

THE FAMILIAR FACE OF COLONIAL OPPRESSION:  
AN EXAMINATION OF CANADIAN LAW  
AND JUDICIAL DECISION MAKING

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## CHAPTER ONE

### INTRODUCING CANADIAN LAW TO ABORIGINAL PERSPECTIVES<sup>1</sup>

Early in their work, the Royal Commission on Aboriginal Peoples articulated four principles that would govern their work. These four principles are recognition, respect, reciprocity, and responsibility. These principles are seen as essential to achieving the new relationship between Aboriginal Peoples and Canadians that has eluded us at least since the time of Confederation. These standards are here embraced as the **minimum** essential elements required for meaningful legal relationships amongst the distinct peoples which make up Canada. Establishing meaningful legal relationships which both Aboriginal Peoples and Canadians can respect is just one step in creating a new partnership.<sup>2</sup>

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<sup>1</sup>The views expressed in this paper, of which there are many, are those of the author alone and not the Royal Commission on Aboriginal Peoples.

I wish to express my sincere thanks to Professor Kent McNeil who demonstrated to me that he was both an outstanding scholar and friend during my years spend in graduate school at Osgoode Hall Law School. Without his support many of the ideas in this paper would never have had the opportunity to be developed.

The law discussed in this paper is currently only to November of 1994.

<sup>2</sup>It is important to note that I am not yet completely comfortable with the language of partnership. First, the form any new political relationship will take needs to meet with the consent of Aboriginal Peoples. This consent has yet to be systematically given. Second, a true partnership requires that the partners occupy relatively similar "bargaining" positions. This is not true of the balance between Aboriginal governments and Canadian governments. Partnership is a useful concept when the goal is to foster discussions about political options but I am yet to be convinced it is the final framework solution. When I think about change and, in particular, change to the framework for the relations of Aboriginal Peoples and Canadians, the language of renewal is more helpful to me. Renewal seems to more fully capture my Aboriginal understanding of what is required. I understand renewal by understanding the phrase "all my relations". We are surrounded by lessons of renewal in the natural world. For example, the seasons changing from spring to summer to fall to winter and then to spring is the easiest to understand. I am indebted to Leroy Little Bear for bringing to my attention the way renewal can be used to explain Aboriginal political aspirations.

Necessary to any conversation about the inherent right to self-government or self-determination, is an examination of the meaning of these phrases. It is a simple task to define the meaning of these concepts as they are commonly used in legal circles and perhaps even in the political realm. Recognizing that different cultures have different and distinct ways of being, means it is essential to develop first (and at least) a bi-cultural understanding. This understanding must, in turn, foster a shared (or agreed to) understanding of the meanings of the terms which shape the legal discussion. This will not be a simple task. This task is not simple because it absolutely requires that the Aboriginal perspective(s) be shared so it becomes as readily and simply understood as the mainstream political and legal perspectives. Developing a shared understanding is only the first small step. Canada must learn to value and respect Aboriginal traditions and participation. There is some evidence that in certain sectors of Canadian society this process of relationship building has already begun. The acceptance of sentencing circles would be an example.<sup>3</sup>

For such sharing of Aboriginal knowledge and ways to occur, trust becomes a necessary element in any new relationship. This is a contradiction. It is precisely the ability to trust that has been destroyed by the historic oppression of Aboriginal Peoples and all of the oppression's present day manifestations. Reclaiming the ability to trust is one key to the dream of a new political reality for Aboriginal Peoples.

There is often a hesitancy and a reluctance surrounding the response to the suggestion that a renewed historical understanding is required for a new relationship to truly take shape. Aboriginal experience of this country's history is not linear, the past is not simply the past.

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<sup>3</sup>I am not suggesting that sentencing circles are Aboriginal. They borrow from both the Aboriginal healing process and the Canadian criminal justice sentencing process. At times, the combination of these two processes is contradictory as one system is based on healing and the other on punishment and deterrence. I do not fully ascribe or support sentencing circles as a solution, but merely note that a step has been taken in a new direction.

Residential school experience demonstrates this point. Children were removed from their parents for ten months of the year and placed in an artificial, institutional environment. They did not learn how to be caring parents in such an artificial environment. Their children in turn learned dysfunctional parenting patterns as a result. In the same way, patterns of sexual abuse learned in the same schools permeates many of our communities today. Today the results of these experiences spread to other social “correctional” systems such as child welfare, young offender and criminal justice. To try to address the present day manifestations of the historic oppression, without a clear understanding of colonial causation is to offer only a superficial opportunity for change and wellness. The need for historical honesty is not a need to blame others for the present day realities, but a plea for the opportunity to deal with all of the layers of oppression that permeate Aboriginal lives today. When non-Aboriginal guilt becomes the focus, Aboriginal pain is appropriated and transformed.

Making the Aboriginal perspective accessible to the mainstream, may not be an easy task for a number of reasons. First, it cannot be assumed that Aboriginal Peoples as collectives or as individuals will support such an activity as it is a commitment that is full of risk. Second, culture is often unspoken and/or unexamined by the individuals who live it. This is true of both Aboriginal and Canadian ways of interacting with the world. Third, there are a number of stereotypes and faulty assumptions that undermine existing relationships between Canada and Aboriginal Peoples. One example demonstrates the degree to which the relationship is undermined. Diversity of views is seen as a cornerstone of Canadian democracy. The suggestion that Canada should embrace only one political perspective and therefore abolish the party system would be instantly decried as totalitarian. Yet, I have been asked repeatedly why all the “Indians” do not support the national chief (whoever he might be at the time). The parallel question, “Why don’t all Canadians support the prime minister?” is obviously ridiculous to most of us. This is an alarming requirement foisted on Aboriginal politics and creates the situation where Aboriginal people must meet a standard of absolute unanimity prior to being received as

legitimate. Canada, on the other hand, does not have to aspire to such high aspirations of accountability for themselves.

The first small step in creating a renewed partnership vision is to understand the nature of the gaps in our conversations. This is particularly true if it is recognized that a new relationship between Canada and Aboriginal Peoples interfaces with both legal and political discourses. What are the differences and similarities between the legally accepted (Canadian) definitions of Aboriginal experience and at the same time the understanding Aboriginal Peoples have of the legal/political/personal concepts self-determination and self-government. This is a theme that unites the work presented in this discussion.

As Aboriginal Peoples (that is the Indian (First Nation), Inuit and Metis) are not homogenous, there is no single Aboriginal perspective. To complicate matters further, homogeneity does not even exist among the First Nations, Metis or Inuit. Canadians are also not a monolithic entity. This is another challenge to the work of creating shared understandings. Working to create the essential shared and bi-cultural understanding on which a renewed partnership can then be built is a task that will require the ongoing commitment of Aboriginal Peoples and Canadians. Understanding (bi)cultural difference means accepting that the work is layered and detailed. It will also require the commitment of Canadians to allow Aboriginal Peoples to lead the way to the future. This might become the third major obstacle.<sup>4</sup> This is only a superficial accounting of the requirements that are necessitated by the Commission's commitment to a new relationship.

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<sup>4</sup>As this commitment is the business of Canadians and their governments, it is not my place nor my responsibility to discuss or detail it. That would be a fundamental violation of my responsibility as a Mohawk woman to respect Canada's authority to govern itself. A reversal of intellectual conquest and colonialism is not an answer.

Many people use the phrases self-government, self-determination and sovereignty interchangeably. However, the three phrases do not hold exactly the same meanings from the Aboriginal perspective(s).<sup>5</sup> Many "traditional"<sup>6</sup> people hold a disdain for the phrase self-government. The definitions and relationships between these terms are superbly articulated by Vine Deloria Jr. and Clifford Lytle:

When we distinguish between nationhood and self-government, we speak of two different positions in the world. *Nationhood* implies a process of decision making that is free and uninhibited within the community, a community in fact that is almost completely insulated from external factors as it considers its possible options. *Self-government*, on the other hand, implies a recognition by the superior political power that some measure of local decision making is necessary but that this process must be monitored very carefully so that its products are compatible with the goals and policies of the larger political power. *Self-government* implies that the people were previously incapable of making any decisions for themselves and are now ready to assume some, but not all, of the responsibilities of a municipality. Under self-government, however, the larger moral issues that affect a *people's* relationship with other people are presumed to be included within the responsibilities of the larger nation.<sup>7</sup>

It should be self-evident why the term sovereignty (and nationhood) is the political preference of many First Nations and other Aboriginal people. As most First Nations reject the notion of municipal style governments as insufficient, the language of self-determination is preferred.

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<sup>5</sup>Please note, again, that there is no single Aboriginal perspective. This cannot be emphasized too frequently. The beliefs vary among original nations and have been influenced by both time and geography. A single Aboriginal view only appears to exist when it is juxtaposed against the dominant non-Aboriginal system. Presenting the two world views as diametrically opposed takes us further away from the solutions. Unfortunately, it is difficult to discuss these issues concisely in the English language without falling into the trap of polarization.

<sup>6</sup>I use this phrase to refer to those Aboriginal Peoples who strive to understand the ways of life as they were originally given to us. To be traditional, does not mean to live in the past. The values and ways of Aboriginal cultures are as viable today as they were centuries ago.

<sup>7</sup>*The Nations Within: The Past and Future of American Indian Sovereignty* (New York: Pantheon Books, 1984), 13-14.

In the Canadian context, the meaning of self-government has become attached to the agenda of the federal government to provide municipal styled governments on "Indian reserves". From a traditional perspective, this is unsatisfactory for a number of reasons. Many believe that the right to self-determination has never been and cannot be extinguished. That is to say that the right to self-determination is inherent. Others suggest that their right to self-determination is protected by the numbered treaties that were signed. The views of traditional and treaty people are the essential difference between the phrases self-government and self-determination as they usually appear in political debates. It must also be remembered that any effort to move toward self-determination which focuses on the reserve as the sole basis for any form of jurisdiction<sup>8</sup> will be unsatisfactory to urban and Metis groups. What seems to be common across all Aboriginal Peoples despite our vast differences is a desire to continue to exercise our authority in political, social and legal ways amongst our own people following our own understandings of political authority.

There is another challenge which will directly impact on our ability to craft a truly new (or re-newed) relationship. It has a significant impact on our ability to forge ahead, yet it rarely receives any attention within the discourses of law, politics or academia.<sup>9</sup> The difference

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<sup>8</sup>It is not essential to define self-government within the confines of territorial limits. There are a number of exceptions to the territorial integrity of a nation state which are already recognized in domestic law. Among others, the exceptions include income tax provisions, criminal law, and admiralty law. A fuller discussion is found in Geoff R. Hall, "The Quest for Native Self-Government: The Challenge of Territorial Sovereignty", 50:1 *University of Toronto, Faculty of Law Review*, 39-60.

<sup>9</sup>These categories of discourses are, of course, artificial. This is more true when these categories of discourse are inappropriately applied without consideration of the differential world views of Aboriginal people. When the world is looked at in a holistic way, everyone's opinion carries with it a similar weight. The way voice is legitimated in Aboriginal society is vastly different from that of the mainstream society. A number of consequences flow from this observation, such as, a traditional person who is also an academic is not fully separated from their community. The Aboriginal academic does not have credibility in their community based on their academic qualifications but based on the recognition of what they have earned in the Aboriginal way in

between the Aboriginal perspective and that of the dominant legal discourse also involves matters of language. When Aboriginal Peoples discuss the meaning of self-government and/or self-determination, they are forced to do it in a language that is not their own. We must express our ideas in english or in french, languages which are both the epitome of our colonial experiences. It is almost solely Aboriginal energy that fosters the accommodations that are required to carry on both the political and legal dialogues. This is a particular experience of oppression.

Aboriginal Peoples have been historically controlled by a variety of means including our exclusion from the systems which have determined the meaning of concepts such as justice, sovereignty, and rights. Howard Becker explains:

...control based on the manipulation of definitions and labels works more smoothly and costs less... The attack on hierarchy begins with an attack on definitions, labels, and conventional conceptions of who's who and what's what.<sup>10</sup>

The pathway to a new relationship is paved with the long term commitment to share the definitional power that creates the legitimacy whereby words and phrases gain their accepted meaning. It requires the free giving up of control over Aboriginal lives. Nothing can be taken-for-granted. The re-examination of the way language sanctions particular worldviews and understandings is central to this process.

The recognition of a renewed framework logically involves the examination of current  


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 their community. The artificial dichotomies between community member and activist, academic, politician or technician must be questioned. Any absolute dichotomy must be suspicious as no dichotomies exist in the natural world. The creation of dichotomy as a condition of existence is a colonial manifestation.

<sup>10</sup>"Labeling Theory Reconsidered" in *Outsiders: Studies in the Sociology of Deviance* (New York: The Free Press, 1973), 178. Although the study of deviance is not analogous to the topic of this paper, Becker's conclusion persuades me of the significance of his comment to the study of rights.

Canadian constitutional provisions. This may or may not be the appropriate starting point.<sup>11</sup> There are two principles that must govern the intellectual examination of the meaning of section 35 from an Aboriginal perspective. An examination of the historical relations between Aboriginal Peoples and Canadians (especially their government representatives), clearly indicates that the philosophical grounding of the relationship is based on a misplaced notion of Euro-Canadian superiority.<sup>12</sup> More fundamentally distressing, allowing Euro-Canadian superiority to remain ingrained in the fabric of Canadian society ignores the trust responsibility of the Canadian government to Aboriginal Peoples.<sup>13</sup> This assumption of superiority must be fully stripped away

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<sup>11</sup>Perhaps, it would be more logical to start with developing a true understanding of both history and the provisions of the treaties.

<sup>12</sup>The court in *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 at 177, 70 D.L.R. (4th) 385 affirming the decision of MacDonald J. in *Pasco v. Canadian National Railway Co.*, [1986] 1 C.N.L.R. 35 at 37:

"We cannot recount with much pride the treatment accorded to the native people of this country."

Hereafter, the Sparrow decision will be cited in the *Canadian Native Law Reporter* as a means of supporting the important work of the Native Law Centre to ensure that court decisions affecting Aboriginal Peoples have wide circulation.

<sup>13</sup>Section 91 (24) empowers the federal government to act with respect to matters involving "Indians and Lands Reserved for Indians". It is under this section that the federal government has the power to enact legislation such as the *Indian Act*, R.S.C. 1985, c. I-5. During the 1950's the courts began to articulate the notion that Canada has a special responsibility to Indians:

The language of the (Indian Act) embodies the accepted view that these aborigines are, in effect, wards of the state, whose care and welfare are a political trust of the highest obligation. *St Ann's Island Shooting and Fishing Club v R.*, [1952] 2 D.L.R. 225 at 232.

Minimally, we would now recognize the idea of wardship as overly paternalistic (or grounded in the notion of supposed European superiority), the idea of wardship has developed into what is now legally recognized as a fiduciary responsibility (see the discussion in *Guerin v R.*, [1984] 6 W.W.R. 481 at 501) and more recently has been recognized as a trust responsibility by the Supreme Court of Canada in *R. v. Sparrow*, supra, at 180-181.

from the current legal interpretations of section 35. As this section "recognizes and affirms" "existing Aboriginal and treaty rights" as opposed to being a mere granting of rights, the constitutional provision requires that this standard be incorporated in all legal analysis. If section 35 were a grant of rights, this would lend credence to the Euro-Canadian superiority myth. To not commit to non-superiority as a principle would render the constitutional words "recognized and affirmed" meaningless.<sup>14</sup>

The eradication of the belief in the natural superiority of Europeans (and their descendants) must be fully and finally disposed. Meaningful negotiations can only occur between the first and founding nations, when those we negotiate with believe in the principal of equality.<sup>15</sup> Unfortunately, this will not be enough to purge our relations of the notion of one race's natural superiority. The definitions that have developed within Canadian legal and political systems must all be considered suspect as they were all developed on the previously held presumptions of Euro-Canadian superiority. All the presumptions must be renegotiated to reflect

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<sup>14</sup>In *Sparrow*, supra, at 179, the Supreme Court of Canada states: "When the purposes of the affirmation of aboriginal rights are considered, it is clear that a generous, liberal interpretation of the words in the constitutional provision is demanded." This requires that the interpretation of documents regarding Aboriginal Peoples must be construed liberally and any "doubtful expression be resolved in favour of the Indians" (*Nowegick v. The Queen*, [1983] 2 C.N.L.R. 89 at 94 and affirmed in *Sparrow*, supra, at 179). It is impossible to identify ambiguity without understanding the historic context in which the documents were drafted.

<sup>15</sup>This suggestion brings me back to my earlier comments about language. Equality does not grant rights of "sameness" but rather from an Aboriginal perspective must be understood as creating relationships of balance and harmony.

In her essay, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women", Mary Ellen Turpel writes:

Equality is simply not the central organizing political principle in our communities. It is frequently seen by our Elders as a suspiciously selfish notion, as individualistic and alienating from others in the community. It is incongruous to apply this notion to our communities.

the participation of all partners in this new dialogue.

As this paper has already advanced, the essential and often overlooked step in creating a renewed relationship between Aboriginal Peoples and Canadians, is an examination of the meaning of the concepts we are building our relationship with. This necessarily involves an analysis of the ways in which individuals and institutions attain the legitimacy and authority to have their definitions enforced. If we are not certain that we are constructing a conversation based on a common understanding of both the legal and political terms, we cannot be certain we are turning the page in the history of the absolute legal oppression of Aboriginal Peoples. If we cannot even have a conversation, then how can we hope to build a relationship, legal or otherwise? The dominant system's monopoly on the definitions of both legal and political terminology, holds the book open to a page where the oppression of Aboriginal Peoples is still writ large. In the Gitksan and Wet'suwet'en case Chief Justice Allan McEachern in his closing, personal comments states:

The parties have concentrated for too long on legal and constitutional questions such as ownership, sovereignty, and "rights", which are fascinating legal concepts. Important as these questions are, answers to legal questions will not solve the underlying social and economic problems which have disadvantaged Indian peoples from the earliest times.<sup>16</sup>

...This cacophonous dialogue about legal rights and social wrongs has created a positional attitude with many exaggerated allegations and arguments, and a serious lack of reality. Surely it must be obvious that there have been failings on both sides...

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<sup>16</sup>Justice McEachern attempts to distance law from the colonialism and oppression that First Nations have faced in Canada. Justice McEachern must come to understand that law was a central tool in delivering the oppression and colonialism to First Nations. Canadian laws established residential schools, outlawed ceremonies, denied women their birthright, and outlawed our forms of government to provide only a few examples. The obvious and undesirable conclusion of the reasoning of Justice McEachern is to allow Canadian law to escape responsibility and accountability. There can be no full solution to the "problems" of "Indians" if the role that law has played in our oppression and colonization is immune from scrutiny and remedy.

It is my conclusion, reached upon a consideration of the evidence which is not conveniently available to many, that the difficulties facing the Indian populations of the territory, and probably throughout Canada, will not be solved in the context of legal rights. Legal proceedings have been useful in raising awareness levels about a serious national problem. New initiatives, which may extend for years or generations, and directed at reducing and eliminating the social and economic disadvantages of Indians are now required. It must always be remembered, however, that it is for elected officials, not judges, to establish priorities for the amelioration of disadvantaged members of society.<sup>17</sup>

It is precisely this form of judicial reasoning which precipitates the oppression of Aboriginal Peoples.<sup>18</sup> This thinking is the result of the abuse of the legal and/or political authority in such a manner that neither the judiciary or the politicians wish to assume their responsibility.<sup>19</sup> Justice McEachern's meanderings would be appropriate only when the courts can convincingly decide Aboriginal cases without sanctioning one political/social/legal worldview. This day has yet to arrive. Aboriginal people turn to the courts for a number of reasons including the recognition of the relationship between oppression/colonialism and the law which results in the problems our communities and people face. After all, law has been the tool by which oppression/colonialism has been delivered to Aboriginal Peoples in this country.

It is necessary that the artificial concern about the separation of political and legal spheres in the delineation of "existing aboriginal and treaty rights", must be seen as problematic. Such

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<sup>17</sup>*Delgamuukw (Muldane) et al v. The Queen*, [1991] 5 C.N.L.R., 1 at 276 (B.C.S.C.).

<sup>18</sup>I am not trying to suggest that this is the only problem that can be found within the reasoning of the *Delgamuukw* case (also referred to in this discussion as the Gitksan and Wet'sutwet'en case).

<sup>19</sup>This pattern is overly familiar to Aboriginal people. During the 1970's when Aboriginal people desired to see reforms in the area of child welfare (a provincial responsibility), the provinces denied that they had any responsibility to "Indians". The federal government who had the constitutional authority to legislate regarding "Indians", denied responsibility for child welfare. The result was that Indian children received no services beyond apprehension. The consequences in human life, both of the children and their families, cannot be measured.

thinking is doubly problematic when it is the supreme law of the land that is the focus of a judge's interpretation of Aboriginal and treaty rights. Accountability must be seen as personal, judicial and political. The solution is simple, but also elusive. Legal terminology must come to embrace Aboriginal Peoples experience and the meaning that Aboriginal people attach to that experience.<sup>20</sup> As it stands now, all too often legal interpretation embraces only one particular world view and cultural heritage.<sup>21</sup> More troublesome is the fact that within the present system there are no formal or informal mechanisms for judicial accountability when cultural relevance is the issue.

This is where we come face-to-face with a major obstacle, as well as a major irony, in the search for a renewed relationship. The Canadian government insists on negotiating self-government arrangements only with the political representatives that are statutorily recognized (until recently, this was only chiefs with an *Indian Act* mandate). Both the Metis and the Inuit have been historically excluded from this regime of *Indian Act* control. Since the signing of the *Manitoba Act* until 1982, the leaders of the Metis were catapult into legal non-existence. Worse yet, after the so-called Riel Rebellion, many Metis leaders were declared criminal. In the case of

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<sup>20</sup>Chief Justice McEachern excuses himself from any such personal responsibility in the early pages of his judgment:

...cases must be decided on admissible evidence, according to law. The plaintiffs carry the burden of proving by balance of probabilities not what they believe, although that is sometimes a relevant consideration, but rather facts which permit the application of the legal principles which they assert. The Court is not free to do whatever it wishes. Judges, like everyone else, must follow the law as they understand it (*Dulgamuukw*, supra, 6).

This use of circular reasoning to exclude knowledge based on Aboriginal conceptions of the universe is thinly disguised racism. Knowledge founded in a "Canadian" world view has never been subject to such scrutiny by the courts. It is an unacceptable double standard. This recognition is one of the reasons Aboriginal distrust of Canadian law is a reality. Canadian law will continue to be seen as an unjust system if this reasoning continues to permeate legal thought.

<sup>21</sup>This is not surprising when the composition of the judiciary is considered.

Indians, our true political representatives were replaced with a foreign system of government<sup>22</sup> who's officials although duly elected were not held accountable to the electorate.<sup>23</sup> This issue has not yet been resolved.

Confronting the contradictions and being brave and resourceful in the face of the challenges that all governments in this territory will confront is a continuous process of re-newed commitment. Aboriginal nations must shake loose of all the shackles of oppression. Canadians must learn to live free of false assumptions of superiority. There are no immediate or simple answers. The commitment required involves understanding that change will come in small steps, much like a young child learning how to walk. Final solutions cannot be fully articulated as the walk has just begun.

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<sup>22</sup>See *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.). In this case the Hereditary Chiefs of the Six Nations community challenged the authority of the *Indian Act* Chiefs. The court held that:

I am of the opinion that the Six Nations Indians are entitled to the protection of the laws of the land duly made by competent authority and at the same time subject to such laws. While it might be unjust or unfair under the circumstances for the Parliament of Canada to interfere with their system of internal Government by hereditary Chiefs, I am of the opinion that Parliament has the authority to provide for the surrender of Reserve lands (at page 424).

It is the standard of "fairness", swept aside in many of the cases such as *Logan*, which must come to be accepted as the basis of determining the legality of Canadian government action regarding Aboriginal Peoples and their interests.

<sup>23</sup>Under section 82(1) and (2) of the *Indian Act* R.S.C. 1985, c.I-6 the chiefs are accountable to the Minister of Indian Affairs. This has caused untold problems in many reserve communities. It is a pressing issue which requires immediate amendment. It is unconscionable on the part of the Canadian government to allow such an undemocratic principle to be present in the *Indian Act* system. It is a clear violation of Charter principles which the Canadian government is responsible to even though I do not believe that Indian governments carry the same responsibility to respect the Charter. Section 25 of the Charter fully resolves this debate regarding the application of the Charter to Indian governments.

The Canadian constitution, since 1982, has become the supreme law of this country.<sup>24</sup> This offers a unique opportunity for both Canadians and Aboriginal Peoples to continue to revitalize our relationship based on a “large and liberal interpretation” of the new constitutional provisions. This opportunity for renewal must occur in a more equitable<sup>25</sup> and honest way. Section 35(1) of the constitution provides that the "existing aboriginal and treaty rights" of Aboriginal Peoples<sup>26</sup> are "recognized and affirmed". From the outset it is important to recognize that section 35 is not part of the *Charter* nor is it a guarantee given to Aboriginal Peoples from the Government of Canada.<sup>27</sup>

A guarantee is something qualitatively and quantitatively different than a recognition and/or affirmation. When a recognition or an affirmation is made, the thing being recognized and/or affirmed already exists. In this specific case of legal-political relations, it is a relationship which was **just** being seen by the drafters of the Canadian constitution for the first time. The rights, however, pre-exist the Canadian recognition of them. All that Canada can do is to begin

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<sup>24</sup>Section 52 of the *Constitution Act*, 1982.

<sup>25</sup>I am consciously choosing not to use the word equality. Legally, equality has become so close to empty rhetoric. In common usage, equality infers sameness and I do not wish to imply that Aboriginal Peoples should be treated or conceived in the same manner as Canadians. Such an inference would strip the meaning from the solemn promise in section 35. Equitable treatment is treatment that is fair and just. These are more accurately the standards at the heart of my concern.

<sup>26</sup>As provided in section 35(2) provides that the Aboriginal Peoples includes the "Indian, Inuit and Metis".

It is curious to note that the word "aboriginal" is not capitalized in the text of the constitution. This may be picking at small points but in my mind it is exemplary of the failure to respect Aboriginal Peoples that has dogged Canadian history. For this reason, I have chosen to capitalize the words in the text whenever I am not directly quoting another source.

<sup>27</sup>It must be emphasized that the consent of Aboriginal nations to the application of Canadian law is still outstanding.

to take responsibility for their historic and ongoing failure to respect the authority and legitimacy of Aboriginal governments. This simple task of recognition has now been completed by the entrenchment of section 35(1). The more pressing and onerous question of how to implement and respect this responsibility is without full answer in either political or legal realms.

