Colonialism and the Suppression of Aboriginal Voice

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This article examines the silencing of Aboriginal people in Canadian legal discourse. The continued colonization of Aboriginal people is represented in legal decisions which display how Aboriginal laws, evidence, and reasoning are barred from the judicial process. By relying on early precedent the Supreme Court of Canada sanctions the non-participation of Aboriginal people in resolving rights disputes. Moving beyond a historical analysis, legal thought and legal language create barriers which prevent courts from receiving Aboriginal evidence and laws. Contradictions inherent in the study of colonialism also reveal themselves in Canadian law. Even when the Supreme Court attempts to incorporate Aboriginal voice it fails. The potential for progress that was shown in the *Calder* decision has since been nullified and Aboriginal people continue to face barriers when confronting Canadian law. The author asserts that the continued application of legal power is representative of the ongoing colonization of Aboriginal people. This article is relevant to the Canadian legal community because it addresses serious and persistent underlying issues in the legal treatment of Aboriginal/Crown disputes.

Le présent article examine comment le peuple autochtone est réduit au silence dans le discours juridique canadien. Il ressort des décisions judiciaires, où sont exclus de la procédure les lois, la preuve et le raisonnement autochtones, que la colonisation de ce peuple se poursuit. Se fondant sur de vieux précédents, la Cour suprême du Canada sanctionne la non-participation du peuple autochtone au règlement des différends au sujet de ses droits. En sortant du cadre de l'analyse historique, la pensée et le langage du droit créent des obstacles qui empêchent les tribunaux d'admettre la preuve et les lois autochtones. Les contradictions inhérentes que révèle l'étude du colonialisme sont aussi présentes en droit canadien. La Cour suprême échoue même en cherchant à intégrer le discours autochtone. L'espoir de progrès créé par la décision rendue dans l'affaire *Calder* s'est maintenant évanoui; le peuple autochtone se heurte toujours à des obstacles en droit canadien. L'auteur soutient que l'application constante du pouvoir légal est un signe que la colonisation du peuple autochtone perdure. L'article est d'intérêt pour la communauté juridique canadienne parce qu'il aborde des enjeux sous-jacents persistants importants dans le règlement des différends opposant les Autochtones et le ministère public.

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I. INTRODUCTION

> [W]hat we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land–our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting grounds, their salmon streams, and places where they got their berries; it has always been so.[1]

I open this paper on voice with the words of David McKay, of the Nishga nation, not only for the soundness of his words but also as a symbolic attempt to place Aboriginal voice where it belongs in Aboriginal rights debates: at the forefront. Placing Aboriginal voice at the forefront is important because being heard in a dispute can depend on how much power each party has in relation to the decision-maker. In the Canadian/colonial legal context, Aboriginal people have been refused the power to interpret their relationship with the colonizer. Instead, that power is exclusive to the colonizer and is frequently left to the colonizer's legal doctrine, rules of evidence, and prerogative in determining the parameters of debate, including the specific laws that bring the parties to court.

As the colonial project continues, Aboriginal people continue to appear in the courts of the colonizer. It is often, but not exclusively, under section 35(1)[2] of the colonizer's constitution that Aboriginal people seek to have their ways of existing protected. For Aboriginal people, colonialism is not simply an act of settling lands and extending Crown authority. Colonialism has invaded Aboriginal souls in the sense that everyday we are faced with questions of identity and dislocation. This means "that there is unfinished business, that we are still being colonized (and know it), and that we are still searching for justice."[3] The constant pressure of colonialism means that

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1. *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 at 358, 34 D.L.R. (3d) 145 [*Calder* cited to S.C.R.]. The statement of David Mackay, of the Nishga nation, given at a Royal Commission in 1888. Throughout this paper I will retain the spelling found in the original case law.
2. *Constitution Act, 1982*, s. 35, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35(1) reads: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
3. Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London and Dunedin, N.Z.: Zed Books and University of Otago Press, 1999) at 34.

our expressions are questioned and corrected and brought in line at every legal turn. There are a few flickers of hope but these acknowledgments of Aboriginal voice usually occur in dissenting opinions, in passing or in cases with limited or no precedential value.

When I speak of Aboriginal voice in this paper, I am not necessarily referring to the use of particular Aboriginal languages or expressions of Aboriginal interests rooted in traditional beliefs or values. Language and tradition can both form a part of Aboriginal voice but for the purposes of this paper they are not specifically the focus. In this context, I am referring to a broader and more basic concept. I am referring to the full expression of the political, community, or cultural voice of Aboriginal peoples. Unhindered, it will take shape dependent upon what claims or assertions an Aboriginal community is making, what the venue is and who the audience is. Aboriginal voice is ultimately the expression of a political community crafted by historic, cultural and contemporary considerations. An essential consideration within "contemporary Aboriginal rights discourse is the problem of reconciling Aboriginal nationhood, as manifested in indigenous laws, with the Crown's unilateral assertions of sovereignty."[4] Central to this consideration is "the claim that Aboriginal peoples possess a form of sovereignty, or nationhood; more importantly, the kind of nationhood Aboriginal peoples believe they still possess predates the formation of the Canadian state."[5] Claims based in sovereignty or nationhood are set forth by distinct political communities. The expression of these distinct political communities is similar but differently focused than that offered by Larry Chartrand.[6] Professor Chartrand has shown how Aboriginal rights discourse fails to acknowledge the political dimension of Aboriginal/Crown disputes. This failure is achieved through an unwillingness to attribute responsibilities to the political authority of Aboriginal peoples in disputes with the Crown. Chartrand points out that within Aboriginal rights discourse, Canadian courts have "typically ignored the existence of Aboriginal communities as polities having a legitimate role in the management of their rights, let alone recognise that they are equal in status to federal and provincial constitutional authorities."[7] Similarly, in this paper Aboriginal voice refers to the ability of

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4. Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 14. See also Manitoba, Report of the Aboriginal Justice Inquiry of Manitoba, The Justice System and Aboriginal People, vol. 1 (Manitoba: Queen's Printer, 1991) at 1 where Ovide Mercredi states: "In law, with law, and through law, Canada has imposed a colonial system of government and justice upon our people without due regard to our treaty and Aboriginal rights. We respect law that is fair and just, but we cannot be faulted for denouncing those laws that degrade our humanity and rights as *distinct peoples*" [emphasis added].
5. Turner, *ibid.*
6. Larry N. Chartrand, *The Political Dimension of Aboriginal Rights* (LL.M. Thesis, Queen's University Faculty of Law, 2001) [unpublished].
7. *Ibid.* at 30.

