theory that the lands indigenous peoples

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[279]Green, "Claims to Territory", *supra* note 257 at 74.

[280]Williams, *Discourses of Conquest*, *supra* note 2 at 248.

had occupied since time immemorial were not *legally* possessed; indeed they were hardly occupied. This conclusion, which served the European "will to empire," clearly ignored indigenous legal systems, such as the Gitksan and Wet'suwet'en Feast system, and relied upon stereotyped images of First Nations in order to operate.

As Robert Williams has argued, whatever the rationale, colonizing powers were able to degrade the original peoples of the New World, based on their normative divergence from Europeans. In the eyes of the early Papal Bulls, indigenous peoples' lack of adequate clothing, currency or knowledge of God justified their domination; in the eyes of Victoria and Gentili, the failure of indigenous peoples to meet the "sameness" standards of "natural" law allowed their rights to be ignored. Failure to abide by the Law of Nations did not justify simply its enforcement, but rather the decimation of entire peoples in genocidal attacks. And in the eyes of Vattel, insufficient occupation and cultivation of North American soil indicated the legal incapacity of its indigenous peoples to claim any rights over their territory.

Variations of these themes were formally brought into American law by the U.S. Supreme Court in the so-called "Marshall trilogy,"[281] although there are different shades of opinion in these cases.[282] By the time cases like *Cherokee*, *Johnson* and *Worcester* were argued, the

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[281] *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831) (hereinafter *Cherokee*); *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543, 5 L.Ed. 681 (1832) (hereinafter *Johnson*); *Worcester* v. *Georgia*, 31 U.S. (6 Pet.), 8 L.Ed. 483 (1832) (hereinafter *Worcester*).

[282] Indeed, *Worcester* eloquently repudiated many of the derogatory stereotypes and assumptions which underlay the Doctrine of Discovery, and which Marshall C.J. had articulated in *Cherokee Nation* and *Johnson*. He also ridiculed the notion that the mere arrival of Europeans in North America could legitimate their claims of sovereignty. *Worcester* is often relied on as a prototype of "intercultural law": see, for instance, Jeremy Webber, "Relations of Force and Relations of Justice: The Emergence of Normative Community Between Colonists and Aboriginal Peoples" (1995) 33 Osgoode Hall L.J. 623 (hereinafter "Relations of Force"). Macklem, "Legal Imagination," *supra* note 266 at 403-405; Tully, "Middle Ground," *supra* note 139 at 172; and Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R.* v. *Pamajewon*" (1997) 42 McGill L.J. 1011 at 1032 *ff.* But, along with *Cherokee Nation* and *Johnson*, *Worcester* contained the seeds of the Congressional plenary power, which is the American version of the power criticized in the second monologue discussed in this chapter: the "monologue of sovereignty."

colonial regime was well-installed and needed simply the imprimatur of legal justification in order to legitimate what had gone before and what was to come.[283]

Indeed, in *Fletcher*, by characterizing lands ceded from Georgia to the United States as "vacant lands in the United States," Marshall C.J. adopted the argument developed by Vattel and Locke, that indigenous peoples were incapable of possessing their lands at law, and also incapable of alienating them to whomever they pleased.[284] In *Johnson*, Marshall C.J. rationalized the proposition by holding that the United States was, in effect, a sort of "successor in title" to Great Britain over the lands in question. By holding that the U.S. held the exclusive right to extinguish Indian title, he confirmed indigenous incapacity, on which the British Crown had relied, and which deftly sidestepped the genesis of purported *colonial* capacity.

E. The Present-Day Significance of the Past.

The stereotypes and derogatory images of indigenous peoples that have been generated over the four-hundred year long monologue of discovery have occupied an integral part of North American culture.[285] Of course, when they are placed in perspicuous contrast with conclusions culled from a serious analysis of indigenous political, social and legal institutions, both currently and historically, they are wholly repudiated. This is especially so when such analysis is informed by the words of indigenous peoples themselves, in their own ways, such as through the *adaawk* and *kungax* described in chapter two. This is precisely the point that Taylor makes about the

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[283]Williams, *Discourses of Conquest*, *supra* note 2 at 289.

[284]*Fletcher* v. *Peck*, 10 U.S. (9 Pet.) 711 (1835), quoted in Williams, *supra* note 2 at 309.

[285]See for instance Berkhoffer, *The White Man's Indian*, *supra* note 265 for a classic discussion.

broadening of horizons of significance through a serious attempt at the intercultural journey called for in this thesis.

Unfortunately, the indefensible images of indigenous peoples and the appalling lack of understanding about their political, social and legal structures are not confined to treatises and judgements of the nineteenth century. Indeed, many landmark American cases which define, restrict and eradicate the rights of American Indian tribes, often borrowed from the monologically-derived images of primitive and savage Indians to support their conclusions.[286]

As recently as 1970, in *Calder*,[287] the British Columbia Court of Appeal relied explicitly upon images of indigenous primitiveness and savagery to legitimate the extension of sovereignty over British Columbia and the marginalization of Aboriginal rights. Speaking of the Nisga'a plaintiffs' ancestors, Davey, C.J.B.C. stated that, "they were undoubtedly at the time of settlement a very primitive people with few of the institutions of civilized society, and none at all of our notions of private property."[288] Echoing the rhetoric of Vattel and Locke, he added that, "These people knew nothing of the so-called benefits of civilization. Having regard to the size of the area of territory over which they may have *roamed* they were comparatively few in number."[289] And of the relationship of the plaintiffs' ancestors to the claimed territories, he argued that, "These were territorial, not proprietary boundaries, and had no connection with

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[286]See for instance *United States* v. *Kagama*, 118 U.S. 375 (1886), *Lone Wolf* v. *Hitchcock*, 187 U.S. 553, 23 S.Ct. 216 (1903) and *United States* v. *Sandoval*, 231 U.S. 28 (1913) (hereinafter *Sandoval*).

[287]*Calder* v. *A.G. B.C.* (1970), 13 D.L.R. (3d) 64 (B.C.C.A.) (hereinafter *Calder — C.A.*).

[288]*Calder — C.A.*, *supra* note 287 at 66.

[289]*Calder — C.A.*, *supra* note 287 at 70 (emphasis added).

notions of ownership of particular parcels of land."[290]

It has been noted in chapter two that the Nisga'a share not only language and much history with the Gitksan, but also many elements of their legal and territorial system, especially the *adaawk*.[291] Thus, it is clear that many of the statements by Davey C.J.B.C. can not survive the insights of a perspicuous contrast. In addition, Davey C.J.B.C. made these comments in spite of contrary evidence from well-known anthropologist Wilson Duff, who testified at trial, thus revealing that even though important Nisga'a "horizons" were available to him, Davey C.J.B.C. was un*willing* to engage in the intercultural journey before him.

The real "turning point" in the repudiation of this kind of rhetoric came with the Supreme Court of Canada appeal in *Calder*.[292] Hall J. set a refreshing tone when he criticized Davey C.J.B.C. for relying on "ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect, a subhuman species."[293] This sentiment was echoed by Judson J., who said that

> the fact is that when the settlers came the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution of this problem to call it a 'personal and usufructuary right.'[294]

A similar censure was given recently by the High Court of Australia in *Mabo*,[295] which sharply

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[290] *Calder — C.A.*, *supra* note 287 at 66.

[291] Chapter two, part one, section A. See also Sterrit *et al.*, *Tribal Boundaries*, *supra* note 150 at 3.

[292] *Calder*, *supra* note 3.

[293] *Calder*, *supra* 3 note at 25.

[294] *Calder*, *supra* 3 note at 11.

[295] *Mabo* v. *Queensland* (1992), 107 A.L.R. 1 (H.C. of A.) (hereinafter *Mabo*).

criticized the assumptions which underlie the monologue of discovery. Indeed, Brennan J.'s judgement is one of the most blistering and eloquent critiques to that effect.[296]

In an important respect, however, this positive development is negated by the fact that even though the explicit assumptions upon which the monologue of discovery rests have been jettisoned, the damage has already been done. This is because while courts such as the Supreme Court of Canada and the Australian High Court have rejected the assumptions, their effects live on through the "monologue of sovereignty," which the monologue of discovery enabled. In the monologue of sovereignty, courts unproblematically accept two very problematic propositions: first, that sovereignty over North America vested with its mere assertion by colonial powers; and second, the very curious "content" of that sovereignty. Courts accept that "sovereignty" carries with it the right, on the part of the holders of sovereignty, colonial states, to "extinguish" any and all rights that indigenous peoples might have, as long as the proper manner and form is followed.[297] In the next section I will demonstrate how this curious "monologue of sovereignty," although perhaps more palatable in rhetoric than the monologue of discovery, operates to marginalize and subjugate First Nations and their political, social and legal institutions.

One effect of the repudiation of the kind of rhetoric found in the American cases cited above, and as exemplified in the B.C. Court of Appeal's decision in *Calder*, has been a move on the part of Canadian courts to extend a measure of justice to First Nations, under the rubric of

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[296] *Mabo, supra* note 295 at 29 *ff.*

[297] Although this will be elaborated throughout this thesis, particularly in the Canadian context, in the United States the Congress has the power to unilaterally end the trust duties of the U.S. toward Indian tribes: *Sandoval, supra* note 286; in Australia, adverse actions by either the legislature or the Crown is sufficient to extinguish Aboriginal title: *Mabo, supra* note 295 at 50; in Canada, the Parliament has the exclusive legislative competence to extinguish Aboriginal title: *Delgamuukw — S.C.C., supra* note 6; and s. 35 of the *Constitution Act, 1982*, which entrenches Aboriginal rights, can be modified if the requisite manner and form prescribed in Part V of that instrument is observed.

"Aboriginal rights." One way that courts have been able to accomplish this without disrupting the monologue of sovereignty, has been to employ the English property law categorization of *dominium* and *imperium*. Therefore, in addition to analyzing the monologue of sovereignty, I will address this foundational categorization and the role it plays in the law of Aboriginal rights.

Part Three — The Monologue of Sovereignty.

A. Categorical Distinctions: *Dominium* and *Imperium*.

Traditionally, there have been three ways at common law for a colonizing power to assert its sovereignty over territory. The first is the military conquest or subjugation of a previously independent political unit; second is the formal transfer of jurisdiction by way of cession; and finally is the settlement of territory that is legally unoccupied or which does not belong to another political entity.[298] Each of these three methods — conquest, cession or settlement — carried with it particular legal consequences as to the status of ownership of land. It is clear that in jurisdictions like most of British Columbia, the first two criteria were not met: there has been no war, and there have never been any treaties between the Crown and indigenous peoples. Thus, it is likely that the third method of colonization was relied on by colonizers.[299] This method goes by a number of different names, such as the "settlement thesis", the "Doctrine of Discovery" or

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[298] *Per* L'Heureux-Dubé J.: *Van der Peet*, *supra* note 252 at 330, para 108 dissenting on other grounds; *per* Deanne and Gaudron JJ.: *Mabo*, *supra* note 295; Mabo v. *Queensland* (1992), 107 A.L.R. 1 (H.C. of A.) (hereinafter *Mabo*); Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L.R. 498 at 511 (hereinafter "Aboriginal Rights and Canadian Sovereignty."

[299] Some scholars have suggested that Canadian courts have never specified the theory under which Canada obtained its sovereignty, owing to their arrogant confidence in its *per se* validity: Douglas Sanders, "The Supreme Court of Canada and the legal and political struggle over indigenous rights" (1990) 22 Cdn. Ethnic Studies 122 at 122. I would suggest that the Supreme Court, in relying upon *Johnson*, *supra* note 281, for *its* assertion that Crown sovereignty has never been seriously questioned, has implicitly adopted the monologue of discovery: *Sparrow*, *supra* note 4 at 404.

the "doctrine of *terra nullius*." What is common to each is the proposition that the territory settled is, legally speaking, a vacuum of sorts. What is also common to all three is that they can only persist if the legal systems of First Nations are kept silent.

The standard position of the common law is that on the assertion of sovereignty by the Crown, a very peculiar kind of *proprietary title* is "inserted" "underneath" all other kinds of title in the subject territory. Known as "radical" title, it represents absolute ownership, although not necessarily with beneficial use, of the territory over which it is asserted. Such a theory is said to harken back to feudal times in England, specifically the "Norman Conquest" by William the Conqueror. It is held that because the Crown of England holds ultimate legal title to all territories, it is able to demand of its subjects "feudal incidents", or duties, in return for bundles of rights over land, which are expressed in terms of time, known to the law as "estates in land."[300] The feudal incidents are indicative of one of the "incidents" of radical title — *imperium*, roughly meaning the power of government over the territory.[301] In parceling out estates, the Crown is said to have divested itself of the beneficial ownership of the land, and is only able to regain it through purchase, lawful expropriation or escheat, at which time, the radical title combines with the beneficial ownership to give absolute beneficial and legal ownership to the Crown, also called a plenum dominium.[302]

Thus, an interesting contrast between land holding in Anglo-Canadian law can be drawn with land holding in Gitksan and Wet'suwet'en law. In English property theory the "estate

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[300] *Per* Brennan J.: *Mabo*, *supra* note 295 at 32 and 38.

[301] *Per* Brennan J.: *Mabo*, *supra* note 295 at 30.

[302] The uniting of *imperium* (the power of government) with *dominium* (beneficial ownership): *St. Catherine's Milling*, *supra* note 259 at 55.

owner" does not own the land itself, just a bundle of rights over it for a period of time. The concept of *dominium*, which will be discussed below, is divorced from *imperium*, and ownership gives the holder the right to do what she wishes with the land. The estate may but often does not carry with it a set of responsibilities. It is held of a higher lord. For the Gitksan and Wet'suwet'en, people are directly connected to the land — that relationship is not mediated by anything like an estate. "Ownership" carries with it obligations that are more important than the rights; the connection with it is eternal and renewed and importantly, it is held of the Creator, not a higher person, and therefore, cannot be taken away improperly.[303]

This is a critical distinction which the common law makes. It allows the law to conceptually distinguish between *dominium*, roughly meaning ownership; and *imperium*, which roughly means jurisdiction. It does not lend itself easily to Gitksan and Wet'suwet'en legal systems, but now underpins the law of Aboriginal title. It has permitted those colonial states to extend a measure of justice to indigenous First Nations while at the same time leaving the underlying claim of colonial states to total power (sovereignty) intact and unchallenged.

B. The Common Law Approach: Recognition or Continuity?

This distinction has caused a great deal of confusion as to the relationship between the colonial state's right to rule a territory and its right to the beneficial enjoyment of land in that territory. To address the question, scholars and jurists have identified two general approaches, the first called the "doctrine of recognition" and the second the "doctrine of continuity."

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[303]This difference in categorization was canvassed more fully in chapter two, part two, section C(ii) ("Responsibilities of Chiefs").

In the theoretical approach of this thesis, "recognition" refers to the serious attempt by members of one culture to expand their knowledge and understanding of the identity claims made by members of another culture. It is about recognizing that other interlocutors in the intercultural dialogue may present perspectives and insights about themselves, the world and their other interlocutor, that broaden the horizons of significance for that other interlocutor.

The doctrine of recognition is categorically different. It refers to a theoretical approach to the law of Aboriginal rights, in which Aboriginal rights, title and self-government do not exist unless they are *recognized* by the colonial state, through a legislative act, a common law prerogative, or some practice from which it can be inferred that recognition occurred. As such, it has the ironic potential to be a tool of the most grievous kind of *mis*recognition. This approach to Aboriginal rights has been identified by some scholars as the "contingent theory" of Aboriginal rights, in which Aboriginal rights, "emanate ... from state recognition of a valid Aboriginal claim to freedom from state interference."[304]

The doctrine of recognition has its basis in the theory that all claims to interests in property (whether they be "full" title, or "user rights") must be held "of the Crown." That is, they must originate in a Crown grant, for if they do not, then they originate from a radical title that does not rest with the Crown. As we saw above, in English property theory, through the doctrine of feudal incidents, it is precisely the radical title which vests in the colonial state the incident of *imperium*, that is, the right to govern, or sovereignty. Thus, the doctrine of recognition reasons that if title derives from something other than the Crown's radical title, then

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[304] Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty," *supra* note 298 at 501.

that title rests elsewhere, which is inconsistent with the assertion of Crown sovereignty.[305]

The doctrine of recognition has some support in academic writing. L.C. Green argues that, "whatever title Indians were acknowledged as having in the land ... [it is] solely that which is acknowledged as remaining with them by the Crown; it amounts to no more than a right to live on and enjoy the use of such lands as have not been granted to settlers or taken into the complete exercise of jurisdiction by the Crown."[306] The bulk of scholarly opinion, however, runs contrary to that position, [307] and favours the "doctrine of continuity."

By contrast with the doctrine of recognition, the "doctrine of continuity" holds that while the insertion of radical title, which carries with it *imperium*, or jurisdiction, is successfully vested in the Crown upon the assertion of sovereignty, insertion of radical title is insufficient to vest beneficial ownership of territory in the Crown. Rather, the doctrine of continuity establishes that the property relations which existed prior to the assertion of Crown sovereignty are *presumed* to continue "unmolested," unless the proper authority modifies or extinguishes such relations.[308]

Such a characterization fits more easily into what Asch and Macklem term, the "inherent rights" approach which "views Aboriginal rights as existing independent of the legal creation of [the colonial state] and not requiring explicit legislative or executive recognition of their existence."[309] On its face, then, the doctrine of continuity is more consistent with the goals of

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[305]For a succinct discussion of this point, see Dawson J., in dissent, in *Mabo*, *supra* note 298 at 93 and 98.

[306]Green, "Claims to Territory," *supra* note 257 at 125.

[307]One of the definitive rejections of the doctrine of recognition can be found in Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989).

[308]The Doctrine of Continuity was usefully laid out by Toohey J. in *Mabo*, *supra* note 295 at 143.

[309]Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty," *supra* note 298 at 500.

this thesis than the doctrine of recognition, because it at least recognizes that the position of Aboriginal peoples exists independent of the recognition of their interlocutor — the colonial state. Courts have for many years sent out confusing and conflicting signals as to which approach is to be adopted in Canadian law of Aboriginal title.

i. *St. Catherine's Milling.*

As noted at the beginning of this chapter, many scholars start their analysis with a consideration of the famous *St. Catherine's Milling* case. In that case, the Privy Council adjudicated a dispute that was essentially between the federal government and Ontario as to which government has the beneficial enjoyment of lands ceded to the Crown by First Nations by way of treaty. The Privy Council held that when land is ceded by First Nations, the beneficial enjoyment falls to the province.[310]

The Court also notoriously stated that, "the tenure of the Indians was a personal and usufructuary right, dependent upon the goodwill of the sovereign."[311] The Privy Council implied that Aboriginal rights to possession were solely due to the Royal Proclamation of 1763, thus articulating the doctrine of recognition. Reflecting the categorical distinction between *dominium* and *imperium*, the Privy Council went on to state that, "It appears ... 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

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[310] *St. Catherine's Milling*, *supra* note 259 at 58.

[311] *St. Catherine's Milling*, *supra* note 259 at 54.

title was surrendered or otherwise extinguished."[312]

In this short description it thus becomes apparent that one of the leading cases on Aboriginal rights in Canada (and throughout the Commonwealth) went forth on a completely monological basis. No mention of Aboriginal perspectives on their land was made in the case; no reference to the legal system of the Ojibway First Nations was cited; indeed, the indigenous First Nations *was not even represented* at the bar. Not only were Ojibway legal norms not cited, but nor were those of any other First Nations, which is relevant due to the fact that high appellate decisions are often believed to be law throughout the land.[313] The only legal principles cited were those which underlie English property law, such as the distinction between *dominium* and *imperium* and between beneficial and legal estate. And the only sources deemed relevant were British in nature, such as the *CA 1867*.

Furthermore, the case left the law in considerable doubt as to the quality of Aboriginal title. Its statement that Aboriginal title is merely "personal and usufructuary" was explicitly relied upon by the *Mabo* court to justify extinguishment by both the state legislature and the Crown;[314] and the issue of whether it is a proprietary or personal right in Canada seems only to have been settled more than one hundred years later, in *Delgamuukw*. That case firmly upheld the rights of the Canadian state to enjoy sovereignty and legal jurisdiction over the entire territory. These issues, as well as the latent confusion over the source of Aboriginal rights

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[312]*St. Catherine's Milling, supra* note 259 at 55.

[313]Indeed, this was criticized by Borrows, "With or Without You," *supra* note 227 at 644 & 646, in which he argued that the adjudication of Aboriginal rights should be fact *and site* specific, in order to account for the enormous legal diversity among First Nations in Canada.

[314]*Mabo, supra* note 295 at 66.

(contingent or inherent), have plagued Canadian law ever since, and have only begun to be addressed in the jurisprudence that started with *Calder*.

In *Calder*, the B.C. Court of Appeal unanimously accepted the doctrine of recognition. Davey C.J.B.C. held that, "Whether Aboriginal rights ought to be confirmed or recognized depends entirely upon the Crown's or Legislature's view of the policy required to deal properly with each situation."[315] The Court found as a fact that, "These matters and circumstances show that there has been no recognition of the claim of the appellants to Indian title which has statutory force."[316]

ii. The Move to "Inherent Rights": *Calder*, *Guerin*, *Sparrow* and *Van der Peet*.

In the appeal of *Calder*,[317] a six to zero majority of the Supreme Court of Canada rejected the doctrine of recognition and the contingent theory of Aboriginal rights as the source of indigenous rights. The two major opinions, one written by Judson J. and the other by Hall J., both agreed that Aboriginal title exists at common law; they also agreed that title was not dependent upon the Royal Proclamation. They disagreed, however, as to whether or not that title had been extinguished. Judson J. held that title had been extinguished by necessary implication in the "Calder Proclamations";[318] by contrast, Hall J. held that extinguishment could only have occurred at the hands of the legislature, in language that made the intention to extinguish "clear

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[315] *Calder — C.A.*, *supra* note 287 at 67-68.

[316] *Per* Tysoe J.A., for the Court: *Calder — C.A.*, *supra* note 287 at 76.

[317] *Supra* note 3.

[318] *Calder*, *supra* note 3 at 23. The Calder Proclamations were exhaustively laid out by Tysoe J.A. in *Calder — C.A.*, *supra* note 287 at 88 *ff.*

and plain." According to Hall J., the Calder Proclamations were *ultra vires* the Governor of the colony. This deadlock as to result in *Calder* was broken by the decision of Pigeon J., who held against the appellant Nishga'a nation, based on a procedural point unrelated to Aboriginal title.

Calder was an extremely important decision in the development of Aboriginal rights and the law of Aboriginal title in Canada. Hall J. explicitly rejected the consequences of the doctrine of recognition, stating that under it, Aboriginal peoples would, on the assertion of sovereignty, have become trespassers in their own lands.[319] He referred to such a proposition as, "self destructive. If trespassers, the Indians are liable to prosecution as such, a proposition which reason itself repudiates."[320] He also insisted that "the Nishgas are, and were from time immemorial, a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law."[321]

Hall J. was thus able, in his judgement, to extend a measure of justice to the Nisga'a, by stating that although jurisdiction (*imperium*) rests with the colonial state, beneficial use and occupation of the territories (some form of *dominium*)[322] rests with the First Nation. By employing that distinction, which is well-known to English property law, but foreign to the law of the Nisga'a, Hall J. sought to repudiate the more unsavoury aspects of the monologue of discovery, while embracing and utilizing the monologue that discovery enabled: sovereignty.

Although *Calder* set the stage for the rejection of the indefensible images of First Nations

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[319]The same point was made in *Mabo*, *supra* note 295 at 143.

[320]*Calder*, *supra* note 3 at 81.

[321]*Calder*, *supra* note 3 at 49.

[322]Although both the Court of Appeal and the Supreme Court urged the plaintiff Nisga'a to lead a definition of Aboriginal title and its content, they declined to do so, stating only that what they sought was not an estate in fee simple.

as "primitive," "savage," and "warlike," and although Hall J. suggested a legal test which requires the "clear and plain intention" of the legislature to interfere with Aboriginal rights, the two most important *results* of the monologue of discovery went unchallenged. In particular, both judges accepted that the assertion of Crown sovereignty legitimately vested in the colonial state jurisdiction over the territories, and that "sovereignty" has a peculiarly "total" content. That is, Aboriginal rights, according to both judges, could be totally eviscerated at the pleasure of the colonial state. The judges disagreed only on the manner and form required, not the underlying conclusion that such a power exists.