The Canadian governments could do no more than recognize and affirm Aboriginal and treaty rights as that right is one which is inherent in Aboriginal nations. As the Canadian government has not gone further (such as a *Charter* style guarantee) than the recognition and affirmation of these rights, affirms the Aboriginal assertion that these rights are inherent. It is because section 35(1) respects the Aboriginal view that our rights are inherent that any hope can be held out for a new authority being established by the 1982 constitutional entrenchment.

There is no issue in my mind why the failure to secure Aboriginal consent to this constitutional provision is not fatal to the goal of establishing a renewed relationship. If all section 35(1) accomplishes is to recognize the responsibility of Canadian governments to Aboriginal Peoples, then logically no Aboriginal nation needs to consent. Section 35(1) does not change in any way the Aboriginal view of the world, our values, beliefs and systems of government. The issue of outstanding consent remains one of the principal keys to opening the door to a new and revitalized constitutional relationship with Aboriginal Peoples. Consent becomes a primary issue after the passing of section 35(1) because Canada has finally acknowledged honestly the relationship with Aboriginal Peoples.

The question that remains is an important one. Who has the authority to define what the scope and content of "existing Aboriginal and treaty rights". This definition will either be developed through political negotiation, judicial pronouncement or unilateral Aboriginal acts. The language of Aboriginal rights is a new one coming into legal being only through the entrenchment of section 35(1) notwithstanding the fact that Canadian courts have long been

considering the rights of “Indians”.<sup>28</sup> Treaty rights have a longer history and therefore, at least initially, appear easier to define.<sup>29</sup>

Given the utmost importance of the task of legally interpreting these three small words, “existing aboriginal rights”<sup>30</sup> it is important to focus on their meaning before we try to apply them in any kind of specific setting, such as a case. When I first came to the issues presented by section 35(1) and began considering the meaning of the phrase, “existing aboriginal rights”, I was stopped in my tracks because I did not understand what a right was. What I now understand is that rights discourse is not necessarily or automatically relevant to Aboriginal cultures.<sup>31</sup> A

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<sup>28</sup>The use of the word “Indian” here respects the earliest legal language used to describe who we call today the Aboriginal people. I do not intend a narrow usage such as the one found in any of the versions of the *Indian Act* (that is status Indians only). Although no Canadian court has yet fully come to this conclusion, it is my legal opinion that the word “Indian” in the *Royal Proclamation* and section 91(24) of the *Constitution Act, 1867* includes all Aboriginal people as we are referred to today. In *Re Eskimos*. [1939] S.C.R. 104, [1939] 2 D.L.R. 417 demonstrates the legal acceptance of “Eskimos” (now properly referred to as Inuit) as “Indians” within the meaning of section 91(24). Following the reasoning in *Re Eskimos* the Metis can easily make sound and convincing arguments that they too are included in the historical usage of the word “Indians”. For a fuller discussion please refer to Clem Chartier, ““Indian”: An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867”, 43:1 *Saskatchewan Law Review* (1978), 37-69. and on a related issues see Catherine Bell, “Who Are the Metis People in Section 35(2)?” XXIX:2 *Alberta Law Review* (1991), 351-381.

<sup>29</sup>Treaty interpretation is fraught with historic problems. Do the treaties stand as full evidence of the agreements between Aboriginal nations and Canada recognizing the power that Canada possessed both because they held the pen which drafted the written record and the use of military presence coupled with the sanctions of criminal law.

<sup>30</sup>By focusing this discussing on “existing aboriginal rights” to the exclusion of “existing treaty rights” is not an indication that treaty rights are not as significant or as important as Aboriginal rights. Treaty rights have a history which is similar but also unique from Aboriginal rights. One does not necessarily exclude the other, that is, a right could be both Aboriginal or treaty or both at the same time. Treaty rights will be more fully discussed later in this paper. I start with the concept of Aboriginal rights because it is a reflection of how my own thinking on these issues developed.

<sup>31</sup>I am grateful to many Elders for helping me understand my confusion. In particular, I am grateful to Chief Jacob E. Thomas, Cayuga, Six Nations Territory.

system of responsibility makes more sense to the Aboriginal being. Until the parties involved can come to some form of consensus on this question then I believe the chance exists for the constitutional affirmation to be misconstrued by conventional legal interpretation systems.<sup>32</sup>

Noel Lyon suggests that the shape of what is has changed with the entrenchment of Aboriginal and treaty rights in the constitution:

Section 35 is a solemn commitment to honour the just land claims of aboriginal peoples, fulfill treaty obligations, and respect those rights of aboriginal peoples which the *Charter*... recognizes as their fundamental rights and freedoms. What else could it be? Constitutional reform is not done to continue the status quo.<sup>33</sup>

Constitutional scholars and lawyers (Aboriginal and Canadian) in conjunction with Aboriginal Peoples must articulate their understanding of what the status quo has been before anything new can be constructed. Until we clearly understand what has been we cannot understand what exactly requires renewing. This means that we have a lot of work to do before we can interpret the meaning of section 35 in specific cases. As the conventional legal system is absolutely not geared to this kind of analysis, I am fearful that the analysis which is essential to any future progress on Aboriginal and treaty rights will get lost in the rush to both prepare for litigation and keep court dockets moving. The opportunity that is presented to us, both as Aboriginal Peoples as well as to Canadians, may not again soon be presented to us.

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See also the discussion in Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" (1989-90), 6 *Canadian Human Rights Yearbook*, 3-45.

<sup>32</sup>This was one of the sources of the difficulties for the Aboriginal participants during the last constitutional round (the Charlottetown Round).

<sup>33</sup>Noel Lyon, "An Essay on Constitutional Interpretation" (1988) 26 *Osgoode Hall Law Journal*, 95-126 at 101. This particular quotation from Professor Lyon's article was adopted by the Supreme Court of Canada in *R. v. Sparrow*, supra, at 178.

In contemplating the meaning of section 35, I began to read about the history of rights (predominantly the liberal view), but was never satisfied. I did not like what I was reading and could not situate my Aboriginal self within the discourse. What I was reading did not fit the way that I had been brought up and the way that the Elders had taught me. The result was that I was not happy that my experience did not fit within the existing discourse about rights. The result was a tension that I could not initially resolve (and it continues to mystify me). It is this tension and how I have come to understand it, that I want to speak about.

What I have wanted to avoid is constructing a competing theory of rights. I do not want to displace the Western or liberal theory of rights. But, at the same time I do not want this theory forced upon me. Let my people chose to pick it up if we decide that it is able to work for us. What needs to be recognized within the parameters of the liberal theory of rights, is the exact thing that section 35 has done for the constitution of this country. Not belonging to the Western culture which spawned the existing theory of rights, I am not the appropriate actor to redefine its parameters. All the guidance that I can appropriately provide is to point to the fact that the theory is excluding my voice. My voice represents a separate culture; the culture of Aboriginal Peoples. My dissatisfaction with the liberal theory of rights is probably also filtered by the fact that I am also a woman.<sup>34</sup> The liberal theory of rights must recognize and affirm that it is possible for another theory of rights to exist within different peoples and that this other theory is and also can remain to be legitimate.

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<sup>34</sup>In the view of John Locke, man's freedom is a measure of man's natural right to have equal access to the fruits of his labour. The subjection of women within the family, on the other hand, is seen by Locke as necessary and legitimate means to ensure that property relations are maintained. Women do not have a natural right to the fruits of their labour. Not only is this Lockean definition of equality problematic for women but it demonstrates the relationship of freedom and equality rights to relations of property ownership (or man's domination of the land). See John Locke, *Second Treatise of Government*, C.B. Macpherson (editor) (Indianapolis: Hackett Publishing Co., 1980), 39-42.

Theoretically, we have to recognize<sup>35</sup> and affirm that a right to Aboriginal people means something fundamentally different than it does within the sphere of Canadian legal relations. My objective here is to begin constructing in a language that can be understood by people who have not been educated to our ways, what a theory of Aboriginal and treaty rights looks like. Unfortunately, this is a formidable task and more frequently I find myself articulating what the rights do not look like rather than articulating their affirmative qualities.

Looking at the history of rights accorded to Aboriginal Peoples in Canadian jurisprudence, what I first came to understand was that it is a history bounded solely by Canadian law. The term Aboriginal rights is a term with a specific legal meaning and one that only expresses claims that have currently been accepted within Canadian law. I am concerned with the rights that have been excluded and I also refer to these as Aboriginal rights.<sup>36</sup> The source of the tension is that Aboriginal and treaty rights in Canadian law do not embrace the much broader notion of Aboriginal and treaty rights that exist within my Aboriginal understanding.<sup>37</sup> This arises because courts have consistently rejected attempts to introduce a different way of understanding bounded by Aboriginal cultural concepts.

The first recognition that must be made about Aboriginal rights in Canadian law is that

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<sup>35</sup>Recognition exists at various levels. Some of us must continue to remind ourselves that our experience and understanding is equally legitimate and a complete authority. This is the very real cost of belonging to an oppressed or enclaved population. Others have the difficult task of opening their eyes and ears for the first time.

<sup>36</sup>For a discussion on the process of naming as it has been applied to First Nations, please see Patricia Monture, "I Know My Name" in Gerald Finn (editor), *Limited Edition: Voices of Women, Voices of Feminism* (Halifax: Fernwood Publishing, 1993), 328-344.

<sup>37</sup>This is another clear example of the language crisis I earlier referred to. I use the same words, Aboriginal rights, yet mean two entirely different things.

they developed almost exclusively around the right to property.<sup>38</sup> I would assert that this right to property is more appropriately described as a struggle for the ownership of the land.<sup>39</sup> It is not the land in and of itself that is important, but the ownership thereof. Beginning with *St. Catherine's Milling*<sup>40</sup> and continuing through the important cases such as *Guerin* and *Calder*<sup>41</sup> the disputes at the heart of these cases were property disputes.<sup>42</sup>

A property claim in Canadian law does not have the capacity to include the Aboriginal holistic view of the land. A holistic view of land holding enshrines not only the concept of ownership but also, at a minimum, spirituality:

With respect to the lands they lived on, many Indians felt a strong religious duty to protect their territory. Future generations would need the lands to live on, many previous generations had migrated long distances to arrive finally at the place where the people were intended to live. One could sell neither the future nor the past, and land cessions represented the loss of both future and past to most Indians.

...although Indians surrendered the physical occupation and ownership of their ancestral lands, they did not abandon the spiritual possession that had been a part

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<sup>38</sup>There is a relationship here between the evolution of Aboriginal rights and treaty rights. The development of specific treaty rights has also and unnecessarily been tied to the question of ownership of the land. Prior to the case of *R. v. Sioui*, [1990] 3 C.N.L.R., 127, the federal government asserted that a treaty must involve a surrender of land. Cases such as *Sioui* and *Simon*, [1986] 1 C.N.L.R. 153. demonstrate that fundamental change within Canadian law is possible. The more essential question is at what price has the change has come?

<sup>39</sup>It is interesting to note that the rights and freedoms guaranteed to Canadians under the Charter do *not* include the right to private property, or any other ownership based right. The Charter's articulation of rights without mention of property obscures this historic relation of the evolution of present day human rights laws.

<sup>40</sup>(1888) 14 App. Cas. 46, 4 Cart. 107 (P.C.).

<sup>41</sup>(1970), 34 D.L.R. (3d) 145; 74 W.W.R. 1.

<sup>42</sup>The vast majority of Aboriginal litigation involves some attempt to protect hunting or fishing rights. This is also a reflection of the preoccupation with land rights.

of them. Even today most Indians regard their homeland as the area where the tribe originally lived.<sup>43</sup>

The Aboriginal notion of land rights encompasses both a notion of time as occupation (past, present and future) and a notion of spiritual occupation. Both of these notions of Aboriginal occupation challenge the individualization of the common law system of property ownership. In other words, the Aboriginal understanding of the relationship to land incorporates both ideas of individual rights and responsibilities as well as collective rights and responsibilities.<sup>44</sup>

There have also been a number of important hunting and fishing cases heard by Canadian courts. The right to hunt and fish is one component of the right to use the land and in the case of Aboriginal people this right is one that was to exist for ever, as long as the grass grows and the rivers flow. It is often characterized in Canadian court decisions as a mere usufructuary right (rights of use are lessor than rights of ownership in Canadian law).<sup>45</sup> In Canadian law then, the

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<sup>43</sup> Deloria and Lytle, *supra*, 10 - 11.

<sup>44</sup> A similar conclusion is reached by Leroy Little Bear, "A Concept of Native Title", *C.A.S.N.P. Bulletin*, Volume 17:3, December 1976, 30-34.

<sup>45</sup> Aboriginal rights were first characterized as usufructuary rights of a personal nature (that is they are alienable only to the crown) in the *St. Catherines Milling Case*. This view was rejected in *Guerin* where Justice Dickson stated:

The nature of the Indians' interest is therefore best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indians' behalf when the interest is surrendered. **Any description of Indian title which goes beyond these two features is both unnecessary and potentially misleading** ( *Supra*, 136. Emphasis added).

In an earlier case (*Calder*), Justice Judson opined:

... it does not help one in the solution of this problem to call it [Indian title] a "personal and usufructuary right" (*Supra*, 156).

Scholars and judges who continue to rely on the usufruct as descriptive of Aboriginal rights rely on legal principles which Canadian courts have rejected in favour of a *sui generis* view of

history of Aboriginal rights is the history of the use and/or ownership of land. Hunting and fishing rights are nothing larger, to date, than the further specification of the existing encapsulating structure of property relations. As already indicated, this is a very narrow structure which offends the holistic view of personal relationships held by Aboriginal Peoples.

It is precisely this relationship between Aboriginal rights and land that does not satisfy me. I do not think that property is a complete way of defining what Aboriginal right(s) are. Even the larger concept of land rights are just such a small portion of what must be talked about. But the common law history, the case law that we have to rely on, property is the almost exclusive place where the attempts to characterize an Aboriginal right coalesce. I am not suggesting that a focus on property/land is or was, wrong. It was essential as both the environment and Aboriginal Peoples futures were fundamentally threatened. I do not think that we as lawyers, or we as Aboriginal Peoples, should have done things differently. It has happened and what we must consider is what is the best way to go on from here.<sup>46</sup> The affirmation created by section 35(1) makes it even more crucial to make this consideration and to make it carefully.

It is not just the way that land law is charted or the relationship of history to the law that troubles me deeply. Canadian law is bounded by important distinctions in matters of public and private.<sup>47</sup> Public matters are generally matters in which one of the various arms of government is involved. Private matters on the other hand tend to involve individuals. Matters of family law

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Aboriginal rights.

<sup>46</sup>This does not mean that we must forget the past. To the contrary, our future as Canadians or as Aboriginal Peoples are dependent on our ability to begin to understand history in a truthful way. This means that we must accept oppression as a cornerstone of the historic relationship between Canada and Aboriginal Peoples. We must fully commit to eradicating oppression and all of the traces of it from the future.

<sup>47</sup>The most famous case here is *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Deliver Ltd.* (1986), 33 D.L.R. (4th) 174.

between individuals are private, but, matters of family law that involve the state (such as child protection hearings) are public. Aboriginal Peoples have had some success in having private law matters such as adoption and marriages following laws of custom recognized in Canadian law.<sup>48</sup> Much has been made of this accomplishment. From an Aboriginal perspective(s), family relations would not be seen as a matter of private law. In fact, the public/private distinction would make little sense to the Aboriginal mind. Feminist concern, on the other hand, has pointed to the fact that so-called women's concerns tend to overly rest within the private sphere and this has perpetuated the discrimination against women in law. Care must be taken when constructing theories of Aboriginal and treaty rights to ensure that the same pattern of trivialization of Aboriginal concerns is **not** followed. The fact that Canadian law has recognized Aboriginal family relations only in the private law sphere must be viewed as problematic.<sup>49</sup> This is a marginalization of Aboriginal rights. Aboriginal rights also encompass rights that Canadian law would characterize as public.

What needs to happen now is to come to a full stop. We must stop what we are doing until we have as fully as we possibly can come to an understanding about the definition of rights.

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<sup>48</sup>See for example the following custom adoption cases: *Re Beaulieu* (1969), 67 W.W.R. 669 (N.W.T. Terr. Ct.), *Re Katie's Adoption Petition* (1961), 38 W.W.R. 100 (N.W.T. Terr. Ct.), *Re Tagornak*, [1984] 1. C.N.L.R. 185 (N.W.T. S.C.) and the discussion in Norman Zlotkin, "Judicial Recognition of Aboriginal Customary Law in Canada", [1984] 4 C.N.L.R. For marriage cases please see *Connolly v. Woolrich* (1867), 17 *Rapports Judiciaries Revises de la Province De Quebec* 75 and the discussion in Constance Backhouse, *Petticoats and Prejudice: Women and Law in Nineteenth-Century Canada* (Toronto: The Osgoode Society and Women's Press, 1991), 9-28; *Re Wah-Shee* (1975), 21 R.F.L. 156 (N.W.T. S.C.).

<sup>49</sup>Although a lengthy discussion of several of the cases that respect Aboriginal customs in relation to adoption and marriage are discussed in *Partners in Confederation: Aboriginal People, Self-Government and the Constitution* (Ottawa: Royal Commission on Aboriginal Peoples, 1993), 5-8, this particular concern is oddly never mentioned. Of further concern is the fact that the brilliant feminist discussion pursued by Professor Connie Backhouse in her text, *Petticoats and Prejudice*, is also over-looked by the Commission. Neither of these oversights are acceptable as the exclusion is gender based.

I am more concerned about the exclusions than the inclusions (which is why a review of the case law<sup>50</sup> is not central to the discussion I first wish to provoke). I understand that I am asking lawyers, judges and to a lesser degree law-makers; to do a remarkable thing. A thing they have never had to do in the past (as evidenced in Justice McEachern's words cited earlier in this paper). I would hope that the legal profession looks upon it as a marvelous challenge and not a threat to the dominant legal system. After all, what we are talking about is defining and interpreting the supreme law of this land. It ought to challenge our collective cultural legal imaginations.

What must be part of the future vision is to be able to build an understanding based on the small commonalties that exist between the two social (including politics and law) systems. One of the things that is very important in our legal history is the fact that property/land rights have been developed at common law.<sup>51</sup> It is also an approach, this common law tradition, that Aboriginal people can relate to for two reasons. The common law approach is a process of at least partial agreement. This process of agreement does not arise in a single judgment about a single case, but in the entire process of courts and of judges affirming previous decisions or distinguishing previous decisions. It is the process by which the common law moves forward. Through trying like cases and resolving them in like ways, norms or rules developed within the law. It is only the **result** of the adversarial process that can be seen as similar to the process of consensus which is so central to Aboriginal ways. Aboriginal governments, and I distinguish Aboriginal governments from *Indian Act* governments which were forced on my people, will make no decision until a consensus has been reached. We call this process "coming to one

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<sup>50</sup>Interestingly enough the case law method of Canadian law is a central problem for the kind of legal analysis that I am proposing. By wedding ourselves to the decisions of the past we continue to entrench in present day form the oppressive relations of Canadian and British history.

<sup>51</sup>I recognize that some of the laws of Quebec follow a different pattern. However, the civil law system does not provide the foundation for the Canadian system of constitutional law. The distinct legal system in Quebec, therefore, receives no unique focus here.

mind". It does not mean total unitary agreement to a decision, but the respect of all people for a decision which has been made. This is the first parallel that can be made.

The second parallel between Aboriginal legal process and the common law tradition, at least in the origins of that tradition, is the use of oratory. My people did not write things down. They did not record things on paper. When I go out to give a talk, it is not a paper, it is not all written down. I am not reading to the audience. The common law was once a form of oral history<sup>52</sup> and much latter it came to be written down. Even today, judges may provide only an oral decision. Today, many examples can be drawn from the case law which demonstrate the disregard displayed by the judiciary toward oral traditions. This is the second parallel and not the last parallel that will be discovered.

It is very important that we discuss both the parallels and contradictions which exist between the Canadian system and the Aboriginal process of law before we go any further in interpreting section 35(1). First, such an analysis dispels the myth that incorporating Aboriginal Peoples within Canadian legal structures (perhaps through separate systems) will somehow ghettoize the Canadian system as opposed to improving it. Second, it seems that the majority of our energy is devoted (and perhaps mis-spent) to tell you how different we are (which is really a discussion about removing the boot of oppression from our necks).<sup>53</sup>

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<sup>52</sup>Oratory is often thought to be a lessor process than that of possessing a written history or system of law. Aboriginal nations would not absolutely concur with such an assertion. One of the benefits to having a system of laws which is oral is that all the recording is done in your head. This means that the law is there at the exact moment you need it. You do not have to run off and find a law book to determine what the law is. When each individual of the nation (that is to say each child, woman, and man) is required to know, understand, and live the law; then there is little chance that one person (such as a lawyer) can benefit from mis-stating the law.

This principle of oratory seems to reflect another parallel with the Canadian legal system, that being, that not knowing the law is no excuse. Because of the specialization of the Canadian legal system, the fairness of this principle may be appropriately called into question.

Once it is recognized that the legal rights of Aboriginal Peoples are rights about property (even though our interest is the broader notion of land), then one is able to recognize what has been excluded. As much of my work has been focused around the rights of Aboriginal offenders, the criminal justice system and the experience of Aboriginal people, and particularly Aboriginal women it was easy for me to recognize what was glaringly absent from the case law on Aboriginal rights. We have not even begun to discuss what “human rights”<sup>54</sup> Aboriginal Peoples may have under section 35(1).

There are several reasons why this omission was fairly easy for me (and other Aboriginal people) to make. It is very much part of my culture to look at the history of any phenomena to understand what it has come to mean today. When you look at the development of human rights, it was not until 1985 and the *Bhinder*<sup>55</sup> and *O'Malley*<sup>56</sup> decisions, where the courts in Canada came to articulate that intent does not have anything to do with discrimination.<sup>57</sup> In Great Britain and the United States, intent was removed from the purview of the courts some fifteen

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<sup>53</sup>I have presented a similar analysis within the justice sphere in “Thinking Aboriginal Justice: Myths and Revolution” in Richard Gosse, James Youngblood Henderson and Roger Carter (eds), *Continuing Poundmaker and Riel's Quest: Presentations Made at A Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994), 222-232.

<sup>54</sup>I do not intend to limit the discussion of “human rights” protected under section 35(1) by defining human rights in the manner that Canada is presently accustomed in their statutory framework. It is also ironic to note that the *Canadian Human Rights Code*, R.S.C. 1985, c. H-6, section 67 provides an exception for the federal *Indian Act* regime and any regulations made thereunder.

<sup>55</sup>*Bhinder v C.N.R.* (1985), 23 D.L.R. (4th) 481 (S.C.C.).

<sup>56</sup>*O'Malley v Simpson-Sears ltd.* [1985] 2 S.C.R. 536 (S.C.C.).

<sup>57</sup>I have discussed my views on racism and discrimination in a number of other articles. In particular, please see Patricia A Monture, “Reflecting on Flint Woman” in Richard Devlin (Editor), *Introduction to Jurisprudence*, (Toronto: Emond Montgomery, 1990), 351-366.

years before the recognition was made in Canada.<sup>58</sup> It is no wonder that sometimes it feels like it is taking us a very long time to get anywhere.

I want to tie the notion of human rights to the understanding of land rights we have already developed. It is only in this way that we will build a more complete theory of rights in respect of Aboriginal Peoples. What I think human rights means in this context, is the right to be self-governing or self-determining or being sovereign. This is the most fundamental of all human rights. It matters not how it is expressed what matters most is the content of the right.

When I say sovereignty to you it has much the same effect as the word racism. The result is defensive posturing and denial - especially on the part of people in the federal government who are supposed to have a sacred “trust” responsibility with my people.<sup>59</sup> The denial arises because people are afraid that Aboriginal sovereignty will mess up your territory (the lines you have arbitrarily drawn around Canada). You do not want us to pull the country apart acre by acre. Consider where that takes us back to. We have just made a circle. We are right back to individualized property rights (and I would reiterate that what Aboriginal Peoples are more

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<sup>58</sup>Beatrice Vizkelety, *Proving Discrimination in Canada* (Toronto: Carswell, 1987), 14 - 36.

<sup>59</sup>In the *Sparrow* decision, Justices Dickson and LaForest opine:

... the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship (Supra, 180).

And later in the decision the Justices declare:

... we find that the words “recognition and affirmation” incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power (Supra, 181).

interested in is land rights). Sovereignty must be about territory, because you say that is what it means. I say sovereignty is about my right to be a Mohawk woman.

This is another place we must stop the process. Whenever I engage in legal discourse there is a translation process going on in my head. Even though my first language is and remains to be english, I do not understand the words in the same way you do. So, I am translating twice every time I try to speak law to you. This is a lot of work for anyone to do merely to engage in a conversation. Perhaps, before you react to my words, you could consider that what I mean to be sovereign is not the same as the way you are using the word.

For Aboriginal Peoples, sovereignty is not primarily about control of territory. That is not to say that Aboriginal Peoples do not aspire to having a land base that will make our nations economically stable and self-sufficient. Our notion of land is not merely about individual ownership of property. We have a notion of community ownership of land which very much combines the spiritual with any notion of ownership. Sovereignty then is not about ownership or territory in the way that Canadian politicians and lawyers would define those words. We have a Mohawk word that better describes what we mean by sovereignty and that word is, "Tewatatha:wi". It best translates to "we carry ourselves".<sup>60</sup> This Aboriginal definition of sovereignty is a definition which is about responsibilities and not just about rights.

What sovereignty is to me is a responsibility. It is the responsibility to carry ourselves; collectively as nations as well as individually. In order to be a self-determining nation, you must have self-disciplined individuals. You must have individuals who understand who they are and how to carry themselves. What must be understood then is that the Aboriginal request to have our sovereignty respected is really a request to be responsible. I do not know of anywhere else in

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<sup>60</sup>Marlyn Kane (*Ossennonton*) and Sylvia Maracle (*Skonaganleh:ra*), "our World", 10:2 and 3 *Canadian Woman Studies* (Summer/Fall 1989), 7-19 at 10.

history where a group of people have had to fight so hard just to be responsible. It seems so absolutely ridiculous.

For Mohawks, this very much means understanding the Great Law of Peace.<sup>61</sup> It means understanding the various treaties we have signed with other nations, be they Aboriginal Peoples or Settler Nations. One of the most important of our treaties in this day and age is the "gus-wen-qah". It is also referred to in english as the "Two-Row Wampum".<sup>62</sup> It is the treaty which governs the relationship between the Six Nations Confederacy (respectfully called the Haudenosaunee) and the Settler Nations.