Aboriginal parties to express the totality of their claims, experiences, and worldviews in the legal process. This expression can be as simple as taking account of the Aboriginal perspective when interpreting treaties,[8] or as complex as crossing cultural barriers created by language or worldview.[9] The Aboriginal perspective on Canadian law has broadly taken shape either by calling upon the courts to take into account Aboriginal laws and worldview,[10] or by calling for equal treatment of Aboriginal laws and the recognition of Aboriginal autonomy.[11] It is important to keep in mind that the Supreme Court has created a doctrine of Aboriginal rights that applies to all Aboriginal nations.[12] The doctrine of Aboriginal rights applies to all Aboriginal peoples despite the Supreme Court creating Aboriginal rights principles on a case-by-case basis. The blanket application of Aboriginal rights doctrine means that courts have closed the door to hearing the unique expressions of Aboriginal political voices.[13] As a result, the legal process of the Canadian courts has removed the impetus for a political solution to Aboriginal/Crown disputes by effectively excluding Aboriginal expression from that legal process.[14]

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8. For an example of an Aboriginal perspective on treaty interpretation see Gordon Christie, "Justifying Principles of Treaty Interpretation" (2000) 26 Queen's L.J. 143 [Christie, "Interpretation"].
9. The Report of the Royal Commission on Aboriginal Peoples calls for a principle of mutual respect: "Respect among cultures creates a positive, supportive climate for harmonious relations, as opposed to the acrimonious and strife-ridden relations of a culture of disdain. Respect for the unique position of Canada's First Peoples—and more generally for the diversity of peoples and cultures making up this country—*should* be a fundamental characteristic of Canada's civic ethos" [emphasis in original] (Canada, Report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, vol. 1 (Ottawa: Canada Communications Group, 1996) at 684 [RCAP]).
10. For some insight into the potential for Aboriginal laws to influence common law interpretation see John Borrows, "Constitutional Law From a First Nation Perspective: Self-government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1; John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 Osgoode Hall L.J. 1 [Borrows, "Listening"]; and James (Sákéj) Youngblood Henderson, "Interpreting *Sui Generis* Treaties" (1997) 36 Alta. L. Rev. 46 [Henderson, "*Sui Generis*"].
11. Several examples of such critical commentary from both Aboriginal and non-Aboriginal scholars include Christie, "Interpretation", *supra* note 8; Gordon Christie, "A Colonial Reading of Recent Jurisprudence: *Sparrow, Delgamuukw* and *Haida Nation*" (2005) 23 Windsor Yearbook of Access to Justice 17 [Christie, "Colonial"]; Chartrand, *supra* note 6; Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 Alta. L. Rev. 498; Russel Lawrence Barsh & James (Sákéj) Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42 McGill L.J. 993; James (Sákéj) Youngblood Henderson, "First Nations Legal Inheritances in Canada: The Mikmaq Model" (1996) 23 Man. L.J. 1 [Henderson, "Inheritances"]; Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 1999); Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1997) 42 McGill L.J. 1011.
12. An overview of this common law doctrine can be found in Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196.
13. Aboriginal rights are limited to the "practices, traditions and customs central to the aboriginal societies" prior to contact between Europeans and the Aboriginal rights seeking community (*R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 44, 137 D.L.R. (4th) 289 [*Van der Peet* cited to S.C.R.]).
14. See Chartrand, *supra* note 6 at 30 ("the Supreme Court of Canada has rendered what must logically be a political process into a legal one in which the settler peoples' governments have the upper hand over the Indigenous peoples' governments").

This paper is not about the legal doctrine of section 35(1), although at times it will be discussed. It is not specifically about the limits of Canadian courts and whether they are doing all they can to protect Aboriginal rights,[15] although some of that will be discussed as well. Rather, this paper is about the role that Canadian courts play in Aboriginal peoples' ongoing experience of colonialism.[16] While the colonizer/colonized dichotomy might be flawed for its generality, the legal system often provides stark contrasts in which such a framework remains workable.[17] Robert Yazzie's assessment supports the framing of Aboriginal/Crown relations in a colonizer/colonized dynamic; he writes:

> Postcolonialism will not arrive for Indigenous peoples until they are able to make their own decisions. Colonialism remains when national legislatures and policy makers make decisions for Indigenous peoples, tell them what they can and cannot do, refuse to support them, or effectively shut them out of the process.[18]

The experience of colonialism is vast and varying but, for the purposes of this paper, I will limit my discussion to some of the ways in which Aboriginal people are denied a voice in the colonial legal system.

In this paper, I assert that the perpetuation of colonial power means that Aboriginal people continue to be faced with the inability to define their own world within the confines of Canadian law. I will look at four ways in which colonial law fails to receive a full expression of Aboriginal voice. First, Aboriginal peoples have historically been denied the ability to participate directly in the legal process. This is evident when examining jurisprudence upon which the courts still rely and which did not involve Aboriginal people in the process. Second, the structure of legal language, thought and interpretive process means that Aboriginal people must make several

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15. The notion of Aboriginal rights, throughout most of this paper, will not be limited to a discussion of s. 35(1) rights or doctrine. Rather than limiting that term to how a court might characterize an Aboriginal claim, I use Aboriginal rights to incorporate broader notions of equality, fairness and self-determination. That is why I will at times refer to Aboriginal rights where the court has not heard arguments based on s. 35(1) Aboriginal rights.