The conclusion that the source of Aboriginal title is inherent, rather than in the Royal Proclamation, was cemented in two subsequent decisions. Those judgements have also settled that Hall J.'s approach to the question of extinguishment is the one to be preferred. In *Guerin*,[323] the Supreme Court of Canada affirmed the holding of all six *Calder* justices that "Aboriginal title [is] a legal right derived from the Indians' historic occupation and possession of their tribal lands ..."[324] and opined that *Calder* had implicitly rejected the doctrine of recognition. According to the Court

> ... Indian title is an independent legal right which, although recognized by the Royal Proclamation of 1763, nonetheless predates it ... Their interest in their lands is a pre-existing legal right not created by *Royal Proclamation*, by s. 18 of the *Indian Act*, or by any other executive or legislative provision.[325]

If that be so, then it must be implied that the right pre-dated the purported assertion of sovereignty by the English Crown, meaning that Canadian law has moved at least far enough to

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[323] *Guerin* v. *The Queen*, (1984), [1985] 1 C.N.L.R. 20 (hereinafter *Guerin*).

[324] *Guerin*, *supra* note 323 at 132.

[325] *Guerin*, *supra* note 323 at 133.

concede that some of the assumptions which underlie the monologue of discovery, such as the inferiority and primitive nature of First Nations, are invalid and do not form an explicit part of the law.

This conclusion is strengthened in *Sparrow*, in which the Supreme Court of Canada explicitly sourced the plaintiff's Aboriginal right, which was recognized and affirmed by s. 35(1) of the *CA 1982*, to the fact that the "... Musqueam have lived in the area as an organized society long before the coming of European settlers, and that the taking of salmon *was an integral part of their lives and remains so to this day.*"[326] That is, the right of the Musqueam to take salmon was not reliant on some Proclamation, section, executive order, or even the common law, but was rather due to its importance to the livelihood and culture of the indigenous claimants. Furthermore, the Court explicitly referred to and imported into the law First Nations perspectives on their own way of life.

Sparrow thus represents an excellent step forward in the goal of creating a dialogue in which intercultural understanding is seriously pursued and the resulting "broadened horizons" that Taylor and Oman describe, and which are called for in chapter one of this thesis, are imported into the law in a serious and meaningful way. Indeed, the Court did not stop at simply identifying indigenous prior occupation as the source of Aboriginal rights (the doctrine of continuity), but also went on, in addition to adopting Hall J.'s "clear and plain intention" test,[327] to draw a fine distinction between legislative enactments which merely *regulate* Aboriginal rights, rather than those which *extinguish* them. The Court also placed the burden of justifying

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[326] *Sparrow*, *supra* note 4 at 398 (emphasis added).

[327] *Sparrow*, *supra* note 4 at 401.

infringement upon the Crown.[328]

But the Court's statements as to extinguishment once again point to its unquestioning acceptance of both the legitimacy of the assertion of sovereignty by the colonial state, and the peculiarity of that sovereignty's content — that is, that it implies total power to extinguish Aboriginal rights. Indeed, in *Sparrow*, the Court was explicit as to the first of these two propositions, when it stated that

> It is worth recalling at this point 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 outset never any doubt* that sovereignty and legislative power, and indeed the underlying title, vested in the Crown.[329]

The monological orientation of such a proposition is breathtaking. It completely ignores foundational legal norms of many First Nations, such as the Gitksan and Wet'suwet'en, in whose legal system, a mere *assertion* of a legal or historical fact is insufficient to validate it as true. Rather, the assertion must be made publicly, defended by reference to shared knowledge, and, most importantly, *validated* by other stakeholders as true.[330] As in *Calder*, the ability of the colonial state to extinguish Aboriginal rights was unquestioned. Indeed, Asch and Macklem have noted that in this sense, *Sparrow* moved away from an inherent rights approach back toward a contingent approach, which, when defining Aboriginal rights, assigns preeminent importance to the actions of colonial states, rather than to First Nations.[331]

Recent Canadian jurisprudence has affirmed the trend of sourcing Aboriginal rights to the

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[328]*Sparrow*, *supra* note 4 at 400 - 401.

[329]*Sparrow*, *supra* note 4 at 404 (the Court cited *Johnson*, *supra* note) for this proposition (emphasis added).

[330]For a more complete discussion, see chapter two, section B ("The *adaawk* and *kungax*"), subsection ii(b) ("The accuracy of the *adaawk* and *kungax*" by a "circumstantial guarantee of trustworthiness").

[331]Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty," *supra* note 298 at 507.

fact that First Nations pre-existed the arrival of Europeans. For instance, in *Van der Peet*, Lamer C.J. stated that

> In my view the doctrine of Aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, Aboriginal peoples *were already here*, living in communities on the land, and participating in distinctive cultures, as they had done for centuries. It is this fact ... which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional status.[332]

But Lamer C.J. also went one step further, and in so doing came closer to acknowledging that the purported sovereignty of the Canadian state is the most important factor affecting s. 35 of the *C.A., 1982*, which entrenches Aboriginal rights within Canada's constitution.

Lamer C.J. stated that, "... what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, *is acknowledged and reconciled with the sovereignty of the Crown.*"[333] Indeed, this assertion as to the purpose of s. 35 in the *CA 1982* has become the cornerstone of the Court's Aboriginal rights doctrine, whether it applies to Aboriginal rights,[334] title,[335] or self-government.[336]

Barsh and Henderson have criticized the Court's notion of reconciliation, however as coming out of thin air and having no jurisprudential or scholarly basis or support.[337] But what it should do is focus attention upon two things. The first is the assertion of Crown sovereignty, and

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[332] *Van der Peet, supra* note 252 at 303 (emphasis in original).

[333] *Van der Peet, supra* note 252 at 303, (emphasis added).

[334] As in the so-called *Van der Peet* trilogy.

[335] *Delgamuukw — S.C.C., supra* note 6.

[336] See *Pamajewon, supra* note 7.

[337] Barsh and Henderson, "Ropes of Sand," *supra* note 51 at 997.

what that means, which should invite analysis of its validity. Second is to focus attention upon the *relationship* between First Nations and the colonial state. A focus on interaction is exactly what this thesis calls for.

As to this latter focus of analysis, I shall argue in chapter four of this thesis that although it starts off with those potentially laudable thoughts, *Van der Peet* turns *away* from relationships, and launches yet a *third* monologue, that of the "authentic Indian." And as to the assertion of colonial sovereignty, *Van der Peet* is consistent with the monological orientation of Canadian law on Aboriginal rights in its reliance upon *Sparrow*'s "throw away" line as to the undoubted validity of the assertion of sovereignty.[338]

Thus, while Canadian courts have recently taken enormous steps toward rejecting the indefensible stereotypes and images generated by the monologue of discovery, they have failed to question the *results* of those assumptions. In particular, the monologue of discovery purported to allow colonial states to assert sovereignty to the complete exclusion of First Nations. Furthermore, that sovereignty is of a curious type: it purports to carry an absolute power to extinguish the laws and political structures of indigenous peoples, as well as to extinguish their unique connection to the land, which was described in chapter two of thesis.

This is all notwithstanding the fact that First Nations like the Gitksan and Wet'suwet'en have highly developed mechanisms of international dialogue and negotiation, which confirm that assertions of sovereignty without their consent or participation present profound challenges to bedrock principles of the their legal systems. In Canadian law, while the conclusions of the first monologue (discovery) have been rejected, the second monologue (sovereignty), which discovery

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[338] *Per* L'Heureux-Dubé J., dissenting on other grounds: *Van der Peet, supra* note 252 at 331.

enabled, continues. The silence of First Nations is deafening indeed.

C. The Sovereignty Crisis, Part I.

The foregoing analysis makes it clear that it is not all that difficult to make a principled argument for the existence of Gitksan and Wetsuwet'en tenure and law in the territories included in the Claim Area. What seems more problematic is the assertion of any *Crown* sovereignty, or the ability of the Crown to make any of the land grants or expropriations that it has made. Whence comes *Canadian* authority? Can a principled justification of Canadian jurisdiction be developed, or must it rely on the monologue of discovery?

This question is immensely difficult to answer and forms a vital part of the debate on Aboriginal rights.[339] Indeed, it underlies the position of Aboriginal sovereigntists who deny any legitimacy of the Canadian state whatsoever, except that to which their ancestors might have acceded by Treaty.[340] I do not pretend to have a solution, but believe that the answer might lie in redefining our notion of what sovereignty means. I shall address that, however, in the Conclusion to this thesis.

Part Four — Conclusions.

This chapter demonstrates that two immensely important doctrines of Canadian law — how Canada came to obtain its purported sovereignty, and what that sovereignty means,

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[339]See for Michael Asch and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 208 at 226 (hereinafter "Affirming Aboriginal Title").

[340]See for instance Culhane, *The Pleasure of the Crown*, *supra* note 165 at 355 for a discussion.

completely overlook the physical and normative presence of First Nations. Indeed, these monologues depend on the absence of indigenous voices, because when the insights of chapter two are deployed, it becomes clear that the detestable images of indigenous people generated by the monologue of discovery are *factually* baseless. Similarly, the claims to complete sovereignty which the monologue of discovery enables are rendered untenable by an examination of the rich, dynamic legal system of the Gitksan and Wet'suwet'en, as represented in the *adaawk*, *kungax*, crests, totem poles, Houses and so on.

Indeed, even though the images which the monologue of discovery generated are surely rejected by Canadians today, their *effects* live on implicitly in the monologue of sovereignty. Thus, contrary to L.C. Green's claim that they are past and must remain there,[341] Canadian law relies on their continued, if obscured, application.

In chapter four, I will continue the analysis of monologues, this time turning from dramatic issues of extinguishment, to cases in which courts *do* recognize the normative presence of First Nations and attempt to account for that. As quickly as Aboriginal rights are acknowledged, however, they are marginalized, through the deployment of imaginary images of what it means to be an Indian. Thus, the monologue of the "authentic Indian" redefines Aboriginal rights and laws as practices or activities, and defines them so narrowly as to sometimes render them nugatory.

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[341]Green, "Claims to Territory," *supra* note .

Chapter Four

Monologues, Part II:
The Authentic Indian and the Trial of *Delgamuukw*

> ***The time period that the court should consider in identifying the right ... is the period prior to contact between Aboriginal and European societies ... it is to those pre-existing societies that the court must look in defining Aboriginal rights.***
>
> **Chief Justice Antonio Lamer**

In the first section of this chapter, I will present the third of the monologues which I am discussing. The monologue of the "authentic Indian" differs from the first two in that it is not about the eradication of Aboriginal rights through discovery or extinguishment, but about the ways in which Canadian courts assign "content" to the Aboriginal rights which they *do* recognize. This recent jurisprudence accepts the that Aboriginal rights are inherent (although it continues to accept their susceptibility to extinguishment). However, the monologue of the "authentic Indian" limits the breadth of Aboriginal rights by restricting their source *and content* to pre-contact "customs, traditions and activities."

In the second section, I will move from the general propositions developed in the first three monologues, and critique the trial decision of *Delgamuukw*. I will focus upon the ways in which the court's approach to Aboriginal rights produced a grievous misrecognition of Gitksan and Wet'suwet'en political, social and legal realities which were presented in chapter two of this thesis. I focus on *Delgamuukw* not because that decision is particularly unique in its monological approach and in its resulting grievous misrecognition of the Aboriginal litigants, but because it is quite representative of Canadian law's approach to Aboriginal rights. Furthermore, the trial judge was presented with exactly the same materials and resources used to produce the

conclusions in chapter two of this thesis. He had the benefit of listening to the leading experts in Gitksan and Wet'suwet'en communities — the elders and hereditary chiefs; he had an opportunity to learn from their unique sources of law and history — the *adaawk* and *kungax*; and he was asked to undertake an intercultural process very similar to that called for in chapter one of this thesis. Because of all of these things, his voluminous trial judgement presents an excellent source to contrast with the conclusions reached in chapter two of this thesis.

Part One — The Monologue of the "Authentic Indian."

As noted in chapter three, the *Van der Peet* court came closer than any other to introducing a relational, potentially dialogical role in the analysis of Aboriginal rights. Its acknowledgment of the inherency of Aboriginal rights [342] and the critical role that Crown sovereignty plays in the analysis of Aboriginal rights,[343] though novel and without support in jurisprudence or scholarship,[344] and though awkwardly stated, difficult to unpack, and poorly applied by the Court, should invite analysis of the monologue of sovereignty, and a relational approach.

John Borrows has argued that, "Vacuous reasons about section 35(1) reconciling Crown assertions of sovereignty with the fact that Aboriginal peoples were here first, may at the most elementary level qualify as an application of intersocietal law."[345] But if left at the level of

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[342] *Per* Lamer C.J.C.: *Van der Peet, supra* note 252 at 303, para. 30 (emphasis in original).

[343] *Per* Lamer C.J.C.: *Van der Peet, supra* note 252 at 303, para. 31 (emphasis added).

[344] Barsh Henderson, "Ropes of Sand," *supra* note 51 at 997. See also John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1998) Am. Indian L.R. 37 at f.n. 46 (hereinafter "Frozen Rights").

[345] Borrows, "Frozen Rights," *supra* note 344 at 61.

rhetorical statements without substantiation, that is all such statements are — a vacuous starting point. Unfortunately, that is precisely what *Van der Peet* accomplishes, through the monologue of the "authentic Indian," which incorporates two important propositions.

The first is a shift in focus from Aboriginal *laws* and *rights* to Aboriginal *practices*. Such a shift then enables the Court to incorporate a highly problematic notion of culture, which is more bounded, static and acontextual than that employed by Kymlicka, which was criticized in chapter one of this thesis.[346] By shifting focus away from Aboriginal *laws*, and toward Aboriginal *practices*, the process of constructing a particular image of the "authentic Indian" is rendered more possible.

A. Laws and Practices.

The High Court of Australia took a potentially major step toward equalizing the position of First Nations and the colonial state, when it held that Aboriginal title

> has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.[347]

Such dicta could represent an invitation to courts to entertain a *dialogue*, in which Australian law is not only informed by, but also partially *constituted* by the perspectives and law of indigenous peoples. That is, the horizons of significance will be broadened.

I argued in chapter two of this thesis that a focus upon Aboriginal laws also implies a greater measure of Aboriginal *control* over their content, because sovereign peoples have the

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[346]Chapter one, part one, section D.

[347]*Mabo*, *supra* note 295.

right to develop their laws in response to changes in their circumstances.[348] Borrows argues that a focus on Aboriginal laws also, "fans the embers of Aboriginal law and encourages its development as a greater source of authority for Aboriginal and non-Aboriginal Canadians."[349] Put in terms of the theoretical approach of this thesis, a focus on Aboriginal laws has the potential to permit First Nations to control the form and content of their contribution to the intercultural dialogue.

In *Van der Peet*, Lamer C.J. borrowed heavily from *Mabo*, and its holding that Aboriginal law is relevant to the definition of title. Indeed, he even purported to directly apply Brennan J.'s judgement. In so doing, however, he effected a critical "slippage" in language that deflects attention away from Aboriginal *rights* and laws, which are explicitly protected in s. 35(1), toward Aboriginal *practices*. Whereas Brennan J. held that Aboriginal title is defined by reference to traditional laws, the *Van der Peet* Court inexplicably allowed the reference to laws to disappear in *its* formulation of the test. According to the Court, the test for identifying s. 35(1) rights

> must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the *practices, traditions and customs* central to the Aboriginal societies that existed in North America prior to contact with the Europeans.[350]

The reference to Aboriginal *laws* disappeared. Soon thereafter, the court stated that, "in order to be an Aboriginal *right*, an *activity* must be an element of a practice, custom or tradition integral to the distinctive culture of the Aboriginal group claiming the right."[351] The reference to *rights* disappears before our very eyes. These disappearances are crucial, given the argument just made

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[348]In particular, see chapter two, part three, section B ("Legal Pluralism").

[349]Borrows, "Frozen Rights," *supra* note 344 at 62.

[350]*Van der Peet, supra* note 252 at 310, para. 44.

[351]*Van der Peet, supra* note 252 at 310, para 46.

as to the potential that a focus on Aboriginal law has for intercultural dialogue.[352]

By eliminating focus on Aboriginal laws, a valuable medium of intercultural dialogue is not only lost, but the monologue of the "authentic Indian" is *enabled.* By substituting laws and rights with practices, which enjoy less value and status in Western discourse, the monological exercise is rendered easier, because judges are able to characterize the rights without reference to what indigenous peoples themselves are saying. Indeed, as Borrows notes, in *Pamajewon*,[353] which was decided in accordance with the *Van der Peet* test, the indigenous plaintiffs sought to characterize their claim as the *right* to self-government, which arose from unextinguished indigenous *legal* norms. By contrast, the Court recharacterized the subject matter of the dispute as an *activity* — a twentieth century-style commercial lottery of a kind that was never known among Aboriginal peoples prior to contact.[354] Had the Court engaged the claim on the footing that the plaintiffs asserted — a question of legal norms — it would have been forced to at least acknowledge that indigenous legal norms exist and that they are given content by *indigenous values* and *perspectives*.

The focus on practices directly enabled the *Van der Peet* court to employ a highly problematic notion of culture. In chapter one of this thesis, I criticized Will Kymlicka for employing a "tool box" notion of culture, which ignores the fluid, contested, messy nature of

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[352]As shall be discussed in chapter five, Aboriginal laws make somewhat of a reappearance in *Delgamuukw — S.C.C.*, *supra* note 6.

[353]*Pamajewon*, *supra* note 7.

[354]Borrows, "Frozen Rights," *supra* note 344 at 54.

"culture."[355] The *Van der Peet* court similarly de-contextualized culture, treating it like a whole, coherent "thing," rather than a process.

B. *Van der Peet* and Culture.

Recall that the *Van der Peet* test calls for the reconciliation "of the pre-existence of Aboriginal societies with the sovereignty of the Crown."[356] The problem with the Court's formulation is that it defines the "Aboriginal" side of that "equation" in excessively narrow and restrictive terms, that force First Nations to present practices and customs that meet an artificial test of authenticity and connection to "ancient practices." The way the Court did so was to focus on the "pre-existing" aspect of Aboriginal use and occupation of land as not only the *source* of Aboriginal rights, but also as the primary indicator of their *content*. Of Aboriginal rights, Lamer C.J. stated that they, "must be temporally rooted in the *historical* presence — the ancestry — of Aboriginal peoples in North America."[357]

Lamer C.J. relied on the way that leading cases have identified *historic* use and occupation as the *source* of Aboriginal rights to support extending that element into the definition of *content* as well. For instance, although most people rely on *Worcester*[358] for its broad language about indigenous sovereignty *after* the assertion of colonial sovereignty, Lamer C.J. relied on *Worcester*'s discussion of the pre-existing occupation of lands by First Nations,

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[355] See chapter one, Part One, Section D ("Critique of Kymlicka's Formulation") especially section ii ("Minimalist Conceptions of Culture").

[356] *Per* Lamer C.J.: *Van der Peet*, *supra* note 252 at 303 para. 31.

[357] *Van der Peet*, *supra* note 252 at 303, para. 32.

[358] *Worcester*, *supra* note 281

and identified that discussion as "relevant for the identification of the [present] interests that s. 35(1) was intended to protect."[359] In so doing, the Court permitted a double standard which requires First Nations to root their rights to their past practices, while non-indigenous Canadians need not do the same.[360]

Not satisfied with inviting a general discussion as to what is integral to Aboriginal cultures, the court went on to hold that practices, traditions or customs must be more than just "aspects" of an Aboriginal society that claims protection. The Court held that the "claimant must demonstrate that the practice, tradition or custom was a *central* and significant part of the society's distinctive culture. He or she must demonstrate, in other words, that the practice, tradition or custom was one of the things which made the culture of the society distinctive — that it was one of the things that truly *made the society what it was*."[361]

The Court went on to intensify the historical aspect of the test by holding that such proof must refer to an Aboriginal society *prior* to *contact*. Therefore, to reformulate an already difficult and complicated test, it would appear that, to be protected, an existing Aboriginal right must be an activity; that is an element of a practice, tradition or custom; integral and central, not merely incidental to the pre-contact, distinctive culture of the Aboriginal group. If a practice, custom or tradition that arose before contact is, in the view of the court, merely incidental to the "underlying right" (like the trading of fish in *Van der Peet*), then protection does not accrue. Nor would protection accrue to a practice, tradition or custom that is a central, significant, integral

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[359] *Van der Peet, supra* note 252 at 307, para. 37.

[360] Borrows makes the same point: "Frozen Rights," *supra* note 344 at 54.

[361] *Van der Peet, supra* note 252 at 314, para. 55 (emphasis in original); this was affirmed in *Delgamuukw — S.C.C., supra* note 6 at para. 150.

aspect of an Aboriginal culture, but which that arose wholly or partially in response European arrival. This is because the Court held that s. 35(1) does not exist to reconcile post-contact Aboriginal culture with sovereignty, but only pre-contact culture.[362]

C. The Doctrinal Debate Over The Protection of Culture.

When the test is fleshed out in this way, the inescapable conclusion is that what the Court aimed to protect in *Van der Peet* was some particular notion of Aboriginal culture. Indeed, the language and tone of the judgment is very similar to a body of scholarly and judicial support for the idea that the purpose of Aboriginal rights is the protection of some core of Aboriginal identity and cultural integrity.

The notion of using s. 35(1) as a way to protect Aboriginal culture has strong support in the Academy, among scholars such as Michael Asch, Patrick Macklem and Menno Boldt.[363] Each of these individuals is a proponent of Aboriginal rights, and each likely disagrees with the *Van der Peet* test and the way in which it has been applied in cases like *Smokehouse*, *Gladstone* and *Pamajewon*.[364] Theirs is a robust, dynamic, forward thinking conception of Aboriginal identity. However, they explicitly call upon courts to adjudicate aspects of indigenous identity, and in so doing, their work can be misrepresented and used to support a perversion of their approach, as is seen in *Van der Peet*.

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[362]See Borrows's blistering attack on this aspect of the judgement for completely undermining the "intersocietal" approach the Court rhetorically valorized: "Frozen Rights," *supra*, note at 56-58.

[363]See Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty," *supra* note 298 at 514 *ff*; Macklem, "Legal Imagination," *supra* note 266; and Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993).

[364]*Van der Peet*, *supra* note 252; *R.* v. *N.T.C. Smokehouse*, [1996] 2 S.C.R. 672, [1996] 4 C.N.L.R. 65; *Gladstone* v. *The Queen* (1996), 137 D.L.R. (4th) 648 (S.C.C.) (hereinafter *Gladstone*) and *Pamajewon*, *supra* note 7.

Macklem argues that the judiciary has had some success in protecting First Nations from the interference of provincial laws of general application by applying the "Indianness" test, in which courts have held that provincial laws, even if in every other respect valid, may not extend to a certain "core" of Indian identity. Along with Asch, Macklem argues that the very same test should be applied against *federal* legislation, unless the First Nation in question has voluntarily surrendered its sovereignty. Macklem argues that, as the monologue of discovery is a racist doctrine which ought to be repudiated, the federal government cannot rely on it to obtain jurisdiction over Indians and lands reserved for Indians. Thus, he argues that, at best, the Parliament has a right of preemption against the provinces and other nation states when dealing with First Nations. Macklem argues that until First Nations voluntarily give up their sovereignty, all things that implicate "Indianness" should be recognized to fall within First Nations' sphere of self-government. As he puts it, the judiciary can "police the boundary between Canada and First Nation" by extending the doctrine.[365]

Although these scholars are thoughtful and committed advocates of Aboriginal rights, it seems that their approach is problematic and open to two challenges. Theoretically, the ability of anyone to identify anything like a "core" of identity seems problematic, especially when one suggests that such a core, if it could be found, is shared by all people within a given group. And practically, it seems dangerous, especially with cases like *Van der Peet* and *Delgamuukw*,[366] to

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[365]Macklem, "Legal Imagination," *supra* note 266 at 422. See also Asch and Macklem, "Aboriginal Rights and Canadian Sovereignty," *supra* note 298 at 514 *ff*, and Royal Commission on Aboriginal Peoples, *Partners in Confederation: Aboriginal Peoples, Self-Government and the Constitution* (Ottawa: RCAP, 1993). Interestingly, and I would argue incorrectly, Macklem argues that over the history of confederation, the judiciary, particularly the Supreme Court of Canada since 1973, have been natural allies to Aboriginal peoples. I would argue that the analysis in chapter three, part three could be used to dispute that.

[366]*Delgamuukw — Trial*, *supra* note 73.

place Aboriginal identity in the hands of the judiciary. The following critique is aimed primarily at the *Van der Peet* case, and the implication its "integral to the distinctive culture" test has for Aboriginal rights, but some of the criticisms apply to the scholarly position just analyzed.

D. Critiquing *Van der Peet.*

i. Core vs. Periphery.