The gus-wen-qah is vastly complex but is visually quite simple. It is two purple rows of shell imbedded in a sea of white. One of the two purple paths signifies the European sailing ship that came here. In that ship are all the European things - their laws, and institutions, and forms of government. The other path is the Mohawk canoe and in it are all the Mohawk things - our laws, and institutions, and forms of government. For the entire length of that wampum, these two paths are separated by three white beads. Never do the two paths become one. They remain an equal distance apart. And those three white beads represent "friendship, good minds, and everlasting peace".<sup>63</sup> It is these three things that Aboriginal Peoples and the Settler Nations

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<sup>61</sup>An excellent resource (although I do have some concerns about the way gender relations are represented) is Chief Jacob Thomas (with Terry Boyle), *Teaching from the Longhouse* (Toronto: Stoddart Publishing Company, 1994).

<sup>62</sup>The "gus-wen-qah" became an important to symbol to the Penner Commission on Self-Government (1983). See Keith Penner, *Indian Self-Government in Canada: Report of the Special Committee* (Ottawa: Queen's Printer, 1983).

<sup>63</sup>This interpretation is the one presented by Jacob E. Thomas in his publication "The Friendship Treaty Belt and the Two Row Wampum Treaty" which was compiled for his library on November 13, 1978. A copy is on file with the author.

I have also heard the treaty explained to mean that the three beads represent friendship, truth or respect or honesty, and kindness. As the treaty was signed on separate occasions with the Dutch,

agreed to govern all of their future relationships by.<sup>64</sup> It is very easy to see how this treaty has been disrespected by all of us.

There is a reason why we recorded our laws, our treaties, in shell. We did not write them down because we were not that "advanced". We do not believe that writing everything down is a very advanced idea. When you write things down they are easily forgotten as you assume the paper will do your job of remembering for you. When you write things down they are very easily destroyed. Fire would be one example of how easily words on a page can be destroyed. But, if a wampum belt is thrown into the fire, the shells will still be there when the ashes are cool. If you have learned well, you will be able to put that wampum belt back together again. This is the standard of knowing the law that all Mohawks will be responsible to. The only way that you can destroy a wampum belt is willfully. It cannot happen by accident. Those shells will last a very

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the French, the English and the Americans it is understandable why several interpretations exist. It is also understandable because of the difficulty in translating complex Mohawk words into simple english ones.

<sup>64</sup>This explanation was provided to the Special Committee on Indian Self-Government in 1983:

When your ancestors came to our shores, after living with them for a few years, observing them, our ancestors came to the conclusion that we could not live together in the same way inside the circle... So our leaders at that time, along with your leaders, sat down for many years to try to work out a solution. This is what they came up with. We call it Gus-Wen-Qah, or the two row wampum belt. It is on a bed of white wampum, which symbolizes the purity of the agreement. There are two rows of purple, and these two rows have the spirit of our ancestors; those two rows never come together in that belt, and it is easy to see what that means. It means that we have two different paths, two different people. The agreement was made that your road will have your vessel, your people, your politics, your government, your way of life, your religion your beliefs - they are all in there. The same goes for ours... They said there will be three beads of wampum separating the two, and they will symbolize peace, friendship, and respect.

As cited in Darlene Johnston, "First Nations and Canadian Citizenship" in William Kaplan (ed), *Belonging: The Meaning and Future of Canadian Citizenship* (Montreal and Kingston: McGill-Queen's University Press, 1993), 349-367 at 351.

long time and the law of the people will be taught from those belts.

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

One of the best and simplest definitions of the right being asserted by Aboriginal Peoples is expressed by Oren Lyons, a traditional chief, of the Haudenosaunee Confederacy. In his words:

Sovereignty - it's a political word. It's not a legal word. Sovereignty is the act. Sovereignty is the do. You act. You don't ask. There is no limitation on sovereignty. You are not semi-sovereign. You are not a little sovereign. You either are or your aren't. It's simple.<sup>65</sup>

Just as the notion of self-government carries with it a derogatory meaning for many traditional people, the phrase sovereignty carries with it a particular cultural and legal meaning which causes non-Aboriginal people to be fearful. Solutions lie beyond the defensive posturing found in the mere semantics of the majority of discussions on self-government or self-determination.

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<sup>65</sup>Oren Lyons, speech from the 1979 Montreal Conference on Indian Government cited in Richard Hill, "Continuity of Haudenosaunee Government", Jose Barreiro, *Indian Roots of American Democracy* (New York: Akwe:don Press, Cornell University, 1992), 166-175 at 175.

## CHAPTER TWO

### **LEGAL WARRIORS<sup>66</sup>: THE HISTORY OF CANADIAN COURT DECISIONS**

The attempt to justly resolve Aboriginal claims within the accepted parameters of the Canadian state challenges the basic presumptions on which the state lays claim to its legitimacy.<sup>67</sup> Justly resolving Aboriginal claims, therefore, requires a measure of creativity which has yet to be imagined and a break with past policies, laws and practices that is equally hard for Canadian governments to imagine. This conclusion is easily reached for many Aboriginal people who have considered the impact of colonialism on our lives. All of our experience demonstrates the obvious nature of this recognition. For many Canadians, the conclusion is not so apparent and requires a demonstration of the many reasons why Aboriginal people reach this conclusion.

Canada's political history demonstrates that since the time of the signing of the numbered treaties, the will to resolve outstanding Aboriginal claims has most often been non-existent. This documented lack of political will on the part of all Canadian governments has left Aboriginal people little option but to turn to the courts to resolve outstanding issues. These efforts have never been fully successful in solving any of the legal issues placed in the hands of the Canadian judiciary. For example, courts have been want to clearly define the concept of Aboriginal title which is the pivotal point in many Aboriginal claims. However, litigation has often resulted in forcing Canadian governments to at least recognize that there are outstanding issues which are

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<sup>66</sup>Within the construction of Aboriginal reality this term does not carry with it any unsatisfactory gender specificity.

<sup>67</sup>Concepts such as the division of powers, parliamentary supremacy, the independence of the judiciary and the rule of law are seen by Canadian governments as absolutes which Aboriginal people must conform to.

legitimate. At the most, Canadian legal history can be viewed as a string of narrow victories secured at great cost to Aboriginal people, each no more meaningful than a single bead in a belt of wampum.

The best example of this phenomena of nominal gain through legal victory is the 1973 decision of the Supreme Court in the Nishga land litigation. In *Calder*, six of the seven Supreme Court Justices found that there was a pre-existing Aboriginal title which was not exclusively sourced in the *Royal Proclamation of 1763*. This decision cannot be minimized as it was a major turning point in Aboriginal/Canadian political relations. As a result of the *Calder* decision, the Canadian government was forced to recognize the existence of legal rights in land held by Indian nations. Michael Asch describes the impact the *Calder* decision had:

Prior to the *Calder* case, the government regarded Aboriginal rights as a transitional issue, for Aboriginal societies would presumably assimilate eventually into the Canadian mainstream. Given such an ideology, the notion that Native peoples could possess permanent constitutional rights, including the perpetual right to self-government, was unthinkable. Immediately after the *Calder* decision, government took the position that the transition had already taken place. But within five years this was replaced by a new perspective: that Aboriginal society was not a transitional phenomenon and its survival should be recognized. Initially, the political component of this continuity, based on legislative authority, was not to be entertained, but this also may be reconsidered. In sum, government on Aboriginal rights has evolved, even on the question of political rights, from a position of resistance to one of reluctance.<sup>68</sup>

Furthermore, these rights are enforceable in courts of law unlike mere moral and political rights which are not. Prior to *Calder*, Canada had asserted that Aboriginal rights were merely moral or political rights and were not legally enforceable. The result of the *Calder* litigation was the establishment of a land claims process by the Trudeau government to resolve both specific and

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<sup>68</sup>Michael Asch, *Home and Native Land: Aboriginal Rights and the Canadian Constitution* (Toronto: Methuen, 1984), 71-72.

comprehensive claims.<sup>69</sup> Clearly, the Nishga land litigation was the causal factor in the establishment of the new political response to land claims issues.

The experience of Aboriginal people and the legal system must be seen in a much broader context than the overly celebrated string of narrow victories secured in recent decades. The legal victories are magnified against a back-drop of well-documented political failures. It is this often forgotten back-drop of political failure that is instrumental in creating an illusion about the magnitude of court victories. After all, Aboriginal people do need something to cheer about. Our celebration has been used to cloud the truth, that very little has been accomplished through litigation.<sup>70</sup> The victories must be placed in a larger social context and brought back into a realistic perspective.<sup>71</sup>

One context that must be highlighted is the role that law has occupied in the oppression of Aboriginal nations. Aboriginal Peoples in this country have survived many oppressions - from residential schools and child welfare systems to criminal law sanction and the forced removal of legitimate governments. These oppressions have resulted in either (or both) the forced removal of citizens from communities (often children) or the attempt to remove culture from the individual. Recently, the horrid details of many of these unsuccessful attempts have been

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<sup>69</sup>*Sparrow*, supra, 179-180. I am not suggesting (nor was the court) this process was a successful one. In fact, it has not been.

<sup>70</sup>I am not suggesting that Aboriginal litigation ought to be fully abandoned. My preference would be to see more creatively structured litigation strategies. This would require an opportunity to overcome the isolation that most lawyers are required to work. To support such an endeavor Aboriginal people require institutional space. The creation of a litigation centre would go a long way to fulfilling this need.

<sup>71</sup>This perspective setting exercise is even more essential in the face of the failure of the constitutional negotiation process (the Charlottetown Round). As a new round of constitutional renovation is unlikely and little has changed with regard to political will, Aboriginal Peoples are left with few options and the courts often seem like the only viable one.

brought to public light with increasing frequency.<sup>72</sup> Although these attempts at assimilation never met with full success (and that in itself is witness to the strength, wisdom and creativity of Aboriginal ways and people), they have left a devastating imprint on every individual and every community.

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

Law has been the tool through which all the oppressive actions of successive Canadian governments have passed. It is amazing to note that many Aboriginal people still believe Canadian law and our collection of nominal victories remains a viable and valuable solution. It is not a source of immediate and substantial result. Law has been a very large part of the problem. These small victories, often gained at immeasurable cost, have been the only opportunity for Aboriginal people to seek redress from the many impositions of the system of the Canadian state.<sup>73</sup> It is impossible for me to remain chained to a plan of action that ensures my children will continue to suffer the same effects of colonial imposition.

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<sup>72</sup>This is worthy stopping to note because “telling is the first part of healing”.

<sup>73</sup>I am not critical of those individuals and communities who have brought forward such claims to Canadian courts. I have deep regard for them. It is the process of studying those so-called victories over the last ten years of my life that leads me to the conclusions I am mentioning. I am angered by the amount of wasted Aboriginal energy, Aboriginal intellect and Aboriginal resources that have been devoted to securing such small successes.

The courts have been the vehicle by which Aboriginal people have successfully forced governments to come to terms with outstanding land issues. This success is however not complete. In and of themselves, the court decisions are narrow victories and the cases only partially address the difficulties which confront Aboriginal nations. In all of the cases, the courts reserve to the Canadian crown a "present proprietary estate" or recognize that the underlying crown title is absolute. It is accurate to conclude in the face of the reservation held in the name of the crown that this string of narrow victories sits under a heavy ceiling of Euro-Canadian presumption.

It is not just the substantive conclusions reached by courts that impact adversely on Aboriginal people who seek to secure just resolutions to their claims. The court process is also one which contains a number of difficulties which are inherent in the process and structure of legal resolution. Often these are the unspoken rules of the judiciary and government which ensure (albeit unintentionally) that Aboriginal Peoples cannot overcome the historic biases that form the basis of the Canadian legal legacy. One such rule is the system within the legal process called precedent. Precedent is just one of several legal processes which are by their very nature problematic for the resolution of Aboriginal claims. Precedent is used here as a single example but there are many more that could be offered. By establishing a system which relies on previous court decisions (that is precedent), the judiciary is backward looking. There is little in the history of the legal resolution of Aboriginal claims that such a backward looking process could be characterized as beneficial to Aboriginal Peoples. Such a process ensures that Canadian beliefs are continually affirmed unquestioned in future resolutions. Its effect is to subtly entrench the beliefs of historic times, such as that of European superiority, in present day decisions. By agreeing to the litigation process to resolve a claim, Aboriginal Peoples agree implicitly to the terms on which the non-Aboriginal dispute resolution system is based regardless of the consequences or biases that process affirms.

The earliest case on the rights of Aboriginal people living in the territory that became known as Canada offers a clear example of the problems endemic in the legal process. In 1888, the Privy Council (then the highest court to hear Canadian appeals) handed down its decision in the case of *St. Catherines Milling and Lumber Company v. The Attorney General of Ontario*.<sup>74</sup> This decision set the tone and provided the legal parameters for Aboriginal land litigation until the decision of the Supreme court in the *Calder* case in 1973. This case was the first Canadian case to take the issue of Indian<sup>75</sup> title before the Judicial Committee of the Privy Council.

The dispute between the lumber company and the Ontario government arose as the result of the signing of Treaty Three in northern Ontario in 1873. The lumber company, who were in fact closely connected to the federal government lead by John A. Macdonald, had received a license to cut timber in the area of Wabigoon Lake. The lumber company had cut two million feet of lumber and was prepared to remove it from the area. In this particular case, the province took issue with the right of the federal government to issue the timber licenses (and the company to remove the timber). The dispute had been simmering between the two levels of government since the Dominion had acquired the territory from the Hudson's Bay Company in 1870.<sup>76</sup> The province decided it was time to litigate the dispute. Wishing to affirm their beneficial interest in the land by virtue of section 109 of the *British North America Act*, the province brought action

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<sup>74</sup>14 App. Cas. 46 (P.C.).

<sup>75</sup>Until 1982, the language used to describe the Indian, Inuit and Metis was the term Indian. Since its first use in the *Royal Proclamation of 1763* the word Indian has subsequently acquired a very narrow meaning. As *Re Eskimos*, [1939] S.C.R. 104, [1939] 2 D.L.R. 417 demonstrates, Indians once included at least Inuit peoples. The Metis can also make sound and convincing arguments that they were included in the historical usage of the word Indians. Please refer to Clem Chartier, "'Indian': An Analysis of the Term as Used in Section 91(24) of the British North America Act, 1867" *Saskatchewan Law Review* 37-69.

<sup>76</sup>S. Barry Cottam, "Indian Title as a "Celestial Institution": David Mills and the *St. Catherines Milling Case*" in Kerry Abel and Jean Friesen, *Aboriginal Resource Use in Canada: Historical and Legal Aspects* (Winnipeg: University of Manitoba Press, 1991), 247-265 at 247-248.

against the lumber company seeking injunctive relief. The federal government intervened in the appeal but failed to indemnify the lumber company fully.

Lord Watson writing for the Privy Council upheld the province's view that although title to the land vested in the crown, the beneficial interest vested in the province. Based solely on the constitutional provision found in section 109 the Privy Council reasoning was in fact correct. There is no dispute that federal and provincial governments can legitimately order their relationships according to the agreements reflected in the constitutional provisions. The federal government had no authority to issue a timber license and the lumber company had been unlawfully carrying out their economic pursuits. Damages and an injunction lay against the company. The sound constitutional reasoning of the case eclipses the impact that this decision soon imposed on Indian nations.<sup>77</sup> In fact, without examining the context of the times it remains unclear as to why the interest of Indians ever became an issue in this case.

The fact that the Privy Council's decision followed acceptable legal practices is an insufficient basis upon which to conclude that the decision in the case was a good one. The proper legal process obscures other important legal facts. The constitutional provisions reflect an agreement between only the federal and provincial governments. The process to resolve any disputes between these two levels of government is also part of the constitutional agreement between the two recognized levels of Canada government. Indian nations are fully outside the agreement never having consented to the imposition of Canadian constitutional law. Nonetheless, they were drawn fully into the dispute resolution process. Nothing exists in Canadian or British law to go behind a constitutional document that is being litigated to amend the shortcomings (exclusions) in the drafting process regardless of the degree of devastation that the omissions create for an enclaved people.

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<sup>77</sup>I am here adopting the language of the times and intend to create no disrespect to Metis and Inuit nations. As previously discussed, I firmly believe that the Metis and Inuit were included in this historic term.

In the face of the rather clear statement of interest contained in section 109, the only hope the federal government possessed to claim the land was to argue that the result of the extinguishment of the Indian interest by treaty created a complete vesting of land interest in the federal government. In this way, the federal government hoped to eclipse the clear provision in section 109 of the *British North America Act* and the resulting provincial entitlement. The federal government saw nothing wrong with “using” the Indian population and their rights in this manner. The federal government's hopes in this case rested squarely on the backs of Indian people and the hope that the court would recognize that Indian title was a recognizable legal interest.

Writing in detail about the politics surrounding the *St. Catherines* case, Barry Cottam describes:

The Dominion argued, through John A. Macdonald, who was both the Prime Minister of Canada and the Superintendent General of Indian Affairs, that the Indians had owned the land and passed it to the Dominion through the treaty; thus the Dominion owned the land and its resources even though they lay within the boundaries of Ontario as established by the JCPC in 1884. The Ontario government had to produce an alternate view; Indian title had to be established as something less than full ownership for Ontario's counter claim to stand. The Ontario government met the Dominion argument with assertions that the Indians had no concept of property recognizable in law, and that, whether they did or not, the title to the lands of North America lay in the Crown of England by virtue of the processes of discovery conquest and settlement. If the Indians had any rights at all they came through the generosity of the Crown.<sup>78</sup>

The federal government attempted to stand in the place of Indian people solely for the purpose of increasing their own interest in lands (as opposed to protecting the interest of the Indians) that under simple constitutional interpretation belonged to the province. The federal attempt failed. The devastating consequences of this federal action are still being carried by Indian nations

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<sup>78</sup> Cottam, *supra*, 248.

today. The result of the federal action has been the legal trivialization of the Indian interest in land.

Indian people were neither parties in the action nor were they represented at any stage in the court process. Yet, Indians have lived with the consequences of this decision for more than a century. Not only were the Ojibwe people, or any other Indian nation, unrepresented at the hearing, no where was any concern expressed by Lord Watson regarding the fact that the Indian position and Indian people were not parties to the case and therefore were not heard. This failure to hear Indian concerns may be typical of the times but it is none the less a complete breach of the principles of fundamental justice<sup>79</sup> which the Euro-Canadian system alleges they revere. Nonetheless, subsequent court application of the Privy Council decision determined the interests of all Indian peoples for nearly a century (not just those signatory to Treaty Three) before they were challenged.

The decision of Lord Watson, has percolated through the great majority of court cases on Indian title subsequent to 1888. In rendering his judgment, Lord Watson noted that the definition of Indian title was imprecise:

... there was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point.<sup>80</sup>

Presenting yet another contradiction in their reasoning, the court continued by offering their comments on the nature of Indian title, regardless of whether or not this was necessary for the decision. It was held that the Indian interest in land was a "mere burden" on the absolute crown title. Lord Watson characterized the Indian interest as a "personal and usufructuary right".<sup>81</sup>

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<sup>79</sup>Such as the right to be heard.

<sup>80</sup> *St. Catherines Milling*, supra, 55.

This is legalese for the right to merely use the land. Usufructuary rights are less than estates or “full” interests in land. The interest of the crown in the land is, therefore, in law was found to be greater than the interest of Indian Peoples. The underlying reason why a greater legal interest vests in the crown is not discussed in the case but can logically be assumed to be the belief in the natural superiority of Europeans.

Following the reasoning of Lord Watson at a different level another interesting and disturbing observation is made. No where in the decision does the court identify and fully explain the source of the crown title. The same imprecision does not surround the source for the Indian interest in land. Lord Watson carefully sources the Indian interest in the *Royal Proclamation of 1763*. My dissatisfaction with the characterization comes from the understanding that if Indian title is sourced in the *Royal Proclamation* (that is after British “discovery”) then crown action is seen by the court to be required before the Indian interest is seen to exist. This was the burden left to Indian litigators who in the future would be required to displace this belief before they can even attempt to successfully articulate their legal claims. The judicial reasoning in *St. Catherines* can only be seen as a colonial gesture of great magnitude and must be viewed as the narrowest possible construction of the history of this land. It has taken nearly a full century to partially escape these legal intellectual shackles.

In 1888, it would have been fairly simple to argue that the aspects of Indian title found in the decision of the Privy Council in *St. Catherines* were obiter.<sup>82</sup> As Aboriginal people were not involved in judicial processes at this time, immediate action against the negative decision in this case was not made.<sup>83</sup> This obiter argument was only applicable immediately after the decision

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<sup>81</sup>Ibid, 55.

<sup>82</sup>This is a legal term that means the point is not relevant or necessary to the determination of the issue in a particular case and therefore is not binding on future courts.

<sup>83</sup>I wonder when the signatories to Treaty Three first became aware of this decision. The

in *St. Catherines*. The cases immediately following the Privy Council decision embraced and affirmed the reasoning of Lord Watson fully. The faulty reasoning becomes binding. This requires that subsequent courts follow the definition of Aboriginal rights to land as "mere burdens" as well as originating in crown action or break with precedent. From 1888 to 1973 when the *Calder* decision is handed down by the Supreme Court of Canada, little progress is made in the courts toward justly resolving Aboriginal claims. In fact, the "mere burden" rule is more forcefully applied. Indian nations are left to confront the dire consequences of a rule definition process that was exclusionary.

There are two clear levels of difficulty in the *St. Catherines* case. The principles of fundamental justice apply in such a way that they offer no protections to people who are fully outside the process of either constitutionalism or the agreed upon dispute resolution process. From a technical legal perspective, the denial of the rights in the first instance became a major legal obstacle to those who were not party to the process. Indian people had no right to be heard even though their rights were fundamentally affected and this must be seen as highly problematic.<sup>84</sup> Not only are the process and rules problematic, but substantively the *St. Catherines* decision is also unacceptable. It is based on ethnocentric and colonial views about Canada, the land and its history. It is an exclusionary judgment and its value as a legal precedent must be fully surrendered.<sup>85</sup>

For nearly a century after 1888, no progress is made before the judiciary, but certain changes did occur on the political front which directly impact on the change to occur in the judiciary during the 1970's. In 1951, the prohibition on retaining counsel or raising money for

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publication of cases, even today, is not accomplished in such a way that Aboriginal communities have great access to this information.

<sup>84</sup>There is no such right that accrues to an individual not party to a case.

<sup>85</sup>Common law principles (that is law made by judges) can be set aside by legislative action.

litigating Indian claims is removed from the *Indian Act*.<sup>86</sup> There is no question that this section affected the type of litigation that was brought before domestic courts. It is one important reason why no compressive claims are found in the courts prior to the *Calder* decision.<sup>87</sup> Prior to the 1950's the Aboriginal rights litigation predominantly was comprised of claims regarding the right to hunt or fish. These are individualized claims and are quasi-criminal in nature. Such an arena is clearly not the best for providing sound judicial articulation of the principles of Indian rights.<sup>88</sup> Unfortunately, much of the litigation still clings to the pattern of individualized and quasi-criminal claims. The removal of this section which effectively prohibited Aboriginal litigation follows the post World War II sensitivity to human rights as the result of war time atrocities and not any particular sensitivity to Indian concerns.

During the post war period, international human rights protections also began to appear. In 1960, the federal government introduced the *Canadian Bill of Rights* which introduced anti-discrimination protections.<sup>89</sup> During this same period (1960), the federal franchise was granted to registered Indians. Quebec was the last province to grant the provincial franchise in 1968. All of these factors produced a greater awareness amongst both the Canadian public and the judiciary regarding Canada's history and its discriminatory treatment of Indian people. In fact, the judiciary is not unaware of these facts and in 1990 they stated:

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<sup>86</sup>This section was included in the *Indian Act* of 1927 and was enforce until 1951.

<sup>87</sup>The decision in *Logan v Styres*, *supra*, is but one example of this lesson.

<sup>88</sup>This fact did not escape the attention of the court in *Sparrow*:

... the trial for a violation of penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right... (at page 172).

<sup>89</sup>*The Queen v Drybones*, [1970] S.C.R. 282, struck down section 94(b) of the *Indian Act* which prohibited Indians from being intoxicated off of a reserve.

For many years, the rights of the Indians to their aboriginal lands - certainly as *legal* rights - were virtually ignored. The leading cases defining Indian rights in the early part of the century were directed at claims supported by the Royal Proclamation or other legal instruments and even these cases were essentially concerned with settling legislative jurisdiction or the rights of commercial enterprises. For fifty years after the publication of Clement's *The Law of the Canadian Constitution* (3d ed., 1916), there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature. By the late 1960's aboriginal claims were not even recognized by the federal government as having any legal status. Thus the *Statement of the Government of Canada on Indian Policy* 1969, although well meaning, contained the assertion (at p. 11) that "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to the Indians as members of the Canadian community." ... It took a number of judicial decisions and notably the *Calder* case in this Court (1973) to prompt a reassessment of the position being taken by government.<sup>90</sup>

By the 1970's, the time was right for a partial break with the judicial past. How substantial this break has been remains open to question.

The importance of the *Calder* case has already been noted in this paper and it may come as a surprise to some that the Nishga were not successful in their claim. Based on the technical decision of Justice Pigeon, the Nishga lost their suit for a declaration declaring that their title to the land had never been extinguished.<sup>91</sup> The Nishga had failed to secure a fiat (the permission

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<sup>90</sup>*Sparrow*, supra, 177.

<sup>91</sup>In summarizing the Nishga position, Justice Judson provides:

The Nishga Nation did not agree to or accept the creation of these reserves. The Nishgas claim that their title arises out of aboriginal occupation; that recognition of such a title is a concept well embedded in English law; that it is not dependent on treaty, executive order or legislative enactment. In the alternative they say that if executive or legislative recognition ever was needed, it is to be found in the Royal Proclamation of 1763, in Imperial statutes acknowledging that what is now British Columbia was "Indian Territory", and in Royal instructions to the Governor of British Columbia. Finally, they say that their title has never been extinguished (Supra, 149).

of the province to go ahead and sue them) prior to commencing their litigation as was required by British Columbia statutes.<sup>92</sup> Justice Judson and two other Supreme Court justices held that Aboriginal title had been extinguished indirectly through a series of legislation and crown proclamations. Two justices concurred with Justice Hall who insisted that extinguishment can only be demonstrated by the "clear and plain" expression of the crown. Tallying up the opinions, the Nishga narrowly lost their bid to secure a declaration stating their title was unextinguished by a split decision of four to three.