16. See Sophie McCall, "The Forty-Ninth Parallel and Other Borders: Recent Directions in Native North American Literary Criticism" (2004) 34:2 Canandian Review of American Studies 205 at 212 ("Colonialism is not a safe topic of the past; rather it continues to shape Aboriginal experience while it perpetuates its history of violence").

17. For a similar approach but in relation to Aboriginal identity, see D'Arcy Vermette, "Colonialism and the Process of Defining Aboriginal People" (2008) 31 Dal. L.J. 211. On the notion of "post-colonial" see J. Edward Chamberlain, "From Hand to Mouth: The Postcolonial Politics of Oral and Written Traditions" in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 124 at 131 [*Voice and Vision*], where Chamberlain notes that the term "post-colonial" "seems to assume that we're in a state of political grace—or a state of mind—that it's not always easy to recognize looking around at the conditions in which many people live." And while Chamberlain can move beyond this term because postcolonial theory is something we do, a way in which we can frame the world and chronicle "the conditions of dislocation, dispossession, and disease that colonialism creates . . .," I am unable to make similar concession to a term that seems wholly inappropriate.

18. Robert Yazzie, "Indigenous Peoples and Postcolonial Colonialism" in *Voice and Vision*, *ibid.* at 46.

important accommodations in order to bring claims before the court. The result is that Aboriginal peoples' stories get lost in the shuffle of legal formalities. Third, the colonial experience can produce contradictions that are worth examining. This can include misapplication of Aboriginal voice, divided courts and conflicting past precedent, some of which might be more inclusive of Aboriginal voice as compared to current law. Fourth, the power relationships between colonizer and colonized produce a situation where Aboriginal communities and ways are not involved in the legal process. The colonizer has a monopoly on interpretation, which denies Aboriginal people the freedom to label their world. In the larger landscape of colonization, the legal system lies at the heart of the anti-dialogical action of the oppressor.[19] This paper asserts that colonial courts remain an inappropriate locality to settle Aboriginal and Crown disagreements.

II. Aboriginal Exclusion In Legal Precedent

Many of the cases that today's courts rely upon to determine the nature of Aboriginal rights did not involve Aboriginal people in the legal process.[20] This section will look at three such cases and how they came to speak to Aboriginal rights. The first of these cases is *St. Catherine's Milling and Lumber Co.*[21] This decision by the Judicial Committee of the Privy Council illustrates how Aboriginal people can become objects in colonial law. *St. Catherine's Milling* involved a dispute between the Dominion of Canada and the province of Ontario. Each party claimed to have beneficial interest in 32,000 square miles of land that was ceded to the Crown in a treaty with the "Ojibbeway"[22] in 1873. This case specifically involved the issue of jurisdiction over timber between the federal and provincial governments, however, the Privy Council states: "[i]ts decision necessarily involves the determination of the larger question between that government and the province of Ontario with respect to the legal consequences of the treaty of 1873."[23] In examining those legal consequences, *St. Catherine's Milling* gained prece-

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19. Paulo Freire, *Pedagogy of the Oppressed*, 20th-Anniversary ed., trans. by Myra Bergman Ramos (New York: Continuum, 1997) at 120 describes the process of oppression: "[T]he oppressors attempt to destroy in the oppressed their quality as 'considerers' of the world. Since the oppressors cannot totally achieve this destruction, they must *mythicize* the world. In order to present for the consideration of the oppressed and subjugated a world of deceit designed to increase their alienation and passivity, the oppressors develop a series of methods precluding any presentation of the world as a problem and showing it rather as a fixed entity, as something given–something to which people, as mere spectators, must adapt."
20. For a collection of cases dealing with Aboriginal issues from 1763–1910, see Brian Slattery, *Canadian Native Law Cases*, vol. 1, 1763–1869 (Saskatoon: Native Law Centre, 1980); Brian Slattery, *Canadian Native Law Cases*, vol. 2, 1870–1890 (Saskatoon: Native Law Centre, 1981); and Brian Slattery & Linda Charlton, *Canadian Native Law Cases*, vol. 3, 1891–1910 (Saskatoon: Native Law Centre, 1985).
21. *St. Catherine's Milling and Lumber Co. v. The Queen* (1888), 14 A.C. 46, 10 C.R.A.C. 13 (P.C.), reported in Brian Slattery, *Canadian Native Law Cases*, vol. 2, 1870–1890 (Saskatoon: Native Law Centre, 1981) [*St. Catherine's Milling* cited to Slattery].
22. The common spelling today is "Ojibway."
23. *St. Catherine's Milling*, *supra* note 21 at 53.

dential value for its characterization of Indian land interests. This occurred despite the fact that the Ojibbeway were not on hand to represent their conception of these interests. By not including the Ojibbeway in the decision-making process, the colonial authorities were perpetuating the violence that is colonialism: "Any situation in which some individuals prevent others from engaging in the process of inquiry is one of violence. The means used are not important; to alienate human beings from their own decision-making is to change them into objects."[24] It is perhaps not surprising, then, that the Privy Council characterized Aboriginal title as a mere personal right that was a burden upon the underlying Crown title, and dependent on the goodwill of the Crown.[25] Such a characterization clearly places Aboriginal interests in a position of subjugation to the Crown. As such, *St. Catherine's Milling* is a clear expression of the Crown's assumed superiority over Aboriginal peoples.[26] As the following case illustrates, a similar process can be seen in the context of constitutional interpretation.