Both the *Van der Peet* test and the scholarly call for a focus on "Indianness" ask First Nations to present some kind of "authentic" picture to the Court.[367] As Barsh and Henderson argue, the notion of what is "central" or "core" to Aboriginal communities is inescapably subjective to the community in question. Because of this, and because of the fact that any finder of fact within the wider Canadian court system will very likely not be Aboriginal, there is a serious danger that what is most important to a society might be overlooked as "incidental."[368]

This is especially so when it is likely that, with *Van der Peet*'s comments about the difference between "mere" aspects and central aspects, courts will be *looking* for practices to classify as "incidental."[369] Lamer C.J. warned that,"The court cannot look at those aspects of the Aboriginal society that are true to every human society ... nor can it look at those aspects of the

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[367]American courts have grappled, relatively unsuccessfully, with this issue, as has American scholarship. See for instance, *Mashpee Tribe* v. *New Seabury Corp.*, 592 F.2d 575 (1st Circ., 1979) and its voluminous commentary, such as the fascinating account by Clifford, *The Predicament of Culture*, *supra* note 52. See also Jo Carrillo, "Identity as Idiom: Mashpee Reconsidered" (1995) 28 Indiana L.R. 511, Gerald Torres and Kathryn Milun, "Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case" (1990) Duke L.J. 625.

[368]Barsh and Henderson, "Ropes of Sand," *supra* note 51 at 1000. This same criticism is made by Borrows, "Frozen Rights," *supra* note 344 at 56.

[369]*Van der Peet*, *supra* note 252 at 313, para. 55.

Aboriginal society that are only incidental or occasional to that society."[370] Rather, the court should ask itself "whether, without this practice, tradition or custom, the culture in question would be fundamentally altered other than what it is."[371]

I have argued that culture is more akin to a process than a discrete, bounded entity. Thus, such a question, which focuses on one moment, seems highly artificial. A focus on core identity also ignores the fact that not only are such questions inescapably internal to the societies in question, but they are also inescapably *contestable within* such societies. First Nations are every bit as diverse as non-Aboriginal ones. Some value separation and a return to roots, while others desire more contact and integration with the wider Canadian community.[372] Borrows makes the common sense observation that, "different people may entertain different ideas of what is distinctive, specific or central,"[373] and goes on to suggest that, "Canadian courts have not yet come to terms with the fact that, like others, Aboriginal people are traditional, modern and post-modern."[374] Within communities, then, there is likely to be great disagreement as to what constitutes, "practices, traditions and customs, integral to the distinctive culture of" the group.

What this approach also ignores is the criticism that looking for elements that are "central" rather than "incidental" assumes the "independence" of cultural elements. Barsh and

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[370] *Van der Peet, supra* note 252 at 314, para. 56.

[371] *Van der Peet, supra* note 252 at 314, para. 58.

[372] John Borrows, "Negotiating Treaties and Land Claims: The Impact of Diversity Within First Nations Property Interests," (1992) 12 Windsor Yearbook of Access to Justice; indeed, Teresa Nahanee's critique also displayed the influence of and partial desirability of norms and values generated within Canadian society: Nahanee, "Dancing With a Gorilla," *supra* note 64.

[373] Borrows, "Frozen Rights," *supra* note 344 at 56.

[374] Borrows, "Frozen Rights," *supra* note 344 at 63.

Henderson argue that to presume that "cultural elements can exist independently of one another, so that the loss of one element does not compromise the perpetuation or enjoyment of others" is theoretically and empirically fallacious.[375] They challenge whether the Supreme Court would be so bold as to identify what practices, traditions and customs are "integral to the distinctive culture" of Canadians in general.[376] In so doing, Barsh and Henderson identify what I think is most objectionable about the *Van der Peet* approach.

When *Van der Peet* requires some notion of"centrality" and then restricts it to a pre-contact context, it asks First Nations to caricaturize themselves, their communities and their ancestors, and to present some kind of "essentialist" image that accords with the imagination of the judiciary. It becomes clear that an individual First Nations person, fishing for food, will have a much easier time attracting s. 35(1) protection, than will an Indian Band that opens a gambling casino.[377]

Such an approach demonstrates that in the judicial imagination, as in so many other Western intellectual traditions, the indigenous person is "caught" either in a romantic or ignoble image,[378] but one that is frozen in time — despite the Court's protestations that its approach avoids the problem of "frozen rights."[379] Lamer C.J. argued that his reference to allowing

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[375]Barsh and Henderson, "Ropes of Sand," *supra* note 51 at 1000.

[376]Barsh and Henderson, "Ropes of Sand," *supra* note 51 at 1000. Borrows levels a similar challenge: "Frozen Rights," *supra* note 344 at 54.

[377]*Cf Sparrow*, *supra* note 4 with *Pamajewon*, *supra* note 7.

[378]See Berkhoffer, *White Man's Indian*, *supra* note 265.

[379]*Van der Peet*, *supra* note 7 at 316, para. 64. The *Sparrow* Court had held that " 'existing' [in the text of s. 35(1)] suggests that these rights are 'affirmed in a contemporary form rather than in their primeval simplicity and vigour'. Clearly, then, *an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate 'frozen rights' must be rejected.*" *Sparrow*, *supra* note 4 at 397 (emphasis added).

practices, traditions and customs to be the modern manifestation of ancient rights, avoids frozen rights. Yet, as can be seen in *Van der Peet* and *Smokehouse*, the act of selling salmon failed his test. This was on the basis that significant trading of salmon was held not to have begun in the plaintiffs' First Nations until after the fur trade began. Thus, even though undoubtedly pre-fur trade First Nations would have had the *right*, under their own legal systems, to dispose of salmon in accordance with their laws, the Court did not focus on what they were *permitted to do*, but rather, on what they *actually did.*

In so doing, Borrows argues, indigenous understanding of Aboriginal rights, which privileges the *right* and considers the protection of specific practices to be secondary, is reversed.[380] The discussion of Gitksan and Wet'suwet'en law presented in chapter two of this thesis clearly establishes that high chiefs, on behalf of their Houses, have wide discretion, bounded by the dictates of law, to decide to what purposes their territories can and should be put.

It is in these observations that the true effect of the elision from law and rights to practices discussed above can be observed. By turning away from rights and law, courts are able to turn away from indigenous understanding of Aboriginal rights. Put another way, indigenous voices are kept silent, and intercultural conflict is addressed by a monologue generated by non-Aboriginal understanding of what it is that long-gone indigenous people did, and what that meant to them.

Perhaps the most eloquent indictment of an approach which focuses on the dichotomy between traditional and modern rather than on indigenous understanding of their right to engage in a broad spectrum of activities, was made by the lawyers for the Gitksan and Wet'suwet'en:

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[380]Borrows, "Frozen Rights," *supra* note 344 at 63.

> [we] argue that a division between traditional and non-traditional is false and misleading. It is misleading because it implies judgements about Indian life and culture that we would not apply to our own. The application of such a dichotomy denies to "traditional" cultures the right to be modern, to change, to evolve, to progress, and thus consigns these cultures to the past. Gitksan and Wet'suwet'en systems are open and adaptive.[381]

By failing to heed these kinds of concerns, the *Van der Peet* court ignored its own rhetoric regarding the importance of developing an "intersocietal law" which draws on the traditions and perspectives of Aboriginal and non-Aboriginal communities, preferring instead to draw upon stereotypical and problematic images of what "authentic" Indians do, and what they don't.

ii. Contact vs. Sovereignty.

The Court's focus on contact as the relevant time marker is another troubling aspect of *Van der Peet*. The Court's own position is that s. 35(1)'s purpose is to reconcile pre-existing Aboriginal systems with the assertion of *sovereignty*, not the *arrival* of Europeans. Notwithstanding the myriad problems presented by the unproblematic assertion of sovereignty which are canvassed in chapter three of this thesis, it is at least theoretically coherent to imply that an assertion of sovereignty might interfere with indigenous rights. However, to imply that the mere *arrival* of foreigners, and ones who had very little power over indigenous peoples, could impair rights within the indigenous legal regimes seems completely without principle or support.[382] Indeed, historical evidence derived from oral histories and documentary evidence alike demonstrates that, in Gitksan and Wet'suwet'en territory, the fur trade began in the early 1820's, but significant impact on their First Nation and their ability to govern their territories did

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[381] Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 42.

[382] That the mere arrival of non-Aboriginal people in the vicinity of the Nass and Skeena Rivers had little impact on Gitksan and Wet'suwet'en control and regulation of their traditional territories cannot be seriously disputed: Ray, "Men of Property," *supra* note 244.

not occur until decades later.[383]

The arbitrary selection of contact as "the date" also demonstrates the impression of Aboriginal people that the Court is working with: one that is frozen in time, and engaged in "Aboriginal" practices that might evolve, but will not fundamentally change, over time. That is, First Nations may change, for instance, the technology by which they harness the riches of a river (e.g. weirs to seiners), but they cannot change their fundamental ways of living (e.g. damming; opening businesses on the same river).

As Borrows notes, McLachlin J., in dissent in *Van der Peet*, sharply criticized the notion that the arrival of non-Aboriginal peoples could have had any juridical impact on indigenous legal systems and Aboriginal rights to their territories. As she noted,

> Aboriginal rights find their source not in a magic moment of European contact, but in the traditional laws and customs of the Aboriginal people in question ... One finds no mention in the text of s. 35(1) or in the jurisprudence of the moment of European contact as the definitive all-or-nothing time for establishing an Aboriginal right.[384]

Such an approach recognizes the rich and dynamic nature of Aboriginal societies, before, at and after the "moment of contact." It also holds more promise than the majority's approach for meaningful intercultural dialogue and fusing of horizons.

The majority's contact approach denies, as Barsh and Henderson argue, indigenous ability to change that which is "central" to their communities. And as they argue,

> To presume that Aboriginal societies are less dynamic or creative than other cultures, or that they must remain stuck in time in order to remain authentic and deserve to retain their rights, is sociological nonsense recalling the discredited social-Darwinist conception of "primitivity."[385]

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[383]This is corroborated in by Sterrit *et al.*, *supra* note 150, especially chapter two.

[384]*Van der Peet*, *supra* note 252 at 372, para. 247.

[385]Barsh and Henderson, "Ropes of Sand," *supra* note 51 at 1001.

So, under *Van der Peet*, precolonial practices can evolve, but a practice that developed after contact is not "genuine", and therefore falls outside protection.[386]

Following Dworkin, Barsh and Henderson's critique focuses on what they call the jettisoning of "principle" in favour of "evidence."[387] I think that their observation is better characterized as I do above: the Court has jettisoned an analysis of Aboriginal *laws* for an analysis of Aboriginal *practices*.

iii. The Question of Power.

These theoretical objections to the "culture approach" to Aboriginal rights foreshadow the practical danger. While all adjudication is an exercise in interpretation, and vulnerable to the biases and preconceptions of the finder of fact and law, it seems that explicitly *inviting* the judiciary to determine what activities and practices occurred before contact, and what those meant to the communities involved, is really an invitation for the judiciary to define Aboriginal identity. And while there is a cost and a danger to litigating Aboriginal rights before non-Aboriginal tribunals, it seems that an approach which focuses upon identity and culture is more open to the vagaries of interpretation than perhaps the approach of Barsh and Henderson, who see s. 35(1) as a sort of "choice of law" rule.

Further to this observation, Barsh and Henderson criticize the *Van der Peet* approach on the grounds that it will enhance the disadvantage that First Nations already also face at the hands of what Turpel calls the "interpretive monopoly" over the judicial process held by non-

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[386]Barsh and Henderson, "Ropes of Sand," *supra* note 51 at 1001 and Borrows, "Frozen Rights," *supra* note 344 at 54.

[387]Barsh and Henderson, "Ropes of Sand," *supra* note 51 at 1006.

Aboriginal peoples.[388] In an already biased world, inviting non-Aboriginal people to determine central, integral and distinctive characteristics of Aboriginal culture is fraught with danger.[389]

iv. Conclusions.

Thus, in an ironic way, while the new focus upon First Nations, their practices, and what those practices meant to the First Nations involved initially appears to be an exercise in intercultural understanding, it actually settles back into being another monologue, driven by stereotyped and frozen images of what "Indian" means and by expectations that such an image can be universally developed. Throughout this thesis I have argued that *true* dialogue, which is a *necessary prerequisite* to intercultural understanding, requires that both participants be able to speak in their own "language," and be able to present their own horizons of understanding.

A focus on Aboriginal laws, given *by* Aboriginal legal experts *in their own ways* is a promising route, given that communities like the Gitksan and Wet'suwet'en already have established legal systems which articulate their most important philosophies and norms, *in their own way of knowing*. Even that observation must be qualified by the interpretive danger that comes with a "foreign" tribunal giving the final word on what the content of such legal systems are. Additionally, there is the problem referred to in chapter two,[390] of Aboriginal elites dominating the process. But, with a sufficient degree of autonomy for First Nations, at least they can contest those issues within the structures and institutions that they themselves have

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[388]Turpel, "Interpretive Monopolies," *supra* note 141.

[389]Barsh and Henderson, "Ropes of Sand," *supra* note 51 at 1002.

[390]Chapter two, part I Section (B)(ii) ("Scope of the Description").

developed, such as the Feast, and the *adaawk* and *kungax*.

What emerges from the monologues of discovery, sovereignty and the "authentic Indian" in chapters three and four, is the profound power imbalance between First Nations and the non-indigenous state. This is accomplished through a variety of monological strategies, such that, even when the courts acknowledge and apply inherent Aboriginal rights, First Nations are still marginalized and subjugated.[391] As Macklem notes, attempts to strengthen Aboriginal rights are unsatisfactory when they do not question the underlying hierarchy and the absence of meaningful indigenous voices in the intercultural dialogue.[392] No matter what amelioration courts do bring, the problematic possibilities of extinguishment, infringement and narrow characterization of Aboriginal rights persist.

Part Two — From the General to the Specific: *Delgamuukw*.

In chapter one of this thesis I adopted the argument of James Tully that modernist legal and philosophical analysis is consumed by a "craving for generality" in which the lessons, insights and complications of actual experience are sacrificed to the cleanness and coherence of theory.[393] In chapters three and four, I have argued from a point of relative generality, punctuated by examples, that the mainstream development of Canadian law in the area of Aboriginal rights

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[391]Indigenous marginalization is of course not limited to a discursive aspect — the material power imbalance is profound and notorious.

[392]Macklem, "Legal Imagination," *supra* note 266 at 410.

[393]Of course, major bodies of theory, such as post-modernism, post-structuralism and feminist theory, criticize such a craving and do not themselves strive for such.

has been marked by a failure to extend recognition[394] from the colonial state and its "knowledge community" to First Nations and their distinctive knowledge and ways of knowing. I have argued that this has been achieved through at least three different monologues of Canadian law: discovery, sovereignty and the "authentic Indian."

In this section I move from these general propositions to a more concrete example, in which some of the themes played out above emerge. In particular, I will demonstrate that the trial court in *Delgamuukw*[395] employed a strictly monological approach in which recognition of the Gitksan and Wet'suwet'en, and their unique political and legal structures and institutions was withheld, producing a case of grievous *mis*recognition in which intercultural understanding was frustrated. Indeed, elements of all three monologues are present and interact in this judgement, which is notable, given that the Gitksan and Wet'suwet'en went to Court *seeking* an intercultural *dialogue* in order to attain the expanded horizons that I describe and call for in chapter one of this thesis. However, as noted in the Introduction to this chapter, I don't believe that *Delgamuukw* represents an *exceptional* example. Indeed, I think that is rather representative.

In this section I will analyze *Delgamuukw* from a perspective that draws explicitly on the analysis of Taylor's work developed in chapter one of this thesis. In particular, I will assess how successfully the court engaged in the kind of intercultural "journey" I described there. To reiterate, it was argued that in order to seriously address intercultural conflict, it is necessary

> to move in a broader horizon, within which what we have formerly taken for granted as the

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[394] Again, it should be stressed that I work with a specialized definition of recognition, which valorizes intercultural understanding as the best way to address intercultural conflict. Intercultural understanding comes from a serious attempt to understand what the other cultural interlocutor is saying, and to recognize the value of such claims not only with respect to that interlocutor, but to ourselves, too.

[395] *Delgamuukw — Trial, supra* note 73.

> background to valuation can be situated as one possibility alongside the different background of the formerly unfamiliar culture. The 'fusion of horizons' operates through our developing new vocabularies of comparison, by means of which we can articulate these contrasts ... *We have reached the judgement partly through transforming our standards.*[396]

In chapter one of this thesis I argued that this requires two criteria: first is a *willingness* on the part of one participant in the dialogue to accept the possibility of the other's presenting a value system that might be as legitimate as the first participant's own. This requires a willingness to open one's world view to the influence of the other. The second criterion is the "hybrid result" — the more successful the "journey", the more likely it will be that the final conclusion will owe itself to the understanding of *both* knowledge communities. The two criteria are integrally linked, because if the initial willingness is absent, the subsequent "hybrid result" is unlikely.[397] The best one can hope for is perhaps what Oman described as "overlapping consensus."[398]

The reader will notice that in this section, there is very little analysis of the second criterion, that of the hybrid result. That is because, as shall be demonstrated, the trial judge in *Delgamuukw* was unwilling, or unable, to make the initial "journey." Thus, analysis of the second criterion will have to await chapter five's analysis of the Supreme Court of Canada's treatment of *Delgamuukw*.

A. The Intercultural Journey.

i. The Gitksan and Wet'suwet'en.

The first and most obvious way the initial willingness to engage the other and to open

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[396]Taylor, "The Politics of Recognition," *supra* note 40 at 67 (emphasis added).

[397]For a fuller discussion: chapter one, part two, section B ("Intercultural Communication and Understanding").

[398]Oman, *Sharing Horizons*, *supra* note 1 at 162.

one's self and world view to that of the other is to address the way in which indigenous peoples have considered non-indigenous knowledge and ways of knowing in their attempts to address intercultural conflict. Then, we need to assess the way in which non-indigenous *courts* have considered First Nations knowledge and ways of knowing.

That is, have the courts made a true attempt to understand the knowledge community that First Nations present? It is not enough to approach First Nations knowledge, traditions, laws, customs and "perspectives" as "gaps" to be "filled." As Mary Ellen Turpel has argued,

> The perception of difference as an imperative which may loosen or shift the paradigm of knowledge, rather than a cognitive gap to be filled [is what is necessary] ... Sensitivity to cultural difference is sensitivity to the limitation of the capacity to know ... [so that] experiencing difference ... is identifying an imperative that changes the "very nature of what I think I know."[399]

Put quite simply, a genuine attempt must be made to meet the other knowledge community on its own terms, to appreciate First Nations knowledge and the *way they know* it.

Natalie Oman argues that since 1977, the Gitksan and Wet'suwet'en have been engaged in a complex process of resistance and accommodation, in which they have advanced their claims to territory and self-governance by reference both to their own legal systems as represented in the *adaawk* and *kungax*, as well as advancing their claims within the framework of Canadian law and politics. In short, they have sought an intercultural dialogue by speaking within the framework of their own laws, *and* those of the Canadian state.[400]

They did so by attempting a three-level cultural translation: through the evidence of chiefs and elders, given orally and in their own language; through a team of specially-trained linguistic translators; and through expert witnesses "to act as a human bridge between the two worldviews

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[399]Turpel, "Interpretive Monopolies," *supra* note 141 at 13 and 25.

[400]Oman, *Sharing Horizons*, *supra* note 1 at especially chapter four.

at play in the case."[401] As such, the trial judge was "treated" to a dialogical, intercultural setting. However, his rejection of evidence and indigenous legal principles, especially those contained in the *adaawk* and *kungax*, actually produced results which would be expected in a monological setting.

ii. The Colonial State.

One of the best ways to assess whether courts have been ready to meet indigenous peoples in this kind of intercultural exercise is to look at their treatment of oral traditions, histories and ways of knowing. And to do that, one need go no further than to compare the *Delgamuukw* trial to its appeal[402] in order to examine the two extremes. The treatment of oral traditions, histories and knowledge in the law of evidence presents one of the most serious barriers to First Nations' ability to pursue claims to rights and territory in a way that is comprehensible to the communities themselves. That is, First Nations make their claims because of the dictates of indigenous law, but the unwillingness of non-indigenous courts to receive and understand their ways of both expressing and understanding that law is a major impediment to the claim itself.

It must be understood that oral traditions do not only present an empirical difficulty to a knowledge community unfamiliar with the oral medium, but also that for many First Nations, the fundamental, metaphysical, cognitive *way of knowing* is intimately bound up in oral expression and understanding. Thus, when a non-indigenous court rejects the admissibility, veracity or

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[401]Oman, *Sharing Horizons*, *supra* note 1 at 143.

[402]Which shall be analyzed in chapter five.

importance of official, sacred, ancient knowledge such as the *adaawk* or *kungax*, because it is known and expressed through oral tradition, there is a "grievous *mis*recognition" whose source lies not in a principled rejection, but an unwillingness to learn.

The effects of misrecognition are not hard to identify. In the wake of McEachern C.J.'s blanket rejection of the *adaawk* and *kungax*, reaction was swift and emotional. Gitksan hereditary chief Muluulak (Alice Jeffrey) remarked when the trial decision came down, that, "I cannot say anything except that we were devastated. To be so thoroughly devastated and told that you don't exist is a hard thing to take."[403] Yalgalahl (Dora Wilson) expressed herself as a witness and as someone who respects her elders and chiefs:

> The spirits of our grandfathers and our grandmothers were on our shoulders, and we were there speaking on their behalf because they are the ones that taught us that this our land. There were a lot of times where I just felt like screaming, "Hey, you're wrong. How dare you say this? How dare you do this? How dare you be disrespectful of my elder sitting in this witness stand? How dare you speak to her that way? How dare you speak to him that way?[404]

Indeed, had the plaintiffs known that there would be such a disrespectful dismissal of their knowledge, they would never have presented it. One elder from Bella Coola said she would rather have her stories die than tell them to someone who was not ready to hear.[405] Herb George also expressed his anger at the way in which the stories were treated: "We view this judgement for what it was — a denial and a huge misunderstanding and ignorance of the First Nations

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[403]Muluulak (Alice Jeffrey), "Remove Not the Landmark" in Frank Cassidy, ed., *Aboriginal Title in British Columbia:* Delgamuukw *v.* The Queen (Lantzville, B.C.: Oolichan Books and The Institute for Research on Public Policy, 1992) 58 at 60.

[404]Yagalahl (Dora Wilson) "It Will Always Be the Truth" in Frank Cassidy, ed., *Aboriginal Title in British Columbia:* Delgamuukw *v.* The Queen (Lantzville, B.C.: Oolichan Books and The Institute for Research on Public Policy, 1992) 199 at 201. She elaborates on these feelings in "Time of Trial: The Gitksan and Wet'suwet'en in Court" (1992) 95 B.C. Studies 7 at 10-11, in which she discusses the pain that the Gitksan and Wet'suwet'en communities felt upon the dismissal of the *Delgamuukw* action at trial, and the trial judge's derogatory words about the ancestors of the Gitksan and Wet'suwet'en and their *adaawk* and *kungax*, discussed below.

[405]Leslie Hall Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991) at 9 (hereinafter *Carriers of No*).

across this country. It is a failure to recognize the First Nations of this country for what they are and who they are — the First Nations of this land, the owners of this land."[406]

B. Literate vs. Oral.

One source of non-indigenous resistance to recognition lies is the emphasis that courts place on literate over oral texts in proving claims. Clifford argues that non-indigenous culture evinces a clear privilege of written "fact" over oral "claim". Clifford argues that

> The distinction between historical and ethnographic practices depends on that between literate and oral modes of knowledge. History is thought to rest on past — documentary, archival — selections of texts. Ethnography is based on present — oral, experiential, observational — evidence. ... [This distinction] resonates with the established (some would say metaphysical) dichotomy of oral and literate worlds ...[407]

Clifford recounts his fascinating observations and analysis of the Mashpee trial, in which the Mashpee had to prove that it was a tribe before litigating a land claim. He demonstrates how the written word prevailed over the spoken in that trial, as the courtroom theatrics and testimony of elders and chiefs gave way to the dry recitation of "history" by the defendants' expert witness.[408]

Clifford is not alone in identifying this dichotomy. Clay McLeod argues that literate forms of knowledge are weapons used to devalue and undermine oral forms of knowledge. Looking at *MacMillan Bloedel* as a representative example, McLeod quotes the court's statement that MacMillan Bloedel sent a crew of workers to Meares Island, "*armed* with all the necessary *pieces of paper* in the form of title and tenure documents, permits, licences and other

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[406]Herb George (Satsan), "The Fire Within Us" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v.* The Queen (Lantzville, B.C.: Oolichan Books and The Institute for Research on Public Policy, 1992) 53 at 56.

[407]Clifford, *The Predicament of Culture*, *supra* note 52 at 340-341.