The way in which the Nishga drafted their litigation is an important issue in and of itself. The remedy sought was a declaration - a judicial statement - and nothing more. The Nishga did not ask the court to define the concept of Indian title, merely to note that it had not been extinguished. The question asked the court was purposefully a narrow one. The Nishga themselves ensured that both remedially and substantively the issue before the courts could cause them as little harm as possible. Two comments can be substantiated from the recognition of the narrow scope of the Nishga claim. First, the Nishga did not trust the courts with the larger question of Indian title.<sup>93</sup> Second, by seeking only declarative relief the Nishga understood that the real solution lay outside the judicial process and the court action was just the first step<sup>94</sup> to secure a political negotiation process that had evaded the Nishga since shortly after their contact with the Settler Nations.

Oddly, given the result, the Nishga case is hailed by most as a great victory. This view is

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<sup>92</sup>*Crown Procedure Act*, R.S.B.C. 1960, c.89.

<sup>93</sup>Personal conversations with Frank Calder, 1990.

<sup>94</sup>This strategy can also been found in other cases such as *Dumont et al. v Attorney General of Canada and Attorney General of Manitoba*, [1990] 2 *Canadian Native Law Reporter* 19 (S.C.C.).

evidenced in the fact that six of the seven justices clearly expressed the view that Aboriginal title does in fact exist and that it exists independently to the *Royal Proclamation*. It was this judicial recognition that persuaded politicians that a land claims process was overdue. Unfortunately, *Calder* only partially resolves the substantive concerns articulated in the *St. Catherines* case. Although some justice is done to the history of this land commencing prior to 1763, the Indian interest is still viewed by the *Calder* court as a lessor interest.

Little attention has been paid over the years to a serious legal inconsistency in the *Calder* case. In concluding his judgment, Justice Judson states:

There is a further point raised by the respondent that the Court did not have jurisdiction to make a declaratory order requested because the granting of a fiat under the *Crown Procedure Act*, R.S.B.C. 1960, c.89, was a necessary prerequisite to bringing the action and it had not been obtained. **While it is not necessary, in view of my conclusions as to the disposition of this appeal, to determine this point, I am in agreement with the reasons of my brother Pigeon dealing with it.**<sup>95</sup>

Every court is required to have jurisdiction before it can take hold of a matter. If crown fiat was required and not secured, then the court was not properly charged with the matter. Without jurisdiction, the courts have no authority to speak to an issue. Yet, Justice Judson - a justice of the highest court in the land - spoke at some length regarding the scope of Indian title and the test to be applied to the extinguishment question. All of the proceeding reasons of Justice Judson sit in the air. It is ironic that Aboriginal people are expected to have prima facie faith in the judicial process when the judiciary so easily overlooks basic procedure rules in Indian claims. Interestingly, the court does not overlook any of these rules when it is to the advantage of Aboriginal Peoples. Legal rules tend to be applied strictly only when they disadvantage Aboriginal litigants.

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<sup>95</sup>Ibid, 168 (Emphasis added).

Although the bulk of Justice Judson's comments in *Calder* are technically made without jurisdiction, this is not the status that the Canadian judicial process has accredited to them. Justice Judson's comments have often been reproduced at length in subsequent cases as they respect the Aboriginal point of view that Aboriginal title is independent to British or Canadian crown action. Justice Judson stated:

Although I think that it is clear that Indian title in British Columbia *cannot owe its origin to the Royal Proclamation of 1763*, 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. That is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished.<sup>96</sup>

As progressive as Judson's statement may seem, the impact of his position is immediately diminished as he asserts "there can be no question that this right was dependent on the goodwill of the Sovereign." This establishes a familiar pattern of 'slight of pen' which emerges with a nominal scrutiny in all Aboriginal rights cases. The courts frequently make sweeping statements which affirm Aboriginal views and Aboriginal rights. These are next subtly diminished in a single sentence which affirms that the crown's interest is greater than the Indian interest. No explanation of how this is legally so is ever provided. This pattern of flowing Aboriginal rights language masks the colonial aspects (often one-liners) of most decisions.

Although Justices Hall and Judson agree that the source of Aboriginal title is in historic occupancy, they disagree on the test required by the crown to demonstrate extinguishment.

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<sup>96</sup>Ibid, 156 (emphasis added).

It should be noted that Judson J believed the *Royal Proclamation* did not apply to British Columbia as that territory was largely "undiscovered" (*Calder*, supra, 154). Justice Hall disagrees noting: "The wording of the Proclamation itself seems quite clear that it was intended to include the lands west of the Rocky Mountains (supra, 206).

Justice Hall's test is strict, requiring the crown to demonstrate a "clear and plain" intention on the face of any crown enactment.<sup>97</sup> The court is evenly split (three to three) on this issue as Justice Pigeon makes no comment on the issues of substance. It is not until the *Sparrow* decision in 1990 that this issue of extinguishment is resolved.<sup>98</sup>

Twelve years following the *Calder* decision, the Supreme Court handed down its decision in the *Guerin* case. Before the decision in the *Guerin* case,<sup>99</sup> the federal government bore no recognized legal responsibility for the way in which reserve lands are administered by the Department of Indian Affairs. In the case that created a revolution at the Department, the Musqueam Indian Reserve had leased land to the Shaughnessy Golf Club. The terms of this lease were misrepresented to the band and the terms they had directed the Department to secure were ignored. Unable to secure a copy of the lease for a number of years,<sup>100</sup> the band was frustrated in their attempts to resolve the inequality in a satisfactory manner.

The decision in *Guerin* is penned by Justice Dickson. In order for the band to secure a remedy, it must be demonstrated that a legal obligation exists that prohibits the Department from

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<sup>97</sup>Justice Hall states:

It would, accordingly appear to be beyond question that the onus of proving that the sovereign intended to extinguish the Indian title lies on the respondent and that intention must be "clear and plain". There is no such proof in the case at bar; no legislation to that effect (*Ibid*, 210).

<sup>98</sup>Justice Dickson and LaForest affirm the Hall view. *Sparrow*, *supra*, 174.

<sup>99</sup> *Guerin* was decided after the entrenchment of Aboriginal rights in the Canadian constitution. Although the court does not rely on the new constitutional provisions in its decision, it is nevertheless aware of the new legal relationship in section 35(1). The court in *Guerin* was not acting in an unpredictable way. See also the discussion in *Sparrow*, *supra*, 178.

<sup>100</sup>The federal government tried to shield themselves behind the Musqueam delay in bringing the action. The statute setting out limitation periods indicated a seven year limit. The court chastised the crown, as the delay was a result of their failure to provide the band with a copy of the lease despite the numerous attempts of the band to secure the lease.

securing less favourable lease terms. Musqueam was not a party to the lease. They agreed to a conditional surrender of their land to the Department for the purposes of the lease. The surrender document was so generally worded that no lawful violation of the document had occurred. The lease terms were also not violated. As they were not a party to the lease, and the golf club was not a party to the surrender, the First Nations was stopped from seeking more conventional legal remedies.

The relationship created to resolve the legal obstacles was the fiduciary relationship. This relationship although similar to trust is not a trust according to the court.<sup>101</sup> It is emphasized that all "Indian" law is *sui generis*, meaning simply that it is unlike anything else.<sup>102</sup> The fiduciary relationship arises both in the historic occupation of Indian nations jointly with the fact that the crown has provided that the land is only alienable to them. This last point is a fundamental component of both the *Indian Act* regime and the *Royal Proclamation*.<sup>103</sup> It is the exercise by the crown of discretion that triggers the fiduciary relationship. The court affirms that Professor Ernest J. Weinrib's view that "the hallmark of the fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion".<sup>104</sup>

In determining the results of the crown's breach, the courts clearly point out that the crown acted unconscionably. This unconscionable action is crucial as the remedy is characterized as an equitable one. The remedy is dependent on the irregularities in the surrender process.<sup>105</sup> It is

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<sup>101</sup>*Guerin*, supra, 131.

<sup>102</sup>*Ibid*, 136. Note this concept is also relied on in *Calder*.

<sup>103</sup>Justice Wilson writes a concurring opinion that sources the fiduciary relationship within a statutory framework.

<sup>104</sup>*Guerin*, supra, 137, citing Professor Ernest Weinrib's article, "The Fiduciary Obligation", (1975) 25 *University of Toronto Law Journal*, 1 at 7.

this action the court found to be unconscionable and a violation of the honour required by the person who exercises discretion. The court also emphasizes the fact that the crown acted without consulting with the First Nation and unilaterally renegotiated the lease after the surrender documents were complete. The reasoning of the court provides a clear test for litigants to follow in the future although few have yet chosen to follow this fiduciary path.<sup>106</sup>

What is most important in *Guerin* is the result of the breach by the crown of their fiduciary responsibility. As all legal rights of which the fiduciary relationship is but one, requires a complimentary remedy. The Department was required to pay damages in the amount of \$11 million dollars. This result ought not be diminished in the face of many Aboriginal people seeking to find ways to resource economic development in their communities.

In the same way that political attitudes changed after *Calder*, change also followed on the winds that swirled following the release of the *Guerin* judgment. The Department of Indian Affairs actively followed a policy of "devolution"<sup>107</sup>. Devolution is the process whereby Indian

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<sup>105</sup>One view of the decision in this case is very narrow. Some have suggested that the fiduciary relationship will only apply to unconditional land surrenders and not other crown actions. This view cannot be substantiated by any comments made by the court. To the contrary, the court describes the relationship in very broad terms. The narrow view can only be substantiated technical terms by relying on the principle of interpretation that suggests no precedent can be larger than the facts it is decided upon. I have already clearly stated that I believe it is time to get beyond the consistent use of technical legal arguments which are clearly biased against the Aboriginal claimant.

<sup>106</sup>It is my opinion that the fiduciary path is one that holds much hope for Aboriginal people. What is novel about this approach is that it focus the attention on the actions of the crown rather than Aboriginal people. In my opinion, Canadian law can only bind Canadians. Aboriginal Peoples are bound only by their traditional laws until such a time that they freely consent to the application of Canadian laws. A full discussion of the possibilities and detriments of litigation brought under the terms of fiduciary obligation is unfortunately a discussion of some length, such length that it cannot be discussed in detail in this paper.

<sup>107</sup>The process of devolution was first began in the 1970's as a response to Indian demands for greater control over the education of our children.

bands are facilitated in assuming greater administrative control over their affairs. Without commenting fully on the merits of the devolution process, it must be noted that greater administrative control is obviously not tantamount to self-determination. Self-determination requires the recognition of law making powers which are not essential to assuming greater administrative control. Assuming administrative control at the band level frequently only amounts to agreeing to control our own misery. Furthermore, in such a circumstance the crown is released from any direct, visible and immediate responsibility for the misery created by their laws and policies, both past and present. Failure to take responsibility is not a step toward a brighter future but just a new lesson in a continuing tale of victim blaming.

The devolution process and the governmental justifications for this process are suspicious. As already pointed out, devolution is a federal exercise in responsibility shifting which is paid for by a nominal increase in dollars directly available to the band. Devolution is yet another unconscionable act on the part of federal authorities. The interesting question remains. Can an unconscionable act protect the same federal authorities from their earlier unconscionable acts that would be subject to the fiduciary standard? Such reasoning defies logic, two wrongs cannot make a right.

Little attention in this discussion has yet focused on the important area of treaty rights interpretation. In 1985, the court missed an opportunity to consider the meaning of section 35(1) in the *Simon* case. The plaintiff withdrew the constitutional question and instead based his hunting defense on a provision of the *Indian Act*. In order to come to a conclusion on whether s.88<sup>108</sup> applied, the court had to consider the definition of a treaty. Prior to this decision, the

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<sup>108</sup>Section 88, R.S.C., 1985, c.1-5 (formerly R.S.C., 1970, c.I-6), reads as follows:

88. Subject to the terms of any treaty and any other Act of Parliament, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent

government asserted that treaties were legal only if the treaty included a land surrender provision. This excluded many of the treaties made in eastern Canada, treaties of peace and friendship, from the ambit that federal authorities recognized. The court, however saw the matter differently. They held that the 1752 Treaty that the Mi'cmaq signed was indeed a legally enforceable agreement.<sup>109</sup> Although this does not assist us in providing a certain constitutional definition of treaty, *Simon* takes us a long way down the road to respectful treaty analysis. However, as we have seen before, the same familiar pattern emerges. The courts were used to force political recognition. Unfortunately, implementation of all the treaties still remains a serious and pressing issue. Respectful implementation of treaties would resolve many of the Aboriginal issues that are presently outstanding.

In the wake of the *Guerin* and *Simon* cases, another familiar pattern emerges. Both the *Calder* and *Guerin* decisions impacted on the political realm. *Simon* created a full revolution in the treaty recognition sphere. Although these impacts initially appear to be progressive, closer scrutiny raises questions about the level of success that was actually attained in each case. As the year 1982 brought significant changes to the Canadian constitution, the next required analysis is a determination of the court's ability to break with the past.

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that those laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder, and except to the extent that those laws are make provision for any matter for which provision is made by or under this Act.

<sup>109</sup>*Sioui*, supra, 127.

### CHAPTER THREE

#### THE SUPREME COURT SPEAKS: *R. v SPARROW*

In May of 1990, eight years after the entrenchment of section 35(1), the Supreme Court of Canada released the decision in the fishing trial of one Ronald Edward Sparrow.<sup>110</sup> The response to this first pronouncement by the highest court of the land on the meaning of section 35(1) of the Constitution Act, 1982, was immediate. In a media flurry, it was hailed as a breakthrough in the arena of Aboriginal rights efforts.<sup>111</sup> It was in fact a victory of sorts, the conviction of Mr. Sparrow was quashed and a new trial was ordered.<sup>112</sup> But the *Sparrow* decision is no more than one small victory in a long history of Aboriginal struggle against oppression.

Mr. Sparrow is a commercial fisherman. He fishes as his father, grandfather and great-uncle did before him. Four generations have fished, as Mr. Sparrow's son now fishes. He is a member of the Musqueam community. The Musqueam reserve is located within what is now the city limits of Vancouver. He was charged in May of 1984 with a violation of the British Columbia fishing regulations.<sup>113</sup> Mr. Sparrow admitted that he had been fishing in Canoe

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<sup>110</sup>I would like to thank Mr. Sparrow's sister Leona for trusting me with this small bit of family history. Any errors are my own. Copies have been provided for both Ronald and Leona prior to publication in an effort to respect them as individuals and to regard the laws of Indian "copyright".

<sup>111</sup>I am not the first person to note dissatisfaction with the construction of the *Sparrow* decision as progressive. See for example, Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993). The best discussion I have seen on the negative implications of the *Sparrow* decision is written by Kent McNeil, "Envisaging Constitutional Space for Aboriginal Governments", 19:1 *Queen's Law Journal* 1993, 95-136.

<sup>112</sup>In fact Mr. Sparrow was never forced to trial the second time on this charge.

<sup>113</sup>He has also twice since this infraction been charged with fishing offenses under Aboriginal specific regulations. No convictions have yet been registered but the harassment must seem

Passage with a drift net that was longer than the regulations provided. The facts of the case were never in dispute. In order to defend against the charge, he chose to assert that he was exercising an Aboriginal right to fish in that area as his people had since time immemorial.<sup>114</sup>

Life for the average Aboriginal person is precarious and the situation that Mr. Sparrow found himself in is but one example of the truth of this assertion. He supports himself and his family by fishing. On one May day, drifting down the river behind his father, his life was snatched from his control as the next six years were to be spent defending his right to fish all the way to the highest court of the land. Legal costs are the obvious way in which his life was adversely affected during those six years. I imagine that those were also stressful years full of lawyers appointments and court hearings. Court proceedings are adversarial and follow formal and often unexpressed rules. It is a process most frequently foreign to Aboriginal people. As both he is both a commercial fisherman and an Indian fisherman, a conviction on an Aboriginal fishing charge could have resulted in the refusal of the Minister to renew his licenses.<sup>115</sup> Before discussing the legal impact of the *Sparrow* decision, I wish to pay my respects to the individual who carried the consequences that led to some legal gain for our people and communities. Too rarely is this considered in legal processes and in academic commentaries on this case or others.<sup>116</sup>

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unending.

<sup>114</sup>*Sparrow*, supra, 164.

<sup>115</sup>Mr. Sparrow has four licenses, both commercial and Indian. The discretion rests with the Minister to issue both commercial and Indian fishing licenses. A conviction on this charge could have resulted in a denial to renew any one of Mr. Sparrow's licenses. His ability to remain in his chosen profession is conditional on his ability to maintain his licenses.

<sup>116</sup>A notable exception may be the literature which has been inspired by the decision in *Delgamuukw v B.C.*. The reader is referred to an inspirational piece by Dara Culhane, "Adding Insult to Injury: Her Majesty's Loyal Anthropologist", 95 *B.C. Studies* 1992, 66-92.

My view of the law often differs from that of my legal colleagues as I see the entire process of law as one that centrally involves “stories”. Stories of life are the cornerstone of law in the Aboriginal way. My desire to deal first with the story aspect of the *Sparrow* case is my attempt to resolve the Aboriginal discomfort I always experience when trying to do Canadian law. It is a tool of survival for me.

The action that Mr. Sparrow took to defend himself against the breach of the fishing regulation was political action and the fact that this action was located in the judicial process must not be seen to minimize the political dimensions of Mr. Sparrow's actions.<sup>117</sup> On the day that he was charged, Mr. Sparrow was just one of many fishermen out on the water. The fisheries officers passed by many boats, including his father's, before stopping at Ronald's boat. By choosing to assert his Aboriginal right <sup>118</sup> to fish as his defense, he chose to characterize his actions in a bolder manner. But this choice also carried with it a serious responsibility. What if his case were not successful? What if the courts said there was no Aboriginal right to fish? His actions carried with them the serious risk of grave consequences for his family, his community and many other Aboriginal nations that depend on the fishery. This is a position into which **only** an Aboriginal fisherman can be thrust.

Mr. Sparrow was thrust into a role much larger than merely defending himself against a breach of a fishing regulation.<sup>119</sup> Concern must be raised about the way in which the

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<sup>117</sup>In other words, Mr. Sparrow is one of the outstanding legal warriors of the 1990's.

<sup>118</sup>It is important to note that this case does not speak directly to the important question of defining the meaning in Canadian law of the concept of treaty rights. Within the legal process only findings that are essential to the resolution of the specific case at issue will be commented on by the courts. As the Musqueam First Nation has never been party to any treaty with the crown, the question of treaty rights does not arise in this case.

<sup>119</sup>Section 61(1) of the *Fisheries Act* makes it an offense to contravene either the Act or the regulations.

Aboriginal culture is put on trial especially in hunting and fishing cases which comprises the majority of litigation in the area of Aboriginal rights. Fish are not commodities in the Aboriginal way of thinking. All life that has spirit is sacred. The testimony of Dr. Suttles (an anthropologist) reveals:

Dr. Suttles described the special position occupied by the salmon fishery in that society. The salmon was not only an important source of food but played an important part in the system of beliefs of the Salish people, and in their ceremonies. The salmon were held to be a race of beings that had, in "myth times," established a bond with human beings requiring the salmon to come each year to give their bodies to the humans who, in turn, treated them with respect shown by performance of the proper ritual. Towards the salmon, as toward other creatures, there was an attitude of caution and respect which resulted in effective conservation of the various species.<sup>120</sup>

It is an onerous responsibility to be the individual who chooses to put one's culture on trial in an institution that belongs to another culture. In a related way, it is interesting to note that the testimony of a non-Aboriginal anthropologist is the required standard of proof in order to have recognized in court facts which are apparent to any individual living in the Musqueam community. The standard to which courts hold Aboriginal people accountable to regarding cultural facts is unacceptable.<sup>121</sup>

The context which surrounds the *Sparrow* decision is also not widely discussed by Canadian courts, the legal profession or legal academics. The Supreme Court does make one notable but brief comment which minimally indicates they are aware of this impact that the context surrounding their articulation of Aboriginal rights has. The court recognizes that a "trial

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<sup>120</sup>*Sparrow*, supra, 172.

<sup>121</sup>Another good example of evidentiary burdens impacting negatively on Aboriginal claimants are the comments of Steele in the Bear Island Foundation trial. Of particular importance are the difficulties that Aboriginal claimants face when an historical context that respects the Indian perspective is also required of the judiciary. Steele J. states:

for the violation of a penal prohibition may not be the most appropriate setting in which to determine the existence of an aboriginal right..."<sup>122</sup> Unfortunately, the court does not expand on their reasons for asserting their dissatisfaction. This invisible edge of the reality of Aboriginal litigation must be seen as a factor in future governmental decision making.<sup>123</sup> When Canadian

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Chief Potts, who is 38 years old, has a white mother and a father who is not of pure Indian ancestry, and whose Indian ancestry descended from persons who arrived on the lands about 1901, long after most of the issues in dispute had occurred. It could not be said that his own ancestors had any direct **oral knowledge** of the events in question. He was therefore merely giving evidence of oral he had accumulated from other members of the band. He cannot speak the native language and therefore has difficulty communicating fully with some of the oldest members, although they speak english.

*Attorney General of Ontario v Bear Island Foundation et al* (1984), 15 D.L.R. (4th) 321 at 337-338.

Justice Steele has little understanding of the meaning of oral knowledge. In fact, Justice Steele's rule would exclude oral history in the majority of cases as it requires that only a living member of the band can provide that history. This demonstrates that Justice Steel has not been able to understand the specific qualities of oral history as an Aboriginal person understands it. Ironically, even the anthropological evidence presented in support of the testimony of Chief Potts is deemed insufficient and unbelievable. Justice Steele expects that the history of a community is passed on from father to son (no mention of mothers and daughters is made) in a nuclear family relationship. The structure of family in an Indian sense is far removed from what Justice Steele imagines. Justice Steele cannot see beyond his own culture and the presumptions it operates on. Lastly, the opening comments of Justice Steele affirm that he is overly concerned with biological traits of 'Indian-ness', a bias which likely colours the rest of his judgment.

What Justice Steel fails to acknowledge is that Chief Potts has repeatedly been elected by a democratic process within that community. If he so poorly represented the community, then such repeated elections would be unlikely to occur. The end result is a grave insult paid to Chief Potts.

<sup>122</sup>*Sparrow*, supra, 172.

<sup>123</sup>The decision to charge is made within the bureaucracy of Canadian government. Who is making these decisions is often shielded from public view and in particular is information not readily available to Aboriginal people. It is also impossible given the current mandates of courts to stop or fully examine this practice. It is at this place - the decision to charge - that much is going wrong with the litigation of Aboriginal rights. Aboriginal people are left in a defensive (as contrasted with affirmative) position battling powers that have the ability to limit the delineation

politicians fail to negotiate satisfactory remedies to outstanding issues with Aboriginal Peoples the responsibility of government is transferred to individual Aboriginal people such as Mr. Sparrow. This is unconscionable. With the possibility of self-government negotiations on the table this issue of responsibility is of particular importance.

The court recognizes at the beginning of their decision that the issue in the *Sparrow* case was much larger than Mr. Sparrow's ability to defend himself against a fishing regulation infraction. "The issue is whether Parliament's power to regulate fishing is now limited by section 35(1)..."<sup>124</sup> The court adopts a pragmatic approach to this question turning to the text of section 35(1) which states:

The existing Aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.<sup>125</sup>

The decision of the Supreme Court focuses on the definition of the words and phrases, "existing", "Aboriginal rights" and "recognized and affirmed". It is followed by the courts application of the definitions they proscribe to the facts in this single case. It is this pragmatic and definitional approach to the issue at the heart of the case that contributes significantly to the importance of the case as a model for the resolution of future disputes. The *Sparrow* case is the Supreme Court of Canada's first pronouncement on the meaning of section 35(1).<sup>126</sup> Whether or not the

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of our rights. Perhaps a national moratorium on the quasi-criminal prosecution of Aboriginal people for hunting and fishing infractions should be introduced and the use of a mediation process initiated.

<sup>124</sup>*Sparrow*, supra, 164.

<sup>125</sup>The Constitution Act, 1982, Part II. Section 35(1) appears under the heading of "Rights of Aboriginal Peoples of Canada".

<sup>126</sup>The court did have opportunities to examine the meaning of section 35(1) prior to this decision. The *Simon* decision (supra) is the most notable example. In that case the court chose not to enter the discussion on section 35(1). This also demonstrates my earlier comments on the necessity of examining the context.

pragmatic and definitional approach articulated by the court creates a constitutional space<sup>127</sup> for the future development of Aboriginal rights is open to question.

### **DEFINING "EXISTING":**

The entrenchment of section 35(1) created a flurry of both litigation and academic activity.<sup>128</sup> One of the central debates in this literature and in lower court decisions<sup>129</sup> was the definition of the word existing. As a starting point, the court immediately concluded that the entrenchment of section 35 did not have as a purpose the revival of Aboriginal rights which had already been extinguished.<sup>130</sup> This conclusion is easily reached and should be self-evident. The meaning of the word extinguishment or the process to reach such an outcome is less readily discernible and was not approached by the courts in this section of the case.

The *Sparrow* case is about the interpretation of regulations and the interaction between regulatory schemes and the new constitutional protections of Aboriginal (and treaty) rights.

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<sup>127</sup>This language is suggested by Professor Kent McNeil, *supra*.

<sup>128</sup>See for example Brian Slattery, "Understanding Aboriginal Rights" (1987), 66 *Canadian Bar Review* 726; Lyon, *supra*; Kent McNeil, "The Constitutional Rights of the Aboriginal People of Canada" (1982), 4 *Supreme Court Review* 25; and William Pentney, "The Rights of the Aboriginal People of Canada in the Constitution Act, 1982, Part II, Section 35: The Substantive Guarantee" (1987), 22 *University of British Columbia Law Review*, 207.

Clearly these few articles are only examples of the academic literature that was generated. Of note, however, is the fact that these four articles are cited by the Supreme Court in the *Sparrow* decision. Also of note in a systematic analysis of the *Sparrow* pronouncements is the fact that all of the scholars whose work the Supreme Court relied upon are non-Aboriginal and all are men.

<sup>129</sup>See for example *R. v Eninew*, [1984] 2 *Canadian Native Law Reporter* 122; *Attorney General of Ontario v Bear Island Foundation*, *supra*; *R. v Hare and Debassige*, [1985] 3 *Canadian Native Law Reporter*, 139; *Re Steinhauer v. The Queen*, [1985] 3 *Canadian Native Law Reporter*, 187; and *R. v Agawa*, [1988] 3 *Canadian Native Law Reporter*, 73.