With the introduction of section 91(24), and the subsequent judicial interpretation of the scope of that section, Aboriginal peoples' status as objects has become entrenched in the Constitution. In 1939, the Supreme Court of Canada had to decide the extent of the federal government's jurisdiction in *Re: Eskimos.*[27] This reference case involved a dispute between the federal government and the province of Quebec over the bounds of section 91(24) of the *British North America Act, 1867.*[28] The province of Quebec asserted that the "Eskimo" in that province were "Indians" under section 91(24). Once again, Aboriginal people were not present to tell their story. "Eskimo" and "Indians" had ceased to be peoples and had become legal objects to be forced into an appropriate legal box.

Re: Eskimos, like *St. Catherine's Milling* before it, proceeded without consideration of the viewpoints of those who were at the centre of the decision. Despite there being "no legal barrier to having representation from Aboriginal communities" the Inuit were not consulted: "Instead, six white Supreme Court of Canada judges and

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24. Freire, *supra* note 19 at 66.
25. *St. Catherine's Milling, supra* note 21 at 54–55.
26. Christie, "Colonial", *supra* note 11 at 32 assesses the reasoning in *St. Catherine's Milling* as follows: "The colonial courts either reasoned that the sovereign powers of Aboriginal peoples were eliminated through the primal event of the assertion of Crown sovereignty, or they viewed these sovereign powers as unworthy of any serious judicial consideration. Similarly, pre-existing Aboriginal land interests were either seen as removed through the assertion of Crown sovereignty, or as unworthy of serious judicial consideration."
27. *In the Matter of a Reference as to Whether the Term "Indians" in head 24 of section 91 of the British North America Act, 1867, Includes Eskimo Inhabitants of the Province of Quebec,* [1939] S.C.R. 104, [1939] 2 D.L.R. 417 [*Re: Eskimos* cited to S.C.R.].
28. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91, reprinted in R.S.C. 1985, App. II, No. 5 [*B.N.A. Act* or *British North America Act*] (formerly the *British North America Act,* 1867). S. 91 articulates areas of federal jurisdiction. S. 91(24) reads: "Indians, and Lands reserved for the Indians."

two sets of white government lawyers all set about contemplating the weighty question: 'Are Eskimos Indians?'"[29] Considering this, it should not come as a surprise that the sources relied upon in *Re: Eskimos* did not include Aboriginal peoples' opinions on their identity.[30] This is not surprising since, generally speaking, Aboriginal people were not consulted in regards to being under any foreign authority. Some treaties reveal that at times Aboriginal people did allow some foreign jurisdiction in dispute resolution as a means to ensure smooth relations.[31] However, even at those times, the Aboriginal nations reserved their autonomous authority. The imposition of Canadian law remains a colonizing process.[32]

The famous opinion of Chief Justice Marshall of the Supreme Court of the United States in *Johnson and Graham's Lessee v. M'Intosh,*[33] which is often looked to for guidance, occurred in a context void of Aboriginal voice. That case involved a dispute between two non-Aboriginal titleholders. The first title was gained by direct purchase from the Piankeshaw Indians. The second title was obtained via grant from the United States. As such, Aboriginal people were not involved in this case, which had some serious consequences for their legal rights under the laws of the colonizer.[34] The remarkable thing about Marshall's comments is that, in comparison with section

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29. Constance Backhouse, "'Race' definition run amuck: 'slaying the dragon of Eskimo status' before the Supreme Court of Canada, 1939" in Dianne Kirkby & Catharine Coleborne, eds., *Law, history, colonialism: The Reach of Empire* (Manchester: Manchester University Press, 2001) 65 at 69 [footnotes omitted].
30. See also *ibid.* at 73–74.
31. Henderson, "Inheritances", *supra* note 11 at 18.
32. An exception might be the numbered treaties where sweeping language in the written documents purports to submit Aboriginal people to the Crown in virtually all conceivable ways: "It is not difficult to imagine a court challenge on sovereignty being met with the claim that sovereignty was transferred by cession. Unlike sovereignty by settlement in the context of populated land, sovereignty by cession is not a principle necessarily undeserving of constitutional embrace; based on the will of parties, it suggests that the transfer of sovereignty ought to be a matter of agreement and not simply brute force" (Asch and Macklem, *supra* note 11 at 513). For an examination of the accuracy of the written numbered treaties, see *Re Paulette et al. and Registrar of Titles* (No.2), 42 D.L.R. (3d) 8, [1973] 6 W.W.R. 115 (N.W.T.S.C.) where Morrow J. took evidence relating to treaties 8 and 11, the tenor of which led to the conclusion that, despite what was written in the treaties, there was doubt about whether or not Aboriginal title was extinguished.
33. 21 U.S. (8 Wheat.) 543 at 590, 5 L.Ed. 681 (1823) [*M'Intosh* cited to Wheat.].
34. The other two cases which comprise the "Marshall trilogy," *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1, 8 L.Ed. 25 (1831) [*Cherokee Nation* cited to Pet.] and *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 8 L.Ed. 483 (1832) [*Worcester* cited to Pet.], did have some Aboriginal involvement. In *Cherokee Nation,* the Cherokee Nation petitioned the United States Supreme Court directly, to obtain relief from Georgia laws which abrogated the Cherokee Nation's ability to exist as a political society. The Cherokee asserted that as a "foreign state" the United States Constitution gave them the right to take their claims directly to the Supreme Court. Their claim was denied. The Cherokee Nation was characterized, not as a foreign state, but as a "domestic dependent nation." The consequence being that the Court wouldn't hear their claim. *Worcester* was a continuation of the same claim in *Cherokee Nation* brought on behalf of a non-Aboriginal missionary. Worcester's conviction, of residing on Cherokee land without a license from the state of Georgia, was overturned by the Supreme Court. The Cherokee Nation was not directly a party to this case. It appears that *Worcester* was a test case brought on their behalf and undoubtedly included their involvement. However, there must be serious concern, beyond the technicalities of the United States Constitution, about why the Cherokee were not successful in bringing the claim themselves and why a claim brought by a non-Aboriginal missionary was more successful.