[408]Clifford, *Predicament*, *supra* note 52 at 339. The Mashpee were unsuccessful.

authorizations and approvals."[409]

Ridington and Brody also argue that the litigation system misrecognizes oral culture, by consistently favouring literate over oral text. They address the *Blueberry River* case, in which the Band sued the federal government for breach of fiduciary duty in transferring ownership of I.R. 172, which the nation calls "the Place Where Happiness Dwells." The transaction cost the Band hundreds of millions of dollars in lost oil revenues. They detail ways in which the oral evidence and the witnesses, mostly elders, were disrespected and marginalized. Brody observes that:

> The judge represents the world to whom the elders have to tell of their claim. Elders who are interrupted, not only by the judge's manner, but also by the lawyers for the Crown. Elders whom I'm sure have never been interrupted ... when telling these stories, being interrupted every second sentence. The interpreter struggling to make sense of what's being said. An atmosphere in which nothing can stand as a fact, and yet the people speaking in the court believing in facts more, perhaps, than any other peoples in the world, peoples for whom truth has always been objective, constantly being accused of untruthfulness either directly or in implication.[410]

Brody goes on to add that:

> The elders sensed that they were being played with [in this game of courtroom strategy], and they might come to the conclusion that they're being mistrusted, disliked, doubted by the cross-examining lawyer. And that will, in fact, cause them to fall silent and that happened several times in the case that if somebody doesn't believe what you're saying, you shut up. That's the dignified thing to do.[411]

The trial judge, Addy J., had the following to say about the witnesses' veracity:

> I am forced to the conclusion that their testimony was founded (and, in most cases, perhaps unconsciously) on the fact that oil was discovered on the reserve some thirty years later, rather than on a true recollection and description of what actually took place at, and previous to, the surrender

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[409] *MacMillan Bloedel* v. *Mullin*, [1985] 2 C.N.L.R. 26 at 31 (B.C. S.C.) (emphasis added). Quoted in Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30 Alta. L. Rev. 1276 at 1280 (hereinafter "The Oral Histories of Canada's Northern People").

[410] *Blueberry River Indian Band* v. *Canada (Department of Indian Affairs and Northern Development)* (1987), 14 F.T.R. 161, [1988] 1 C.N.L.R. 73 (T.D.) discussed in Robin Ridington, "Cultures in Conflict: The Problem of Discourse" in W.H. New, ed., *Native Writers and Canadian Writing: Canadian Literature Special Issue* (Vancouver: UBC Press, 1991) 273 at 284. A review of the transcript evidence in *Delgamuukw*, some of which was canvassed in chapter two, reveals much the same process.

[411] Ridington, "Cultures in Conflict", *supra* note 410 at 286.

> meeting in 1945. It is perhaps a case of the wish being father to the thought.[412]

McLeod argues that common rules of evidence, such as the rule against hearsay, the best evidence rule, the parole evidence rule, and the distinction between admissibility and weight conspire to render oral histories inadmissible, notwithstanding the trustworthiness they attain through the kinds of "triangulation" discussed in chapter two.[413]

Like Ridington, McLeod argues that such a bias in favour of written over oral "truth", as it were, reflects a deeply ethnocentric obstacle to the ability of cultures to communicate. He echoes the insights of Wittgenstein, Bakhtin, Heidegger, Geertz and Taylor, which were canvassed in chapter one of this thesis in noting that

> Humans do not just copy and transmit information in the way that one computer communicates with another. Human communication also creates a point of view or a context within which information becomes imbued with meaning. Human communication is a cultural accomplishment and a means of defining cultural identity ... Through our discourse with one another we negotiate a world in which we can understand our differences. Discourse establishes the syntax we use to create meaning and comprehension. It uses metaphors that layer one set of meanings on top of another for synergistic effect. Two speakers, or two cultures, are more than the sum of their parts. Discourse is only a problem when we talk past one another *or, worse, use talk to suppress another person's ability to express himself or herself freely.*[414]

What Ridington expresses, of course, is a *dialogical* understanding of this kind of process. In his understanding, it is self-evident that two "conversationalists" will have different perspectives, each of which must be respected and understood.

C. *Delgamuukw.*

The observations of Clifford about *Mashpee*, McLeod generally, and Brody and

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[412]Quoted in Ridington, "Cultures in Conflict", *supra* note 410 at 274.

[413]See McLeod, "The Oral Histories of Canada's Northern People", *supra* note409 especially at 1281-1283.

[414]Ridington, "Cultures in Conflict", *supra* note 410 at 275 & 276 (emphasis added).

Ridington about *Blueberry River* all bear striking resemblance to *Delgamuukw*, where, after hearing dozens of Aboriginal witnesses describe and explain the *adaawk* and *kungax*, in their own and in their "translated" voices, and after having had the benefit of the plaintiffs' expert anthropologists, all of whom were highly regarded in their field,[415] the trial judge nonetheless declared that he was fundamentally unpersuaded. Indeed, McEachern C.J. went further to say that he assigned the *adaawk* and *kungax* no weight.[416]

Instead, the trial judge preferred the records of Hudson Bay trader William Brown which contained derogatory comments about the plaintiffs' ancestors, which the trial judge picked up in his own highly problematic characterization of the plaintiffs' ancestors.[417] Brown's records also had very little in them that tended to corroborate the plaintiffs' claims as to the Feast or their land tenure system. Contrasting them to the testimony of the witnesses and the experts, which will be discussed shortly, the trial judge betrayed his preference for written evidence, stating that Brown's records "provided much useful information *with minimal editorial comment* ... [They represented] marvelous collections [which] largely spoke for themselves."[418]

The trial judge related Brown's antipathy toward the plaintiffs' ancestors: he "held them in no high esteem, partly because of their addiction to gambling."[419] McEachern C.J. also relied

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[415]See the discussion of the anthropologists' qualifications in Culhane, *The Pleasure of the Crown*, *supra* note 165.

[416]*Delgamuukw — Trial*, *supra* note 73 at 204.

[417]See for instance the connection between Brown's journals and the trial judge's findings as to Gitksan and Wet'suwet'en levels of social sophistication: *Delgamuukw — trial*, *supra* note 73 at 202. According to McEachern C.J., the plaintiffs' ancestors had an unstable social system, were warlike and "disobedient."

[418]*Delgamuukw — trial*, *supra* note 73 at 172 (emphasis added). On appeal, the Supreme Court went a substantial distance to correcting this problem, which shall be discussed in chapter five.

[419]*Delgamuukw — trial*, *supra* note 73 at 201.

on Brown's failure to mention Houses among the Gitksan to conclude that the House system is a recent development. McEachern C.J. was "left in considerable doubt about the antiquity of the house system."[420] He never considered the likelihood of nineteenth century First Nations, knowing that a white trader held them in "no high esteem," even sharing information as to their social structure or land tenure system.

McEachern C.J.'s characterization of the documentary evidence has been sharply criticized by historians who caution that there is no such thing as historical records which "speak for themselves". Instead, all historical data must be properly contextualized, so that the reader can better understand who the author was, why she was writing, and how her characterizations might be challenged.[421] Indeed, there is a particular problem with historical records in the context of assessing the history of First Nations and their rights to land and resources. More often than not, observations contained in primary sources from the era in question were written by traders, missionaries and others who were not sensitive to First Nations perspectives or values, or who were even outrightly hostile towards First Nations.[422]

In contrast to the documentary record, McEachern C.J. assigned little or no weight either to oral evidence, or evidence that was derived from oral communication (the experts). The primary form of evidence given by the Gitksan and Wet'suwet'en was through the *adaawk* and *kungax*, which, as demonstrated in chapter two of this thesis, constitutes for both First Nations

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[420] *Delgamuukw — trial*, *supra* note 73 at 203.

[421] See Robin Fisher, "Judging History: Reflections on the Reasons for Judgement in *Delgamuukw* v. *B.C.*" (1992) 95 B.C. Studies 43 at 46.

[422] See for instance RCAP, "Women's Perspectives," in *Report of the Royal Commission on Aboriginal Peoples, Vol IV: Perspectives and Realities* 7 at 18.

their "official" histories, as well as their most important laws. Although he initially ruled the *adaawk* and *kungax* admissible into evidence, the trial judge ultimately assigned them no weight, opining that they were not reliable.[423] He held that the defendants had raised "serious doubts about the reliability of the *adaawk* and *kungax* as evidence of detailed history, or land ownership, use or occupation."[424] In his description of what he found to be the flaws in the oral traditions, McEachern C.J. demonstrated his desire to treat them the same way one might treat written sources — subjecting them to similar standards of consistency and internal coherence.

This ignores much of the vast literature on oral traditions, some of which was canvassed in chapter two of this thesis. For instance, Sharon Venne tells us that the oral history of a people is spread out among many elders, such that no one person knows the "whole story"; instead, it is only when each elder tells her or his story that one can begin to build a more comprehensive account.[425] A very similar understanding exists with respect to the Gitksan and Wet'suwet'en.[426]

Explaining stories and the function they play in First Nations societies, John Borrows observes that

> Such stories change, but the truth is not lost. Modification recognizes that context is always changing, requiring a constant reinterpretation of many of the account's elements. While the timeless components of the story survive as the important background for the central story, its ancient principles are mixed with the contemporary setting and with the specific needs of the listeners.[427]

Dell Hymes makes a similar point when she notes that, "The paradox of the myths, indeed, is that

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[423] *Delgamuukw — trial*, *supra* note 73 at 204.

[424] The Chief Justice lists his objections: *Delgamuukw — trial*, *supra* note 73 at 179-182.

[425] Venne, "Understanding Treaty 6: An Indigenous Perspective," *supra* note 203 at 176 *ff.*

[426] Wa and Uukw, *The Spirit in the Land*, *supra* note 83 at 39. Indeed, for the Gitksan and Wet'suwet'en, for one chief to speak of the histories or places that belong to someone else is considered akin to a trespass upon that other person (at 39).

[427] Borrows, "With or Without You," *supra* note 227 at 648.

they vary so much, yet in principle are passed on unchanged."[428] The observation is borne out by reference to the way in which the *adaawk* of the Seeley Lake *Medeek* is told with different details, depending upon who tells the story.

Recall from Antgulilibix (Mary Johnson)[429] that the Grizzly rumbled down Stekyooden Mountain; yet in Ken Harris's account, the giant Grizzly lives *in* Seeley Lake and emerges from that lake to attack the offending Gitksan. This variation in detail might seem rather significant, when it is recalled that the plaintiffs used the former version to prove their presence at the site at the time of a great landslide. However, when one realizes that the *purpose of the story* was to lay down a fundamental tenet of Gitksan law concerning the proper treatment of the animal world, one can see that, as Borrows and Hymes argue, detail can change, but the essence remains.

Indeed, it may be that the stories do *not* actually contradict one another in detail. Recall Venne's observation that different story holders tell different aspects of the grand story, and that one must hear many stories from many tellers to learn the comprehensive narrative. It could be that the narrative that Harris tells "fills in" a gap of the narrative told at trial. That is, at trial, the Grizzly came down the Mountain and *through* the Lake, with little mention of the Grizzly's activities there; Harris might be "filling in" those details. In this way, indigenous oral traditions are explicitly *dialogical*, in that they do not purport, as monologues do, to tell the whole story.

James Tully also picks up on a common problem that not only courts, but others "schooled" in non-Aboriginal, scientific-oriented knowledge traditions might encounter when dealing with the stories of First Nations communities. That is the lack of explicit explanation

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[428]Hymes, "Mythology," *supra* note 175 at 597.

[429]"Transcript Evidence," Antgulilibix (Mary Johnson), May 27, 1987 (Volume 11) (pages 667 *ff*).

within the stories themselves. Unlike the "stories" of the common law, which usually contain both the narrative and the "rule", the Aboriginal teller typically "refuses to provide answers to the questions raised by her story. This would defeat the didactic purpose of storytelling, which is not to set out categorical imperatives but to develop the listeners' ability to think for themselves.[430]

Indeed, most commentators agree that the important knowledge contained in oral traditions does not sit, ready-made, for anyone to pick up and apply to any situation. In order to understand them, one needs familiarity with the myriad of stories, as well as the surrounding context, so that the meaning of each can be better understood.[431] This is not so different from the Common law. James Zion observes that the Common law claims to be a codification of the customs of the English Peoples, and that it consists of their myths and values, which makes its function very similar to that of oral stories and traditions in First Nations communities.[432] Everyone expects that it takes years of training to contextualize the "stories" of the Common law; yet, in the trial of *Delgamuukw*, the trial judge unproblematically assumed that the *adaawk* and *kungax* were incoherent.[433]

The trial judge displayed similar "blinders" with respect to the expert evidence. Antonia Mills and Richard Daly, who testified for the plaintiffs, are both highly regarded anthropologists and acted as a bridge of understanding with respect to many basic concepts such as the feast, the

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[430]Tully, *Strange Multiplicity*, *supra* note 87 at 32.

[431]Borrows, "With or Without You", *supra* note 227 at f.n. 110.

[432]Zion, "Indian Common Law," *supra* note 230 at 124.

[433]Borrows also notes that study in the Common law takes years of training and practice, and argues that the same is true for First Nations legal systems: "With or Without You". Zion makes a similar argument and goes further to advise non-Indigenous researchers as to how they can become "ethnojurists": "Searching For Indian Common Law," *supra* note 230 at 139-140.

clan and House systems, and some rudiments of Gitksan and Wet'suwet'en land tenure. They came by their knowledge in an explicitly dialogical fashion by speaking with members of Gitksan and Wet'suwet'en communities, and by validating conclusions with the experts.[434]

The trial judge held that their contributions were rendered suspect by the fact that the experts had lived with the plaintiffs for a period of several years after the commencement of the litigation.[435] He also had difficulty understanding Daly's report, which described the rudiments of Gitksan social and legal structure, and apparently decided to give up.[436]

In an anecdotal episode emblematic of McEachern C.J.'s difficulty with oral evidence, we learn that Gitksan elder Antgulilibix (Mary Johnson) gave some of her evidence by singing a "dirge" (mourning) song from her *adaawk*, in order to tell the story of the sacrifice that a grouse made to allow two Gitksan sisters to live in a time of great starvation. The song was sung in order to demonstrate both Gitksan connection to the animal world; and to demonstrate Gitksan historical connection to the site where the event happened in time immemorial. Before Mrs. Johnson was able to begin singing, McEachern C.J. objected. He proposed instead that the lyrics be *written down* and then entered into the trial record, stating that, "To have witnesses singing songs in court is not the proper way to approach this problem." He went on to protest that it would be useless to sing, owing to his "tin ear."[437] In this little vignette the trial judge demonstrated his difficulty with the very *form* of the evidence, to say nothing of its substance.

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[434]See, generally, Mills, *Eagle Down*, *supra* note 150 at 12 for her understanding of what her role was.

[435]*Delgamuukw — trial*, *supra* note 73 at 171-172.

[436]*Delgamuukw — trial*, *supra* note 73 at 171.

[437]Pinder, *The Carriers of No*, *supra* note 405 at 6-7. The entire exchange can be found in "Transcript Evidence," Antgulilibix (Mary Johnson) May 27, 1987 (Volume 11) (pages 669 *ff*).

By contrast, McEachern C.J. had little difficulty trouble accepting evidence from Crown anthropologist Sheila Robinson, who had never once spoke with anyone from the plaintiffs' communities. Rather, Robinson conducted what she termed an extensive review of the anthropological literature, in particular Marius Barbeau. Others have criticized the trial judge's reliance on her testimony, along with her flimsy qualifications in comparison to the plaintiffs' experts,[438] as nonsensical given her lack of contact with the people about whom she made claims. I would suggest that it might have been *because* of that lack of contact.

For McEachern C.J., Robinson's testimony was "untainted" by interest or "presentism"; her sources, who included not only Barbeau, but also Brown, essentially "spoke for themselves", so to speak. As such, it is abundantly clear that the trial judge displayed a deep problem accepting and understanding oral evidence, and that he preferred written evidence, implying that it was somehow more reliable. In this way, the trial judge revealed the deep metaphysical assumptions of non-indigenous culture as to the superiority and reliability of written over oral evidence, and betrayed the preference of modernist theory for the general over the specific.

At the end of *Delgamuukw*, which was one of the longest trials in Canadian history, the trial judge dismissed the plaintiffs' claim and virtually all of the remedies and declarations they sought. After hearing the most detailed explanation of their history and laws that First Nations has ever given, he stated that "although the Aboriginal laws which [the plaintiffs] recognize could be relevant on some issues, I must decide this case only according to what they call 'white man's law ...' "[439] Such a sentiment is blatantly monological, and flies in the face of the

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[438]See the excellent and well-considered critique by Culhane,"Insult to Injury," *supra* note 173 at 74 *ff* and Dara Culhane, *The Pleasure of the Crown*, *supra* note 165.

[439]*Delgamuukw — Trial*, *supra* note 73 at 118.

"intersocietal" approach which the Supreme Court of Canada has called for.

McEachern C.J. found the *adaawk* and *kungax* to be totally unreliable,[440] and said of the plaintiffs' ancestors, whose history constitutes most of the *adaawk* and *kungax* that, "the Indians of the territory were, by historical standards, a primitive people without any form of writing, horses, or wheeled wagons."[441] As such, he demonstrated Jennifer Nedelsky's observation that it is not enough to simply *expose* people to diversity; it must be accompanied by the *willingness* described in this thesis to broaden horizons.[442] By failing to even *attempt* the intercultural journey, McEachern C.J. accomplished an act of almost total *mis*recognition, with a result that he commanded no moral authority with the Gitksan and Wet'suwet'en.

Part Three — Conclusions.

Chapters three and four have illustrated various monologues, such as discovery, sovereignty and the "authentic Indian", as well as the way in which courts like *Delgamuukw* deploy an entirely monological approach, whose effect is to marginalize and subjugate First Nations by silencing their voices. Each monologue enables the other in subtle ways. Discovery permits the assertion of a peculiarly total sovereignty, which permits the extinguishment and infringement of Aboriginal rights without their consent. Age-old stereotypes combine with an unquestioned belief in the "seniority" of colonial over indigenous laws to enable both the erasure of Aboriginal legal systems in favour of discrete practices, and the construction of static,

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[440] *Delgamuukw — Trial*, *supra* note 73 at 204.

[441] *Delgamuukw — Trial*, *supra* note 73 at 141.

[442] Nedelsky, "Embodied Diversity," *supra* note 134 at 108.

anachronistic images of the "authentic Indian."

The McEachern judgement demonstrates that, in subtle ways, each of the three monologues described in chapters three and four still exist and interact to produce discrete monologues such as the story of Delgam Uukw's fight with the Queen.[443] The judgement featured offensive characterizations of the plaintiffs' ancestors; blatant favouring of "white man's law" over that of the Gitksan and Wet'suwet'en; the conclusion that their rights had been extinguished by the mere proclamation of a far-away Governor; and the conclusion that any existing rights were tantamount to a right to wander and forage. Indeed, the influence of the monologues of discovery, sovereignty and the "authentic Indian" are impossible to miss.

Patrick Macklem argues that First Nations peoples *did not* voluntarily cede their sovereignty, and that continuing a regime that ignores their lack of consent relies on the unacceptable monologue of discovery.[444] Innovatively, he argues that, due to s. 35(1), Canadian courts can no longer "hide" behind the monologues outlined in these chapters. Rather, Macklem argues that s. 35(1) calls upon courts to assess the monologue of discovery and the assertion of sovereignty, because the content of Aboriginal rights is directly dependent upon such an assessment. He argues that blind acceptance of the assertion of sovereignty would "concede [the courts'] status as passive instruments of colonial rule."[445]

This conclusion can only be strengthened by the announced purpose behind s. 35(1), that it exists to effect the reconciliation of prior occupation with the assertion of Crown sovereignty.

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[443]Known formally as *Delgamuukw* v. *British* Columbia. The same story is undoubtedly now part of both the *adaawk* and *kungax*, and undoubtedly "reads" much differently from the version in the D.L.R.'s.

[444]Macklem, "Legal Imagination," *supra* note 266 at 418.

[445]Macklem, "Legal Imagination," *supra* note 266 at 451-452.

Given this context, Macklem calls on the judiciary to, "... construct principles that accept that native people did not surrender their sovereignty or pre-existing forms of government by the mere fact of European settlement."[446]

A true reconciliation of Aboriginal and Canadian legal systems does not entail the overwhelming and subsuming of one system by the other. Instead, it implies the coming together of the two on an equal footing, and a creation of common ground between them, equally informed by the values of each.[447] As long as the monologues continue, however, and the voices of First Nations remain silenced, First Nations will do all the conceding.

In chapter five I will argue that there *are* instances in which Canadian courts open themselves to dialogue and broadened horizons. Building on that possibility, I will analyze the appeal of *Delgamuukw*, and demonstrate that it contains elements of *both* dialogue *and* monologue, in its treatment of oral evidence, and its discussion of the content of Aboriginal title. Following that, I will conclude with a call for the law to recognize and embrace the potential contribution that Aboriginal legal systems make, not only to a more just approach to First Nations, but also to the broadening of non-Aboriginal understandings of themselves and their own laws.

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[446]Macklem, "Legal Imagination," *supra* note 266 at 418.

[447]Borrows makes the very same observation, and calls for "concession" on both sides: "Frozen Rights," *supra* note 344 at 59.

Chapter Five
Venturing Into the Middle Ground: *Delgamuukw* and Beyond

> ***"If I perceive my ignorance as a gap in knowledge instead of an imperative that changes the very nature of what I think I know, then I do not truly experience my ignorance. The surprise of otherness is that moment when a new form of ignorance is suddenly activated as an imperative."***
>
> **Barbara Johnson, quoted by Mary Ellen Turpel**

Part One — Introduction.

In chapter one of this thesis, I developed philosophical and moral arguments for an intercultural approach to Aboriginal rights marked by certain features, such as a dialogical, as opposed to monological, perspective; an emphasis on recognition; and the deployment of "perspicuous contrast." I have argued that this can be accomplished through the meeting of two related criteria: the *willingness* to undertake a "journey" in which "horizons of understanding" are broadened to include values and norms from more than one cultural group; and a "hybrid result" which would consist in norms, understanding, judgement or whatever, which are generated from the background of those broadened horizons of understanding.

Importantly, what this process entails is a *transformation* of our very selves. We start from a position and subjectivity that is learned, contested and defined largely from within our own cultural traditions, and deeply influenced by our position (such as race, gender and sexuality) within our immediate and broader communities. As such, the perspective with which we start is *culturally constructed* and deeply contingent. The intercultural journey called for here requires us to open our minds to the possibility that other cultures have a set of values, norms and understandings about themselves and the world that might offer us a new perspective on those

others, on the world itself, and perhaps most importantly, on ourselves.[448]

Natalie Oman sets out a continuum of approaches to intercultural conflicts. That continuum runs roughly from the "overlapping consensus" pole at one end, which holds little optimism for intercultural understanding but valorizes the pragmatic goal of living together by agreeing on the specific resolution of disputes; to the "comprehensive recognition pole," in which intercultural understanding is sought for reasons of both pragmatism and normative superiority. Oman argues that when "interlocutors" are in a context of profound cultural difference, and when the relationship between cultures is marked by a serious power imbalance, then "a mutual appreciation of another's wordview ... is an indispensable element of intercultural agreements" that form the basis of a long term solution to intercultural disputes.[449]

A. Perspicuous Contrast.

One of the most profitable ways that one might attempt to expand one's horizons along the lines that Taylor calls for and which are described in chapters one and four of this thesis, is through what Wittgenstein terms "perspicuous contrast." Such an approach is called for by Taylor, Tully, Borrows and Oman, among others.[450] The process of perspicuous contrast requires us to place descriptions of events, phenomena, ideas, values or whatever, side by side in an

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[448]I do not claim here that the results of such a process are somehow more objective than they would be absent such an approach. They are still culturally constructed, or perhaps more accurately, *inter*culturally constructed.

[449]Oman, *Sharing Horizons*, *supra* note 1. See 162-175 where she outlines her understanding of the continuum of approaches. Actually, Oman recognizes that no actual intercultural negotiations can ever be solely situated on any one part of the continuum. Rather, intercultural relations are usually marked by shifting their approach along the continuum, alternately extending more or less genuine recognition: see for instance 173 or 199.