<sup>130</sup>*Sparrow*, *supra*, 169-170.

Regulations are subordinate to statutes and this is one reason why a favourable decision in a regulatory infraction case is not seen as especially significant. It is not known how the courts will respond to a section 35 challenge that attacks a statutory provision or one that involves the distribution of legislative powers.<sup>131</sup> However, as the court was more than willing to save the regulatory powers of the crown, it is hard to imagine a situation where the courts would not protect statutory powers in a less rigorous manner. Despite the eloquent language adopted to describe Aboriginal rights by the courts, there is a complete refusal to acknowledge powers of self-government and self-regulation. This practice of limiting rights under eloquent language at a minimum is disturbing.

As the application of regulatory powers is to continue, the court traces the history of the regulatory regime in the fisheries. The regulatory process<sup>132</sup> that many Aboriginal rights have been subject to, and especially hunting and fishing rights, results in a "crazy patchwork" of systems that vary from one jurisdiction to the next. Blair J.A. in the *Agawa* case, commented on this structure:

Some academic commentators have raised a further problem which cannot be ignored. The Ontario Fishery Regulations contain detailed rules which vary for different regions in the province. Among other things, the Regulations specify season and methods of fishing, species of fish which can be caught and catch limits. Similar detailed provisions apply under the comparable fisheries Regulations in force in other provinces. These detailed provisions might be constitutionalized if it were decided that the existing treaty rights referred to in section 35(1) were those remaining after regulation at the time of the proclamation

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<sup>131</sup>Section 88 of the *Indian Act* regulates the conflict between treaties and federal statutes on one hand and with provincial legislative regimes on the other (as seen in the *Simon* case). The conflict between federal statutes with either a treaty or Aboriginal right will be an interesting legal discussion. A discussion that is still much awaited. Cases are now before the courts that challenge the membership provision of the current *Indian Act*. This is also an unfortunate terrain to hear this challenge and this issue is fully developed in the next Chapter.

<sup>132</sup>The application of provincial regulatory systems is incompatible with the views that many Aboriginal nations hold regarding their hunting and fishing rights. This is one of the reasons for the multitude of litigation in this area.

of the *Constitution Act, 1982*.<sup>133</sup>

Generally, a system that creates vastly different rules in different domestic jurisdictions is not viewed as positive. Such a system breeds confusion as no national standard is clear. Canadian law operates on the premise that such confusion leads to chaos and disorder. Notwithstanding, the multitude of hunting and fishing regulations regarding Aboriginal and treaty rights (a matter of national dimensions) has stood unchallenged for many years.

It is blatant that the purpose of section 35(1) was not to re-enforce the myriad of differing regulatory systems which existed in 1982. Such an assertion would make no constitutional sense. Such an assertion borders on the ridiculous. The constitution is, after all, the supreme law of the land. Statutes are "subordinate" to constitutional provisions and protections. Regulations are subordinate to statutes. To suggest a reversal of this hierarchy of authority would seem to warrant no comment on the part of Canada's highest court. This recognition highlights one of the major difficulties in litigating Aboriginal rights.<sup>134</sup>

The manner in which Aboriginal hunting and fishing rights have been regulated would have serious consequences as well. The Supreme Court cited with approval this passage from an article written by Professor Brian Slattery:

This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to

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<sup>133</sup>Supra, 87 and also affirmed in *Sparrow*, supra, 170.

<sup>134</sup>I want to recognize that I am not, by choice, a litigator and all of my observations are made from a place outside of courtroom experience. I do not think this belittles my views. Rather, I am merely pointing to the fact that an experienced litigator would also be able to advance this critique in different directions. See for example, Louise Mandell, "Native Culture on Trial" in Sheilagh Martin and Kathleen Mahoney (eds.), *Equality and Judicial Neutrality* (Toronto: Carswell, 1987), 358-365. In addition, some serious question must be raised by the fact that many (at least one half) of the Aboriginal people with law degrees make choices not to litigate.

place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory.<sup>135</sup>

Professor Slattry's legal analysis cannot be faulted although the conclusion is obvious and should have required little academic or judicial discussion. The courts preoccupation with discussing the obvious is a matter of some curiosity especially in the face of the great number of issues that remain unresolved in the area of Aboriginal rights. In fact, the court has yet to articulate a clear theory of Aboriginal rights.

A more fundamental problem is not referred to by the courts. The power to regulate arises in provincial or federal statutes. The rights of Aboriginal peoples do not flow solely from the crown neither can their source be found in provincial, territorial or federal statutory regimes. Aboriginal rights are originated in the historical occupation of Aboriginal nations of the territory that became Canada.<sup>136</sup> The presumption that provincial, territorial or federal jurisdictions have the authority to regulate Aboriginal rights - rights which do not owe their origin to any crown enactment or action - is presumed. It is without any demonstrated clear foundation in Canadian law.

The courts ability to presume regulatory powers over fishing (an Aboriginal right) rests on an overly narrow interpretation of the powers divided between federal and provincial

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<sup>135</sup>*Sparrow*, supra, 170.

<sup>136</sup>*Calder*, supra, 156.

Judson J states:

... 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 (ibid).

governments in sections 91 and 92 of the *Constitution Act*, 1867. It is presumed that the sovereign powers of government are fully exhausted between those two levels of government.<sup>137</sup> This leaves no room for the creation of an Aboriginal jurisdiction. This suggestion defies the perspective advanced by Aboriginal peoples. By skipping over such an essential issue the Canadian courts covertly affirm the existing self-governing powers of Canada as both complete and absolute. This is the heart of the criticism of the *Sparrow* case.<sup>138</sup> This is an error that is repeated throughout the decision.

An important distinction is made in the case between rights which have been unextinguished and the manner in which rights are exercised. This distinction is a subtle one that may not be easily discerned by those not accustomed to reading legal text. In the Canadian articulation of a right it is not necessary for the right to be acted upon for it to be exercised. Rights that lie dormant are not rights without meaning nor are they rights that have ceased to exist. These dormant rights can be picked up and used again. This distinction is a very important one for Aboriginal people to consider.

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<sup>137</sup>James Youngblood Henderson briefly describes the Aboriginal criticism of this debate:

While the division of powers in the criminal justice system was an existing constitutional fact at the time the Victorians were making treaties with First Nations, none of the prerogative treaties ratify this division. Indeed, as was made clear by First Nations..., in the Victorian treaties, the Crown and the First Nations established an alternate system - the peace and good order system - that is separate and distinct from the 1867 system [in "Conclusion: All Is Never Said" cited in Gosse, Henderson and Carter, *supra*, 423 to 432 at 424].

There is no reason why the systems that Professor Henderson refers to is limited to only criminal justice matters, this is merely the context he discusses concerning the self-governing powers of Aboriginal people. It is also not a view that is uniquely applicable to the numbered treaties.

<sup>138</sup>Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*", XXIX (2) *Alberta Law Review* (1991), 498-517.

In closing their discussion of the meaning of the word "existing", the Supreme court states:

...the phrase "existing aboriginal rights" must be *interpreted flexibly so as to permit their evolution over time*.<sup>139</sup>

Or in the words of Professor Slattery, the court affirms that the word existing means that Aboriginal rights are "affirmed in a contemporary form rather than in their primeval simplicity and vigor."<sup>140</sup> These statements are very important. Justices Dickson and LaForest begin their decision by pointing out the case will examine the strength of the promise made to Aboriginal peoples in section 35.<sup>141</sup> As seen throughout the judgment, the court emphasizes that a broad interpretive framework is necessary for the determination of the scope of any Aboriginal right. This sets a very high standard (perhaps one that is not in fact met in the decision) and potentially safeguards the rights of Aboriginal peoples.

### **DEFINING "ABORIGINAL RIGHTS":**

The court next turns its attention to defining the scope of the concept of Aboriginal rights. The first step in this definitional exercise is to ascertain that the Musqueam did indeed have a right to fish in the area of Canoe Passage and that right existed from time immemorial. The court states:

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<sup>139</sup>*Sparrow*, supra, 171 (emphasis added).

<sup>140</sup>*Ibid*.

This is the first example of the court's reliance on "dependency language". I am referring to language which reinforces the notion of Aboriginal inferiority. As the slander is not express, but subtly put forward, this adds to the difficulty in disrupting the process by which Aboriginal people are denigrated. For example, by describing Aboriginal societies as primeval ("of the first age of the world") the court deals Aboriginal history and civilization a subtle blow of great proportions.

<sup>141</sup>*Sparrow*, supra, 163.

The evidence reveals 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.<sup>142</sup>

In this case, the requirement to source the Aboriginal right to fish in a time immemorial casing was not a difficult one to demonstrate. However, this will not necessarily be so in every case that comes before the courts. Two notable exceptions stand out clearly in my mind. My community, known as the Six Nations Reserve, is not part of the territory that Mohawk people historically occupied. After the American revolution, many in my nation felt forced to relocate from the Mohawk Valley located in now what is New York state after having fought unsuccessfully for the British. If in my community, time immemorial is prefaced on a requirement to trace that history strictly to continuous occupation of a specific piece of land, it could be difficult to persuade the court of our entitlement. Such a situation would be ridiculous. The historic forces that necessitated Aboriginal transition were brought to bear by the Settler Nations. Now their descendants rely on these occurrences to diminish Aboriginal rights.

The second situation arises in the western provinces. A number of chiefs refused to take treaty at the time when specific numbered treaties were signed. These treaties have a number of adhesions signed in subsequent years. Examples are the people who followed such leaders as Big Bear and Poundmaker.<sup>143</sup> The same situation arose in the Cypress Hills.<sup>144</sup> When these chiefs finally agreed to treaty, they were not allowed to choose land in their traditional territories

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<sup>142</sup>Ibid, 171.

<sup>143</sup>An excellent historical discussion from the Aboriginal perspective is found in Jean Goodwill and Norma Sluman, *John Tootosis* (Winnipeg: Pemmican Publications, 1984), 2-39. References can also be found in the work of Jack Funk, *Outside the Women Cried* (Battleford: T.C. Publications, 1989), 5-18.

<sup>144</sup>Walter Hildebrandt and Brian Hubner, *The Cypress Hills: The Land and Its People* (Saskatoon: Purich Publishing, 1994).

but were relocated. In this situation, occupation to time immemorial and a specific and original territory would be difficult to establish. Both of these examples demonstrate that Canadian courts have a nominal understanding of the history of this land. This is a troubling realization.

I am not suggesting that in my community or in some of the western provinces Aboriginal or treaty rights could not be demonstrated. The fact that voluntariness is lacking in each of the examples I have given vitiates against the necessity to demonstrate the time immemorial component in every case that may have the occasion to come before the high court. However, what disturbs me is a familiar pattern of avoidance that emerges in the Aboriginal rights cases. Courts created the time immemorial requirement. It is a legal fact (or fiction depending on your view). Aboriginal recognition that we occupied this territory prior to the arrival of Europeans and others does not necessitate the precise and narrow way the courts have constructed the time immemorial argument. It is a vast misunderstanding of the Aboriginal position. In some future case rather than arguing the central issues important to an Aboriginal litigant, that litigant will be forced to argue around the legally created time immemorial requirement.

Equally troubling is the manner in which the courts construct the time immemorial requirement. The language used to describe the concept is quite offensive. No one speaks of early Canadian society as being "organized".<sup>145</sup> Language such as this is a throwback to the

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<sup>145</sup>A lengthy discussion of this requirement is found in the *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development*, [1979] 3 *Canadian Native Law Reporter* 17 (F.C.T.D.). Mahoney J states:

While the existence of an organized society is a prerequisite to the existence of an aboriginal title, there appears no valid reason to demand proof of the existence of a society more elaborately structured than is necessary to demonstrate that there existed among the aborigines a recognition of the claimed rights, sufficiently defined to permit their recognition by the common law upon its advent in the territory (at page 46).

Again, the rights of Aboriginal peoples are denigrated to the stature of the common law. Such

days when people believed that Aboriginal people were not civilized and were lessor forms of humanity. The use of "dependency language" can be frequently cited in this (and most other) court decisions.<sup>146</sup> All of this kind of thinking and talking must disappear from Canadian court decisions if the goal of the courts can be assumed to be about inspiring the trust and faith of Aboriginal people. Trust and faith, perhaps, are the forerunners to the creation of a system of justice that people believe is just.

There is also a third concern. The court indicates that the right which Aboriginal people seek to protect must have been integral to the Aboriginal community. Further into the decision, the court provides this description:

The anthropological evidence relied on to establish the existence of the right suggests that, for the Musqueam, the salmon fishery has always constituted an *integral part* of their distinctive culture. Its significant role involved not only consumption for subsistence purposes, but also consumption of salmon on ceremonial and social occasions. The Musqueam have always fished for reasons connected to their cultural and physical survival. As we stated earlier, the right to do so may be exercised in a contemporary manner.<sup>147</sup>

Precisely the scope of the "integral" requirement is unknown. It is potentially a way in which Aboriginal rights could be limited at some future date.

The court, digressing in its discussion of the scope and definition of an Aboriginal right, stops to deal with an argument put forward by the crown. The crown asserted that the Aboriginal right to fish was not demonstrated by Mr. *Sparrow* at trial. This failure to meet the evidentiary

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pronouncements are unacceptable.

<sup>146</sup>Use of dependency language is also found in legal and academic literature. One example already mentioned is the previously cited work of Brian Slattery. In my opinion, legal academics have an obligation to understand more than just the mere legal text, but also the cultural bias in that text.

<sup>147</sup>*Sparrow*, supra, 175 (emphasis added).

burden, contends the crown, is fatal to the action. There was evidence presented at trial to suggest that the right to fish had been scantily exercised by the community during some periods between 1867 and 1961.<sup>148</sup> The court, however, points to the misconception that such an argument is prefaced on. Rights that are not exercised are not extinguished due to lack of use.<sup>149</sup> This point was also discussed in the court's articulation of the word existing.<sup>150</sup>

Closely related to the first argument is the crown assertion that the right to fish had been extinguished by regulation. The court provides a long historical account of the regulation of the British Columbia fishery. This brings the court face to face with a legal controversy left unresolved in the *Calder* decision. There, Mr. Justice Judson had asserted that the extinguishment of an Aboriginal right need not be express. Extinguishment took place when the crown acted in a manner that was "necessarily inconsistent" with the continued enjoyment of an Aboriginal right.<sup>151</sup> In *Calder*, Mr. Justice Hall took another view. He asserted that the crown's intention must be "clear and plain" for an extinguishment of Aboriginal title to take affect. In the seventeen years since *Calder* was decided, the issue of extinguishment remains unresolved. This is another example of the marginal progress that is made through the litigation route.<sup>152</sup>

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<sup>148</sup>Ibid, 172.

<sup>149</sup>Ibid.

<sup>150</sup>Please refer to the discussion earlier in this text.

<sup>151</sup>This view can also be found in the cases of *St. Catherines Milling*, *Baker Lake* and *Bear Island Foundation*.

<sup>152</sup>The indecision in resolving the issue of extinguishment has some serious consequences. The federal government continues to rely on a "soft" definition of extinguishment and forces Aboriginal people to extinguish their pre-existing rights in order to access any present day land settlements. The vagueness which often cloaks the legal concepts integral to Aboriginal rights in all likelihood benefits the crown. The failure of the court to expeditiously and clearly define the concepts most frequently strengthens the already more powerful position occupied by the crown.

The polarized opinion on extinguishment left by the judiciary after *Calder*, is finally set aside in the *Sparrow* decision. Justices Dickson and LaForest in *Sparrow* state:

The test of extinguishment to be adopted, in our opinion, is that the Sovereign's intentions must be clear and plain if it is to extinguish an aboriginal right.<sup>153</sup>

It is indisputable that the affirmation of the Hall view of extinguishment is an advantage to Aboriginal peoples. The affirmation of Hall's view over Judson's requires the government to meet a more onerous test. When the test of extinguishment is applied to the facts in the *Sparrow* case, the court easily concludes that the crown "has failed to discharge its burden of proving extinguishment".<sup>154</sup> The difference between exercise and scope of the rights of Aboriginal Peoples remain important to the court. This completes the courts digression away from the task of defining Aboriginal rights.

Interestingly enough, the court pays more attention to the definition of extinguishment than defining or affirming the nature of the constitutionally protected Aboriginal rights. This is demonstrated by the courts discussion of the next question that must be determined - the scope of the existing Musqueam right to fish. The court again emphasizes that an "aboriginal right should not be defined by incorporating the ways in which it has been regulated in the past".<sup>155</sup> Again, there is no debate. This creates an acceptable minimum standard. To have decided otherwise would have gravely disadvantaged future Aboriginal claims.

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Recognizing this fact, necessitates the recognition that in Aboriginal affairs the legal and judicial processes are not fully independent or impartial. The processes can only appear independent and impartial if a particular cultural paradigm is embraced by the observer.

<sup>153</sup>*Sparrow*, supra, 174-175.

<sup>154</sup>*Ibid*, 175.

<sup>155</sup>*Ibid*.

This right to fish must be seen as only one component, perhaps a small component, of the rights that may be classified as Aboriginal or treaty rights. Within the given terms of legal analysis, the narrowing of the discussion to only the right to fish, although predictable, raises some concerns regarding the future application of the *Sparrow* decision. Because the discussion is limited in this manner future cases may be distinguished from the *Sparrow* case in an effort to escape the application of the *Sparrow* rules. This could prove to be either an advantage or a detriment to Aboriginal people in future cases.

The right to fish is not fully, or even expansively, detailed in the *Sparrow* decision. The court narrows their discussion even further addressing only the Musqueam right to fish *for food*.<sup>156</sup> Sometimes this right is referred to the right to fish for subsistence purposes only. The court's discussion also includes a resolution of an issue that should have been viewed as rudimentary. Does fishing for food include fishing for social and ceremonial purposes? This is also an issue that is raised as a result of the simplistic and limiting way that the crown continues to insist on characterizing Aboriginal rights in their factums and arguments.<sup>157</sup> The Supreme

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<sup>156</sup>Although this is good legal practice and the way the courts has structured its decision is predictable, it does nothing to advance a space in which the constitutional protection of Aboriginal rights has a space in which to flourish (or grow like a "living tree" to use the appropriate constitutional parallel). Court practices must be examined and not presumed to be fair, just and right despite the fact that such an examination would be controversial and without legal precedent. The failure to examine the process by which courts decided, by courts, leaves any historic presumptions intact and the benefit of those presumptions usually accrue to the crown. The benefit which accrues to the crown as a result of the legal process is not invisible to Aboriginal people. This is one point at which Aboriginal people see that the legal systems repeatedly fails them.

<sup>157</sup>In the factum of the Attorney General of British Columbia before the Supreme Court of Canada it was argued in *Sparrow* that:

The specific aboriginal right here asserted is not the use of a fishery. Use of the fishery of the Fraser estuary is open to all. The right asserted is regulatory immunity from the *Fisheries Act* and regulations thereunder. **It is conceded the**

Court summarized the Court of Appeal findings as follows:

... held that the aboriginal right was to fish for food purposes, but that purpose was not to be confined to mere subsistence. Rather, the right was found to extend to fish consumed for social and ceremonial activities.<sup>158</sup>

The language used by the courts - "mere subsistence", "fish for food" - is also distressing. It again entrenches the notion of European superiority in the present day definition of Aboriginal rights. The use of dependency language is a common theme in this case as well as in others. Even though the courts resolve this issue in a way that encompasses the Aboriginal view, the fact that an overly simplistic crown argument is disturbed is not cause for celebration. The crown's argument is an argument that should not have been advanced in the first place given the crown's trust responsibility to Indian Peoples. This trust responsibility to Indian Peoples has never been reconciled with the job that lawyers for the crown are asked to complete. The "win at any cost" thinking must be rejected in favour of a more balanced role that takes into account the trust relationship.

The phrase "fish for food" arises in the regulatory regime instituted by British Columbia. The 1878 fishing regulations were the first to specifically mention Indians. By adopting the language of the late 1800s, the court allows the philosophy of the time (that is the belief in European superiority) to seep into the case. The regulations allowed Indians to fish for food for

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**Musqueam had no aboriginal system of regulations whatsoever. They exercised no aboriginal jurisdiction.** Accordingly, they can have no aboriginal right to regulatory immunity (*supra*, 10).

Later in their factum, the Attorney General of British Columbia asserts that the meaning of section 35 is to entrench aboriginal rights as merely possessory rights. These rights are subject to competent legislation and are alienable only to the crown (at page 20-23). At best this is an odd argument and does little to displace the position that Aboriginal and Treaty rights entrench particular (and identifiable) rights.

<sup>158</sup>*Sparrow*, *supra*, 175.

themselves, but not for sale or barter.<sup>159</sup> The present-day regulations provide for the issuing of an "Indian food fish license" on the approval of the Minister.<sup>160</sup> It is an important observation that the regulatory regime in place in British Columbia and elsewhere was instituted unilaterally without consultation with Aboriginal nations or people.<sup>161</sup> Courts must be aware of this exclusive history and its impacts. By adopting a standard of language that is borrowed from legislative frameworks, such as the concept "fish for food", the court has sanctioned (albeit covertly) the exclusionary way and history of the development of such concepts. Against a constitutional standard, this must be seen as unacceptable.

The definition of the right to fish for food in and of itself was quite controversial. The crown argued before the Supreme Court that the right to take fish did not include "the ceremonial and social activities of the Band". Mr. Sparrow argued that the way in which an Aboriginal right is exercised is discretionary in the holder of the right.<sup>162</sup> The court concludes its discussion of the Aboriginal right to fish with this statement:

In the courts below, the case at bar was not presented on the footing of an aboriginal right to fish for commercial or livelihood purposes. Rather, the focus was and continues to be on the validity of a net length restriction affecting the appellant's **food fishing license**. We therefore adopt the Court of Appeal's characterization of the right for the purpose of this appeal, and confine our reasons to the meaning of the constitutional recognition and affirmation of the existing aboriginal right to fish for food and social and ceremonial purposes.<sup>163</sup>

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<sup>159</sup>*Salmon Fishery Regulations for British Columbia*, 1878, as discussed in Sparrow (ibid, 173).

<sup>160</sup>*British Columbia Fishery (General) Regulations*, SOR/84-248, s. 27(1).

<sup>161</sup>Consultation must occur at both levels. Aboriginal nations have political understandings that Canada must learn to respect. Aboriginal people, who for example fish, have developed expertise in certain areas and should also be individually involved in the consultation process.

<sup>162</sup>*Sparrow*, supra, 175.

<sup>163</sup>Ibid, 176. The court's reliance on "dependency language" is also noted here as evidence of

Following the court's reasoning, it can be concluded that a food fishing license also includes the right to fish for social and ceremonial purposes. This clarity is of assistance to Aboriginal Peoples although the lengthy and costly process required to achieve such a rudimentary victory is certainly condemnable.<sup>164</sup>

What is absent from the court's reasons is any discussion of the commercial fishery.<sup>165</sup> The court fails to look at this question as it was not part of the representations made before the lower courts. The right to establish commercial practices in the fisheries is essential to the livelihood of many Aboriginal nations. The failure to resolve this issue in the *Sparrow* case may be seen as one of the weaknesses of the court process, inherent within that process. Issues are drafted as narrowly as possible. The outstanding issues in Aboriginal claims are both broad and multifaceted. To rely on the courts to resolve these issues will continue to be a long and tedious process as every little detail must be litigated in a series of cases.

The position advanced by the British Columbia government is very problematic. They asserted that the right if it existed had been exhausted by regulation. This assertion confused extinguishment of a right with the exercise of that right. It must also be remembered that the right at stake in this case is a constitutional right and as such it is part of the supreme law of the

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the pattern that emerges in this case.

<sup>164</sup>It is worth emphasizing that the right to fish for commercial purposes is recognized as a more essential right in terms of the Aboriginal desire for self-sufficiency. It is clearly disappointing that this right is excluded from Supreme Court review in this case. The delineation of rights is consistently narrowed in such a fashion that valuable Aboriginal time and energy must be repeatedly expended to secure narrow victory upon narrow victory with the great consequence of failure looming around every judicial corner. This is the core of the frustration with Canadian law that I carry.

<sup>165</sup>At least one lower court decision in Ontario looks at this matter and resolves the question in favour of the Indians. See *R. v Jones and Nadjiwon*, [1993] 3 C.N.L.R. 182 (O.C.J.).

land.<sup>166</sup> The constitutional nature of the rights at stake must become a clear judicial touchstone, always at the centre of judicial reasons. The government position is also based on a very narrow construction of the Aboriginal right to fish (only for food and excluding social and ceremonial purposes). The court fully admonishes the validity of this position in the following passage:

Government regulations governing the exercise of the Musqueam right to fish... have only recognized the right to fish **for food** for over a hundred years. This may have reflected the existing position. **However, historical policy on the part of the Crown is not only incapable of extinguishing the existing aboriginal right without clear intention, but it is also incapable of, in itself, delineating that right.**<sup>167</sup>

Given that the government is required to act in a fiduciary capacity<sup>168</sup> towards Aboriginal peoples, it would be hoped that in future their arguments will not be so demeaning to the concept of Aboriginal rights.

This contradiction, that the government must defend Canada's interest at the same time as protecting the Aboriginal interest, is one of the central problems in the ability of Aboriginal people to successfully secure satisfactory litigation outcomes. It seems that the government is consistently willing to put the interest of the crown ahead of their fiduciary responsibilities to Aboriginal Peoples. This recognition leads to a simple conclusion. Perhaps, future litigation should not focus on the definition or assertion of Aboriginal rights but on strictly holding governments accountable to their fiduciary responsibilities and the subsequent liabilities<sup>169</sup> for the breach of that responsibility. This would change the focus of Aboriginal litigation, directing

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<sup>166</sup>*Constitution Act*, 1982, section 52.

<sup>167</sup>*Sparrow*, *supra*, 176.

<sup>168</sup>See the discussion earlier in this paper regarding the *Guerin* case.

<sup>169</sup>It is worth remembering that the Musqueam band received the significant sum of \$11 million.

scrutiny away from Aboriginal Peoples toward Canadian governments and their actions, past and present. As Canadian courts have demonstrated such difficulty and inconsistency in understanding traditions that are not theirs, this undertaking seems more logical and appropriate.

### **DEFINING "RECOGNIZED AND AFFIRMED":**

The most expansive part of the courts reasons is the discussion of the definition of the phrase "recognized and affirmed". It is in this portion of the judgment that the court more fully identifies and defines a theme that was introduced earlier in the case. The resolution of Aboriginal claims requires an articulation of the "appropriate interpretive framework for section 35(1)".<sup>170</sup> The starting point advanced by the court to articulate the appropriate interpretive framework is the *Royal Proclamation of 1763*. The court recalls that the British policy towards the Indian population "was based on respect for their right to occupy their traditional lands".<sup>171</sup> This policy can be traced to the *Royal Proclamation of 1763*. The court confirms that the honourable standard must again be adopted.