35 rights discourse, they have much potential for building a respectable legal construction of Aboriginal title. While there is no Aboriginal voice to be found in the history constructed by Marshall, and this construction carries many historical myths about Aboriginal people,[35] he offered a construction of the law that can incorporate more of the political dimension of an Aboriginal nation's claim.[36] He states the following in this regard:

> The person who purchases the lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.[37]

To a certain extent Marshall attempted to avoid infringing on Aboriginal political authority. As such, using this view as a basis for Aboriginal title would provide a much more thorough recognition of that title than the Supreme Court of Canada has done in *Delgamuukw*.[38] Although Marshall securely placed colonial authority in a dominant position over Aboriginal people,[39] his decision leaves some room for Aboriginal nations to practice their own laws once Aboriginal title is recognized.

Marshall's early attempt at describing Aboriginal peoples' legal rights is forward looking for its time. This is evident from the criticism that was leveled at Marshall from Catron C.J. in the Tennessee Supreme Court:

> North American savages . . . [were a] people that had no government, and with whom the right of the strongest alone was respected . . . . The philosopher and jurist of the quiet city, may easily prove, that such a people had undoubted rights of soil and of sovereignty; and sympathy and eloquence may, as in the Cherokee case, powerfully urge their adoption on the courts of justice, forgetting that it was impossible for our ancestors to recognize rights claimed; that they had actually, by law and the sword, established what their [royal] charters granted, dominion over all abiding within their limits. . . .[40]

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35. For example, Justice Marshall's statement that "the tribes of Indians inhabiting this country were fierce savages whose occupation was war . . ." was assessed by Hall J. in *Calder*, *supra* note 1 at 346–47, as follows: "We now know that that assessment was ill-founded. The Indians did in fact at times engage in some tribal wars but war was not their vocation and it can be said that their preoccupation with war pales into insignificance when compared to the religious and dynastic wars of 'civilized' Europe of the 16th and 17th centuries. Marshall was, of course, speaking with the knowledge available to him in 1823."
36. See generally Chartrand, *supra* note 6.
37. *M'Intosh*, *supra* note 33 at 593.
38. *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at paras. 165, 127, 153 D.L.R. (4th) 193 [*Delgamuukw* cited to S.C.R.] (the Court uses government initiative and Aboriginal culture as limitations on the exercise of Aboriginal title. *Delgamuukw* has no independent role for Aboriginal laws).
39. *M'Intosh*, *supra* note 33 at 588 ("All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognized the absolute title of the crown to extinguish that right. This is incompatible with an absolute and complete title in the Indians").
40. *State v. Foreman*, 16 Tenn. (8 Yer.) 256 at 271 (1835).

This criticism from a lower court judge illustrates a deep resistance to some of the protections that Marshall asserted for Aboriginal claims.[41] However, one of the disturbing aspects of Marshall's decision in *Johnson v. M'Intosh* is that he spoke about Aboriginal title when Aboriginal people were not physically present to share their views. That Aboriginal people weren't involved in the resolution of such disputes is a reflection of the context in which the colonizer's courts exist, regardless of the reasoning employed in the Court's decision. But, as I will discuss in the next section, it is this context that prevents Aboriginal expression even when Aboriginal people are before the court.

III. Problems With Using Legal Language

The law is intended to bring legitimacy with its word. But the law can operate as an instrument of oppression if it begins to prescribe colonial values and authority upon Aboriginal people/nations:

> One of the basic elements of the relationship between oppressor and oppressed is *prescription*. Every prescription represents the imposition of one individual's choice upon another, transforming the consciousness of the person prescribed to into one that conforms with the prescriber's consciousness. Thus, the behavior of the oppressed is a prescribed behavior, following as it does the guidelines of the oppressor.[42]

This is part of the process of colonization. The impact of the law is evident in every case that brings Aboriginal people before the courts. In each instance, the legal process demands that Aboriginal people respond in the language of the law.

There are several ways that the structure of legal language impacts upon the reception of Aboriginal voice. First, Aboriginal people claiming an Aboriginal right need to take care to craft their claims in a way that diminishes the chances of having a damaging claim awarded against them. In an adversarial system, this is often the reality for many parties in court. However, in a colonial relationship, such a requirement amounts to another layer of oppression. Even after making such concessions the court may unilaterally alter the claim being made. Second, legal thought fragments disputes into only those legal questions which are necessary for the court to cast a judgment. At times these legal questions may have very little to do with the broader tensions between Aboriginal people and the Crown. Legal language and thought reduces particular disputes down to word definitions, which denies Aboriginal people and their experiences. Third, there is stagnation in colonial law which prevents jurists from re-envisioning how they handle Aboriginal disputes. Fourth, related to

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41. The dissenting opinion of Johnson J. in *Cherokee Nation, supra* note 34, is also worth noting for its use of the myths of savagery and European superiority.

42. Freire, *supra* note 19 at 28–29.

this stagnation, is the courts' requirement that Aboriginal evidence and claims make themselves "cognizable to the law." When claiming an Aboriginal right, Aboriginal people are forced to accommodate the language of the law. This includes the courts' rejection of Aboriginal laws in favour of limited protection of Aboriginal rights.