[450]Taylor, "Understanding and Ethnocentricity," *supra* note 126 at 125; Taylor, "Politics of Recognition," *supra* note 40 at 67; Tully, *Strange Multiplicity*, *supra* note 87 at 105 *ff*; Borrows, "Constitutional Law from a First Nation Perspective," *supra* note 125 at 6; Oman, *Sharing Horizons*, *supra* note 1 at 177 *ff*.

attempt to allow similarities and differences to become apparent. Quoting Wittgenstein, Oman argues that, "These assembled facts or observations serve as 'objects of comparison' which may 'give ... prominence to distinctions which our ordinary forms of language [or our distinctive form of life] easily make us overlook.' "[451]

In other words, placing seemingly disparate and even incommensurable examples side by side causes us to learn more about each example, because of a new background horizon, which is formed by the presence of the "other" examples. The assemblage allows linkages between ideas, which might have occupied the "deep background" of understanding, to become more apparent. Taylor argues that

> We learn to move in a broader horizon, within which what we have formerly taken for granted as the background to valuation can be situated as one possibility alongside the different background of the formerly unfamiliar culture. The 'fusion of horizons' operates through our developing new vocabularies of comparison, by means of which we can articulate these contrasts ... [Our conclusions are on a basis] that we couldn't possibly have had at the beginning. *We have reached the judgement partly through transforming our standards.*[452]

An approach which features perspicuous contrast has the potential to not only enhance our understanding of and respect for another culture, but also has the potential to enhance our understanding *of our own* culture, by demonstrating that many of the categories and assumptions that we take for granted are not the sole, universal way to think about things; rather, they are one along a spectrum of many.

For convenience, I will allude to two examples of perspicuous contrast to demonstrate how it operates. The first is set out by Taylor in his essay, "Understanding and

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[451]Oman, *Sharing Horizons*, *supra* note 1 at 179.

[452]Taylor, "Politics of Recognition," *supra* note 40 at 67 (emphasis added).

Ethnocentricity",[453] in which he addresses himself to the hypothetical problem that anthropologists have had understanding and assessing what has often been referred to as indigenous belief in "witchcraft." As Taylor describes it, early social scientists attempted to explain such spiritual beliefs in technological terms, arguing that indigenous societies were in a "proto-technological" stage, and were attempting to master nature by magic, while European societies did the same thing through superior science and technology.

Later social scientists rejected that characterization as ethnocentric and argued that what indigenous societies were doing with "witchcraft" has no analogue in Western culture, and was expressive rather than being instrumental. Taylor charges *both* interpretations as ethnocentric because both follow a categorization (proto-science/technology or instrumental/expressive) that Western society makes, but which indigenous societies had not. Rather, he argues that by placing indigenous practices and world view, which perhaps did not make those distinctions at those times, beside those of their observers, we achieve a language of perspicuous contrast in which we can interpret and assess *both* societies. Indigenous societies should be assessed in light of the realization that they did not make such categorizations (but undoubtedly made others which gave them access to different values, insights and ideas); and observers should understand, through the contrast, that not only does European culture make such categorizations, but that such categorizations are *not inevitable*. Thus, criticisms of indigenous cultures are not made on irrelevant grounds ('their mastery of nature is rudimentary') and the components of our own world view are only some among a plethora of many possibilities.

Indeed, a similar set of insights can be gleaned from the discussion in chapter one of this

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[453]Taylor, "Understanding and Ethnocentricity," *supra* note 126 at 127 *ff.*

thesis surrounding the way in which the subject is constituted. To critique both "current" and the Kymlicka-inspired formulations of liberalism, I canvassed, among a number of different examples, some elements of Gitksan and Wet'suwet'en notions of subjectivity. I described their belief in the reincarnation of generations; their perpetual recycling of important names; their intimate connection with the land; and their close relationship to the animal world. It was in those observations that I was able to demonstrate that while liberal theory claims to be neutral in most areas, it in fact features a very particular notion of subjectivity.

What is more, liberal theory's "atomized individual" was revealed as being deeply embedded within the culture which gave birth to liberalism, and involved in a process by which it both constructs, and is constructed by, that culture. Furthermore, by demonstrating the dissonance between liberal theory's claim to neutrality and the reality of its embedded position, I showed that liberal theory's conception of the subject is just one along a spectrum that includes that of the Gitksan and Wet'suwet'en and that which is described by feminist intersectionality theory and is exemplified by Teresa Nahanee.

In the final chapter of this thesis, I will attempt to accomplish a number of goals. In the second section I will argue that while the monologues presented in chapters three and four are major features of Canadian law's approach to Aboriginal rights, Canadian law *is capable* of employing a dialogical approach to intercultural issues. I will canvass two lower level court decisions that make a serious inquiry into the world views and cultural imperatives of the Aboriginal litigants. As a result, the courts' disposition of each matter reflected a heightened sensitivity to the world view of the litigants.

In the third section I will analyze the Supreme Court of Canada's decision in

Delgamuukw.[454] *Delgamuukw* exhibits elements of *both* dialogue *and* monologue, with respect to its approach to the *adaawk* and *kungax* on the one hand, and its discussion of the content of Aboriginal title, and its susceptibility to infringement, on the other. The discussion of *Delgamuukw* will be informed by the perspicuous contrast that I have been carefully developing throughout this thesis, by placing elements of Gitksan and Wet'suwet'en political, social and legal structures in chapter two alongside the monologues of discovery, sovereignty and the "authentic Indian" in chapters three and four.

Part Two — Multiple Stories: The Common Law and Dialogue.

The monologues of discovery, sovereignty and the "authentic Indian" represent the tendency of Canadian law to ignore other cultural perspectives even while dealing with intercultural conflict. However, I will argue that in contradistinction to the rigid approach of cases like *Delgamuukw* and *Blueberry River*, the Common Law *can* actually hear a diversity of stories and recognize a plurality of sources.

Scholars have argued that the rigidity of legal centralism is of relatively recent origin, and is contradicted by an earlier era. For instance, they argue that *stare decisis* was late in coming to the Common Law, and is predicated on assumptions quite different from those of earlier times, in which cases were seen as a medium in which judges were

> engaged in a common, shared exercise in which they did not command one another, presently or in future. Their decisions thus *could not bind*, and this historical reality prevailed well into the nineteenth century. Cases had whatever authority they had because they were part of a body of common experience. They could not be rules to be followed but were rather *examples of the type of reasoning which had thus far prevailed.* As such they did not preclude further argument and reasoning, but invited it, and no case could be seen as identical with another, to be somehow governed by the prior in

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[454] *Delgamuukw — S.C.C., supra* note 6.

> time. Since cases only exemplified arguments, there was no closure of sources, and great willingness to consider a wide range of possible authority.[455]

Glenn argues that the English society which gave rise to the Common Law was marked by great diversity, and that the Common Law, while "common, [was] compatible with that which was not."[456] As Glenn notes, the Common law was commonly seen as an optional system, and was not averse to allowing litigants to opt for other systems of adjudication,[457] such as local or customary law, which were more tailored to the types of disputes and local factors affecting litigants.

In other words, the Common Law method *lent itself* to a dialogical approach in which the competing merits and demerits of a given disposition could be discussed and balanced. The process of centralization which started in the late eighteenth century and which called for a "structured, rational and national concept of law", represented a "break with the past."[458] It exhibited elements of what Tully characterizes as "modern constitutionalism,"[459] and sought to sacrifice the local to the general and to *declare* rather than to *converse*.

Notwithstanding the totalizing tendencies of the Common Law, however, Glenn argues that it retains important aspects of its flexibility. He argues that the Common Law exhibits a tension between uniformity, which is provided through national institutions such as the Supreme

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[455]Glenn, "The Common Law in Canada," *supra* note 231 at 263 (emphasis in original).

[456]Glenn, "The Common Law in Canada," *supra* note 231 at 276.

[457]Glenn, "The Common Law in Canada," *supra* note 231 at 264. Interestingly, the Common Law is still open to such "opting out" in commercial disputes and in the rise of alternative dispute resolution.

[458]Glenn, "The Common Law in Canada," *supra* note 231 at 265

[459]Tully, *Strange Multiplicity*, *supra* note 87 chapter 3.

Court of Canada[460] and the hierarchy of *stare decisis*; and the local and varied, which is possible through the use of standards such as the "real and substantial connection" test,[461] and notions such as "reasonableness."

Tully makes similar observations about the ability of the Canadian legal system to undertake a dialogical approach. Such an approach would undermine the tendency of courts to adhere to a rigid, quasi-scientific approach to law. By way of example, Tully canvasses cases which allegedly pit individual and collective rights against one another, such as the famous "language rights" cases in the province of Québec. He argues that rather than approaching that intercultural conflict as though they could engage in some sort of "calculus" in which universal rules could be identified and then applied, courts adopted a "heuristic approach" in which they attempted a mutual accommodation by balancing the interests involved.[462]

Thus, Tully, like Glenn, argues that there is a certain amount of *space* in the Common Law method, that permits judges, if they are willing to step away from the *stare decisis* method, to broaden their horizons of understanding such that they can comprehend the interests, the world view and the various positions of litigants, and then engage in a process of *mediating* those differences *from a position in which their own horizons have been broadened.* In the following two examples from low level, *local* courts, I shall demonstrate that even with respect to Aboriginal rights and litigants, courts do indeed engage in such a process.

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[460]Glenn, "The Common Law in Canada," *supra* note 231 at 278 *ff.*

[461]Glenn, "The Common Law in Canada," *supra* note 231 at 289.

[462]Tully, *Strange Multiplicity*, *supra* note 87 at 171.

A. *R.* v. *Ashini.*[463]

On September 15, 1988 members of the Innu First Nation were arrested and charged for wilfully interfering with the lawful operation of property. It was alleged that they had trespassed upon Canadian Forces Base Goose Bay in Newfoundland. The facts of the case imply that the defendants had been protesting low-level military flights over their traditional hunting grounds, which they claimed had never been ceded to Canada by conquest or treaty and therefore belonged to the Innu, who enjoyed sovereignty over the territory.

Igloliorte Prov. Ct. J. held that it was open to a defendant to plead that she honestly *and reasonably* believed that the property she was accused of trespassing upon belongs to her. He held that if the defendants could prove that they acted with "an honest belief in a state of facts, which if it existed, would be a legal justification or excuse,"[464] then they would successfully defend the charge. He momentarily ignored the monologues of discovery and sovereignty and considered the arguments of the Innu defendants, who argued that, as they had not voluntarily ceded their traditional territory, the land on which they were arrested for trespassing belonged to the Innu First Nation. Thus, if the court accepted their belief, the offence could not be made out.

Igloliorte Prov. Ct. J. noted that

> We are not dealing with any land which has been the subject of divestiture through treaties, as under the *Indian Act*. Each of these four persons based their belief of ownership on an honest belief on reasonable grounds. Through their knowledge of ancestry and kinship they have showed that none of their people ever gave away rights to the land to Canada, and this is an honest belief each person holds. The provincial and federal statutes do not include as third parties or signatories any Innu people. I am satisfied the four believe their ancestors predate any Canadian claims to ancestry on this land.[465]

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[463] *R.* v. *Ashini*, [1989] N.J. No. 226 (Nfld. Prov. Ct.) (Q.L.) (hereinafter *Ashini*), rev'd. (1989) 79 Nfld. & P.E.I.R. 318, 51 C.C.C. (3d) 329 (C.A.) on procedural grounds unrelated to the merits of the decision.

[464] *Ashini*, *supra* note 463 at Q.L. 3.

[465] *Ashini*, *supra* note 463 at Q.L. 4.

He then held that in determining whether an honest belief in the defendants' ownership was reasonable, he had to have resort not to English or Canadian law, but rather to the concepts of property held by the defendants, who, he held, did not possess the concept of land as property.[466]

To Canada's argument that it obtained sovereignty by means outlined in chapter three of this thesis, the trial judge responded that, "All of the legal reasonings are based on the premise that somehow the Crown acquired magically by its own declaration title to the fee ... It is time this premise based on 17th century reasoning be questioned in the light of 21st century reality." Indeed, he went on to declare that, "By declaring these Innu as criminals for crying, 'enough!' the Court will have been unable to recognize the fundamental right of all peoples to be treated equally before the law."[467]

What becomes apparent from even a cursory reading of this case is that the trial judge engaged in a process of perspicuous contrast. In the interests of broadening horizons and achieving a measure of intercultural understanding in order to address intercultural conflict, he first accepted the premise that the defendants might have something of value to communicate. He undertook the "journey" called for in this thesis, and permitted the defendants to articulate their understanding of the land and of their impugned actions *in their own words*. He then *compared* that account with that of the Crown, which required reliance on the monologue of discovery. As a result of his contrast, he was able to declare that the Crown's anachronistic position undermined Canadian values of equality, a norm shared by both communities.

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[466] *Ashini*, *supra* note 463 at Q.L. 4-5.

[467] *Ashini*, *supra* note 463 at Q.L. 6.

B. *Forsythe* v. *Collingwood Sales Ltd.*[468]

In a rather fascinating example of normative overlap, the Gitksan *adaawk* contains a reference to a recent event in which a high-ranking chief had to hold a feast in order to "wipe away shame" owing to an allegation that she was a thief. Such "shame feasts" are common among Gitksan and Wet'suwet'en and must be held in order to maintain the good name and integrity not only of elders and hereditary chiefs, but their entire House, as well.[469]

In the trial action of *Delgamuukw*, Gyoluugyat (Mary McKenzie), a hereditary chief and elder of the Gitksan First Nation, described the shame feast and explained that

> Another example is when a person is embarrassed by another group, like last summer in the City of Smithers a lady Chief was embarrassed. Her case came up as theft at that time, so after the court was finished she put on a feasting to wipe off that embarrassment, and that word theft, that she steals something, that's no longer to be remembered towards her when she put this Feast on.[470]

Interestingly, her description does not contain any reference to whether that chief was guilty or innocent. That is not because her guilt or innocence is not important, but rather because regardless of that, the shame must be "wiped away."

In that case, Mabel Forsythe was accused by a shop keeper of stealing a radio. An R.C.M.P. officer publicly announced her accusation and placed Ms. Forsythe and her daughter into custody, and escorted her back to her home to interrogate her second daughter. All of this occurred on rather flimsy identification evidence, and by the time she was placed in the police vehicle, her principal accuser was already recanting his initial identification.

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[468][1987] B.C.J. No. 40 (County Ct.) (hereinafter *Forsythe*), aff'd. [1988] B.C.J. No. 683 (B.C.C.A.) (Q.L.).

[469]For a description of the function and purpose of the shame feast for the Wet'suwet'en, consult Mills, *Eagle Down*, *supra* note 150 at 44, 91, 92 and 137.

[470]Gitksan and Wet'suwet'en First Nations, "Transcript Evidence in the trial of *Delgamuukw* v. *The Queen in Right of British Columbia*," May, 1987 - June, 1988 (Volumes 2 - 111) (storage files: Faculty of Law, University of British Columbia, Vancouver, British Columbia) (hereinafter "Transcript Evidence" followed by Witness's Name), Gyoluugyat (Mary McKenzie), May 14, 1987 (Volume 4) (page 248).

After Ms. Forsythe was undeniably cleared of the accusation, she initiated suit against the store, the employee who initially accused her, and the R.C.M.P. for wrongful arrest and wrongful imprisonment. Boyle Co. Ct. J. immediately characterized the plaintiff as, "an honourable and respected woman of distinguished lineage who was wrongly identified as a shoplifter. Her daughter, Nancy, the second plaintiff, also is a person of respectability and honesty. Both were publicly humiliated through no fault of their own ..."[471] Indeed, he went on to state that

> There is no issue that on this Saturday afternoon Mrs. Forsythe and her daughter Nancy were upset and embarrassed by what happened to them. There is nothing to contradict the evidence that the hurt and embarrassment lasted for months and there is nothing to contradict the sense of shame brought upon Mrs. Forsythe and upon her daughter. Nancy had been publicly commended for her honesty earlier in her school career when she returned found money. Mrs. Forsythe is a hereditary chief of the Gedumden, a role that carries with it an obligation to serve as an honourable model for her people — particularly the young. There is nothing to contradict the evidence that rumours and stories of a negative nature circulated as a result of the public nature of these events.[472]

Boyle Co. Ct. J. affirmed in no uncertain terms their innocence, and then held that the defendants were guilty of the torts alleged. Moving to damages, the trial judge stated that:

> Mrs. Forsythe has an unusual but not unique claim for damages ... According to her custom she must hold a feast for her clan to absolve herself of the shame cast upon her by these circumstances — a shame which lies upon her despite her obvious innocence. The customary feast was not disputed, nor was the cost, $2,000. However an undetermined but small part of this sum would be borne by clan members. That feast will absolve her of shame within native society but she is entitled as well to damages for her humiliation in front of non-native persons as well.[473]

The case was upheld by the British Columbia Court of Appeal and provides another excellent example of the ability of the Common law to employ permeable boundaries, capable of incorporating the exigencies of plural legal orders, and of the ability of individual jurists to engage in the "journey" called for in this thesis.

Boyle Co. Ct. J. showed remarkable sensitivity not only to the position of a wrongfully

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[471] *Forsythe*, *supra* note 468 at Q.L. 2.

[472] *Forsythe*, *supra* note 468 at Q.L. 12.

[473] *Forsythe*, *supra* note 468 at Q.L. 20.

accused individual, but also to the unique problems that created for the plaintiff in this case. He recognized her need to "wipe away the shame" notwithstanding her innocence and the public exoneration that the civil action provided, and he also recognized the communal role that her clan (and House) play in the shame feast.

What is also interesting about both *Ashini* and *Forsythe* is that they occurred at low level courts, Provincial and County, in far-flung jurisdictions, Newfoundland and British Columbia. Both were able to take advantage of a substantial degree of flexibility in the law and crafted their results to the exigencies of local circumstances. Indeed, these cases exemplify the ability of one system to *hear* and *understand* another and the possibility that enhanced intercultural understanding can follow a sincere attempt to take another culture's norms seriously.

At this point, it will be convenient to move to a more general level, by re-examining Canadian jurisprudence on Aboriginal rights from this new perspective, and from the perspective gained by the perspicuous contrast I have been developing in chapters two through four. In order to do so, I will discuss the recent ruling of the Supreme Court of Canada in *Delgamuukw* and will demonstrate that it employs both dialogical and monological approaches. I will first commend the steps forward the Supreme Court made in terms of showing a willingness to engage on the intercultural journey, and then will critique some of the substantive findings (the "hybrid result"), fueled by what we learned in chapter two. That is, I will *contrast* the (Canadian) law of Aboriginal title as it stands in *Delgamuukw* with the insights gained in chapter two.

Part Three — "Let Us Face It: We Are All Here To Stay": *Delgamuukw* and Beyond ...

A. Steps Forward ...

i. The *Adaawk*, *Kungax* and the Law of Evidence.

In chapter three of this thesis, I argued that although the assumptions which underlie the monologue of discovery are *explicitly* rejected as objectionable and unacceptable, their effects *implicitly* live on. Courts unproblematically affirm the assertion of colonial sovereignty, and accept that it confers unlimited power to marginalize, ignore and subjugate First Nations. While courts accept that s. 35 stands as a serious barrier to extinguishment,[474] they appear ready to allow not only regulation of Aboriginal rights and title for such goals as conservation,[475] but also for goals of regional commercial fairness[476] and such things as the

> the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.[477]

Courts have also failed to acknowledge that while cases like *Van der Peet* claim to describe and account for some form of Aboriginal reality, they do so from within the monologue of the "authentic Indian" rather than from within a *dialogue* with First Nations themselves.

I have sought to demonstrate that this failure is not just an historical anomaly, but that it is central to the fragility of Aboriginal rights today. The assertion of sovereignty has been recognized as integral to the purpose of s. 35, which stands as a forceful recognition of

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[474] *Sparrow*, *supra* note 4.

[475] *Sparrow*, *supra* note 4.

[476] *Gladstone*, *supra* note 364.

[477] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 165.

Aboriginal rights, but is ultimately the tool by which those rights have been interfered with[478] and characterized in excessively narrow terms.[479]

Recall from chapter four that the *Van der Peet* court held that s. 35 is to be, "directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown."[480] If so, then surely the methods by which indigenous people understand and express their connection to territory they claim must be accounted for. As the Gitksan and Wet'suwet'en argued, "If one culture refuses to recognize another's facts in the other culture's terms, then the very possibility of dialogue between the two is drastically undermined."[481] This essential fact was recognized by the Supreme Court of Canada, which sent *Delgamuukw* back to trial due in part to errors McEachern C.J. made in his appreciation of the *adaawk* and *kungax*.[482]

Indeed, Lamer C.J. had held in *Van der Peet* that

> a court should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in times where [*sic*] there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private law torts case.[483]

Such a holding begins to lay a framework in which Courts may begin, as Lamer C.J.C. put it, the "bridging of Aboriginal and non-Aboriginal cultures."[484] In order to so, the Court held that

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[478]Generally for conservation purposes: *Sparrow*, *supra* note 4.

[479]See discussion of *Van der Peet*, *supra* note 252 and the "authentic Indian" in chapter four.

[480]*Per* Lamer C.J.C.: *Van der Peet*, *supra* note 252 at 303, para. 31.

[481]Gisday Wa and Delgam Uukw, *The Spirit in the Land*, *supra* note 83 at 41.

[482]*Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 80.

[483]*Van der Peet*, *supra* note 252 at paragraph 68, affirmed by *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 80.

[484]*Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 81.

Canadian law is required to "adapt the laws of evidence so that Aboriginal perspectives on their practices, customs and traditions and on their relationship with the land are given due weight by the courts. In practical terms, this requires the courts to *come to terms with the oral histories of Aboriginal societies which for many Aboriginal nations, are the only record of their past.*"[485]

Notwithstanding the fact that elements of oral histories present challenges to the standard rules of evidence, the Court ruled that the law of evidence must be adapted so as to place oral histories on the same footing as historical evidence that the courts are familiar with, such as historical documents.[486] The Court ruled that McEachern C.J. had refused to assign independent weight to the *adaawk* and *kungax* because of his general problems accepting their veracity. McEachern C.J. also held other forms of oral history inadmissible because they were "tainted" by interest — both in that they related to dispute sites, and in that they had been discussed for many years within the communities.

The Court rejected the trial judge's objections that were based on the latter two grounds — that they related to specific sites and that they had been discussed in the community after the commencement of legal action. Lamer C.J.C. noted that it is inherent to oral histories that they relate to specific sites and are often not well-known outside of the community.[487] To the objection that the histories were "tainted" by the fact of a legal action, Lamer C.J.C. first noted that one reason the claims had been discussed for so long was that British Columbia had consistently refused to acknowledge them. He observed that, "It would be perverse ... to use the

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[485] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 83, (emphasis added).

[486] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 87.

[487] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 106.

refusal of the province to acknowledge the rights of its Aboriginal inhabitants as a reason for excluding evidence which may prove the existence of those rights."[488] Secondly, Lamer C.J.C. recognized that not only is constant discussion an essential element of oral histories, but that their *very veracity* depends upon it.[489]

In an important development in the jurisprudence of oral evidence, the Court held that such "difficulties" inhere in the very nature of oral histories. It recognized that oral histories do not relate *solely* to land tenure and the legal system of First Nations; rather, they also contain general mythology, legal and non-legal norms and other values by which First Nations live. It also noted that oral histories by their nature refer to specific sites (such as the Seeley Lake *Medeek*), and that in order to properly continue as oral histories, discussion must "remain alive" within communities. As such, the Court expressed fear that McEachern C.J.'s treatment of oral evidence risked allowing oral histories to be "consistently and systematically undervalued by the Canadian legal system,"[490] which would contradict the purpose of s. 35 and the principle of interpretation that it inspires.

The Court's contributions on this issue are extremely important, and should not be underestimated. By addressing the unique nature of oral histories, both as evidence, and as contrasted with written history, and by calling for a fundamental and principled alteration of the Canadian law of evidence, which is a product centuries-in-the-making, the Court substantially advanced the project of intercultural understanding, by accepting that different "knowledge

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[488] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 106.

[489] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 106.

[490] Lamer C.J.'s discussion occurs at *Delgaumuukw — S.C.C.*, *supra* note 6 at paragraphs 98-108.

communities", such as First Nations, not only have different knowledge, but "know" in a fundamentally different way. In order to reconcile Aboriginal and Canadian systems and communities, the Court said, it is crucial to understand and "come to terms with" this way of knowing.

The Court's statements about oral histories are also very important from a *practical* point of view, because they might lead to a substantial shortening of Aboriginal title actions, and a substantial reduction in their cost and complexity. The Court has done this by establishing a *presumption* as to the reliability of oral histories: litigants are not required to "reinvent the wheel" in each trial, by demonstrating their histories' legitimacy as evidence. The difficulty and complexity of doing such validation is demonstrated by the plaintiffs' attempts to do just that in the original *Delgamuukw* trial, through the story of the Seeley Lake *Medeek.*

As noted in chapter two,[491] the plaintiffs in *Delgamuukw* invested a great deal of resources in presenting expert testimony from a geomorphologist and a paleobotanist to corroborate the *adaawk* of the Seeley Lake *Medeek*; they did so in order to assist the Court by presenting the kind of evidence courts are familiar with. In doing so, they were able to present both the legal and the historical elements of that portion of the *adaawk.*

Such an approach is extremely complicated and expensive however, when one recalls that oral histories in general, and the *adaawk* and *kungax* in particular, relate to specific sites. When the prospect of corroborating oral histories for each and every, or even a significant number of sites referred to in the *adaawk* and *kungax* is considered, it quickly becomes apparent that engaging in a similar corroborative approach will likely prove impossible for most First Nations

[491] Chapter two, part three (Gitksan and Wet'suwet'en History and Law), section D (the Seeley Lake *Medeek*).

in British Columbia.