This recognition is followed by one of the most damning statements in the case:

... there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown...<sup>172</sup>

For this principle the court relies on both the *Royal Proclamation* and the American case *Johnson v McIntosh*.<sup>173</sup> This principle of underlying sovereignty and crown title is not as

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<sup>170</sup>*Sparrow*, supra, 177.

<sup>171</sup>*Ibid*.

<sup>172</sup>*Ibid*.

<sup>173</sup>(1823), 8 Wheaton 543 (U.S.S.C.).

universally acceptable as Canadian courts lead us to believe. In fact, it would be heatedly disputed by most Aboriginal people. It is a concept which Canadian courts must begin to consider. In fact, Aboriginal litigation has largely been successful only because Aboriginal people have carefully drafted their litigation matters to avoid running into this presumption of Canadian law. In the same paragraph the court asserts: "We cannot recount with much pride the treatment accorded to the native people of this country".<sup>174</sup> Perhaps *Sparrow* could be noted as a progressive decision but one that is wrought with so many contradictions that its future application will necessarily be problematic.<sup>175</sup>

The court does set out an affirmative position, they call it the "interpretive framework", from which Aboriginal rights must be approached. Quoting from an essay written by Professor Noel Lyon, the court affirms this view of the change that was introduced in 1982:

... the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.<sup>176</sup>

Whether the court itself can adhere to this high standard poses an interesting question - a question that we already have the answer to. The court has already firmly asserted that underlying title vests in the crown. This is one of the law's old rules, yet, the Supreme Court

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<sup>174</sup>*Sparrow*, supra, 177.

<sup>175</sup>Other writers have also noted these problems. Michael Asch and Patrick Macklem state:

... we return to *R. v Sparrow*, and argue that the court initially embraces an inherent theory of aboriginal rights but attempts to avoid one of its implications, namely, a constitutional right to aboriginal sovereignty, by abruptly switching to a contingent theory of aboriginal rights and unquestionably accepting Canadian sovereignty over its indigenous population (supra, at page 500-501)

<sup>176</sup>*Sparrow*, supra, 178.

does not feel compelled to examine the proposition. Just how much of a break with the past is to be found in the *Sparrow* decision from this point forward must be suspect.

The Supreme Court clearly emphasizes the interpretive process as a key to resolving Aboriginal claims. This is clearly a central issue for the court. However, the court fails to take its analysis to a full conclusion as they draw the section 35(1) protections of Aboriginal rights into the existing law of constitutional interpretation without consideration for the effect this may have on Aboriginal rights. With this quote borrowed from the *Manitoba Language*<sup>177</sup> reference:

The Constitution of a country is a statement of the will of the people to be governed in accordance with certain principles held as fundamental and certain prescriptions restrictive of the powers of the legislature and government. It is, as s. 52 of the *Constitution Act, 1982* declares, the "supreme law" of the nation, unalterable by the normal legislative process, and unsuffering of laws inconsistent with it. The duty of the judiciary is to interpret and apply the laws of Canada and each of the provinces, and it is thus our duty to ensure that the constitutional law prevails.<sup>178</sup>

The courts fail to observe or understand that the problem underpinning many Aboriginal rights claims is one of competing values and principles between Aboriginal people and Canada. This validation of Canadian constitutional process may come at a cost of violating principles (which are also constitutionally protected) revered by Aboriginal Peoples. the court seems fully unaware of this consequence of their decision making and chosen interpretive framework. Such a decision should at least be made after consideration of the choice as well as the consequences.

Despite all the court's warnings about the fact that section 35(1) is removed from the ambit of the *Charter*, the court relies on a *Charter* type justification test to determine if the specific regulation of the fisheries is constitutional. This should cause extreme concern as

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<sup>177</sup>[1985] 1 S.C.R. 721 at 745.

<sup>178</sup>*Sparrow*, supra, 179.

section 35(1) is not part of the *Charter*.<sup>179</sup> In establishing the rationale for the justification test the court later provides in their judgment, they state:

There is no explicit language in the provision that authorizes this Court or any court to assess the legitimacy of any government legislation that restricts aboriginal rights. Yet, we find the words "recognition and affirmation" incorporate the fiduciary relationship referred to earlier and so import some restraint on the exercise of sovereign power. *Rights that are recognized and affirmed are not absolute*. Federal legislative powers continue, including, of course the right to legislate with respect to Indians pursuant to s.91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s.35(1). In other words, *federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights*.<sup>180</sup>

There are a number of troubling pronouncements contained within this partial paragraph. First, the court opens the door for a justification test similar to that found in section 1 of the *Charter*.<sup>181</sup> Second, the court is again assuming that the legislative authority found in sections 91 and 92 are fully spent and that those powers have not been altered by section 35(1). Following the suggestion of Professor Noel Lyon, surely section 35 changes the rules of the constitutional game. I see little truly "new" in the way the court has decided the *Sparrow* case.

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<sup>179</sup>The court in *Sparrow* is well aware of this fact and state (at page 176):

Section 35(1) is not subject to s.1 of the Charter, nor to legislative override under s. 33.

Surprisingly, lawyers for the federal crown were not so astute. In their factum presented to the British Columbia Court of Appeal they state:

There being no aboriginal fishing rights extant as of April 17, 1982 for the Musqueam Indians, **s. 35 of the Charter** did not prevent the operation of the *Fisheries Act* and the regulations (at page 17).

Section 35 is not a part of the *Charter*. It is the first section after the *Charter* and appears under the heading "Rights of the Aboriginal Peoples of Canada".

<sup>180</sup>*Sparrow*, supra, 181.

<sup>181</sup>The test articulated in *Sparrow* is not as rigorous as the Charter justification test.

In fact, the decision follows very neatly the pattern that was established in early Aboriginal rights litigation. It is not revolutionary nor does it create constitutional space for Aboriginal aspirations to flourish.

At least one notable scholar concerned with the issues of Aboriginal and treaty rights believed that the section 35 process was doomed from the outset. Menno Boldt suggests:

While entrenchment may have given a small measure of legal and political legitimacy to aboriginal rights, a strong case can be made that entrenchment has placed aboriginal rights in a legal and political quicksand. As a consequence of entrenchment, Indians have essentially forfeited their prerogative to define these rights. Because entrenched aboriginal rights can be constitutionally defined only by amendment, if and when there is a constitutional amendment that defines aboriginal rights it will say what the eleven governments of Canada want it to say. If there is no constitutional amendment, then Canadian courts will define aboriginal rights. *Either way, whether the definition is made by political process or by judicial process, Indians will be spectators (euphemistically termed 'consultants'), not decision makers or arbitrators.*<sup>182</sup>

The power to define your own experience is essential to the survival of oppressed and colonized peoples. If the purpose of the political negotiations which led up to the entrenchment of section 35(1) of the new constitutional arrangements was to create space for Aboriginal Peoples, then it is fairly obvious that these efforts have failed. Section 35(1) presents a new and interesting option in the legal arsenal of Aboriginal Peoples, but it does not yet represent a fundamental change in our relationship with Canada. If we are to hold out hope for fundamental change, then we must find ways to persuade courts that they must look at our relationships in a truly new way. This is a monumental task but I have little doubt that Aboriginal Peoples will rise to the challenge.

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<sup>182</sup>Supra, 28-29 (Emphasis added).

## CHAPTER FOUR

### RIGHTS DISCOURSE: PERPETUATING COLONIALISM

Canada is celebrated on a myth that two peoples are to be celebrated in the founding of this great state. This untruth is an unsettling principle to which Aboriginal Peoples take issue. It is not just the myth which must be amended. The myth winds itself fully through all Canadian thinking about who they are and what they represent.<sup>183</sup> Each of the strands of the myth must be opened up for discussion and amendment. One example of the persuasiveness of this myth is found in the work of constitutional scholar, Bryan Swartz:

One vision of Canada is of a liberal individualist state. Every person is inherently equal in legal dignity with every other. No special personal or ethnic history is necessary to entitle a person to equal respect from the state. The individual is to be free from restrictions in defining and pursuing his or her own ends in life... The competing vision of Canada is one of a "community of historical communities." The basic units of political philosophy are distinct groups - each one a different colored chip in the Canadian mosaic. These groups have rights against the Canadian state. The rights are not the same for every group. A group's rights depend in large part on its distinctive history.<sup>184</sup>

I would not take issue with the fact that this multi-cultural conflict is the conflict that exists among *mainstream* Canadians. However, Aboriginal Peoples neither accept the premises of a liberal individualist state any more than we encompass a state philosophy of multi-culturalism. Aboriginal people do not deny to the Canadian state the opportunity to define how they will shape their domestic state relationships. However, the immediate problem that faces Aboriginal

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<sup>183</sup>I do not think of myself as a Canadian as all of those state relations have been forced on Haudenauonee people. I also recognize that all Aboriginal people do not share in this belief. Haudenauonee people have never consented to the application of Canadian law or Canadian government. This outstanding consent is the central issue that requires resolution before I could consider myself to be both Mohawk and Canadian.

<sup>184</sup>Bryan Swartz, *First Principles, Second Thoughts: Aboriginal Peoples and Constitutional Reform and Canadian Statecraft* (Montreal: The Institute for Research on Public Policy, 1986), 1.

nations is that we are denied this very same authority to determine our own domestic state relations. This is accomplished through a multitude of institutions and laws including the *Indian Act* and the Department of Indian Affairs, the constitutional division of powers and the *Charter of Rights and Freedoms*. What is required is an understanding that is first built on the rejection of European superiority followed by the ability to respect the Aboriginal domestic order.

Rights philosophy and law in Canada owe their origins to a liberal individualist ideology. It is the particular form of the individualist philosophy that is most difficult for Aboriginal people to accept. The judiciary and Canadian law makers envision two principle categories of rights, rights of individuals and rights of groups (as reflected in the previous quotation from the writings of Bryan Swartz). Individual rights (obviously rights that belong to a single person) when bundled together are rights that can be best described as group rights. A good example is either language rights or religious rights. The right to speak french (or Cree or Mohawk or any other Aboriginal language)<sup>185</sup> in an anglophone dominated state is utterly meaningless if it is understood only as an individual (singular) right. To be meaningful, the right to speak your own language must be exercised in combination with other individuals (the group). Aboriginal people can and do hold both individual and group rights and in some circumstances chose to exercise those rights. There is a right to individual self-autonomy including the right to live free of violence (physical, spiritual, and emotional). As already mentioned, language rights also accrue to individual Aboriginal people as groups of Aboriginal people. However, this characterization of legal rights that Canada has adopted is not a complete characterization of rights. In fact, this characterization of rights is both overly narrow and unnecessarily narrow.

Aboriginal people, when asserting their rights to political autonomy as nations (note, not states) most frequently borrow the language of collective rights. The problems with use of an

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<sup>185</sup> The later have no **express** constitutional protection. This fact is not lost on Aboriginal people. It is a consequence of the two founding nations myth.

ethnocentric language cannot be minimized. Collective rights are similar to group rights in the fact that to be meaningful they must be held by a identifiable group of individuals together. Despite this similarity in the numerical parameters of group and collective rights, these two categories of rights are not equivalents. Collective rights firstly belong to Aboriginal Peoples because of our distinct relationship with the territory that has become the Canadian state. Aboriginal Peoples rely on this notion of collective rights to protect the exercise of rights which are unique to the way we order and organize our nations, communities and families. Douglas Sanders provides this succinct description of the difference between group and collective:

Groups that have goals that transcend the ending of discrimination against their members can be called collectivities, for their members are joined together not simply by external discrimination but by an **internal cohesiveness**. Collectivities seek to protect and develop their own particular cultural characteristics.<sup>186</sup>

Collective rights are asserted by Aboriginal Peoples when we seek to protect our rights as nations including the right to cultural survival.

Canadian courts have had a very difficult time trying to conceptualize rights that are not individual or group based. This is one of the hidden oppressions that Aboriginal people face in the Canadian court system. It is an instrument of colonialism which we have not been able to banish from our lives. In the *Ontario Education Reference*, the Supreme Court commented:

Collective **or** group rights, such as those concerning languages and those concerning certain denominations of separate schools, are asserted by individuals or groups of individuals because of their membership in the protected group. **Individual rights are asserted equally by everyone despite membership in certain ascertainable groups.** To that extent, they are an exception from the equality rights provided to everyone.<sup>187</sup>

Not only does the Supreme Court wrongly equate collective and group rights but their analysis of

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<sup>186</sup>“Collective Rights”, 13 *Human Rights Quarterly* (1991), 368-386 at 369.

<sup>187</sup>[1987]1 S.C.R. 1148, 40 D.L.R. (4th) 18 at 27 (emphasis added).

individual rights is also questionable. Group rights are seen as an exception to the principle that every individual shall be equally protected or treated in the same manner.<sup>188</sup> In this particular case, the court fails to understand that treating unequals equally can result in discrimination. This challenge to define equality in a meaningful way is the current “groove” the court continues to revolve in.

It is not a necessary fact of adjudication that rights need be characterized in a way that diminishes the unique qualities of collective rights. O’Sullivan, J. in dissent in the Manitoba Metis land litigation states:

Lawyers trained in the British tradition tend to look on rights as either private or public. If private, they must be asserted by persons who claim a property interest in the rights. If public, the rights must be asserted by an Attorney General or on the relation of the Attorney General. In extraordinary cases, it is conceded that individual persons may be granted special status to assert public rights...

... It was accepted that any individual who asserts a claim in himself, and who can show a claim of title or right of inheritance, may be able to secure relief by suing on his own behalf **but it is disputed whether anyone is capable of asserting in our municipal courts rights belonging to a people.**

It is difficult for common lawyers to understand what the rights of “a people” can mean. Indeed, at a hearing before a parliamentary committee on the 1987 Constitution Accord (of Meech Lake) held August 27, 1987, the distinguished constitutional expert, the Right Honourable Pierre Elliott Trudeau said:

In my philosophy, the community, an institution itself, has no rights. It has right by delegation from the individuals. You give equality to the individuals. Then they will organize in societies to make sure those rights are respected.

This is an approach with deep roots in the British tradition...

But, as far as I can see, what we have before us in court at this time is not the assertion of bundles of individual rights but the assertion of the rights and status

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<sup>188</sup>Although in other circumstances the Supreme Court has understood that treating unequals alike can result in discrimination. See for example, *Andrews v Law Society of British Columbia*, [1989] 1 S.C.R. 141 at 173-76.

of the half-breed people of the western plains.<sup>189</sup>

This is the only reference to the rights of peoples that I am familiar with in Canadian case law.

What is judicially required<sup>190</sup> is a third vision of the Canadian state, one which is open to the inclusion of Aboriginal Peoples and our understanding of how the universe is ordered. Rights as a construct are just one practical example of the reasons why Aboriginal people are repeatedly excluded from the institutions and benefits of Canadian society. I am not suggesting that the two world views are fundamentally and diametrically opposed. Merely, the assertion is that Aboriginal people have not chosen to relinquish their distinct ways of being.

At least one Aboriginal scholar has suggested that individual rights philosophies have benefited discussions about Aboriginal rights, in particular the right to self-determination. John Borrows suggests in his analysis of recent cases on the political rights of Aboriginal women that:

The ideology of the *Charter* stood as a backdrop in the development of this discourse and subtlety helped to strengthen claims for equality. Tradition was brought forward, and its concepts were draped around the contemporary language of rights. The dialectical interaction of traditional practices and modern precepts forged a language that partook of two worlds. Rights talk could not overwhelm traditional convictions of symmetry in gender relationships while tradition could not ignore current concerns about equality in these same associations. Each discourse partook of the other and created an exchange of legitimacy. People who were concerned about their traditions could use the language of equality to preserve their interests, while people who sought for equality could use tradition to show that it sanctioned and justified the removal of gender discrimination.<sup>191</sup>

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<sup>189</sup>*Manitoba Metis Federation Inc. v Attorney General of Canada*, [1988] C.N.L.R. 39 at 47-48.

<sup>190</sup>In a similar way to the process where courts can take judicial notice of historical facts, the court should be forced to deal with their own involvement in colonial oppression. Rules such as precedent allow the courts the opportunity to excuse past cultural blindness (often to the point of overt racism).

<sup>191</sup>“Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics”, 43 *University of New Brunswick Law Journal* (1994), 19-48 at 31.

This construction of the usefulness of the *Charter* distorts history. Aboriginal people have been able to articulate both our oppression and our colonization long before 1982 (or 1960). What rights discourse has accomplished is to further obscure from the minds of some people the fact that we do live in a colonized state. We live under the illusion that the *Charter* will somehow protect us and improve our lives. This is very similar to the illusion of court victories as being a pathway to substantial change when in reality they have secured only small and questionable victories.

In Chapter Three, it was noted that the process by which Aboriginal and treaty rights have been judicially defined was largely confined to the quasi-criminal forum of hunting and fishing trials. It was also noted that this forum is clearly not the best forum to be judicially articulating Aboriginal and treaty rights. This pattern of individualized litigation that emerges is the result of the colonial relationship as well as the prohibition against “Indians” retaining council that existed in the *Indian Act*. It is not Indian nations who are accountable for the trend toward quasi-criminal litigation. I would hope that Indian nations in the future stop complying with this colonial pattern and become more creative in their litigation strategies.

The same pattern of individualization emerges in the cases which focus on the definition of democratic and political rights of Aboriginal Peoples. The history of litigation in this area is principally confined to litigation about the rights of Indian women. This is also an unfortunate coincidence which has had many negative consequences for Indian people and particularly for Indian women.

In 1974, the Supreme Court of Canada handed down its decision in the *Lavell and Bedard* case.<sup>192</sup> Much has been written about this notorious decision and the exclusionary membership

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<sup>192</sup>*Attorney General of Canada v Lavell and Bedard*, [1974] 1 S.C.R. 1349. A similar American case provides an interesting comparison, see *Santa Clara Pueblo v Martinez*, (1978)

provisions of the *Indian Act*.<sup>193</sup> It was the first case to bring the discriminatory membership provisions applied to Indian<sup>194</sup> women since at least 1876<sup>195</sup> to national (and international) attention. The decision of the Supreme Court was not applauded by Indian women and their supporters. Five of the nine justices found that the stripping away of an Indian women's status upon marriage as proscribed in section 12(1)(b) of the *Indian Act* did not violate the non-discrimination guarantees of the *Canadian Bill of Rights*.<sup>196</sup>

Ritchie, J. applied the rule of law in such a manner that it limited the equality rights set out in the *Canadian Bill of Rights*. This rule which guarantees only formally equality (that is equality as sameness) was applied in such a way that the protections of “equality before the law” and the “equal protection of the law” were very narrowly defined. As Indian women were the

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436 U.S. 49.

<sup>193</sup>See for example, Kathleen Jamieson, *Indian Women and the Law in Canada: A Citizens Minus* (Ottawa: Supply and Services, 1978); Lilianne E. Kroesenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987* (Sarrbrucken: Verlag Breithenback, 1991); Theresa Nahanee, “Dancing with a Gorilla: Aboriginal Women, Justice and the *Charter*” in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System* (Ottawa: Supply and Services, 1993), 359; Douglas Sanders, “Indian Women: A Brief History of their Roles and Rights” 21(4) *McGill Law Journal* (1945), 656-672.; Mary Ellen Turpel, “Patriarchy”, *supra*.

<sup>194</sup>The case applies only to the situation of Indian women as it questions the application of a section of the *Indian Act*, R.S.C., 1970, c. I-6.

<sup>195</sup>This section of the 1876 *Indian Act* provided:

<sup>196</sup>Section 1(b) of the *Canadian Bill of Rights*, R.S.C. 1960, c.44 reads as follows:

1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex, the following human rights and fundamental freedoms, namely, ...

(b) the right of the individual to equality before the law and the equal protection of the law;

group allegedly discriminated against, the two categories of comparison created by the courts were all women and all Indians. Against these two reference groups, no absolute discrimination had occurred. Not all Indians were being discriminated against as Indian men were not penalized for marrying out. Women in general were not effected by the section 12(1)(b) provisions, only Indian women. The result was, therefore, a finding that double discrimination amounted to no legal discrimination. Two lessons must be learned from this case. The reference groups chosen are essential components of the decision making process. As well, the rule of law is highlighted as a principle to be concerned with in the future.<sup>197</sup>

The disastrous results of the decision in *Lavell and Bedard* are still felt in Indian communities today whenever the issue of rights is discussed. The publicity surrounding the case highlighted the differences in political opinion held by groups of Indian women<sup>198</sup> and organizations that are represented as being dominated by Indian men. In truth, the opinions on how to correct the gender discrimination in section 12(1)(b) do not neatly align into male and female camps. In fact, most Indian people have always been in agreement on the need to remove the discriminatory provisions. It must be remembered that the problem does not arise in forms of traditional Indian government but in the provisions of the federal *Indian Act*. The imposition of the *Indian Act* and a foreign system of government relations is the true source of the discrimination. The difference in opinion arises around the question of how to best achieve the result of gender equality in the membership provisions. Nonetheless, the artificial gender lines draw by those outside the culture have continually surfaced in national debates ever since. The court is accountable for the flawed reasoning in *Lavell and Bedard* but in many circumstances

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<sup>197</sup>This lesson was repeated in the so-called Oka crisis when then Minister of Justice Kim Campbell used the rule of law to justify the imposition of thousands of members of the Canadian army on a handful of Mohawk individuals. Kent McNeil also points to his concerns with the application of the rule of law in his most recent article, *supra*.

<sup>198</sup>All Indian women were potentially affected by the application of section 12(1)(b), but in reality this section only applied to a portion of that population, those who chose to marry out.

this culpability has been transferred to Indian men. This is a familiar pattern that was discussed in Chapter Two, responsibility does not always accrue to the party where it is warranted. Here, the law makers who created section 12(1)(b), those who refused to see it removed, and the courts ought to carry the responsibility for the damage done in our communities.<sup>199</sup> Even within our communities, the perspective on who carries this responsibility has become skewed.

It is important to note that I am separating issues of violence against women in its physical forms and the psychological violence done to the individual women who were disenfranchised. This is not the same phenomenon and nothing is gained (except for sympathy) by muddling the two experiences. Sympathetic responses to the violence that Aboriginal women currently survive in Canadian society will not change the fact that for many of us this is our predominate life experience. Speaking in clear terms about the kinds of violence that have been done to us is a responsibility that women must begin to assume. Appropriating the individual experiences of one form of violence against women (physical and sexual), cannot be seen to be a solution to the political violence done to Indian women.

Following the latest round of sizzling gender politics in Aboriginal communities, one Indian man has noted the consequences of advocating a construction of gender politics that is polarized between men and women:

A posture which recognizes, supports and promotes positive contributions from First Nations men does not excuse those who exercise oppressive authority, but it does require that people avoid making statements that overreach merely to sustain their position. There is a great temptation to make these expansive statements because they seem to make the point of sexism stand out in greater relief. **I would argue that such over-broad statements are dishonest and separate the person from the community and disconnect the individuals in the community from each other.** There is room in both law and politics for making interpretations of rights that do not have these adverse effects. Equality rights do

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<sup>199</sup>The amendments to the *Indian Act* passed in June of 1985 (commonly referred to as Bill C-31) did not end the gender discrimination in the *Indian Act*. The 1985 amendments only removed the overt discrimination present on the face of the membership provisions.

not have to be applied to mean sameness. Individual and collective rights do not have to be dichotomized.<sup>200</sup>

The expansive statements that have been made do not serve Indian women's interests well. The continued muddling of our experiences as a singular experience of oppression at the hands of Indian men has created a direct and visible obstacle for Indian women to dismantle. A review of recent cases taken to the Canadian judicial system will serve to demonstrate the degree to which this is the case. At the same time, the belief in sensitive litigation is examined to see if it can be maintained within the context of several recent cases.

Four cases were heard by the Federal Courts in 1992, during the height of the Charlottetown Round, which examined the right of the Native Women's Association of Canada (NWAC) to participate in the constitutional renovation process with the other four designated Aboriginal groups [the Inuit Tapirisat (ITC), the Metis National Council (MNC), the Native Council of Canada (NCC), and the Assembly of First Nations (AFN)]. At the centre of the dispute between the women's association and the federal government, was the issue of equal funding to participate in the constitutional process. NWAC received approximately five per cent of the funds that each of the other four designated Aboriginal organizations received.<sup>201</sup>

The first case was heard by Walsh J in the Federal Court Trial Division and the judgment was rendered on March 30, 1992.<sup>202</sup> In the action the NWAC sought an order of prohibition be issued against the government of Canada. The order would prohibit Canada "from making further disbursements of funds" until it had "provided to the Native Women's Association of

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<sup>200</sup> Borrows, *supra*, 47 (emphasis added).

<sup>201</sup> A copy of the Contribution Agreement between the four designated organizations and the governments was not part of the evidence placed before the court.

<sup>202</sup> *Re: Native Women's Association of Canada et al v The Queen* (Case #1) (1992), 90 D.L.R. (4th) 394 at 406.

Canada an amount of funds equal to that provided” to the four designated organizations and “the right to participate in the constitutional review process on the same terms and in the same way as the four recipient groups.”<sup>203</sup> The NWAC asserted that their *Charter* rights to freedom of expression found in section 2(b) joined with the gender equality provisions in section 28 or their section 15 rights to be free of discrimination were both being violated by the Canadian government. In addition, the women’s association asserted that their Aboriginal rights were being violated under section 35(4), the Aboriginal gender equality provision.<sup>204</sup> In support of the NWAC claim, the court noted the following premises:

It was argued on the basis of accepting, for the purposes of this motion but not as a conclusion, that in aboriginal societies, or at least a number of them, **women are not treated by men as equals, are disadvantaged with respect to them, do not share their views on all issues and cannot rely on them to present their viewpoint at conferences** such as that about to take place. It was also accepted that they receive a disproportionate amount of the government funding made available to the four groups which they contend do not adequately represent them.<sup>205</sup>

As only the federal government are defendants in this action, it seems unusual that the central claim made by the women does not focus on the action of the government but on the activities of other national Aboriginal groups.

In a paper tracing the history of Aboriginal and treaty rights which also assesses the current state of Canadian law, an analysis of the four Native Women’s Association cases is essential. The denial of rights to some Indian women under the *Indian Act* regime, in place since 1876, has had a catalytic effect on the way in which section 15 of the *Charter* was drafted.<sup>206</sup>

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<sup>203</sup>Ibid, 396.