A. Structure of Claims

For Aboriginal people, crafting a legal claim can be quite tricky. At times it might be appropriate to not engage Aboriginal rights, if the result may succeed otherwise. At times there may be a desire to craft a claim to specifically test the limits of legislation.[43] *Calder* provides an example of the barriers Aboriginal people face when crafting legal claims. The limited nature of the Nishga claim in *Calder* is described by Hall J. in the following words:

> When asked to state the nature of the right being asserted and for which a declaration was being sought, counsel for the appellants described it as "an interest which is a burden on the title of the Crown; an interest which is usufructuary in nature; a tribal interest inalienable except to the Crown and extinguishable only by legislative enactment of the Parliament of Canada."[44]

The argument put forward by counsel for the Nishga is a standard common law approach to Aboriginal title based on precedents such as *St. Catherine's Milling*. Presumably, once this title was recognized, negotiations would follow.[45] Speaking of how the Nishga crafted their claims in *Calder*, Monture-Angus notes that this strategy was necessary so that the Nishga could ensure that "both remedially and substantively the issue before the courts could cause them as little harm as possible."[46] This is evident in the limited declaration that the court was asked to make: "WHEREFORE the Plaintiffs claim a declaration that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory hereinbefore described, has never been lawfully extinguished."[47] The claim is clearly designed to

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43. See *R. v. Blais*, 2003 SCC 44, [2003] 2 S.C.R. 236, 230 D.L.R. (4th) 22 [*Blais* cited to S.C.R.] for a good example of such a test case. In that case, Mr. Blais chose not to engage s. 35(1) as a defence to a hunting violation. Instead, he argued that the Manitoba *Natural Resource Transfer Agreement* (being Schedule 1 to the *Constitution Act* 1930, (U.K.) 20–21 Geo. V, c. 26, reprinted in R.S.C. 1985, App. II, No. 26 [NRTA]) protected his right to hunt. Para. 13 of the *Natural Resource Transfer Agreement* assures Indians the continued access of hunting, fishing, and trapping during all seasons of the year for their subsistence. Mr. Blais asserted that as a Métis person he fell under the term "Indian" as it was properly understood. At several points in its judgment, the Supreme Court of Canada noted that s. 35(1) probably would have protected Mr. Blais' right but that he chose not to engage it. The *Blais* tactic was meant specifically to test the scope of the *Natural Resource Transfer Agreement*. Mr. Blais' proposed understanding of the term "Indian" failed and his conviction was affirmed.

44. *Supra* note 1 at 352.

45. Similarly, the Supreme Court has called for negotiation in response to s. 35(1) Aboriginal rights. *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at para. 53, 70 D.L.R. (4th) 385 [*Sparrow* cited to S.C.R.].

46. Monture-Angus, *supra* note 11 at 73–74.

47. *Calder*, *supra* note 1 at 345.

challenge colonial actions rather than seek out justice inclusive of Aboriginal worldview. It puts Aboriginal people in a vulnerable position because if the claim fails outright, or is otherwise undermined by the courts, then the Aboriginal nation has lost initiative towards future negotiation.

Aboriginal peoples' difficulty with crafting claims begins with the burden of having to accommodate the expertise and experience of the courts. This reveals a structural problem with Canadian law:

> This issue of how to draft claims, either on behalf of individuals or communally, is a difficult one. Canadian law is accustomed to claims on behalf of corporations, government structures familiar to them (such as band councils but not traditional Aboriginal governments), or individuals. None of these forms fully encompass Aboriginal forms of traditional government or their relationships with individuals from their community. The pleadings problems reflect embedded structural obstacles to the just resolution of Aboriginal claims rather than difficulties with the plaintiffs' pleadings in this case.[48]

When drafting claims, Aboriginal people must support their claim using the accepted precedents of the court. As such, Aboriginal voice has to be modified to reflect decisions of the court that didn't involve them. If a claim has foundation in the common law it will be more likely to succeed than if it is rooted in Aboriginal conceptions of the right. Perhaps this explains why the pleadings in *Delgamuukw* were significantly scaled back before the Supreme Court.[49]

B. A Note on Fragmentation

Another way in which legal language and thought silence Aboriginal people is through fragmentation. Monture-Angus describes this process in the following way:

> Legal processes take the stories of people and transform them into discussions about the meaning of words and phrases like "existing," "Aboriginal rights," "recognized and affirmed," and so on. This process is contrary to Aboriginal intellectual traditions (including Aboriginal legal processes) as it removes the stories from individuals, families, communities and nations.[50]

This disruption of Aboriginal intellectual traditions is not acceptable and serves as another reminder of the impact of colonialism. After the introduction of section 35(1), the courts had an opportunity to revisit their modus operandi in regards to Aboriginal claims. This revisiting could have placed emphasis on the acknowledge-

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48. Monture-Angus, *supra* note 11 at 118.

49. See *Delgamuukw*, *supra* note 38 at para. 7, where the claim is described in the following way: "This action was commenced by the appellants, who are all Gitskan or Wet'suwet'en hereditary chiefs, who, both individually and on behalf of their 'Houses' claimed separate portions of 58,000 square kilometres in British Columbia. . . . Their claim was originally for 'ownership' of the territory and 'jurisdiction' over it. (At this Court, this was transformed into, primarily, a claim for aboriginal title over the land in question.)"

50. Monture-Angus, *supra* note 11 at 90.

ment of Aboriginal voice through accommodation and real concession by the courts on behalf of the Crown and against accepted colonial legal traditions. Instead, section 35(1) has given rise to a formalistic method for identifying rights. The form used is standard colonial fare and has relied upon the colonizer's legal language to process Aboriginal claims.