Thus, the Court's holding is particularly valuable in this practical sense of promoting more manageable, affordable litigation. It is also very important given the inordinate burden that First Nations have in having to establish use and occupation of the sites claimed, whereas the Crown does not. A strong argument can now be made that the Crown ought to have the burden of *disproving* the veracity or accuracy of oral histories, especially if First Nations continue to be made to discharge that initial burden of proving occupancy.[492]

In addition, the Court implicitly recognized that requiring litigants to corroborate oral histories with evidence recognizable to Western legal tradition implies a hierarchical understanding of knowledge that is not appropriate in intercultural settings. Indeed, as the Gitksan and Wet'suwet'en argued, "For the Court to deny the reality of Gitksan and Wet'suwet'en history except where it can be corroborated by expert evidence in the Western scientific system is to disregard the distinctive Gitksan and Wet'suwet'en system of validating historical facts."[493] Instead of requiring Aboriginal litigants to "come to" the Canadian system and satisfy their own legal systems and the Canadian one, the Court called for Canadian law to "move toward" Aboriginal systems, by recognizing the value and reliability of oral histories.

In chapter four I outlined the monological tendency of courts to obscure law by focusing on practice, and argued that a focus on Aboriginal law would enhance intercultural *dialogue* and indigenous control over their contributions to such dialogue.[494] Oral traditions like the *adaawk*

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[492]This might occur if finders of fact are obligated to extend to oral evidence an initial presumption of trustworthiness, similar to the kind of presumption uncontradicted documentary or expert evidence would receive.

[493]*The Spirit in the Land, supra* note 83 at 39.

[494]Chapter four, part one ("The Monologue of the "Authentic Indian"), section A ("Laws and Practices").

and *kungax* are particularly useful if they are accepted as statements of law, as well as of historical fact.[495] In addition, statements of indigenous law can give rise to the presumption that if indigenous law governs use of a site, then the group has demonstrated a sufficient connection to it. This understanding was endorsed when Lamer C.J. stated that, "if, at the time of sovereignty, an Aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for Aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use."[496]

B. ... And Back.

i. The *Adaawk*, *Kungax* and the Law of Evidence.

A potentially serious problem still persists after *Delgamuukw*, however. That is because although the Court made important statements about the nature of oral histories and some principles governing their use in the context of title litigation, it said very little in the way of how to employ them, except insofar as it chastised the trial judge for his outright rejection of them. The Court stated that it would be too momentous a task to sift through the record, but it did say some very disturbing things.

For instance, the Court held that while it was overturning the trial judge's findings of fact because of his incorrect use of the oral histories, it also confirmed that appellate intervention does not proceed automatically, even when a trial judge errs in her apprehension of oral histories.

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[495] It is important to stress that they are not seen by the Gitksan and Wet'suwet'en as *only* statements of law, but that their legal implications are very important.

[496] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 148.

Rather, the Court held that any error must be "sufficiently serious that it is 'overriding and determinative in the assessment of the balance of probabilities with respect to the factual issue'."[497] Only serious errors will warrant appellate intervention, as in *Delgamuukw*. The Court gave two ominous and related examples of how things might have played out in *Delgamuukw*.

The Court characterized the "bulk" of the plaintiffs' objections to the factual findings as not "palpable and overriding error," but as mere disagreements with the trial judge. The Court affirmed that for much of the evidence, the question is ultimately one of weight, and that attacking the assignment of weight will be a difficult task.

The second example is the Court's treatment of the expert testimony. There has been an enormous amount of criticism of the trial judge's complete rejection of the work of Daly and Mills;[498] the Court, however, stated that "findings of credibility, including the credibility of expert witnesses, are for the trial judge to make, and should warrant considerable deference from appellate courts."[499] Indeed, Lamer C.J.C. stated that, "In applying these [new] principles [of the treatment of oral evidence], the new trial judge might well share some or all of the findings of fact of McEachern C.J."[500] Thus it seems possible that Aboriginal title litigation can still feature serious misuse of oral testimony and histories, as long as the trial judge's treatment of that

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[497] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 88.

[498] In addition to Culhane, "Loyal Anthropologist", *supra* note 173, see Dara Culhane, *The Pleasure of the Crown*, *supra* note 165; also Julie Cruickshank, "Invention of Anthropology in British Columbia's Supreme Court: Oral Tradition as Evidence in *Delgamuukw* v. *B.C.*" (1992) 95 B.C. Studies 25; Antonia Mills, *Eagle Down*, *supra* note 150 at 10-14; Robin Ridington, "Fieldwork in Courtroom 53: A Witness to *Delgamuukw* v. *B.C.*" (1992) 95 B.C. Studies 12; and Michael Asch, "Errors in *Delgamuukw*: An Anthropological Perspective" in Frank Cassidy, ed., *Aboriginal Title in British Columbia:* Delgamuukw *v.* The Queen (Vancouver: Oolichan Books, 1992) 221.

[499] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 91.

[500] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 108.

evidence conforms minimally or superficially to the standards set down in *Delgamuukw*.

ii. Aboriginal Title.

a. The Content of Aboriginal Title.

Unlike the ruling in *Mabo* that Aboriginal title is a personal right which can be extinguished by the adverse act of either the legislature or the Crown,[501] the *Delgamuukw* court held that Aboriginal title is an *interest in land.* In so ruling, the Court acknowledged that it is counter-productive to try to identify Aboriginal interests in land too closely with Common law principles. Rather, the Court reiterated that they are *sui generis*.[502] What designating Aboriginal title as a right in land did accomplish, however, was to affirm that, in the eyes of the Canadian legal system, First Nations' territorial rights constitute "strong rights."

This holding, which is extremely important because it reverses *Van der Peet*'s trend of looking for authentic Indian practices to protect, in favour of recognizing that rights in land carry dynamic and evolving uses,[503] was then scaled back by the features of title which the Court identified. The Court held that Aboriginal title features three dimensions. The first dimension, according to the Court, is its inalienability.

1. Alienability.

The Court held that First Nations, while they might hold a right in land, do not possess

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[501] *Mabo*, *supra* note 295.

[502] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 110-112.

[503] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 117 *ff.*

the right to alienate it to anyone but to the Crown. This understanding stems back to the Royal Proclamation of 1763. Its original purpose is not entirely clear. Some argue that it was aimed at preventing First Nations from being defrauded by unscrupulous land speculators, by requiring alienation to representatives of the Crown only. By contrast, Professor Borrows has suggested that it should be read in conjunction with the Treaty of Niagra of 1764, as a compact between the Crown and assembled First Nations as to how the orderly sharing of land would proceed.[504]

Whatever the reasoning behind the Proclamation of 1763, the Court's pronouncement that the Gitksan and Wet'suwet'en can only alienate their land to the Crown made no reference to *their* legal principles as concern alienation, which are detailed in the *adaawk* and *kungax*. Indeed, Sterrit details a plethora of land transactions which transferred ownership and jurisdiction of various territories between the Gitksan, Nisga'a and Gitanyow.[505] Thus, when the Court stated that Aboriginal territories, "cannot be transferred, sold or surrendered to anyone other than the Crown, and as a result [are] inalienable to third parties,"[506] the Gitksan might be forgiven for wondering how it came to be that a fundamental principle of their legal system "disappeared" without mention. Instead of continuing the approach developed in its discussion of oral histories and turning toward Gitksan and Wet'suwet'en norms regarding the alienability of territory, the Court instead looked only to sources from non-Aboriginal culture, thereby demonstrating its move from dialogue to monologue.

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[504]See generally, John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) 155.

[505]Sterrit, *et al.*, *Tribal Boundaries*, *supra* note 150 at 40 *ff.*

[506]*Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 113.

2. Source.

The Supreme Court made some of its most cryptic and fascinating comments with respect to the source of Aboriginal title. In effect, Lamer C.J.C. mused that title might have a plurality of sources. He held that at common law, possession gives rise to a presumption of title, rebuttable only on proof that someone else has a prior grant from the Crown;[507] but he also held that there might be a "second source of Aboriginal title — the relationship between common law and pre-existing systems of Aboriginal law.[508] This element represents a tantalizing opportunity for intercultural dialogue, owing to its potential to allow First Nations to speak in their own voices, and to develop the content of what they say.

"Sources" of law play a fascinating and complex role in the *Delgamuukw* decision. In coming to his conclusion that Aboriginal title is an interest in land that encompasses, "the right to use the land held pursuant to that title for a variety of purposes, which need not be aspects of those Aboriginal practices, cultures and traditions which are integral to the distinctive Aboriginal cultures,"[509] Lamer C.J.C. drew on *Guerin*'s[510] description of reserve land and its "throw away" line that there is little difference between reserve land and land under unextinguished Aboriginal title; he also drew on miscellaneous statutes that do not purport to address Aboriginal title, such as the *Indian Act* and the *Indian Oil and Gas Act*. Indeed, his reasoning drew fire from La Forest

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[507] *Delgamuukw — S.C.C., supra* note 6 at paragraph 114.

[508] *Delgamuukw — S.C.C., supra* note 6 at paragraph 114.

[509] *Delgamuukw — S.C.C., supra* note 6 at paragraph 117.

[510] *Guerin, supra* note 323.

J.'s concurring but minority opinion.[511]

Contrary to the Blackstone-inspired position that law is "discovered" and "declared" rather than "made" and "developed", I would argue, with others, that in many important respects, law is a form of argument and rhetoric.[512] When formulating opinions, judges attempt to authorize each finding not only with solid precedent, but also with logical rigour. This is certainly true in cases like *Delgamuukw*, which self-consciously carry major implications throughout the country. It seems as though a highly authoritative, compelling source from which to draw the conclusion that Gitksan and Wet'suwet'en title is a "strong" interest in land *would be Gitksan and Wet'suwet'en law*.

One need not look far to realize that Gitksan and Wet'suwet'en legal norms relating to trespass, land holding, transmission of land, licensing and so on, which were canvassed and discussed in chapter two of this thesis, provide a solid backdrop against which to, in the spirit of developing the interaction of Aboriginal legal systems and the Common law, derive an intercultural norm of land title — *both* legal systems recognize the notion of exclusive possession, and *both* have a way of articulating that kind of entitlement.

Unfortunately, "stuck" in a monological moment, the Supreme Court did not see that authority far more compelling than the *Indian Oil and Gas Act* lay at its very fingertips. It might be replied that, as the Court was sending *Delgamuukw* back to trial, it could not have relied upon any of the plaintiffs' alleged legal norms, but at the very least, the Court could have made

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[511] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 192.

[512] For a theoretical explication of this claim, consult James Boyd White, *Justice as Translation : an Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) (hereinafter *Justice as Translation*), and for an example of its application, see Tina Loo, "Dan Cranmer's Potlatch: Law as Coercion, Symbol and Rhetoric in British Columbia, 1884-1951" (1992) 78 Can. Hist. Rev. 125.

comments to tend in that direction, and further the spirit of intercultural dialogue and exchange.

What resulted then, was at best the kind of "overlapping consensus" referred to by Oman, in which both legal systems recognize similar norms, but for different reasons, not because they achieved intercultural understanding.[513] And as Oman argues, the danger of mere overlap in consensus, is that the conclusion is notoriously fragile. Such an observation is borne out in the way that the Court restricted and scaled back the features of title, such as its inalienability, and the factors laid out below.

The final major feature of title which the Court identified was its "communally held" nature. Again, in so doing, the Court made no reference to Gitksan and Wet'suwet'en perspectives or to what their legal system has to say on this matter. While it is true that many First Nations' legal systems feature a strongly communal connection to the land, declaring that to be a fundamental attribute of *all* Aboriginal title for *all* time seems to invite recourse to the monologue of the "authentic Indian," which is frozen in time and imagination, and which is not permitted to change and adapt. Such a declaration also risks characterizing *all* First Nations in the same way. John Borrows has argued persuasively that a truly intercultural approach to Aboriginal rights must be "fact and site specific,"[514] so as to take into account the wide variations in legal and social systems of North American First Nations.

b. The Inherent Limit.

Another intriguing aspect of *Delgamuukw* lay in its declaration that Aboriginal title also

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[513]Oman, *Sharing Horizons*, *supra* note 1 at 162-175.

[514]Borrows, "With or Without You," *supra* note 227 at 644.

contains an "inherent limit." The Court held that, "lands held pursuant to Aboriginal title cannot be used in a manner that is irreconcilable with the nature of the attachment to the land which forms the basis of the group's claim to Aboriginal title."[515] Lamer C.J.C. argued that although the source of Aboriginal title lies in the past, the law of Aboriginal title exists to protect its current application and future vitality; as a result,"uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of Aboriginal title."[516]

Lamer C.J.C. elaborated upon the point by implying that the "Aboriginal" source of Aboriginal title (as opposed to the Common law source, which is that simple possession gives rise to a presumption of title) is the "special bond" that Aboriginal groups have with the land.[517] It is that special bond which should be protected. To that end, he gave two examples. He argued that if Aboriginal title were established by reference to the use of land as a hunting area, then the group that successfully claims title in that respect will not be permitted to use the territory in a way incompatible with that basis of title, such as strip mining; in his second example, if a special bond of religious or spiritual significance is established, then a group may not interfere with that by, for instance, paving the land into a parking lot.[518]

Thus, in a case of circular reasoning, Lamer C.J.C. looked to the principle of non-alienability except to the Crown, which has a long tradition in non-Aboriginal law, inferred from that a special bond and therefore an inherent limit, and then cited that inherent limit as the *source*

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[515] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 124.

[516] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 127.

[517] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 128.

[518] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 128.

of the inalienability.

The inherent limit of Aboriginal title is of considerable concern. To begin with, it seems that the Court reintroduced a focus on *activities*, rather than *rights*, through the notion of activity-specific *sources* of title. That is, if a certain activity is the source of title, then the land may not be dealt with in a way that is detrimental to that activity. Again, the importance of indigenous *law* as a source of title was subtly obscured. On a practical level, the inherent limit is problematic, in that one might wonder if a First Nation which wants to establish a cultural or spiritual centre on "sacred" ground may also pave a parking lot for that centre.

This aspect of Aboriginal title thus invites recourse to the monologue of the "authentic Indian" in that what First Nations' ancestors *did* on the land could end up determining what First Nations can *do* in the future, which is a half-step away from *Van der Peet*. That kind of analysis leaves no room for reference to Gitksan and Wet'suwet'en legal principles, and thus threatens to silence their voices once again.

It should be noted that Lamer C.J.C. did not intend the inherent limit to be interpreted in this way. Rather, he stressed that it should not be taken to restrict the full range of uses that an interest in land implies: it is only a small subset of (relationship-) destructive uses that are to be off limits.[519] One way to avoid the kind of interpretation that I have warned about, then, would be to fill the "content" of the inherent limit not by reference to some court's notion of what a connection to the land *was*, but by reference to what indigenous *legal systems* say the connection *is*. If indigenous legal systems determine that a particular use violates the "inherent" relationship of the First Nation with the land, then the content of that limit will "filled" by the voices and

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[519] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 132.

perspectives of indigenous peoples themselves.

iii. Proof of Aboriginal Title.

a. Contact vs. Sovereignty.

It will be recalled that in *Van der Peet*, the Court held that Aboriginal activities that attracted protection were those that were performed by the First Nation in question prior to *contact*. Indeed, that was criticized in chapter four because it invited recourse to the monologue of the "authentic Indian." In *Delgamuukw* the Court effected a major change in policy by "resetting" the relevant date as that of the assertion of colonial sovereignty.

I argued in chapter four that it is theoretically more coherent to assert that Aboriginal rights might be affected by an assertion of European sovereignty rather than contact. It is absurd to suggest that the mere arrival of foreigners could effect a change in indigenous legal systems; yet the assertion of sovereignty purports to be a legal event, and therefore, at least theoretically, could have an impact upon the legal regimes of indigenous First Nations. However, my critique in chapter three identified the monologues of discovery and sovereignty as the source of that proposition, and criticized courts for never dealing with that challenge.

The Court in *Delgamuukw* was no different. It unquestioningly accepted the assertion of sovereignty. Lamer C.J.C. argued that sovereignty was the appropriate time marker to analyze due to two reasons. The first rationale upon which he relied was his earlier assertion that Aboriginal title arises out of "the relationship between the common law and pre-existing systems of Aboriginal law."[520] Secondly, he asserted without qualification, that, "Aboriginal title is a

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[520] *Delgamuukw — S.C.C., supra* note 6 at paragraph 145.

burden on the Crown's underlying title."[521] From this assertion, Lamer C.J.C. argued that, as the Crown could not have obtained legal title to colonial territory until it purported to insert a legal regime, there could not have been a "burden" until there was an assertion of sovereignty.

As in other cases like *Sparrow* and *Van der Peet*, the Court again effected another deft sidestep of the entire question of sovereignty by asserting without authority that Crown title "inserted" itself underneath all others, and that Aboriginal title is a species of right that subsists under the rubric of *dominium/imperium* dichotomy surveyed in chapter three. Thus, the Court was able to affirm that the assertion of colonial sovereignty is of central significance to the continuing rights of Aboriginal peoples, while simultaneously *ignoring* the assertion of colonial sovereignty.

b. Connection of First Nations to the Land.

In another significant departure from the *Van der Peet* test, the Court backed away from the general proposition that s. 35(1) only protects that which is of central significance to the distinctive cultures of First Nations. In chapter four I criticized that element of *Van der Peet* because it invites recourse to the monologue of the "authentic Indian", in all her caricatured, "frozen" glory. In *Delgamuukw*, while the Court affirmed that this criterion still exists in the determination of Aboriginal title, it essentially jettisoned it by holding that it is subsumed under the general requirement of occupancy prior to the assertion of sovereignty. Lamer C.J.C. held that, "it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of

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[521] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 145.

central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for Aboriginal title."[522]

This concession by the Court could represent a major advance in title litigation for First Nations. They already have a substantial and unbalanced obligation to prove *their* occupancy of claimed territories, while the Crown does not.[523] It would appear now that the issue of First Nations' connection to their territories and unique relationship with them is settled, and at worst, subject to a rebuttable presumption, which rests with the Crown.

My final few comments on the content of Aboriginal title are to allude to another "moment of opportunity" which the Court presented. In addressing whether the occupation of traditional territories at sovereignty had to be exclusive, the Court displayed a measure of flexibility and openness to alternatives that indigenous legal systems might present. Lamer C.J.C. reasoned that, in order to obtain an exclusive right of use and occupation of territories, First Nations should be able to demonstrate some sort of exclusivity of use and occupation at the time of sovereignty.

In addressing how that should be characterized, however, Lamer C.J.C. held that proof "must rely on both the perspective of the common law and the Aboriginal perspective, *placing equal weight on each.*"[524] He conceded that while exclusive possession is an important element of title at common law, First Nations might understand that right differently. For instance, he

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[522] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 151.

[523] It should be noted, however, that a potential legal strategy would be to provoke a confrontation in which indigenous litigants are not *initiating* legal action, but are defending, and thus attempt to shift the burden of establishing legitimate ownership or jurisdiction over the territory in question.

[524] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 156 (emphasis added).

acknowledged that the mere presence of other First Nations within claimed territory at the time of sovereignty might not negate a finding of exclusive possession.

Indeed, he even noted that if those other First Nations were there with the consent of the plaintiff First Nation, that would in fact *strengthen* the claim, by demonstrating that the claiming First Nation had the "intention and capacity to retain exclusive control."[525] This finding is particularly sensitive to the reality of the Gitksan and Wet'suwet'en, who, as demonstrated in chapter two, have had an elaborate legal regime of "licences" that permit the children and husbands of territory-holders to continue to use territory following the death of territory-holders. It was also seen in chapter two that the Gitksan and Wet'suwet'en have elaborate regimes of "rights of way" which permit territory-holders to pass through the territory of another in order to access their own.[526]

Lamer C.J.C. also held that if First Nations can prove the existence of a legal regime relating to the exclusivity of territorial possession, then the legal system could indicate the factual truth of exclusive possession.[527] He also accepted the possibility that First Nations can *share* possession to the exclusion of other First Nations, and that such a fact could strengthen First Nations' claims to territories.[528]

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[525] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 156.

[526] See chapter two, part one, section C(I) ("Ownership of Territories By Houses").

[527] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 157.

[528] Most of the same conclusions were also shared by La Forest J., who wrote a separate, concurring opinion: see *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 196.

iv. Extinguishment (a.k.a. Infringement) of Aboriginal Title.

Following the decision of the Supreme Court of Canada in *R.* v. *Sparrow*, much academic commentary lauded the Court for making a fine distinction between the extinguishment of Aboriginal rights and their infringement by way of regulation.[529] The Court affirmed the interpretation of Hall J. in *Calder* that, "The test for extinguishment to be adopted, in our opinion, is that the Sovereign's intention must be clear and plain."[530] The Court went further by also introducing a test for the infringement of Aboriginal rights that appeared to place a substantial onus on the government to justify *prima facie* infringements by demonstrating that there is a valid legislative objective that is *aimed at preserving s. 35(1) rights.*[531]

In its comments on infringement in *Delgamuukw*, the Court essentially took with one hand what it had given with the other with respect to the "strong" nature of Aboriginal title and with respect to its comments on evidence. It did so by substantially weakening the *Sparrow* infringement test.[532] Lamer C.J.C. began by asserting that Aboriginal rights are not absolute, and can be infringed by both provincial and federal governments.[533] In his subsequent discussion, he made it clear that, consistent with the kind of sovereignty that the monologue of discovery created and which is upheld by colonial courts, the rights of the colonial state *are* absolute.

The Court held that, notwithstanding rhetoric about placing "equal weight" on indigenous

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[529] *Sparrow*, *supra* note 4 at 400-401.

[530] *Sparrow*, *supra* note 4 at 401.

[531] *Sparrow*, *supra* note 4 at 412.

[532] The weakening actually began with the *Van der Peet* trilogy.

[533] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 160.

and non-indigenous "perspectives,"[534] and its implication of dialogue in the sense advanced in this thesis, the colonial state is in fact the "lead player" in Aboriginal rights. Lamer C.J.C. repeated in *Delgamuukw* his statements in *Gladstone* that

> Because, however, distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, *over which the Crown is sovereign*, there are circumstances in which, in order to pursue objectives of compelling and substantial importance to that community as a whole (taking into account the fact that aboriginal societies are a part of that community), *some limitation of those rights will be justifiable*.[535]

Thus, the monologue of sovereignty was upheld in strong form by the *Delgamuukw* court. And the criticism that an absolute sovereignty negates the possibility of a true dialogue, applies here, as well.

Lamer C.J.C. elaborated on what the above-quoted passage means, when he stated that

> In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of Aboriginal title.[536]

In one fell swoop, the Court rolled back the substantial success that *Sparrow* represented, by permitting the provincial government wide powers of infringement and, more importantly, by reintroducing the possibility of *extinguishment* of Aboriginal title, under the guise of acceptable infringement.

Indeed, the "laundry list" that Lamer C.J.C. presented in *Delgamuukw* potentially includes a number of uses of Aboriginal lands that, if done by First Nations themselves, would constitute a violation of the "inherent limit" imposed by Lamer C.J.C. in *Delgamuukw* itself.

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[534] *Delgamuukw — S.C.C.*, *supra* note 6at paragraphs 81, 149 & 156.

[535] *Gladstone*, *supra* note 364 at paragraph 73; affirmed in *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 161 (emphasis added).

[536] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 165; La Forest J. agreed: paragraph 202.

Thus, the very protection that he sought to introduce by requiring the extraordinary step of alienation to effect certain uses of land was perverted by permitting both levels of colonial government to affect, and indeed destroy, that connection by fiat.

The Court did elaborate a fiduciary duty that arises with that extraordinarily wide power of "infringement." It might include a measure of Aboriginal consent, or at least the necessity of notifying First Nations about the impending extinguishment,[537] and that "infringement" requires economic compensation.[538] But what it *did not recognize* is that in permitting such a wide list of possible infringements on Aboriginal title, the Court effected another shift from dialogue to monologue by allowing Aboriginal rights to be affected absent the consent or participation of their holders. Once again, that shift rested on the monologue of sovereignty and the kind of power it purports to create in the colonial state.