<sup>204</sup>Ibid, 397.

<sup>205</sup>Ibid, 405 (emphasis added).

<sup>206</sup>In the *Lavell and Bedard* cases it was found that neither of the protections contained in

These four cases could be an important opportunity for Aboriginal women to test the gains made under the 1982 constitutional amendments. The cases are also unique as the women are asserting political rights. As already noted the majority of Aboriginal rights cases are asserted as a result of charges laid under oppressive hunting and fishing regulatory regimes. The cases are not only important as women's cases but as political rights cases.<sup>207</sup>

Behind the desire of NWAC to participate equally in the constitutional renovation process and be equally funded, is another issue. The NWAC firmly supports the application of the *Charter* to Aboriginal self-government. The four designated Aboriginal organizations are portrayed by the applicants' in this action as unequivocally supporting the principle that the *Charter* cannot apply to Aboriginal governments.<sup>208</sup> This assertion overlooks and simplifies the

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section 1(b) of the *Canadian Bill of Rights*, that is the right to "equality before the law" and "the equal protection of the law", were sufficient to protect the needs of women. Section 15 of the *Charter* now contains four protections. The two *Bill of Rights* protections as well as "equal benefit of the law" and "equality under the law". It must not be diminished that Indian women's suffering and experience shaped the positive development of legal guarantees of equality that benefit all women and other disadvantaged groups.

The case of *Bliss v Attorney General of Canada*, [1979] 1 S.C.R. 183, 92 D.L.R. (3d) 417, was also instrument in the development of this knowledge. Gwen Brodsky and Shelagh Day note:

... women could not be satisfied with the repetition of the *Canadian Bill of Rights* language in the opening part of the guarantee. The Supreme Court of Canada had, after all, instructed women so forcefully that this language provided equality only with respect to procedures and penalties and could not assist women where laws themselves were discriminatory, or where programs were deemed to be "beneficial".

*Canadian Charter Equality Rights for Women: One Step forward or Two Steps Back* (Ottawa: Canadian Advisory Council on the Status of Women, 1989), 15. Note also the discussion on page 14.

<sup>207</sup>Currently, leave has been sought by NWAC to the Supreme Court of Canada.

<sup>208</sup>AFN did not join the four designated organizations as co-defendants in this action. Three of the four, MNC, ITC, and NCC sought and were granted intervenor status. The Assembly of First Nations did **not** participate in the first two cases.

position of the four national Aboriginal groups. The NCC asserted that the *Charter* should only apply to the *Indian Act* but the question of the application of the *Charter* to Aboriginal governments must be the “sole domain” of these governments.<sup>209</sup> The ITC was willing to consider the application of the *Charter* and their position would be developed in conjunction with the Inuit women.<sup>210</sup> The positions of both the NCC and the ITC is clearly not a complete rejection of *Charter* application. The MNC supports fully the retention of the *Charter*.<sup>211</sup> The court does note:

... it is primarily the position of the Assembly of First Nations which they fear. That group is **allegedly** to be strongly of the view that the *Canadian Charter of Rights and Freedoms* should not apply to self government.<sup>212</sup>

This allegation is a very interesting one and central to the reasons that NWAC purports to have been forced to bring forward the action. The position of the Assembly of First Nations, which these women asserted they feared, must next be carefully detailed.

Contrary to the allegations of the NWAC which form the basis for the federal court’s

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<sup>209</sup>NWAC (Case #1), supra, 404.

<sup>210</sup>Ibid.

It should be noted that the Inuit women have their own organization, Pauktuutit. This organization receives no separate funds from government but shares the funds of ITC. Pauktuutit made no application to intervene in this case. *Native Women’s Association of Canada v The Queen* (Case #2) (1992), 95 D.L.R. (4th) 106 at 115 (F.C.A.).

Pauktuutit is at least prepared to consider Charter protections as a viable solution to concerns of Inuit Women. In 1991, Pauktuutit secured funds from the Court Challenges Program “to develop legal arguments based on the Charter of Rights, through which we hope that adequate protection of the rights of Inuit women and children will be ensured.” *Pauktuutit Annual Report, 1990-91*, at page 1.

<sup>211</sup> NWAC (Case #1), supra, 404.

<sup>212</sup>Ibid.

decision in the first instance, the Assembly of First Nations in the end agreed to the application of the *Charter* to Aboriginal governments in precisely the same manner that it is applied to all other Canadian governments.<sup>213</sup> By August 1992, *the Consensus Report on the Constitution*, clearly indicates that the *Charter* would immediately<sup>214</sup> be applied to Aboriginal governments.<sup>215</sup> The *Consensus Report* indicates that “legislative bodies of Aboriginal peoples should have access to section 33” which is the notwithstanding clause. This creates parity in the application of the *Charter* across all Canadian government institutions (that is Aboriginal and non-Aboriginal). Furthermore, no amendment was to be made to the gender equality provisions in section 35(4) of the existing constitution.<sup>216</sup> As section 35(4) protects gender equality within the framework of “existing aboriginal and treaty rights”, there was concern expressed that the proposed provision with respect to the inherent right to self-government would be exempt from the preview of the gender equality provision.<sup>217</sup> This is a fanciful interpretation. The inherent right to self-government is at minimum an “existing aboriginal right”. The NWAC’s allegation that the Assembly of First Nations did not support the *Charter* is (or became) untrue. It is of interest to note this prior to considering the court decisions and the factual information that they accepted.

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<sup>213</sup>Ironically I am not sure that this is of benefit to Aboriginal women. In at least one case, the Charter is being used to support the right of an *Indian Act* government to deny band membership to individuals (women and their male and female children) who were the victims of section 12(1)(b). The application of the Charter does not guarantee that the rights of Aboriginal women will be paramount. *Twinn v Canada* (1986), 6 F.T.R. 138.

<sup>214</sup>This is despite the fact that the justifiability of the inherent right to self-government was to be delayed for five years (see Item 42 of the *Consensus Report*).

<sup>215</sup>Item 43 of the *Consensus Report*.

<sup>216</sup>Item 52 of the *Consensus Report*.

<sup>217</sup>I suppose that it is possible for the proposed provision on the inherent right to self-government to be drafted in such a way to avoid the application of the gender equality provision, it is impossible to make this determination as no final wording was provided for section 35.1(1).

This is not the only allegation made against the four designated organization that on the face of the information filed before the courts by the Native Women's Association that can be attacked on a factual level. In the affidavit of Gail Stacey Moore, she asserts:

However, our attempts to "play by the rules" established by the men have met with disappointment. For example, in an apparent display of good faith and co-operation, the AFN leadership indicated that it would give NWAC the \$228,000 which it had set aside for the women's conference that was to be part of the parallel process, and turn over responsibility for organizing all aspects of the conference to NWAC. The women's conference was one of four scheduled conferences which formed part of the parallel process. **Sadly, we never received the funds, and the conference was never held.**<sup>218</sup>

In fact the Women's Constituent Assembly was held in Toronto, Ontario at the Native Canadian Centre on January 18 and 19, 1992. The total budget for all four constituent assemblies did not total the \$228,000 that NWAC refers to.<sup>219</sup> The NWAC was in charge of half of the invitations sent to women to attend this Toronto conference. One hundred delegates were invited and the First Nations Circle paid for all of the expenses of the delegates. Presentations were made to the Commissioners by the NWAC at this assembly including the provincial or territorial associations of Manitoba, Saskatchewan, British Columbia, Yukon, Northwest Territories, Labrador, Ontario, and Quebec.<sup>220</sup> Ms. Stacy Moore, in fact, chaired the workshop discussing the NWAC held on the first day of the conference.<sup>221</sup> It was clearly upsetting for (and remained an issue at the Toronto conference) the NWAC officials to learn that AFN chose to organize the women's

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<sup>218</sup>Affidavit of Gail Stacey Moore dated March 16, 1992, paragraph 83.

<sup>219</sup>This author was the coordinator of all four constituent assemblies hosted by the First Nations Circle on the Constitution. Ms. Sharon McIvor was in fact one of the Commissioners appointed to the Circle and acted as chair of the Women's Constituent Assembly.

<sup>220</sup>Presented in the order in which they spoke to the Commissioners on January 19, 1992. Copy of original transcript of proceedings on file with the author.

<sup>221</sup>Summary of proceedings of Women's Constituent Assembly, January 18, 1992, Workshop #3 Report, on file with the author.

conference.

The NWAC did not seek to include any of the four designated organization in this litigation. In fact, they opposed the motions of the three organizations that sought intervenor status.<sup>222</sup> This leads to several interesting discussions.<sup>223</sup> First, the exclusion of the four designated organizations can be applauded. The source of the non-recognition of Aboriginal women's rights has historically been the domain of the federal government, their laws and policies. Former section 12(1)(b) of the federally designed *Indian Act* regime is the most notorious example. By bringing suit only against the federal government, the NWAC establishes a principle of respecting the source of the majority of the discrimination. Therefore, responsibility is put in an appropriate place at the feet of the offending government.<sup>224</sup> It is unfortunate that the full scope of the litigation did not follow this principle.

The second observation causes me greater concern. In the *St. Catherines Milling* case, I noted that issue must be made regarding the continued applicability of the decision with respect to Aboriginal Peoples because of the absolute exclusion of Aboriginal Peoples from the litigation process. Conclusions in this 1888 case fundamentally affected the rights of Aboriginal Peoples

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<sup>222</sup>NWAC (Case #1), *supra*, 399.

<sup>223</sup>I am not aware of any other work which seeks to look behind the text of the court decisions to analyze the Aboriginal political context surrounding the NWAC cases. Neither the work of John Borrows, *supra*, or the work of Joyce Greene, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government", 4 *Constitutional Forum* (1993) 110-120, look beyond the judicial reasons provided in the case. This presentation provides only introductory comments and further analysis (by Aboriginal scholars) of the politics between the Aboriginal organizations is required.

<sup>224</sup>I have no evidence that would lead me to conclude that this recognition of responsibility is what actually motivated the NWAC to bring suit only against the federal government. Their opposition to the intervention of the MNC, ITC, and NCC could be used to suggest this was not the case.

without having given those people the opportunity to be represented or heard. In the NWAC cases, it is an Aboriginal collective who excluded other Aboriginal voices (and not just the voices of Aboriginal men involved in political organizations). That this exclusion is *fait accompli* under the banner of gender discrimination is twice as disconcerting. Many Aboriginal women have noted that our experience of discrimination is not one of gender before race.

What is really at issue here is the strategy that ought to be utilized to resolve issues of women's oppression. The NWAC approach is both adversarial and prefaced on a feminist construction of reality. Both of these approaches in my experience are anti-Aboriginal. Some Aboriginal women are now referring to an Aboriginal feminist perspective.<sup>225</sup> I must confess to not understanding what this is.

This raises a third point of inquiry. NWAC<sup>226</sup> advances the illusion that they represent all Aboriginal women. In the affidavit of Gail Stacey Moore, she states:

The Native Women's Association of Canada reminds the Government of Canada, and Canadians that women are 52 percent of the Aboriginal population. **We are**

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<sup>225</sup>See for example Nahanee, *supra*, 360. The author provides no definition of what comprises this new concept. Aboriginal feminism is also refereed to in the work of Joyce Greene, *supra*. She also fails to provide a definition.

I have also written extensively on the lives and experiences of Aboriginal women. Regarding feminism, please refer to "The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice", 56(2) *Saskatchewan Law Review* (1992), 237 to 266. One section of this paper entitled "Within a Legal Paradigm: Aboriginal Women and Feminism". I am not an Aboriginal feminist nor do I support such a construction of the world. My problem with feminism is quite simple. The reference point for feminism is the power and privilege held by white men of which I aspire to be neither. My work is woman-centered and will continue to be as I can only understand the world through my own experience as a Mohawk woman.

<sup>226</sup>This author served as First Vice President of the Ontario Native Women's Association, a provincial affiliate of NWAC from 1988 to 1989. I have attended several national assemblies as well as more recent meetings which included representatives of the Association.

**organized into 13 provincial and territorial organizations.<sup>227</sup>**

The thirteen provincial and territorial organizations that comprise the Native Women's Association of Canada do not in turn establish that they represent the fifty-two percent of the Aboriginal population that women comprise. NWAC does not present in either of the affidavits of Gail Stacey Moore or Sharon McIvor any further information<sup>228</sup> regarding the specifics of their membership. For example, how many on-reserve based groups does NWAC represent? Their claim to being the national voice of Aboriginal women is based on the fact that they boast a provincial or territorial member association in each province or territory.

This illuminates the understanding of the Aboriginal world which NWAC adopts and the fact that their ordering of the world accepted colonial boundaries. In my understanding of our relations, Aboriginal Peoples were not organized into provinces or territories. We were organized in specific nations, for example, the Mohawk, Cree, Dene, Mi'cmaq and so on. Some of our nations chose to organize into treaty territories or other political confederacies. NWAC is organized in such a manner that it respects the colonial boundaries drawn across our nations. Regarding the question of membership and representative voice, NWAC appears to primarily represent women who live away from their communities and those who were disenfranchised under section 12(1)(b). Sadly, no information was placed before the courts regarding this issue and it is impossible to draw firm conclusions on the question of Representativeness. This is highly problematic and a source of one of the essential problems in the litigation.

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<sup>227</sup>Paragraph 75 of the affidavit of Gail Stacey Moore dated March 16, 1992. In this paragraph she is quoting from a speech she delivered in November of 1991 to the Chiefs Assembly in Ottawa (that is a meeting of the Assembly of First Nations).

<sup>228</sup>In another reference, it is reported that NWAC has 120,000 members. (Nahanee, *supra*, 379.

This is less than a quarter of the total registered Indian population. The numbers do not support the claim that the NWAC is a representative voice for all Aboriginal women.

A review of the NWAC affidavits of Gail Stacey Moore and Sharon McIvor reveal further information that should have been critically considered by the courts. The affidavit of Gail Stacey Moore is 25 pages long. Of these 25 pages, 13 are devoted to documenting the discrimination (historic and present) that results from the discrimination against Indian women contained in the *Indian Act*. Not all Indian women were subject to these discriminatory provisions [such as former section 12(1)(b)]. In fact, according to the re-instatement statistics relied upon by NWAC in another forum 30,000 women of the 70,000 registrants lost their status under section 12(1)(b). Of course, some of the remaining 40,000 registrants were children (both male and female) of women disenfranchised under the offensive provision. Less than half the registrants are women disenfranchised. The total Indian register contains 487,000 names.<sup>229</sup> If 52% of those individuals are women, then the total female registered population is 253,240. Less than twelve per cent of all registered Indian women applied for re-instatement. Assuming the majority of women who were eligible for re-instatement applied, then the provisions of section 12(1)(b) did not impact on the majority of Indian women. As the majority of the work of NWAC has focused on the situation of less than 12% of the registered Indian population it is worth questioning just how representative that organization has been of all Indian women.<sup>230</sup> It is equally important to recognize that a good number of Aboriginal people are not in fact status Indians.

The same set of statistics reveals that only 2 percent of the newly registered Indian population reside on reserves. This is not a surprising figure. In fact, a trend toward urban residency has been noted for some time among Indian people. Many of the people re-registering have established lives off of reserves for many years. Of course, there have been horrible

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<sup>229</sup>This are statistics that the NWAC (Manitoba organization) presented to the First Nations Circle on the Constitution on January 19, 1992. They appear on page 24 of the verbatim transcript. The figures were tabulated in June of 1990.

<sup>230</sup>Based on the information they shared in their affidavits, both Ms. McIvor and Ms. Stacey Moore were victimized by section 12(1)(b).

problems with “Bill C-31” registrants being unable to attain on-reserve housing. This is also a problem for people who never lost their status. There exists a general housing crisis of significant proportions on reserves. The fact of the matter is that NWAC may represent off-reserve women, but they have had less impact outside of those particular urban communities. This information also was not presented to the courts. My concern is not to discredit NWAC, but merely to put the work of that organization into a more respectful and honest perspective.<sup>231</sup> Just as great diversity exists among Aboriginal Peoples that diversity also exists in Aboriginal gender groupings.

Based on the evidence presented to the court and the evidence presented by the NWAC itself, this assertion of complete representation of Aboriginal women can again be challenged.<sup>232</sup> The question of representativeness is very important because it is the assertion that you represent men and we represent all women that creates the false dichotomy that was presented to the courts. Life is not this simple and the simplification creates dangerous politics.

On the evidence presented in this case, both Metis women and Inuit women have formed their own organizations. This does not mean that NWAC does not welcome the participation of Metis and Inuit women. It is important to note that Metis and Inuit women have found it to their benefit to have their own associations. While accusing the AFN (and the other three designated organizations) of not representing women, NWAC cannot demonstrate that they have made committed efforts to ensure their voice respects the multiplicity of views held by Aboriginal

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<sup>231</sup>I find it most unfortunate that I have inherited this job. It is a very uncomfortable position to be in, questioning the position of a group of women who are less privileged than I am. Here I am referring to the fact that my Indian parentage was on the “right” (paternal) side of the gender lines and I have always been entitled to be registered.

<sup>232</sup>This assertion of complete representation of Aboriginal women was not essential to the litigation. Charter rights accrue principally to individuals and not organizations. For example, the Charter applies to corporations because they are legal persons.

women. The court absolutely accepts the NWAC as the “bone fide” voice of **all** Aboriginal women<sup>233</sup> despite the absence of any factual information to confirm this view. The court establishes an interesting double standard. The fact that courts lack knowledge about the reality under which most Aboriginal people live is the precondition which facilitated the misunderstanding that occurred in its litigation. In cases regarding other representative groups it is unlikely that the courts would assume that representation was absolute or that absolute representation was required. This is a frequent theme found when Canadians make superficial inquiries into Aboriginal realities.

Representativeness is an important consideration for many Aboriginal Peoples, particularly those seeking to implement “true” forms of self-government.<sup>234</sup> The AFN cannot be said to operate as a true form of Aboriginal government and the Assembly admits this readily. The Assembly represents the majority of *Indian Act* chiefs of Canada. The *Indian Act* is far from an instrument of Aboriginal control. The AFN has also faced internal conflicts. One is the desire of treaty people, particularly of the numbered treaties, to organize in a manner that supports their treaty territories.<sup>235</sup> The AFN has also been challenged by those Indians who live off reserve. Off-reserve residents are not part of the per capita funding formulas for political and social programs provided to the bands and political organizations from the federal government. Because urban women have NWAC (whose funding does not depend on on-reserve residency) to represent them, status Indian men living off-reserve (who have no organization to which they clearly belong) could assert that they have less access to political representation. Of course, this

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<sup>233</sup>NWAC (Case #2), *supra*, 110.

<sup>234</sup>This form of self-government could also be described as the inherent jurisdiction that Aboriginal people possess.

<sup>235</sup>For example, Treaty Six met this past summer (1994) at the Thunderchild First Nation. It has been many years since the Treaty Six First Nations of both Alberta and Saskatchewan have formally met.

assertion fails to consider the impact of gender oppression which justifies the voice given to women through NWAC. The NCC (now known as the Congress of Aboriginal Peoples) has undergone major membership challenges in the last decade. The Metis people have largely coalesced their energies into their own political organization. These divisions were challenged by the 1985 revision to the membership provisions of the *Indian Act* which have resulted in a number of “non-status” Indians recovering their status. This has created an increase in the population of registered Indians who are represented by chiefs and in turn the AFN. Ovide Mercredi, the current national chief, is perhaps one the most notable of the new registrants.

This internal retrospection within the Aboriginal organizations will be a fact of life for at least as long as externally defined criteria are forced on Aboriginal Peoples. The federal government recognized that in the face of their failure to place control in Aboriginal nations to define our own citizenship, the current disputes about representation, including the representation of women, must be worked out in Aboriginal communities. Quoting from a letter written by Joe Clarke to Gail Stacey Moore, Mr. Clarke notes:

... the concerns you have raised, like those raised by others must be addressed within the community itself. They will not be rectified through the addition of another seat to the constitutional table.<sup>236</sup>

In fact Mr. Clarke is correct about process. What is required is the resources and political will to allow Aboriginal Peoples to work out these complicated issues of representation. The issue of representation is complicated and layered and it is difficult to reasonably believe that a court possesses (or ought to possess) the skills to assist in working through the problem.

Not only does this litigation wrongly represent Aboriginal women as all the same (or similarly situated) but the remedy requested is one that is asserted based on an “equality is sameness” argument (that is provide the same amount of funding and the same participation).

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<sup>236</sup> NWAC (Case #1), *supra*, 402.

Had the relationships between the four designated Aboriginal organizations and NWAC not been strained, a more interesting case could have been mounted challenging the representation of all five organizations, none of whom were fully satisfied with their allotments. Such a case would more fully challenge the responsibility owed to the Aboriginal Peoples, including women, by the federal government.<sup>237</sup>

The decision of Walsh J. is prefaced on an assertion of the premises on which the case must proceed. The judge writes:

At the outset of the hearing the court made it clear that the issue of alleged **unequal and unfair treatment of aboriginal women by aboriginal men** is not a matter to be considered in the present proceedings which must be limited to the constitutionality of the said unequal distribution of funds between male dominated aboriginal groups and groups representing aboriginal women.<sup>238</sup>

Walsh J, continues in the same paragraph, without the assistance of complete factual evidence on the treatment (note not abuse) which does occur in Aboriginal communities, stating:

... so that the argument on this issue will therefore proceed on the basis that, even assuming and accepting that aboriginal women are not in many cases treated equally with aboriginal men in aboriginal society and therefore wish to retain the protection given by the *Charter*.<sup>239</sup>

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<sup>237</sup>Such an action could have utilized both treaty rights arguments as well as relied on the fiduciary responsibility of the federal and provincial governments.

<sup>238</sup>NWAC (Case #1), *supra*, 398 (emphasis added).

Oddly Walsh is not going to proceed by considering the nature of the relationship between aboriginal women and men. In the next sentence, he creates the gender division between NWAC and male dominated (which is different from male controlled) organizations. This is evidence of Walsh's preoccupation with at least an element of the "equality as sameness" concept. In my Mohawk understanding of politics, Mohawk women did not pursue the politics of the nation not because of any labeling of the women as inferior, but because politics was seen as a nominal aspiration. In fact, politics was seen to be inferior to women. It was the women who allowed men the politics as they controlled the focal point of the democracy, the home. All men had homes and mothers, sisters and wives. Men's seemed control of the political sphere in the Mohawk view of the world was never absolute.

There are two problems with Walsh's presumptions. First, the presumptions presuppose diametrically opposed gender relationships which are not my predominate experience of any of the Aboriginal communities I have visited or lived in. Second, it was most inappropriate and even improper for the court to question the applicability of the *Charter* to discrimination against Aboriginal women by Aboriginal men. This dispute is an action which NWAC chose to bring solely against the federal government and not against any individual Aboriginal man or organization of Aboriginal men.<sup>240</sup> Perhaps, the rebuttal to this argument is that NWAC was so fearful of AFN (and the other three organizations) that they chose not to join these organizations in an effort to reduce their own feared oppression. Bringing a federal court action (or any other court action), is an act of privilege and power and this partially negates any such assertion. In fact, understanding the *Charter* is in itself an act of privilege. In my experience, Indian women in communities are not overly concerned with the application of the *Charter* to their lives. It exists in a completely different reality from the issues of daily survival that are many women's reality.

I would never dispute that the abuse - physical, psychological and sexual - of women and children in many Aboriginal communities does not occur (the same fact holds true for Canadian society). I would not dispute that the treatment of Indian women by Indian men in some communities has been deplorable, especially around the issue of membership.<sup>241</sup> At a minimum

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<sup>239</sup>NWAC (Case #1), *supra*, 398.

<sup>240</sup>I do not know of the existence of such an Aboriginal organization although I would note that many such "male only" organizations have existed within Canadian society.

<sup>241</sup>By way of example, please refer to Janet Silman (ed), *Enough is Enough: Aboriginal Women Speak Out* (Toronto: The Women's Press, 1987).

My central concern has never been with issues of membership (perhaps because I have always had my birthright recognized) but with issues of citizenship. Citizenship issues are much broader (and more respectful to the views of Aboriginal nations) than are mere membership issues.

the abuse and treatment long suffered by Aboriginal women and our children is dissimilar to that of Canadian women and children as the abuse suffered is at least partially the responsibility and is causally connected to the federal *Indian Act* regime as well as in criminal justice, child welfare and residential school experiences. Only a portion, and more recently, has the abuse been directed to Aboriginal women by Aboriginal men. Our men have not been insulated from the abuse. Male children of women who “married out” were disenfranchised alongside their mothers. Indian men along with Indian women were defined in the legislation as not being persons.<sup>242</sup> It is a senseless endeavor to try and characterize any of the forms of abuse that Aboriginal women and some Aboriginal men have survived as worse than some other form. Abuse in Indian communities is not necessarily or always gender specific. Abuse is abuse. It is wrong. There is no dispute.

The NWAC’s desire to ensure that *Charter* protections exist for Aboriginal women is prefaced on the abuse and unequal treatment of women in Aboriginal societies. Little commentary has been generated by the NWAC regarding the manner in which the *Charter* is expected to protect Aboriginal women from the abuses that they face.<sup>243</sup> Most of the

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Language here is an important issue. Darlene Johnston explains:

The political status of the First Nations within Canadian Confederation has never been satisfactorily resolved. The prevailing Canadian mythology portrays a transition from ally to subject to ward to citizen. In First Nations circles, this is often referred as “the Big Lie”. This theory of transition constitutes a denial of the inherent right of First Nations to be self-governing. Such denial is characteristic of the practice of colonialism (Johnston, “First Nations and Canadian Citizenship”, *supra*, 349).

Johnston continues her article by documenting the statutory authority for the various colonial membership provisions that First Nations have survived.