The courts' inability to establish new precedents free of their colonial history is reflected in their method of dealing with claims. Mary Ellen Turpel sees the courts' use of "highly formalist . . . technical legal reasoning" as silencing Aboriginal people and denying their experiences.[51] When Aboriginal people do bring their worldview to the law, it is interpreted into legal language so that the courts will relate to it. For Aboriginal people, "the 'Aboriginal perspective' of their rights must first be filtered through the lens of the common law. Unfortunately, more often than not, this filter is not very porous—akin to filtering light through a brick wall."[52] As a result, the legal processing of Aboriginal issues has the effect of finding legal concerns that can be almost entirely removed from the issue at hand.[53]

In some instances, it is evident that the law is incapable of dealing with Aboriginal peoples' conceptions of their rights. Regarding the *Paul* and *Derrickson* decisions, Turpel reminds us that "[t]he appellants had to structure their arguments into claims based upon alien property notions and legal doctrines foreign to the customs of their communities."[54] The fragmentation inherent in legal thought helps the court to isolate the legal issue, even if that means creating distance between what is being adjudicated and the core issue. It allows the courts to engage in wordplay rather than more holistic, solution-driven reasoning. Certainly, relying on particular legal problems can be problematic when the actual problems that claimants face are much more intricate:

> The intermingling of several key factors in *Derrickson* and *Paul*–women, property, and violence–facilitates an appreciation not only of the law's (in)capacity to situate aborigi-

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51. Mary Ellen Turpel, "Home/Land" (1991) 10 Can. J. Fam. L. 17 at 21.
52. Chartrand, *supra* note 6 at 81.
53. See Turpel, *supra* note 51 at 29 where she discusses *Paul v. Paul*, [1986] 1 S.C.R. 306, 26 D.L.R. (4th) 196 [*Paul* cited to S.C.R.], which involved an on-reserve matrimonial property dispute between two band members. The Court found that the *Family Relations Act* which governed the division of matrimonial property in the province of British Columbia was inapplicable to Indian reserves. Of Justice Chouinard's decision Turpel writes: "At no point in his decision does Mr. Justice Chouinard explore the consequences of his decision for aboriginal women, who are now without recourse for a just share of matrimonial property upon family breakdown. In passing he mentioned that he was 'not unmindful of the ensuing consequences for spouses.' He justified his disinterest in the consequences by borrowing a phrase from a noted constitutional publicist: Whether such laws are wise or unwise is of course a much-controverted question, but it is not relevant to their constitutional validity."
See also *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, 26 D.L.R. (4th) 175 [*Derrickson* cited to S.C.R.] (another case dealing with the applicability of the *Family Relations Act* in British Columbia to on-reserve matrimonial property disputes).
54. Turpel, *ibid.* at 34.

> nal disputes in a social, political or cultural context, but also the price aboriginal people (in this case, aboriginal women) pay as a consequence of their subjugation to a colonial regime.[55]

This is a serious limitation of the law. The fragmentation of disputes into legal particulars can completely alter the focus of a dispute. Rather than endeavouring to deal with the gender, property and violence dynamics involved in these cases, the Court viewed the problem as a jurisdictional debate between two pieces of colonial legislation. This is evident in the way the Court framed the "constitutional question": "Whether the provisions of Part 3 of the *Family Relations Act*, R.S.B.C. 1979, c. 121, dealing with the division of family assets, are constitutionally applicable to lands in a reserve held by an Indian, in view of the *Indian Act*, R.S.C. 1970, c. I-6?"[56] By framing the issue as a dispute between provincial and federal spheres of jurisdiction, the Court was left deciding the question: "is it up to the federal or provincial government to control Indians?"[57] The importance of such cases is illustrated in the effects that they can have on people's lives. A matrimonial property case can have just as much, if not more, impact on the lives of Aboriginal people than a typical section 35 Aboriginal rights case. But *Derrickson* and *Paul*, although not dealing with section 35, go to the heart of Aboriginal rights because they illustrate the remarkable lack of control that Aboriginal people can have over their own communities. Such issues are central to Aboriginal claims of self-government or sovereignty. By denying entrance of the Aboriginal conceptions of the right into the courtroom, the colonial courts fail to address their position of power over Aboriginal people.[58]

C. Privilege of Being "Cognizable to the law"

The static conception of rights which the Supreme Court outlines in the legal tests associated with section 35(1) analysis is also reflected in how it demands Aboriginal people structure their claims and their Aboriginal "perspective":

> In assessing a claim for the existence of an aboriginal right, a court must take into account the perspective of the aboriginal people claiming the right. . . . It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.[59]

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55. *Ibid.* at 21.
56. *Derrickson*, *supra* note 53 at para. 1.
57. Turpel, *supra* note 51 at 24.
58. *Ibid.* at 30 ("Framing the issue in constitutional division of powers doctrine is an effective strategy for depoliticizing the cases and silencing any questioning of the overwhelming state control of (jurisdiction over) aboriginal peoples. The court, as an emanation of the colonial political regime for aboriginal peoples, is blinded to its role and to the political nature of the law it applies in this context").
59. *Van der Peet*, *supra* note 13 at para. 49.

These two requirements are fundamentally opposed to each other and entirely unjust. The Court is asking for the Aboriginal claimant to give a perspective *on the law* rather than *on the right*. If a perspective on the right was sought then the burden of framing that perspective "in terms cognizable to the Canadian legal and constitutional structure" would not be placed on the Aboriginal claimant. This method is closed to producing meaningful results because: "One cannot expect positive results from an educational or political action program which fails to respect the particular view of the world held by the people. Such a program constitutes cultural invasion, good intentions notwithstanding."[60]

Claims also need to be drafted in a way that the court will understand. Again, it is Aboriginal people making the accommodation and not the courts. To illustrate how this works we can look at how the Court characterized Dorothy Van der Peet's claim. The Court stated: "She is claiming, in other words, that the practices, customs and traditions of the Sto:lo include as an integral part the exchange of fish for money or other goods."[61] The key to this statement is found in the expression "in other words," which indicates that the claimant's Aboriginal voice has been confiscated and turned into a legal voice—the voice of the colonizer. However, the Court goes too far in its characterization of her claim because it implies that Dorothy Van der Peet would frame her claim according to and in support of the "integral" test laid out by the Court.[62] It is inappropriate for the Court to put words in her mouth. It is a reflection of the inflexible nature of the colonial courts.