Early in its discussion of Aboriginal title, the *Delgamuukw* Court stressed that although Aboriginal rights are *sui generis* and must take into account the dual perspectives of the Canadian legal and political system as well as those of First Nations, Aboriginal rights would not be permitted to "strain 'the Canadian legal and constitutional structure.' "[539] What is distressing is that there was no recognition of the skeletal principles of *Aboriginal* legal systems. Analysis of the *adaawk* and *kungax* reveals the profoundly important role that territorial ownership and control plays in Gitksan and Wet'suwet'en life, yet the Court blithely allowed such principles to

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[537] *Delgamuukw — S.C.C., supra* note6 at paragraph 167 - 168.

[538] *Delgamuukw — S.C.C., supra* note 6 at paragraph 169. LaForest J. concurred at paragraph 203.

[539] *Delgamuukw — S.C.C., supra* note 6 at paragraph 82. This holding is reminiscent of that of the *Mabo* court, which stated that no matter how strong a claim to justice that Aboriginal litigants present, they would not be recognized if recognition were to "fracture a skeletal principle of [the Australian] legal system": *Mabo, supra* note 295 at 29.

"fractured" virtually whenever provincial or federal governments wish.

v. Self-Government.

My final comments concerning *Delgamuukw* relate to the Court's refusal to address self-government. The Court held that, "this is not the right case for the Court to lay down the legal principles to guide future litigation," and that "rights to self-government, if they exist*ed*, cannot be framed in excessively general terms."[540] These statements, when viewed in contrast with the issues discussed in chapters two through four, reveal two points. The first is the double standard that colonial governments are permitted to enjoy "unlimited sovereignty" simply by asserting it; second that governments are permitted to engage in an unusually broad range of activities that can infringe on Aboriginal title, while First Nations must specify narrowly circumscribed powers in any claim.

More subtly, but much more importantly, the ability of the Court to separate self-government from Aboriginal title stems from the foundational categorization of English property law between *dominium* and *imperium*. As discussed in chapter three, the peculiar historical development of English legal history led to a theoretical categorization between beneficial ownership of land (*dominium*) and political/legal *jurisdiction* over land (*imperium*). Due also to the peculiarities of English legal history, this categorization classifies both of these qualities — enjoyment and jurisdiction — as property rights. They are "incidents of title."[541]

The most important sources of law on Gitksan and Wet'suwet'en territory — such as the

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[540] *Delgamuukw — S.C.C.*, *supra* note 6 at 170 (emphasis added). The "generality" ruling was originally made in *Pamajewon*, *supra* note 7.

[541] *Mabo*, *supra* note 295 at 30.

adaawk, the *kungax*, crests and totem poles — are *fundamentally* and integrally *part of their territories*. The perspicuous contrast developed between chapters two and four has revealed that for the Gitksan and Wet'suwet'en, it is conceptually absurd to separate jurisdiction from ownership, because each implies the other. That is, while, according to English law the Crown derives its right to govern from its *ownership* of radical title, the Gitksan and Wet'suwet'en do not derive their right to govern territory from their ownership; nor do they derive their ownership from their right to govern. The two concepts are inherently intertwined, and both stem from where the Gitksan and Wet'suwet'en stem — the land itself and their relationship as caretakers and beneficiaries of the land, the animal world and the supernatural realm.

I am not arguing that the Gitksan and Wet'suwet'en cannot comprehend the separation of ownership and jurisdiction now, particularly given their long association with the colonial state. Nor am I suggesting that in treaty negotiations, for instance, they will insist that the two not be separated. What I *am* arguing, however, is that the courts must at least recognize the *starting point* of the Gitksan and Wet'suwet'en horizons of understanding, which do not make the same categorization. The first step in the accommodation of intercultural conflict is a measure of intercultural understanding, and the Court's blithe dismissal of the integrally important issue of jurisdiction is another serious misrecognition of indigenous legal systems that indicates once again that its promising dialogical start to the intercultural exercise went seriously "off the rails" in the ever-crucial category of the "hybrid result" called for in chapter one of this thesis.

This point is not limited to the Gitksan and Wet'suwet'en First Nations, either. The Royal Commission has argued, with respect to indigenous peoples in general, that

> land is at the core of Aboriginal identity, a source of profound spiritual and moral values. Aboriginal peoples require greater physical space than non-Aboriginal people to maintain their cultures and to

> protect their quiet and symbolic places — places of autonomy where they can reassert authority over their economic, social and political futures. *For the same reason, Aboriginal peoples also require a greater share in decision making about activities occurring on the parts of their traditional territories* currently treated as ordinary Crown land.[542]

It is thus critical, from the perspective of all First Nations, that the issue of meaningful control over land be addressed at the same time as ownership over land. It is not enough to simply extend the necessary control that collective ownership implies. What non-indigenous legal systems generally call "jurisdiction" has to be seen as an integral part of title, at least in some sense.

Part Four — Conclusions.

In this chapter I have tried to show that the Common Law is not predisposed solely to an approach that is dominated by monologues, such as those of discovery, sovereignty and the "authentic Indian" as presented in chapters three and four. I have demonstrated that there is another strain to the Common Law, which valorizes open-mindedness, a plurality of sources, and *dialogue* as a way to address intercultural conflict. In discussing the Supreme Court of Canada's decision in *Delgamuukw*, I have argued that it exhibits both dialogue, in its discussion of oral histories, and monologue, in much of its discussion of Aboriginal title. Indeed, this complex shifting back and forth is probably an accurate reflection of how intercultural interaction really occurs — sometimes the recognition and exchange is more genuine than others.

I have tried to demonstrate that when the courts engage in true dialogue, which is marked by a "willingness to journey" to the other culture's horizons, then the "hybrid result" is more

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[542]Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Vol. 2: Restructuring the Relationship* (Ottawa: Canada Communication Group Publishing, 1996) at 557 (emphasis added) (hereinafter *Restructuring the Relationship*).

likely to resonate with both communities, such as the *Delgamuukw* court's discussion of oral histories, or the *Forsythe* court's award of damages. When they lapse back into monologue, the result is less hybrid, and more likely to be marked by a misrecognition of the other's "skeletal" values and principles.

In the Conclusion to this thesis, I will briefly draw some themes and observations together, and then point to where I think attention must be paid in the future. Following that, in the Epilogue, I will identify what I think is a certain intercultural norm, that is, shared by Canadian and indigenous societies.

Conclusions:
Where Do We Go From Here?

Survival is about the connections between things ... it also means not trying to rule others, not trying to classify them or put them in hierarchies, above all not constantly reiterating how "our" culture or country is number one ...

Edward W. Said

Part One — Introduction.

Throughout this thesis I have argued for, and begun to demonstrate, a new approach to Aboriginal rights. I have argued that a serious attempt to address intercultural conflict must start with a serious attempt to achieve intercultural understanding. Such understanding starts, I have argued, with a *willingness* to journey into the world view, beliefs, understandings, values and norms of other cultures, with the acceptance that they might have something valuable to tell us about themselves, about the world, and about ourselves. I have argued that the more willing one is to engage in that journey, then one's conclusions about intercultural conflict will be more likely to exhibit a "hybrid result", drawing on a background of understanding that is informed by values, norms and understandings gleaned by *both* cultures.

Such an intercultural journey requires an appreciation of the *dialogical* approach, which recognizes that the best, and perhaps only, way to begin to understand another culture is to listen to and converse with other cultural interlocutors, *in their own terms*. Forcing First Nations to prematurely "translate" their knowledge and ways of knowing into non-indigenous concepts and ways of knowing perpetrates an act of misrecognition, as it degrades the value of their ways of knowing and forms of expression. Indeed, as Taylor has so ably demonstrated, *recognition* is a

critical component of intercultural understanding and communication.

In chapter two of this thesis, I highlighted some of the most important norms and foundational historical narratives of the Gitksan and Wet'suwet'en. Much of this is expressed through the *adaawk* and *kungax*; their unique legal system which features the feast, Clans, Houses and corporately-held territories; and their intercultural connection to the natural and supernatural worlds, as well as their strong belief in reincarnation.

In chapters three and four I demonstrated that the Canadian law of Aboriginal rights is dominated by a series of monologues which seriously misrecognize indigenous peoples and their rights. While dialogue calls for *subjects* to *interact*, the monologues of discovery, sovereignty and the "authentic Indian" *objectify* First Nations by defining them in ways informed more by non-indigenous imagination of what constitutes the "authentic Indian" than by any values, norms or knowledge presented by indigenous peoples themselves.

In chapter five, I argued that Canadian law need not follow the monological approach. There are moments of opportunity, such as in local tribunals, in which judges broaden their horizons of understanding about indigenous peoples. Intercultural understanding can occur at a higher level, as well. The Supreme Court of Canada, for all of chapter five's criticisms, took enormous steps forward, by deploying a dialogical approach to recognize the unique knowledge of First Nations and their unique *ways of knowing*. And by characterizing Aboriginal title as a "right in land," the Court expressed the view that First Nations enjoy a species of right that the Common law recognizes as being strong in nature.

But the criticisms are serious. What the Court achieved in dialogue, it undermined in monologue, particularly on infringement and justification, by defining Aboriginal title with no

reference to Gitksan and Wet'suwet'en legal principles. Restrictions such as blanket inalienability and the ability of governments to all but extinguish title pay no attention to bedrock indigenous legal principles.

What is evident is that between those two portions of the judgement, the Court moved from dialogue to monologue. It shifted from a cautious but sensitive exploration of indigenous reality, to blithe statements about the need to impose restrictions in the name of reconciliation. Reconciliation was changed from being something that is done *by* people, to something that is done *to* people. Essentially, the Court moved from a relatively hybrid result, to one which was markedly less so. One test of this assertion is how *resonant* each portion of the judgement is with *both* communities.

The Court's discussion of evidence showed a subtle understanding of the exigencies of evidence law, as well as its limitations. It was sensitive to different epistemologies, and fashioned a response informed by both systems. In its discussion of title, however, sources were drawn from one culture; the "compromises" were one-sided; and the ultimate justification, Crown sovereignty, moved from reconciliation of systems to the trumping of one by the other.

In this Conclusion I will explore different elements of the "middle ground" which I propose will move us past the dilemma the Supreme Court has left us. I will address two notions of the "middle ground" — both normative and temporal. By normative, I will explore whether there are norms that can be said to generated from the horizons of understanding of *both* cultures, and therefore to be truly intercultural. By temporal, I will argue that certain safeguards, to protect the *ability* of both parties to negotiate treaties in an atmosphere of greater equality, should be imposed by courts. In particular, I shall discuss treaties and negotiation, and the issue of

sovereignty.

Each of these could of course be a thesis itself. For that reason, my discussion will be necessarily brief and tentative, in the way of providing some suggestions of paths to be looked at, rather than definitive answers. Those schooled in what Tully refers to as the "discourse of modern constitutionalism" will no doubt be frustrated by my refusal to provide definitive recommendations or positions inexorably derived from "first principles." But I take my cue from Sharon Venne, who argues that

> No Elder ever knows the complete story. The information is spread among a wide group of people for a variety of reasons. For one thing, the only one who knows the complete story within one mind is the Creator. No person could ever claim to be the Creator. So, the stories are spread among the people, and only through repeated and continuous contact with Indigenous communities can the complete stories be known.[543]

What Venne describes, of course, is an explicitly dialogical process in which each participant *needs* the other in order to render a coherent account. In the same way, I offer this thesis, and its suggestions, as contributions to the intercultural dialogue.

These contributions are products of the perspicuous contrast developed between chapters two to five, culled especially from a "dialogue" between chapter two and chapters three and four. I argue that dialogue is the only way to enhance intercultural understanding, and that intercultural understanding is undeniably the best way to address intercultural conflict. As such, these contributions represent an important step forward.

A. The Normative Middle Ground — Negotiation and Treaties.

In determining where to go from here, a range of possibilities relating to Aboriginal title

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[543]Venne, "Understanding Treaty 6," *supra* note 203 at 176.

and Aboriginal rights in general, from outright refusal of recognition, to a rethinking of sovereignty and the relationship of the Canadian state to indigenous peoples is possible. Some would argue that we ought to "let bygones be bygones."[544] Others might suggest compensation on the basis of the value of territories at the time of European arrival, reasoning that, absent the "value added" of European settlement, such lands were valueless. What that ignores, of course, is that *priceless* is not the same thing as *valueless*. It also ignores the deep offence that First Nations take at the proposition that they can be "bought out" absent their consent. Without doubt, a better way to proceed is by way of treaties, which have a long presence in the history of Canada and First Nations.

i. Treaty Policy in Canada and the Obligation to Negotiate in Good Faith.

Early dealings between the British Crown and First Nations proceeded on the basis of "peace and friendship" treaties, in which Aboriginal title was implicitly acknowledged and First Nations agreed to ally with England over other European powers, and to live side-by-side with settlers and avoid violent confrontation. Early treaties addressed issues of ongoing life, in which settler and indigenous communities agreed on issues such as civil and criminal law when disputes between their respective citizens arose, and on ways in which to settle disputes over land and trade.[545]

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[544]See Smith, *Our Home Or Native Land*, *supra* note 29 at 161 *ff.*

[545]See RCAP, *Restructuring the Relationship*, *supra* note 542, chapter two, "Treaties" (hereinafter "Treaties"); see Webber, "Relations of Force," *supra* note 282. And see the excellent historical reconstruction of a time of relative equality between First Nations and European settlers, which led to an era of explicit, strong-form legal pluralism, by Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region, 1650-1815* (Cambridge: Cambridge University Press, 1991).

In the mid-1800's, however, colonial policy changed with the Robinson-Huron Treaties,[546] and the advent of the "extinguishment-grant back" model, by which treaties required First Nations to agree to "blanket extinguishment clauses," in which they agreed to "cede, release and surrender" all title, claims and rights, in return for reserves. Crucially, title to those reserves was held of the Crown, rather than of pre-existing Aboriginal legal systems. This policy was continued with the "Numbered Treaties" and was extended well into the twentieth century, especially after the government perceived "uncertainty" in the wake of the *Calder* decision.[547]

The "extinguishment-grant back" model is deeply offensive to most First Nations, and has been a "deal breaker" in negotiations over the last thirty years, because it entails the denial of Aboriginal identity and nationhood that continues to flourish and grow in the territories where it was born. It does so by insisting that First Nations will no longer have the intimate connection to their land that their laws and traditions demand. Such a divorce from traditional territory is an almost incomprehensible demand for First Nations communities, and some argue that it is impossible under indigenous law.[548]

The first modern treaty which does not rely on extinguishment language is the Nisga'a Final Agreement, signed in August, 1998.[549] Instead of wading into the treacherous waters of

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[546]Jackson, "Covenant Chain," *supra* note 258 at 21.

[547]*Calder*, *supra* note 3.

[548]Venne, "Understanding Treaty 6," *supra* note 203. Most treaty nations in Canada deny that extinguishment was the intent of their treaty as understood by the First Nations at the time. See, for instance Jackson, "Covenant Chain", *supra* note 258; see also John U. Bayly, "Entering Canadian Confederation the Dene Experiment" in Bradford W. Morse and Gordon R. Woodman, eds, *Indigenous Law and the State* (Providence R.I.: Foris Publications, 1988) 223 at 224; and see RCAP, "Treaties," *supra* note 545 at 44-45.

[549]Strictly speaking, the "Yukon Agreement", between Canada and the Dene of the McKenzie Valley, does not contain extinguishment language. See Jackson, "Covenant Chain," *supra* note 258 at 57-65 for a detailed and careful review and analysis.

extinguishment, the Final Agreement is silent as to the *source* of the parties' rights, and achieves the much-vaunted "certainty" by exhaustively laying out the parties' rights and stating that the Agreement governs future interpretation. In this way, the Nisga'a were able to share ownership and jurisdiction of their traditional territories at the same time as maintaining their legal and spiritual connection to them.

In chapter two I demonstrated that territory and the continued connection of the Gitksan and Wet'suwet'en to it, lie at the bedrock of their political, social and legal framework. The *adaawk*, *kungax*, crests and totem poles all testify to the central importance that House territories have for both the Gitksan and Wet'suwet'en First Nations. Thus, as with other First Nations, any approach to Gitksan and Wet'suwet'en territories must avoid extinguishment of title. Indeed, the extinguishment approach is fundamentally monological, because it denies that First Nations and Canada are and must continue to be in a relationship. Rather, it tries to *end* relationships.

The superior view of treaties is articulated by the Royal Commission, which states that, "the purpose of treaties was to create a *modus vivendi*, a working arrangement that would enable peoples who started out as strangers to live together as neighbours."[550] In order to restore such an understanding and approach, a substantial shift will have to occur.

One step in this direction is the identification of an intercultural legal rule that requires *both* parties to negotiate, and to negotiate in good faith. Canadian and indigenous legal systems identify negotiations in cases of intercultural conflict as morally and legally necessary. The Gitksan *adaawk*, for instance, is replete with detail and history on the use of intercultural feasting and "treaties" to settle disputes, especially disputes over land.

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[550]RCAP, "Treaties," *supra* note 545 at 21.

For instance, in the ancient period, the *adaawk* tells us that

> Gamlaxyeltxw and Luuxhon traveled south along the Nass River looking for a new and unoccupied area that would sustain them ... Finally, they settled, after a number of generations, at Winsgahulg'l and Gitxsits'uuts'xwt and established formal ties with the people of Gitwilaxgyap ... The people there were a different people and spoke a different language. Both Gamlaxyeltxw and Luuxhon gave major feasts at which they identified themselves to these people and formalized ties of friendship.[551]

There is detail of feasts of peace during the fur trade between the Gitksan and the Tsetsau,[552] and one *adaawk* tells how, "Aminta began a ceremony of peace which concluded with the handing over of the Meziadin territory to the Gitanyow." At the feast, the participants sang songs and presented symbols to identify themselves and their stories.[553] There is also evidence of a peace feast between the Gitksan and provincial officials including Joseph Trutch.[554]

What these examples reveal is that the Gitksan legal system *requires* a dialogical setting, such as a feast, when intercultural conflict, especially over land, develops, in order to properly make peace. We also see that the sharing of land has a long history in Gitksan law. Common to all these examples is that things "aren't right" unless some sort of peace ceremony takes place in which each party can maintain its identity while participating in the event.

The Supreme Court of Canada articulated a very similar notion in *Delgamuukw*, when it stated that the parties should avoid further litigation and go to the bargaining table.[555] Indeed, Lamer C.J.C. went further and stated that, "Moreover, the Crown is under a moral, if not legal,

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[551]Sterrit, *et al.*, *Tribal Boundaries*, *supra* note 150 at 21.

[552]Sterrit, *Tribal Boundaries*, *supra* note 150 at 46 *ff.*

[553]Sterrit, *Tribal Boundaries*, *supra* note 150 at 46.

[554]Galois, "Kitsegukla," *supra* note 245.

[555]*Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 186 (*per* Lamer C.J.C.). The sentiment was echoed by LaForest J. at paragraph 207.

duty to enter into and conduct those negotiations in good faith,"[556] thus suggesting that, under Canadian law, there is a legal duty on behalf of the Crown to negotiate. Indeed, such a duty would be consistent with the fiduciary duty the Crown has with respect to First Nations.

This notion was elaborated upon by the Court some months later, in the context of the secession of Québec from Canada.[557] The Court stated that, upon the clear assertion of a desire to separate from Canada, principles of democracy and federalism interact so as to forbid either the unilateral secession of a provincial population, or the unilateral rejection of separation by the rest of the country.[558] Rather, the Court held that while neither principle "trumps" the other, they *interact* to create in *both* parties the constitutional obligation to negotiate.[559]

Such negotiation has to take place in accordance with the principles that give rise to it, such as democracy and federalism, and the Court held that a failure to negotiate in a manner consistent with such principles and values, "would seriously put at risk the legitimacy of that party's assertion of its rights, and perhaps the negotiation process as a whole."[560] Such a holding by the Court represents a triumph of dialogue over the discourse of modern constitutionalism, in that it recognizes a plurality of interests and normative regimes. The Court's insights seem uniquely relevant to the indigenous context, given the clear desire of First Nations to address their relationship with the colonial state, and given the explicit obligations of that state under s.

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[556] *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 186.

[557] *re Secession of Quebec*, [1998] S.C.J. No. 61 (Q.L.) (hereinafter *Reference*).

[558] *Reference*, *supra* note 557 at paragraphs 90-93.

[559] *Reference*, *supra* note 557 at paragraphs 93-94.

[560] *Reference*, *supra* note 557 at paragraph 95.

35. Thus, I argue that not only do Canada and indigenous peoples have an intercultural legal *obligation* to negotiate, but it must be done in good faith.

Contrary to the example (or the rhetoric) of Québec, negotiations between Canada and First Nations would concern not the *separation* of each into separate states, but the *coming together* of each, albeit in a way that does not obliterate the participants' identity. The key underpinning principle *must be* that in coming together, one system is not obliterated by the other; rather, it must inform and educate the other. As the Royal Commission argued

> Making a treaty does not require the parties to put aside all their political and legal differences, much less adopt each other's world view. A treaty is a mutual recognition of a common set of interests by nations that regard themselves as separate in some fundamental way. Treaty relationships will evolve organically, but there must be no expectation that one world view will disappear in the process. On the contrary, treaty making legitimizes and celebrates the distinctiveness of the parties while establishing their bonds of honour and trust.[561]

Thus, bedrock legal principles of each community ought to be protected, as anything else would not be the "reconciliation" of two systems, but the "extinguishment" of one by the other.

The quickest way to extinguish indigenous systems is to extinguish their title to land, because of the integral connection of First Nations to the land. The Royal Commission recognized this point when it stated that

> the RCAP cannot support the extinguishment of Aboriginal rights, either blanket or partial. It seems to us completely incompatible with the relationship between Aboriginal peoples and the land. This relationship is fundamental to the Aboriginal world view and sense of identity; to abdicate the responsibilities associated with it would have deep spiritual and cultural implications.[562]

ii. The Role of the Courts.

As is sometimes painfully obvious, however, treaties are not easy to negotiate. This is especially so in the case of modern treaties which seek to address incredibly complex and

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[561]RCAP, "Treaties," *supra* note 545 at 54.

[562]RCAP, *Restructuring the Relationship*, *supra* note 542 at 543.

complicated issues such as land, jurisdiction, resource use, dispute resolution and so on. Indeed, the journey of the Nisga'a Final Agreement from comprehensive land claim in the early 1970's, to Agreement in Principle in 1996, to Final Agreement in mid-1998, has been fraught with breakdown, disagreement and on-again, off-again dialogue. And the mere fact of its signing in August, 1998 does not guarantee its passage through the various political bodies of the Nisga'a First Nation, the provincial legislature and Parliament, especially given the widely held but vaguely defined "current liberal" moral and political philosophy which I described in chapter one of this thesis, and which I think enjoys great currency.[563]

In addition to those kinds of problems, there is often disagreement over what rights the parties have and how strong their bargaining positions are during negotiations. Such disagreement was one factor in the breakdown of tripartite negotiations between the federal and provincial governments and the Gitksan in 1996. The Province stated that

> Negotiations between the Province and the Gitxsan have not achieved the progress envisioned in the Accord. It is clear there are fundamental differences between our views of the nature and scope of Aboriginal rights and jurisdiction. These differences lead us to believe that treaty negotiations with the Gitxsan, at this point, will not achieve progress until the issues concerning Aboriginal rights are decided by the Supreme Court of Canada.[564]

Thus the judiciary *does* have a role in the ongoing dialogue of intercultural relations in Canada. Indeed, a plausible argument can be advanced that *Delgamuukw* will refine negotiating positions, which can give rise to optimism; or great concern, given the critique in chapter five.

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[563]See the flurry of opposition to the Final Agreement from letter-writers, talk-show hosts and callers and provincial and federal elected officials. See for instance, "The Nisga'a Deal: Cause for Celebration and Criticism," *Vancouver Sun*, Monday July 27, 1998, p. A11 (letters); and "Campbell urges federal referendum on treaty," *Vancouver Sun*, Tuesday July 28, 1998, p. A3 (Campbell is Provincial Leader of the Opposition).

[564]British Columbia Treaty Commission, *Report on the Suspension of Gitxsan Treaty Negotiations* (March 14, 1996) at 8.

B. The Temporal Middle Ground and Principles Which Should Apply.

i. An Argument for Pluralism.

The "temporal middle ground" refers to the time between now and when Canada and First Nations enter into relationships of mutual satisfaction, in which genuine intercultural understanding and respect is advanced. This middle ground is fraught with danger for First Nations because of the fragility of their rights while the monologue of sovereignty persists. For instance, "Governments are free to create new third-party interests on the traditional lands of Aboriginal claimants right up until the moment a claims agreement is signed."[565] Indeed, Turpel's comments regarding the "interpretive monopoly" help to sharpen focus on the fact that there is a need to equalize bargaining positions, so that First Nations can participate fully in the intercultural dialogue. And so I venture into the issue of sovereignty.

a. The Sovereignty Crisis, Part II.