<sup>242</sup>In the 1867 *Indian Act*, the following provision is found:

12. The term “person” means an individual other than an Indian, unless the context clearly requires another construction.

documentation generated focuses on the fact that abuses do occur (a fact which most Aboriginal people would not dispute). Serious concerns have been raised by at least one Aboriginal scholar, Mary Ellen Turpel, who is highly critical, even fearful, of the application of the *Charter* to Aboriginal people.<sup>244</sup> Lawyers and academics traveling on the pro-*Charter* train, have yet to produce a complete, respectful and systematic response to the kinds of concerns raised by Professor Turpel. For example, Teresa Nahanee (who served as constitutional advisor to the NWAC during the last constitutional round) writes of the concerns of scholars such as Mary Ellen Turpel (a former executive director of NWAC) in the following paragraph:

The *Canadian Charter of Rights and Freedoms* is apposite to the collectivist aspirations of some Indian leaders who find themselves supported by legal theoreticians like Boldt and Long, and to a certain extent, Professors Doug Sanders and Mary Ellen Turpel. Their theories, in my view, are largely influenced by American Indian policy and case law and perhaps their own reading of international law and colonized peoples. To a certain extent, Boldt and Long are influenced by the Rousseauian ‘Noble Savage’ philosophy, and Sanders and Turpel are influenced by the international concept of ‘self-determination’. Some of these theoreticians and some male Indian leaders have argued that sovereignty would put Indian governments outside the reach of the *Canadian Charter of*

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<sup>243</sup>The Native Women’s Association of Canada received funding from the Secretary to prepare a discussion paper on the application of the Charter. The Association produced a booklet of 11 pages, *Native Women and the Charter*, that would be useful as a community education document. I was particularly interested in seeing how this booklet would assert that the *Charter* will protect Aboriginal women from domestic violence and sexual abuse. The booklet provides not assistance in answering this question. The only situation that is described is the section 12(1)(b) discrimination. The *Charter* has thus far only been successful in partially removing the consequences of the section 12(1)(b) discrimination as the grandchildren of a woman who married out are not entitled to regain their status.

In the 1927 *Indian Act*, the following provision is found:

2(i) “person” means an individual other than an Indian;

By 1951, the *Indian Act* no longer contains the offensive person reference. Instead, it reads:

2(g) “Indian means a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian;

<sup>244</sup>Turpel, “Cultural Monopolies, *supra*.”

*Rights and Freedoms.*<sup>245</sup>

This fails to address the substance of the concerns that have been raised.

It is not enough to assert that atrocities do occur. The *Charter* is a fairly narrow legal instrument, at least in its application. The *Charter* applies, under the auspices of section 32(1)<sup>246</sup>, to all activities of government. It is a fairly simple legal conclusion to assert that the *Charter* will apply to the activities of the Department of Indian Affairs and to First Nations activities under the federal *Indian Act* regime. None of these activities are, however, activities of Aboriginal governments exercising an inherent jurisdiction. It would be an odd conclusion if governments whose independent authority is originated outside any crown action, would be forced to submit without consent to the discipline of the *Charter*. It would be odd but not unusual.

A similar pattern of blind judicial reasoning has already been applied to section 35. The rights of Aboriginal Peoples originate outside crown action are meticulously described and documented by the courts. Yet, there is no sound description of the source of crown authority over Aboriginal Peoples. In *Sparrow*, it was assumed to be the settlement thesis (rather than conquest or discovery). It would be difficult for Canadian courts to validly justify the application of *Charter* rights to activities of inherent jurisdiction of Aboriginal governments without the

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<sup>245</sup>”Dancing with a Gorilla”, supra, 370.

<sup>246</sup>This section reads as follows:

32(1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relation to the Yukon Territory and Northwest Territories; and

(b) to the legislatures and government of each province in respect of all matters within the authority of the legislature of each province.

consent of those governments for the single reason that Canadian courts cannot demonstrate the source of their jurisdiction over Aboriginal governments that are acting on their inherent jurisdiction. Failure to demonstrate this prerequisite precludes the inclusion of Aboriginal governments operating under inherent jurisdiction to the operation and application of section 32(1).

If the inherent activities of Aboriginal governments were deemed to fall under section 32(1), then two other comments are of pressing importance. The application of *Charter* provisions to Aboriginal governments are still susceptible to sound challenge. Section 25 of the *Charter* provides a shield against the application of *Charter* based rights that abrogate or derogate from Aboriginal and treaty rights. Section 25 is not a specific shield but applies to the entire application of the *Charter*. The application of the *Charter* question is really one that has already been resolved and has been resolved since 1982. It is, therefore, not woman specific provision.<sup>247</sup> If the concern of the NWAC was really section 25 (and I do not believe that it was), this should have informed the shape of their litigation. Given the assertion in section 25, the *Charter* application question is really “much ado about nothing”.

The second issue raised under the heading of section 25 is more disturbing. If unequal treatment and abuse of any form are not perpetrated by a government actor in his official capacity, then the *Charter* provides no protections what-so-ever for Aboriginal women caught in a cycle of abuse. Even if the *Charter* were to apply, it will not be a complete remedy. I am here reminded of the small comfort that a peace bond offers to a woman who is in a battering relationship. When that abusive partner shows up at the door, I do not think that holding up her piece of paper (the peace bond or the *Charter*) offers any woman any real and immediate protection. If she can reach the phone and the police can arrive in time, he surely can be arrested.

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<sup>247</sup>As section 35 is outside of the Charter, none of this discussion applies to that section.

However, those are probabilities I would not want to have to risk my own life on. It is worth noting that the *Charter* is perhaps less useful in practical terms to the “average Aboriginal woman” given the costs of this form of litigation, indeed much more costly than acquiring a peace bond, and the abject poverty in which many Aboriginal women live.

In the first of the NWAC cases the court finds that no violation of sections 2(b) and 28 or section 15 have occurred. Regarding the section 2(b) violation, Walsh J. articulates:

Undoubtedly the more money placed at their disposal the **louder** their voice could be heard, but it certainly cannot be said that they are being deprived of the right of freedom of speech in contravention of the *Charter*... I do not conclude that there has been any infringement of the applicants freedom of expression.<sup>248</sup>

Walsh J continues explaining why there has been no violation of the applicant’s right to be free of discrimination:

With respect to discrimination as to sex, the disproportionate funds provided to the Native Women’s Association of Canada results not from the fact that they are women but from the unwillingness of the government to recognize that they should be considered as a separate group within the aboriginal community from the four named groups and treated accordingly.<sup>249</sup>

Regarding section 35(4), Walsh J. declines to make comment.

Despite the judges clear conclusions that no *Charter* violation has occurred, Walsh J. proceeds to consider whether an order of prohibition could issue in these circumstances. The legal principle is clear, following the finding in *Canada (Attorney -General) v Inuit Tapirisat of Canada* <sup>250</sup> that there is no immunity for an Order in Council made that is unlawful.<sup>251</sup> “There

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<sup>248</sup> NWAC (Case #1), *supra*, 406 (emphasis added).

<sup>249</sup> *Ibid.*

<sup>250</sup> (1980), 115 D.L.R. (3d) 1, [1990] 2 S.C.R. 735.

<sup>251</sup> NWAC (Case #1), *supra*, 407.

is also no dispute that decision makers are required to act fairly with the principle of natural justice in mind”.<sup>252</sup> The question then becomes was the decision of the government made fairly within the boundaries proscribed by natural justice.

Walsh J. concludes that there is nothing unfair or contrary to natural justice present in the government’s selection of the four designated groups. The NWAC is apparently admonished in Walsh J. concluding remarks:

... in my view of Native Women’s Association of Canada’s assertions that they often have different interests from those of the males in communities and are kept in a subservient and minority position. The Native Women’s Association of Canada’s representative’s position had certainly been heard and considered before this letter was written and a decision, whether right or wrong, **is not unfair or contrary to natural justice because it does not accept the arguments made to the contrary**. There is no breach of any regulation in making the funding and representation decisions these being matters within the discretion of those making them.<sup>253</sup>

It is quite certain that the position of the Federal Court Trial Division was not welcomed by NWAC and its supporters. Walsh J. dismisses the action.

Perhaps the most important statement uttered by the Federal Court Trial Division has yet to be discussed. It is stated:

There is no issue nor can there be, that the applicants herein are subject to all the rights set out in the *Charter of Rights and Freedoms*...<sup>254</sup>

Despite the court’s refusal to issue an order of prohibition, the NWAC is at least partially

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<sup>252</sup>*Martineau v Matsqui Institution Inmate Disciplinary Board* (1976), 31 C.C.C. (2d) affirmed at page 407 of this case.

<sup>253</sup>NWAC (Case #1), *supra*, 408.

<sup>254</sup>*Ibid*, 405. Note that the Charter is said to apply to the applicants NWAC) and not the defendants (the crown). Given the rule set out in section 32 this pronouncement is confused.

successful in their *Charter* application quest.<sup>255</sup> Walsh J. sets out this principle, that the *Charter* applies to the applicants, as an obvious statement of law. This is the familiar trap of treating the constitution as omnipotent and universal in principal over the lives and laws of Aboriginal nations. This statement is set out poorly. It is neither explained or referenced.

The NWAC appealed the decision of the trial division to the Federal Court of Appeal. The appeal is heard by Justices Mahoney, Stone and Gray. Mahoney J.A. writes unanimously for the court. The judge also refuses to issue an order of prohibition but does order by way of declaration that the *Charter* rights of the NWAC have been violated. The declaration issued reads:

IT IS DECLARED THAT the Appellants freedom of expression guaranteed them in sections 2(b) and 28 of the *Canadian Charter of Rights and Freedoms* was infringed by the government of Canada denying the Native Women's Association of Canada equal participation to that accorded the Intervenants and the Assembly of First Nations in the constitutional review process initiated by its publication of the document entitled *Shaping Canada's Future Together - Proposals*.<sup>256</sup>

The Court of Appeal found that the trial division had erred in concluding that there was no violation of the freedom of expression guaranteed in section 2(b) of the *Charter*. Walsh J. wrongly considered only the purpose or intent of the federal government in allocating seats and funding. This is an incomplete analysis. The effect of government action on the freedom of expression is also part of the *Charter* guarantee.<sup>257</sup> The Federal Court of Appeal, basing their

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<sup>255</sup>This will come as no big surprise to anyone who has concluded like I did earlier in this paper that *Charter* application has already been resolved. It is not that I am so fearful about the application of the *Charter*, I would like to see some rigorous analysis done on how to protect collective rights in an individual rights environment before I bow to the *Charter* as a great benefit to Aboriginal Peoples. This criticism may be trivial as section 25 (the non-derogation clause) does resolve the individual versus collective rights dilemma in favour of Aboriginal collectives.

<sup>256</sup>*Native Women's Association of Canada v Canada* (Case #3) (October 16, 1992), 97 D.L.R. (4th) 537-548 at 542.

<sup>257</sup>NWAC (Case #3), *supra*, 120. See also the articulation of the NWAC position found at page

decision on an effects analysis, finds a *Charter* violation has occurred. The court states:

In my opinion, by inviting and funding the participation of those organizations in the current constitutional review process and excluding the equal participation of NWAC, the Canadian government has accorded **the advocates of male-dominated aboriginal self governments a preferred position** in the exercise of an expressive activity...<sup>258</sup>

Many of the procedural concerns raised earlier in this discussion with regard to the first case can be repeated here. The Assembly of First Nations did not become involved in this case, yet, the finding of the court is again based on the perceived bias of the AFN in favour of male-dominated Aboriginal self government. In order to demonstrate the lack of validity about some of the conclusions (conclusions that are reached only because the court did not respect the choice of the AFN to participate in the proceedings). The NWAC alleges that the AFN does not support the application of the *Charter*. This is not true by April 23, 1992. In a resolution passed at the Special Chiefs' Assembly on the Constitution Resolution, the following was passed:

FURTHER BE IT RESOLVED THAT the National Chief and the Constitution Working Group and the Sovereign Treaty First Nations Council ensure that there be no conflict between the individual rights guaranteed in the Canadian *Charter* and the collective rights of the First Nations including the inherent right to self-government.<sup>259</sup>

Although hesitant about the *Charter* the AFN was not voicing vehement opposition.

The final two cases in the NWAC series are attempts by the association to secure any remedy. The granting of a declaration is useful for securing favourable political negotiations. However, in these circumstances a declaration was of little immediate use to the NWAC. They returned to court twice to secure remedies. In the third case, they were unsuccessful because the

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<sup>259</sup> Assembly of First Nations Resolution 6/92. Copy on file with the author.

court held that the constitutional process was now beyond the consultation stage and the court could not interfere in a legislative process. In the last case, which sought to stop the referendum, the court declared that as the referendum had already been held the issue was “a dead letter”.<sup>260</sup> Given the outcome of the referendum, this certainly was the case.

It is unclear what meaningful gains the NWAC has secured by pursuing this litigation. Their relationship with the other national organizations is obviously more strained than it ever has been. Their uniform characterization of all Aboriginal women suffering the same discrimination has also been exposed as untruthful. For me, this is one of the most disturbing aspects of the case. NWAC stood on a case model that reinforced negative stereotypes of Aboriginal women as a single entity, all having similar experiences with section 12(1)(b). In fact, that provision was never uniformly applied to all Aboriginal women, only those who chose to marry out (which is not to suggest what happened to those women was right; it was not). The litigation did not provide a model that educated the judiciary or the Canadian public of the vibrant and diversified roles that Aboriginal women have played in our societies. The litigation deeply saddens me. I cannot characterize it as a success. That the potential exists in the Canadian legal system for further divisive litigation to occur takes me further along the path where I fully reject the utility of that system at all. Perhaps in time I will get over my cynicism, perhaps I will not.

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<sup>260</sup>*Native Women's Association of Canada v Canada* (Case #4), (November 13, 1992) 97 D.L.R. (4th) 548 at 549.

## CHAPTER FIVE

### **PATHWAYS TO SELF-DETERMINATION: THE PERSONAL MEETS THE POLITICAL**

In recent years I have had to make my own choices about how I believe we can locate self-determination in our communities. My interest in self-determination began as a legal and academic pursuit. Perhaps if my early years had not been predominated by the exhausting need just to survive, my experience of self-determination may have been a lived one much earlier than now. More recently I have realized that it is a personal issue. Self-determination begins with looking at yourself and your family and determining if and when you are living responsibly (and I think that applies equally to Aboriginal and non-Aboriginal people). Self-determination is principally about our relationships. Communities cannot be self-governing unless members of that community are well and living in a responsible way. It is also difficult to be self-determining until you are living as part of your community.<sup>261</sup> This truth has been the hardest truth for me to accept and has resulted in great changes in my personal circumstances.

This spring, I left my position at a Canadian law school far from my home and even further from my husband's home. I am from the Six Nations Reserve (so-called) near Toronto

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<sup>261</sup>I make no disrespect to urban Aboriginal people as I have been part of the statistical category for a great majority of my life. In fact, I assume as long as I continue to aspire to be a university teacher that being at least a part-time urban "go-er" will be a fact of my existence. It does not matter if I aspire to that reality or not. I do not believe that being part of your community necessarily is as simplistic as locating yourself and your family there as full time residents. I do recognize that living at home is the easiest way to establish the relationships that self-determination requires. I also recognize that the realities of adoption, section 12(1)(b), incarceration, residential schools, gainful employment in your chosen profession, domestic and sexual abuse (by which every Aboriginal family is touched) makes it very difficult for many individuals to return or remain home. These facts must be incorporated into an analysis which criticizes the rights of "Indians" as being tied directly to reserve residency. This issue of reserve residency as a requirement of Indian rights is a different (albeit an important issue) from the responsibility I am speaking of. That responsibility is the responsibility we carry for maintaining our families and our communities.

and my husband's community is in northwestern Saskatchewan, the Thunderchild First Nation. I did not leave the law school because of any particular experiences at that particular law school. I did leave because of some of my experiences, and my children's experiences, living in the nation's capital. I left and went to the closest university to my husband's home. Close is a three hour drive and five days a week, eight months a year away from my home, my children and my husband. And I consider myself to be fortunate. Just a little further north and there would be no road access to my adopted community and no hope that my family could reside in the community full-time.

I left the law school in Ottawa to join the Native Studies Department at the University of Saskatchewan. Leaving law schools behind was not an accident but a conscious choice. It is the action that reciprocates my realization that law contains no answers but is in fact a very large and very real part of the problem Aboriginal people continue to face. Law is the instrument through which colonialism has, and continues, to flow. This is a problem that is both vast and elusive and has been documented in the previous four chapters of this paper. Leaving legal education in my wake is a personal act of resistance calculated (and prayed upon) as an act of survival but more importantly as an act of renewal.

This personal confessional may bewilder some but I understand best when knowledge is personal. I understand law is not the solution because I have survived legal education for more than a decade now. Because I believe that knowledge is personal my life choices must reflect the knowledge I have gained, even when that knowledge is not what I was seeking. This all has particular consequences in my understanding of the pathways to self-determination for my people and other Indigenous nations.

I became involved in law because I believed in it. I believed that justice could be achieved through law. That sounds terribly naive to me now. Although I still believe in justice, I

no longer have faith in Canadian laws, law makers or judicial resolution of disputes as we know them all today. Law was and is an ultimate lesson in colonial oppression. I am not seeking escape but seeking a way to put my understanding of colonialism and law to a better use. Just as I would not accept being a victim of my adolescent abuse,<sup>262</sup> I cannot accept that my relationship in law would always be about my daily survival. I seek renewal.

Mere days before I packed up my family and moved cross-country, I spent two very frustrating and illuminating days at a think tank sponsored by the Royal Commission on Aboriginal Peoples. This think tank was struck to discuss pressing and unresolved issues regarding Aboriginal self-government. I tried to listen patiently to often dry academic prattle about the meaning of self-government. More than half of the people present had never experienced daily life in any Aboriginal community. Most were white scholars and only a few were Aboriginal. Only one was a member of an Aboriginal community. It was a discussion carried on against all odds. It was painful to listen knowing what the realities were in my home and my husbands. I do not fault the Commission or individual Commissioners. In fact, they have spent day after day traveling to communities to listen to the people. The reliance on academics is a conventional solution to conundrums faced by Canadian governments.<sup>263</sup> I understood then that my experience at the Commission was just another lesson in colonial oppression. How can a Commission established by government order, with its mandated drafted by a former Supreme Court of Canada Justice (no matter how sympathetic to Aboriginal Peoples) merely in consultation with Aboriginal Peoples, be seen as a solution. The mandate is broad, but

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<sup>262</sup>For a fuller discussion of what brought me to the study of law, please refer to “Self-Portrait: Flint Woman” in Linda Jaine and Drew Taylor (eds), *Voices: Being Native in Canada* (Saskatoon: University of Saskatchewan, Extension Division, 1992), 126-134.

<sup>263</sup>The good will of individual Commissioners, their Aboriginal knowledge, or their desire to learn about Aboriginal Peoples are not sufficient to topple years of accepted colonial practice or colonial relationships. Royal Commissioners are part of a structure of government that has excluded Aboriginal Peoples.

it remains one-sided. This is in fact the mirror image of the lesson I learned about Canadian law. Thankfully these days I am catching on faster.

The last year has been an illuminating one. It seems to have been my year to confront colonialism head-on (and the fact that many of these lessons arrived during the year of Indigenous Peoples is not an irony which is lost on me). I have rested this summer and drenched myself in as many things “Indian” as I possibly can. I taught sixty-three wonderful and courageous Aboriginal students who are chasing their dreams about law school. I chased pow-wow from north to south and east to west. I took my family to old historic cites each having a particular significance to my adopted community. By walking the territory we have chosen to put our family down upon, I have learned lessons from the long-distant past. I spent time reflecting on my years of law (colonial survival). I tried to distance myself from every thing and every one who was not healthy for me.

I reflected this summer on many experiences of mine over the years that there was not time to consider when my energy was consumed by the legal institution that surrounded me. What is left to share now are some stories about personal experiences which have fundamentally shaped my thinking about self-determination.<sup>264</sup>

Over the summer, I reflected on the experiences I had of the Charlottetown round of constitutional renovation. Much of this process was disturbing to me. I found it disturbing to watch the divide and conquer politics used against our leadership since the time of contact unfold in full public view, as if we were the authors of those disputes. The best example is the gender divisions which exist among and within our national organizations.<sup>265</sup> For much of this process,

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<sup>264</sup>I could in the alternative write a dry and boring summary about the points I have already made but that seems like much less fun, not nearly as risky and totally “un-Trish-like”.

I sat thankfully outside the arena. From time to time, I was forced to field calls from curious journalists. Like some others in the country, my experience of the latest round of constitutional oblivion was to turn on the TV and watch the Journal or the National. Occasionally, I saw one of my friends on television.

One dear friend, represented the Assembly of First Nations during the Charlottetown process. Several times I heard her express ideas that were contrary to beliefs I thought she held. We had written about these beliefs and talked many times about them. This confused me a lot. I wanted to reach out to my friend but the cyclone process she was involved did not permit that. I could resolve the contradiction only by understanding that Mary Ellen<sup>266</sup> had her lawyer face painted on. I thought a lot about if I could do what she was doing. I am not questioning her integrity, because I know all that she has done all she has done for only one reason, her people. I was devastated at the price to be paid to be both a lawyer at the same time as an Aboriginal woman. It was not the chiefs that I saw abusing this woman, but the very process of Canadian government. Perhaps the chiefs did, but that would be her story to tell. I still cannot reconcile the images of the reality painted by the media with my own experience of Mohawk woman-ness. It was the lesson on which I began to make a new plan for my life that no longer included law as the focal point.

My thinking did not just revolve around my personal situation and my personal dissatisfaction with my professional life. I also took hard looks at the structure of the process. I am referring specifically to the national organizations which represent Aboriginal people. At least that is the claim. Taking the best known as an example, I looked at the Assembly of First

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<sup>265</sup>In my own experience, gender relationships in our political organizations does nor mirror how I have seen these organizations described in the press. Perhaps, I am just fortunate. Perhaps, there is a problem with the absoluteness of the characterization.

<sup>266</sup>Named with permission.

Nations. This organization is an assembly of elected *Indian Act* chiefs. I seem to be doing much apologizing, so again, I intend no disrespect to the many men and women who have suffered long and hard to ensure that our voices have national volume. It is not essential that there is anything really Indian about an *Indian Act* chief.<sup>267</sup> These people draw their limited authority from a piece of federal government legislation. If they act on their inherent authority, those actions are either disallowed by the Department of Indian Affairs or worse yet are penalized in the withholding of band funds. It is that dreaded and re-occurring theme of colonialism. For every little piece of progress we pay dearly.

I concluded that the Assembly of First Nations likewise, owing largely to its origins in a piece of colonial legislation is likewise not the answer. That is not to say that the Assembly is without purpose. They serve an essential purpose for First Nations. They are the tail-gunners in the Indian army. They keep track of the few successes and powers we have to ensure that we do not lose any more ground. They are the pillars that allow people like me to have the space in which to dream. I began to understand that the real change will come at and from the community. This is the only way to really change things for Aboriginal people. The real change will come when the women stand up. When the women stand up the men and children will also soon be standing.

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<sup>267</sup> In describing the situation at the Thunderchild Reserve after the Rebellion of 1885, Jack Funk states:

What these charges demonstrated more than anything was that the whiteman did not understand the Indian system of band allegiance or how a chief gained his position. They thought that band leadership was a hereditary position. They did not understand that a chief only had the authority which the band members chose to give him. The Whiteman thought that a chief had absolute power over his followers, like a feudal king. Hence, they considered Thunderchild to be "hostile" because he had been unable to control all of his young men all of the time (supra, 1-2).

During the preamble to the Charlottetown Round, I was asked by the Assembly of First Nations to do some contract work for them. I organized four constituent assemblies on women, youth, urban residents, and Elders. Two of these assemblies, the one for youth and Elders, brought to me some important teachings. During the youth assembly, several of the committee I worked with came to me on the first day of the conference and asked if they could re-organize the conference. Rather than merely repeating the morning workshops, they wanted to bring them together (combine five workshops to arrive at three scheduled for the afternoon session). The self-government and the law (constitution) workshops would be combined as would education and culture. Left to stand by itself was the justice workshop. I was elated, whether the youth realized it or not (and I do not know if they did because we never discussed it), they were following an old-age tradition of consensus building used by Aboriginal people. Small groups of peoples (families) reach a consensus and then several groups are brought together to continue the process.

I was greatly disturbed that justice "fit" no where in this new conference structure. Justice has always been my passion. I was disturbed enough that I made certain I had some time in the afternoon to listen in on the justice workshop. This workshop was very poorly attended. There was maybe a dozen young people in the room when I walked in shortly after the workshop started. Most of the people present were young men who had come into conflict with Canadian law. In and of itself this did not surprise me. What surprised me was that the workshop had developed into a "hot airing" session on personal injustice. I was uncomfortable in that room and I chose not to stay very long.

I walked away from the room knowing the place where justice sat. It sat in the centre of the circle surround by education and culture, and self-government and law. I began to see that justice, written Indian style, was the key. I developed an unhealthy fear that we would be successful in amending the constitution. I knew that the constitution might be an answer, but it

was an answer to the wrong question.<sup>268</sup> The question ought to be, how do we achieve justice for Aboriginal Peoples domiciled in Canada. To concentrate too long and hard on constitutional amendment forces too much attention on Canada and leaves Aboriginal people only further oppression and marginalization. How can a process that capitalizes on our oppression be seen as a viable solution?

At the Elders assembly, I was equally sat back in my place. I was assigned the duty of facilitating a workshop on the question of Indian membership or status. I assumed this was going to be a women's workshop and used that to counter-balance my fear of being the facilitator for a group of Elders. At my age, this was cultural suicide to believe I could facilitate such a group. When I walked into the room where the workshop was scheduled there were no women. As the workshop progressed, I learned that all the Elders present (about ten) were all Cree men. These men were very concerned about any agreement to new constitutional provisions. They told each that they saw a familiar pattern of oppression (and these are my words). They spoke in Cree about how the treaty cards were taken away from them and replaced with status cards earlier this century. They told of how that moved the source of their rights away from the treaties their ancestors had signed and prayed over to the *Indian Act*. What they foresaw was the evolution from the *Indian Act* to a new form of oppression that would be inflicted under the *Charter* and the constitution. Perhaps, they chose to live with the evil they knew but I do not think this was the case at all. They wanted to move toward a truly new time in the relationship between Settler Nations and First Nations. They wanted to move toward the treaties and the just implementation of those agreements. All of the arrangements that are required are found in those treaties, if not in words in spirit. It is the will to implement the relationship that is missing from Canada's constitutional negotiation package.

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<sup>268</sup>The proceeding four chapters document the ways in which the Charlottetown deal would have been disastrous based on past experience with law as a dispute resolution mechanism.

For these reasons and as a result of my personal lessons combined with the use of my analytical resources, I know that self-determination is not an elusive dream. It is the reality that rests in the heart of every individual Aboriginal person. It is time we put those hearts together side-by-side and the change will come before my children are parents. It is for this reason that I believe the Royal Commission on Aboriginal Peoples despite its short comings will be a success. The Commission has provided the Aboriginal person the opportunity to tell of the oppressions they have survived. I know that telling is the first part of healing. It matters not what the Commission intended to do or what was intended for it to do with the words and pain that were entrusted to them. The healing has already begun.