I stress that in venturing into the issue of sovereignty, I do so cautiously and tentatively. I do so with the knowledge that the Royal Commission noted that the issue of sovereignty represents perhaps an unbridgeable gap between those who insist upon it and those who deny it,[566] and, more importantly, with the realization that there is a tremendous literature, especially in international law, to which I can do little justice in the concluding remarks to this thesis. Thus, I will limit my comments to sketching possible directions.

I have argued throughout this thesis that the monologue of sovereignty, which has its

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[565]RCAP, *Restructuring the Relationship*, *supra* note 542 at 538. The RCAP insists that Canada has a fiduciary obligation to protect claimed lands from spoilation and third party interests until the resolution of disputes at 559.

[566]RCAP, "Treaties," *supra* note 545 at 20.

roots in the monologue of discovery and its repugnant images of Aboriginal identity, carries with it a very curious content. Courts have held that "sovereignty," which is held by the colonial state and not by First Nations, gives the colonial state the *power* to "preside" over the wider community which includes indigenous and non-indigenous peoples. It is through that status that the colonial state is permitted to limit or extinguish Aboriginal rights without consent.[567] Indeed, as I have argued, the monologue of sovereignty confers on the colonial state the ability to move from dialogue to monologue at whim.

James Tully has argued that it is the discourse of modern constitutionalism that is responsible for such a totalizing theoretical definition. Among others, Tully argues that sovereignty is never absolute in the way that theory posits. In reality, sovereignty is always partial, contingent and interconnected with other sovereignties. He gives as an example the international relations of those entities most often seen as "sovereign" — nation states.[568] Because nation states are often unable to impose their sovereignty on other states, they usually engage in dialogue and negotiation. And while there are often major power imbalances, there is usually a recognition of and respect for the autonomy of other sovereigns.

Such an understanding of sovereignty is capable of recognizing the factual presence of continuing First Nations law, and the fact that there are many who follow it, as the legitimate authority that governs their actions. Conversely, it must be recognized that this field is also "occupied" by Canadian authority and laws — both federal and provincial, and that many Aboriginal people adhere to some of those laws, believing them to be just and legitimate, thus

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[567] *Gladstone*, *supra* note 364 at paragraph 73, affirmed in *Delgamuukw — S.C.C.*, *supra* note 6 at paragraph 161.

[568] Tully, *Strange Multiplicity*, *supra* note 87 at 194.

demonstrating their "intersected" identities or "multiple loyalties." A follow-on point is the presence of a large non-Aboriginal population with both a genuine connection to Canada as their home and a genuine loyalty to Canadian law as morally binding upon their conduct. Essentially, there are a plurality of "sovereignties", symbolized by these plural legal orders and multiple loyalties.

The monologue of sovereignty is simply unable to comprehend such subtle factual realities, and therefore presents another excellent example of Wittgenstein's critique of the "craving for generality" and Tully's critique of the discourse of modern constitutionalism. Indeed, Tully calls for a radical re-imagination of sovereignty as something possessed not by states, but by citizens, and as therefore a way to mediate cultural pluralism. He recognizes that Canada is constituted by citizens who have multiple and overlapping loyalties,[569] and therefore are always already experienced in the art of negotiation, dialogue and understanding. Indeed, this notion might be what the Supreme Court was grasping toward when it stated that, "The Constitution is the expression of the sovereignty of the people of Canada,"[570] and that such a redescription should be seriously contemplated by Canadian courts and law.

ii. Measures of Accommodation.

But how would courts effect such a lofty challenge? Bradford Morse and Gordon Woodman schematize the various responses that state law can have to indigenous legal norms

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[569]Tully, *Strange Multiplicity*, *supra* note 87 at 140 *ff.*

[570]*Reference*, *supra* note 557 at paragraph 85.

and legal systems.[571] They describe a range of responses starting roughly with what Morse elsewhere terms the "total rejection" model, in which the state, claiming a monopoly of legal authority and power, refuses to acknowledge the existence or legitimacy of a plurality of legal orders. As Morse argues, this is often thinly disguised by reference to the desire to establish a single legal system for all.[572] Indeed, such a reaction often calls upon the widely held but vaguely defined norms of "current liberalism" criticized in chapter one.

The other extreme in that range of options is what Morse terms "total avoidance," in which two systems "function without any, or only negligible, interaction."[573] While this might appear facially attractive, it implies a level of independence which, while theoretically coherent, is practically unlikely. Although much of it has been forced through colonization, the reality is that Canada contains permeable, overlapping, often contesting but sometimes cooperating, political communities of both indigenous and non-indigenous character. Indeed, the entire point of this thesis has been to argue that viewing political and cultural communities as hermetically sealed from one another is a triumph of theoretical abstraction over lived reality. Thus, it will be useful to briefly canvass how different communities' legal orders can *interact*.

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[571]Bradford W. Morse and Gordon R. Woodman, "Introductory Essay: The State's Options" in Bradford W. Morse and Gordon R. Woodman, eds, *Indigenous Law and the State* (Providence R.I.: Foris Publications, 1988) 5 "hereinafter "The State's Options").

[572]Bradford W. Morse, "Indigenous Law and State Legal Systems: Conflict and Compatibility" in Bradford W. Morse and Gordon R. Woodman, eds, *Indigenous Law and the State* (Providence R.I.: Foris Publications, 1988) 101 at 106 (hereinafter "Conflict and Compatibility").

[573]Morse, "Conflict and Compatibility," *supra* note 572 at 103.

a. Fact and Law.

1. Admittance as Fact.

Broadly speaking, Morse and Woodman lay out three major ways in which formal state law can interact with indigenous legal systems. "Admittance as Fact" occurs when, "the application of non-customary [*i.e.* formal state] norms require the admittance [into evidence] of existing (and accepted) customary law as a relevant fact, such as customary norms involving sentencing."[574] The example of *Ashini* in chapter five, in which the Court looked to indigenous legal norms of ownership in order to determine the factual reasonableness of the defendants' belief in their colour of right defence falls into this category.

Morse and Woodman classify this as a superficial form of legal pluralism, as it does not require the colonial state to concede any of its own jurisdiction or authority. They also note, however, that, due to the traditional blindness of state law to non-state norms, admittance as fact represents a notable step forward.[575]

2. Admittance as Law.

The second major category involves the acceptance by the colonial state that what First Nations present is *bona fide* law. This is a very important concession from the perspective of this thesis, because I am arguing that indigenous *legal systems* and *law* present an excellent way for indigenous peoples to participate in intercultural dialogue on their own terms. Law is a non-static entity, which is capable of change and adaptation and, importantly, an entity which should

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[574]Morse and Woodman, "The State's Options," *supra* note 571 at 10.

[575]Morse and Woodman, "The State's Options," *supra* note 571 at 10.

be changed by those who possess and operate it. This point was made by the Royal Commission when it stated that, "The law of Aboriginal title thus acknowledges that societies and cultures evolve and transform over time and that legal recognition of Aboriginal rights is premised on *continuity, not conformity* with the past."[576] A focus on law might thus afford First Nations a greater claim on what the *content* of their participation in intercultural dialogue is.

Morse and Woodman include a variety of types of state recognition of indigenous legal norms under this heading, and point to, for instance, the acceptance of indigenous formal requirements, such as customary marriage, as meeting the requirements of state laws. Another example is use by the state of an indigenous legal concept and accepting that as meeting some requirements of non-indigenous law.[577] A good example is the *Casimel* case[578] in which the court accepted a customary adoption as sufficiently meeting the words of the *Insurance (Motor Vehicle) Act*'s provisions on dependent parents survivor benefits.

The authors argue that there are a variety of ways by which formal state law can recognize indigenous law as law. One would be "incorporation by reference," in which courts permit the "content" of indigenous law to be "filled" by indigenous peoples through their own institutions, while another would be formal replication of laws by the legislature of the colonial state.[579] Each of these has its advantages and disadvantages.

For instance, while incorporation by reference would preserve a measure of indigenous

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[576]RCAP, *Restructuring the Relationship*, *supra* note 542 at 561 (emphasis added).

[577]Morse and Woodman, "The State's Options," *supra* note 571 at 16.

[578]*Casimel* v. *Insurance Corporation of British Columbia*, (1993) 106 D.L.R. (4th) 720 (B.C.C.A.).

[579]Morse and Woodman, "The State's Options," *supra* note 571 at 13-14.

control over the meanings of their own laws, the deployment of such laws in a non-indigenous legal context could result in their subtle normalization and thus change.[580] By contrast, while incorporation by replication would undoubtedly help to prevent wildly ethnocentric conclusions by trial judges, there is the substantial danger of "freezing" indigenous laws at one moment in time.

Common to both methods is the overriding authority of the state which comes from the monologue of sovereignty. As long as there is *incorporation*, whether it be by reference or replication, there will be the "higher power" of the state to change the norms or disregard them whenever it "slips" back into a monological approach, unless in the meantime there is some shift in power balances that can affect that. So, while the incorporation of indigenous legal norms is undoubtedly a step forward in the project of intercultural dialogue, it is still weak from the perspective that the colonial state can shift from dialogue to monologue and thereby impose its power on the other, weaker, participant, namely, First Nations.

3. *Exclusive Acknowledgment.*

Morse and Woodman's third type of interaction is the most radical, and ultimately the one most worth striving for. "Exclusive acknowledgment" has the state, which usually claims a monopoly on all legitimate forms of law and power, acknowledging the partiality of its own sovereignty. As Morse and Woodman put it, "Through a measure of acknowledgment state law accepts the capacity of customary law to constitute an institution with legal powers, such as a

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[580]See Gordon R. Woodman, "How State Courts Create Customary Law in Ghana and Nigeria" in Bradford W. Morse and Gordon R. Woodman, eds, *Indigenous Law and the State* (Providence R.I.: Foris Publications, 1988) 181 at 187 (hereinafter "Customary Law in Ghana and Nigeria").

traditional assembly with power to enact law or to adjudicate disputes."[581] The state recognizes indigenous *powers*, and by so doing, "implies abandonment of any dogma of a state monopoly of legitimate authority."[582]

The implications of such a development would be profound. It would go a substantial distance toward addressing Turpel's "interpretive monopoly" by removing power from the colonizer and placing it with the colonized. It would contradict the monologue of sovereignty and affirm that *true dialogue* requires more than one sovereign participant — it requires participants who are *secure* enough in their autonomy and self-determination that they can continue to express themselves and their world view *in their own ways*. It would also represent a movement of Canadian law toward indigenous law insofar as First Nations have been saying for generations that while there may be something to Canadian jurisdiction and sovereignty, it has never been total, and has never obliterated their own.

It would also introduce uncertainty into intercultural relations in Canada. As Morse and Woodman observe, the trick is that the state, by acknowledging the co-existence of another law, lacks the "competence to determine the scope of the powers of the customary institution. In this case, conflicts can be determined only by some overriding law,"[583] such as, perhaps a treaty.

This thesis valorizes true dialogue as an approach to intercultural understanding. True dialogue requires more than one sovereign, and requires each to be secure in their ability to contribute to the conversation in their own ways. To ensure this, the trump card of sovereignty,

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[581]Morse and Woodman, "The State's Options," *supra* note 571 at 16.

[582]Morse and Woodman, "The State's Options," *supra* note 571 at 18.

[583]Morse and Woodman, "The State's Options," *supra* note 571 at 19.

which allows the colonial state to lapse into monologue and thus marginalize First Nations and their legal regimes, should be discarded by courts.

In so doing, courts can fulfil the role that the Royal Commission envisions, by providing a sometimes provocative backdrop to the intercultural dialogue. As the RCAP noted, "By recognizing Aboriginal title, the law serves as an instrument for the enforcement of Aboriginal rights and provides Aboriginal nations with a measure of bargaining power during negotiations."[584] In order to do so, courts should consistently draw upon indigenous and non-indigenous legal systems, as I have started to do in this thesis, to both build an intercultural legal "middle ground," and to continually affirm the co-sovereignty of First Nations.

Such a "middle ground" should exhibit a respect for bedrock principles of indigenous legal systems, such as the fact that, for the Gitksan and the Wet'suwet'en, land and territory is the *sine qua non* of their legal and political system. Thus, to allow extinguishment or serious infringement of title lands without their consent is an absolute non-starter. This is not to say that First Nations will capriciously require non-Aboriginal people to vacate their territories. For most First Nations, their relationship with the land is one which is shared with the animals, the trees and the rocks, and for most there is a longstanding legal history of ordered, respectful sharing with new peoples.[585]

Following my discussion regarding infringement *cum* extinguishment, it must also be clear that the wide-ranging infringement power that *Delgamuukw* stands for needs revisiting. Factually, the types of allowable infringement by provincial and federal governments can amount

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[584]RCAP, *Restructuring the Relationship*, *supra* note 542 at 562.

[585]In the context of early contact, see Jackson, "Covenant Chain," *supra* note 258. See also, generally, Asch and Zlotkin, "Affirming Aboriginal Title," *supra* note ? at 228.

to extinguishment without consent, which is not only profoundly disrespectful of bedrock indigenous legal principles, but is also arguably in contravention of a *Canadian* norm of recognition of Aboriginal rights in s. 35(1). Presumably, s. 35(1) introduced a strong norm of consent by Aboriginal peoples to the extinguishment of their rights.[586] To borrow a notion familiar to Canadian constitutional law, it would be perverse to allow governments to do indirectly what they are not empowered to do directly,[587] namely, to infringe so severely as to extinguish.

In order to begin a process of "filling" the content of Aboriginal title by saying what it *does* and what it *does not* contain, however, courts will have to draw consistently on the values, world view and *laws* of Aboriginal and non-Aboriginal communities equally. This is because, as is clear from my critique of *Delgamuukw*, any lapse into a monological exercise of understanding title from one perspective only, will lack the necessary intercultural authority to morally bind both communities.

One way that this might *begin* to occur, and in which Turpel's challenge regarding the "interpretive monopoly" can *begin* to be addressed, is to explicitly open the Canadian legal system to indigenous legal norms, and then to begin aggressively "staffing" the judiciary with those who are schooled in First Nations law.[588] It is a requirement of every court system in Canada (provincial, federal and superior) that its judges enjoy a certain experience in the

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[586]In addition, Patrick Macklem argues that s. 35 is an explicit overruling of monologues such as discovery and sovereignty: Macklem, "Legal Imagination," *supra* note 266.

[587]The classic case on this point is *A.G. Alberta.* v. *A.G. Canada*, [1939] A.C. 117 (P.C.) (The Bank Reference).

[588]For criticism of the efficacy of "indigenizing" state institutions, see Paul Haveman, "Indigenization of Social Control in Canada" in Bradford W. Morse and Gordon R. Woodman, eds, *Indigenous Law and the State* (Providence R.I.: Foris Publications, 1988) 71, but note that he addresses indigenization of law *enforcement* and not *law*.

Canadian legal system. Would it not be equally wise to ensure that at least *some* of the judiciary be experienced in indigenous legal systems?[589]

iii. Conflict.

But what of scenarios in which there is conflict over, for instance, resource use, where the ownership and jurisdiction of land or resources is under conflict? This is a profoundly difficult question to answer, because the thrust of this thesis has been to undermine the right of *either* party (indigenous or non-indigenous) to the ontological claim that they trump the other's legal or political power. One response is to express hope that a new, more equalized environment will usher in a new era of cooperation rather than conflict, and that treaty negotiations will proceed more quickly and in good faith. Another is to observe that states have to deal with less-than-total sovereignty all the time. Yet another is to point to the success stories that do exist such as the various different schemes of co-management between governments and First Nations.

The RCAP defines co-management as, "institutional arrangements whereby governments and Aboriginal entities (and sometimes other parties) enter into formal agreements specifying their respective rights, powers and obligations with reference to the management and allocation of resources in a particular area of Crown lands and waters."[590] Some co-management schemes, which vary widely in content and in relative balances of power, exist absent treaties or agreement

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[589]See the detailed and careful consideration of this notion in Borrows, "With or Without You," *supra* note 227.

[590]RCAP, *Restructuring the Relationship*, *supra* note 542 at 666.

on the larger issues between governments and First Nations.[591]

My-less-than-decisive response is no doubt disappointing and probably deeply unsatisfactory for those who, schooled in the "discourse of modern constitutionalism," expect a set of decisive responses derived from some notional "first principles" and applied clearly and rationally to decide all conflicts. These same people fear the "uncertainty" that an approach such as mine threatens. But as has been pointed out countless times, we do not live in a era of certainty now. Not even when completely steeped in the discourse of modern constitutionalism, marked by monological approaches such as that of McEachern C.J. in *Delgamuukw*, are the vexing issues which face Canada and First Nations any clearer or closer to resolution.

James Tully enthusiastically embraces a transformation from a political community marked by the monologues presented in this thesis, to one which valorizes intercultural understanding and dialogue and is understood to be

> an activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate agreements on their ways of association over time in accord with the conventions of mutual recognition, consent and continuity.[592]

He goes on to argue that, "Most importantly, engagement in intercultural dialogues on the constitution, like Aboriginal exchanges of stories, is itself the exercise of critical freedom, as citizens tell and mediate their stories of the association."[593] Seen in this way, both communities can draw on one of the richest, best and most unique elements of North American indigenous

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[591]Co-management is discussed more comprehensively at RCAP, *Restructuring the Relationship*, *supra* note 542 at 666 *ff.* Examples include the Gwaii Haanas/South Moresby National Park reserve and the 1994 Interim Measures Agreement between the province of British Columbia and the First Nations of Clayoquot Sound, both of which permit mutual input on the management of contested resources while larger negotiations continue.

[592]Tully, *Strange Multiplicity*, *supra* note 87 at 184.

[593]Tully, *Strange Multiplicity*, *supra* note 87 at 207.

culture, which is the notion that each interlocutor in the dialogue possesses only one perspective and thus only one part of the story, thus requiring conversation and dialogue. It is in that spirit that I offer this thesis.

Epilogue
The Intercultural Norm of Recognition

> ***"He had confessed that he had done wrong and he was prepared to correct it. He had thrown himself at the mercy of* Hagbegwatku *and his brother* Goldum tsean. *So* Hagbegwatku *asked his brother,* Goldum tsean, *to move over to one side, and* Hagbegwatku *himself moved over to make room for their grandson at the Head of the House. They called* Massanal *and, true to the spirit of honouring guests, they seated him at the Head of the House where* Hagbegwatku *himself normally sat."***
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> ***Hagbegwatku* (Ken Harris), from his family's stories.**

The stories of Hagbegwatku (Chief Ken Harris)'s family conclude with a story of a "visitor" of sorts to Kitsegukla. He tells the story of two maternal grandchildren of a holder of the name Hagbegwatku, which means First Born of the Nation.[594] The grandchildren, Massanal and Demdelachu, were brother and sister; it became apparent that the two became very committed to one another, and committed the sin which the Gitksan call *kaitz*, and which is known in English as incest. The grandfather, Hagbegwatku, was very angered and banished the two from the village, with orders never to return.

In time, the two were overcome by sorrow and returned to Kitsegukla. As Chief Ken Harris tells it, Hagbegwatku and his brother Goldum tsean, "felt very sorry for their young grandson. He had confessed that he had done wrong and he was prepared to correct it."[595] Their grandfather accepted the apology and let their Massanal sit at the feast table. In the ensuing years, there was much grumbling in Kitsegukla about the situation, and opposition to the fact that Hagbegwatku had permitted his grandchildren to come back after their wrong.

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[594] *Hagbegwatku* (Ken Harris), *Visitors Who Never Left*, *supra* note 174 at 128.

[595] *Hagbegwatku* (Ken Harris), *Visitors Who Never Left*, *supra* note 174 at 129.

It was a time of much strife, with many invasions and battles,[596] as well as constant accusations of witchcraft due to illnesses and death. Much of this was attributed to Massanal and his sister, and many chiefs were angry but kept their own counsel. Over time, Hagbegwatku wanted to give his grandson a title, but there was much opposition to it from other chiefs. They felt it was enough that Massanal was allowed back to the village.

After Massanal died, his nephew was adopted into a Clan,[597] but he received no name.[598] Instead, he was only called Massanal. As Chief Ken Harris tells it, Hagbegwatku then made a plan, and gave to this young Massanal a *nax nock*, which is a Gitksan spiritual story that is connected to the land. The *nax nock* was that of the Thunderbird, *Twe Tjea-Adku*,[599] and allowed him to continue to live at Kitsegukla. From that point forward he held a position of honour in the House of Hagbegwatku, and became the Visitor Who Never Left.

As should be apparent from the analysis of the *adaawk* and *kungax* in chapter two of this thesis, this story can be analyzed on a multiplicity of levels. It tells of the birth of names; it likely forms a part of an important recounting of Gitksan history, with territorial referents (like Kitsegukla) and information about the acquisition and defence of territory. It reiterates an important legal norm about incest. But most importantly for our purposes, it tells a story of

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[596]It is possible that this story contains important evidence about one of the eras in which the Gitksan were in conflict with their Athapaskan neighbours, either a few hundred years prior to European arrival, or during the fur trade era. See Sterrit *et al.*, *supra* note 150 at 34-56.

[597]Recall that the Gitksan are a matrilineal people, whose Clan and House "citizenship" passes down the mother's line.

[598]By name, the story refers to a hereditary title. Had the initial sin of *kaitz* never occurred, it is likely *Massanal*'s nephew would have received the name *Hagbegwatku.*

[599]In an earlier story, Chief Ken Harris tells of "The Origin of the Thunderbird, *Twe Tjea-Adku*," in *Hagbegwatku* (Ken Harris), *Visitors Who Never Left*, *supra* note 174 at 75. The Thunderbird originated in a case of incest, in which the offenders were to be put to death but became Thunderbirds.

reconciliation that was predicated on the notion of *recognition.*

Massanal and his sister committed an offence that was serious in the eyes of the Gitksan law. Indeed, incest was at one time punishable by death. After receiving a harsh sentence of banishment, the young offenders returned to their village, seeking forgiveness and reconciliation. The key to that reconciliation was an admission of wrongdoing and a recognition of the norms that had been violated, as well as the locus of the wrongdoing — the House of their grandfather.

As is part of Gitksan tradition and law, Massanal and his sister were treated with respect by their grandfather, even before they had made their apologies. Despite considerable opposition to their presence, their grandfather not only allowed them to stay, but treated them as honoured guests, although guests without names, and therefore without official status or "deep" recognition within Gitksan society.

As time slipped by, however, after Massanal had demonstrated the correctness of his ways and his willingness to reintegrate within the ways of his people, his nephew and next in line was finally honoured with official recognition, through a place at the Feast, the receiving of a *nax nock*, and a name which continues to this day. Indeed, that name itself was unique and represented the young man's unique history and origin within the community — where once he was an outsider, he was now recognized, but without having his origin obliterated.

In chapter one of this thesis, I made philosophical and moral arguments for the value of genuine recognition that occurs without the obliteration of one's identity. I argued that this kind of recognition is extended once *relationships* are formed and once trust and mutual *respect* are earned and developed. In chapter five, I demonstrated that the Common Law can valorize *dialogue*, an open and free exchange of *stories* and the *broadening of horizons* of understanding

and significance.

A long and terrible set of monologues of Canadian law have degraded, marginalized and subjugated First Nations, and led in the words of the Australian High Court to "a conflagration of oppression and conflict which was ... to spread across the continent to dispossess, degrade and devastate the Aboriginal peoples and leave a national legacy of unutterable shame."[600] Yet I submit that indigenous and non-indigenous communities *share* an "intercultural" value of *recognition* and mutual *respect*. Recognition holds moral claim to the identities and cultures of both communities. Indeed, it is seen throughout Canadian culture and politics, and, as chapter two demonstrates, is foundational to the Gitksan and Wet'suwet'en.

This thesis has presented an argument for the value of intercultural understanding through dialogue as the most superior way to address the intercultural problem of Aboriginal rights within the modern plural state. I argue that we can strive for more than just "overlapping consensus," and develop a set of mutual values without surrendering identity or autonomy.

Of one intercultural norm, I am sure. And that is the norm of recognition. Without it, the ugliest, most racist and most destructive side of my culture shows its face. With it, lie the seeds of a path which, already destined to be intertwined, can be marked by respect and peace. What I am sure of is that the colonial state must *recognize* the Gitksan and the Wet'suwet'en First Nations, as well as all other First Nations of North America, as sovereignty-bearing; territory-holding; self-governing; law-possessing; culture-producing; *equal* interlocutors in the intercultural dialogue. Because then, and only then, can my country, Canada, take with pride and honour, rather than shame, the high Gitksan name of Visitors Who Never Left.

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[600] *Per* Deanne and Gaudron JJ: *Mabo, supra* note 295 at 79.

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