The courts are so inflexible that they are willing to redraft claims brought before them. In *R. v. Pamajewon*[63] the Supreme Court of Canada unilaterally altered the claim which the appellants had raised in defence. The original claim involved "the assertion that s. 35(1) encompasses the right of self-government, and that this right includes the right to regulate gambling activities on the reservation."[64] On appeal and without giving the appellants an opportunity to present evidence according to the newly characterized right, the Supreme Court altered the claim to avoid casting "the Court's inquiry at a level of excessive generality."[65] The Court determined that "the most accurate characterization of the appellants' claim is that they are asserting that

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60. Freire, *supra* note 19 at 76 [footnote omitted].
61. *Van der Peet*, *supra* note 13 at para. 76.
62. *Ibid.* at para. 46 ("[I]n order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right"). The Court majority writes: "[A] claim to an aboriginal right cannot be based on the significance of an aboriginal practice, custom or tradition to the aboriginal community in question. . . . It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods" (*ibid.* at para. 79).
63. [1996] 2 S.C.R. 821, 138 D.L.R. (4th) 204 [*Pamajewon* cited to S.C.R.].
64. *Ibid.* at para. 24.
65. *Ibid.* at para. 27.

s. 35(1) recognizes and affirms the rights of the Shawanaga and Eagle Lake First Nations to participate in, and to regulate, gambling activities on their respective reserve lands."[66] There is no dynamic, evolving right encompassed in the Supreme Court's chosen conception. Effectively, the Court is telling Aboriginal people that there is no right to govern, rather, there is only a right to do. And this right to do is limited to very specific traditional activities.

The decision of the Supreme Court of Canada in *Delgamuukw* is significant for several reasons, not the least of which is that it represents the Court's initial attempt to define the content of Aboriginal title. However, for immediate purposes, *Delgamuukw* is significant for its statements about and treatment of Aboriginal oral sources of history. Unsure about how to handle Aboriginal peoples' oral evidence, the Court referred to the Royal Commission on Aboriginal Peoples (RCAP) for guidance:

> [Aboriginal oral tradition] is less focused on establishing objective truth and assumes that the teller of the story is so much a part of the event being described that it would be arrogant to presume to classify or categorize the event exactly or for all time.
>
> . . . .
>
> [T]here are many histories, each characterized in part by how a people see themselves, how they define their identity in relation to their environment, and how they express their uniqueness as a people.[67]

In a seemingly hypocritical move, the Court goes on to adopt the arrogance that the RCAP stated oral tradition was trying to avoid:

> Dickson J . . . stated in *Kruger v. The Queen,* [1978] 1 S.C.R. 104, at p. 109, that "[c]laims to aboriginal title are woven with history, legend, politics and moral obligations". The difficulty with these features of oral histories is that they are tangential to the ultimate purpose of the fact-finding process at trial—the determination of *the* historical truth.[68]

The Court does not heed the words of the RCAP and fails to realize that the history, legend, politics and moral obligations of oral history *are* the historical truth for Aboriginal people.[69] So in that way they are central, rather than tangential, to the

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66. *Ibid.* at para. 26.
67. RCAP, *supra* note 9 at 33, cited in *Delgamuukw*, *supra* note 38 at para. 85.
68. *Delgamuukw*, *ibid.* at para. 86 [emphasis added]. For additional discussion on the reception of oral histories into the courts, see Andie Diane Palmer, "Evidence 'Not in a Form Familiar to Common Law Courts': Assessing Oral Histories in Land Claims Testimony After *Delgamuukw* v. *B.C.*" (2000) 38 Alta. L. Rev. 1040. For an earlier call for the courts to accept the oral evidence of Aboriginal people, see Clay McLeod, "The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to First Nations: Breaking Down the Barriers of the Past" (1992) 30 Alta. L. Rev. 1276.
69. Similarly, Borrows explains: "[T]he existence of explicitly subjective elements in oral history can, at times, present greater opportunities for understanding historical events than the recitation of bare facts. It can reveal the intellectual, social, spiritual, and emotional cognition of the event for the group in question. . . . So called 'wrong' statements can still be psychologically true and reveal more about the people and events under study than the mere fact being chronicled. A group's understanding of their own past is as much a part of history as are more verifiable facts" (Borrows, "Listening", *supra* note 10 at 11).

determination of historical truth. These elements, though they go unacknowledged, are also central to the construction of historical truth within the colonizer's worldview. What this indicates is that even as the Court tries to find a way to incorporate oral traditions into the fact-finding process, the acceptance of Aboriginal traditions will only be done in a piecemeal fashion, so long as it coincides with the Court's worldview.[70]

It is important to recognize that, in the end, the Aboriginal "perspective" was not actually used in formulating the Court's understanding of Aboriginal title. In turning to the content of Aboriginal title, the Court attempts to bring Aboriginal people closer to the decision-making process by stating that Aboriginal title "must be understood by reference to both common law and aboriginal perspectives."[71] However, it is interesting to note how the Court actually goes about incorporating "aboriginal perspective." The Court finds that Aboriginal title has it source in "the prior occupation of Canada by aboriginal peoples."[72] Yet, in defining the scope of Aboriginal title, the Court does not refer to the source of the title. Instead, the Supreme Court of Canada relies on previous jurisprudence and various pieces of legislation. The "aboriginal perspective" is nowhere to be found in defining the content of Aboriginal title. However, inexplicably, the Court does refer to the "aboriginal perspective" when placing *limits* on Aboriginal title:

> [O]ne of the critical elements in the determination of whether a particular aboriginal group has aboriginal title to certain lands is the matter of the occupancy of those lands. Occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group. If lands are so occupied, there will exist a special bond between the group and the land in question such that the land will be part of the definition of the group's distinctive culture. It seems to me that these elements of aboriginal title create an inherent limitation on the uses to which the land, over which such title exists, may be put.[73]

The Court determined that Aboriginal people cannot act in a manner that detrimentally impacts their historic cultural connection to that land. Yet the Court diminishes Aboriginal authority further when it states: "If aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands and convert them into non-title lands to do so."[74] Thus, the

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70. See Monture-Angus's criticism of the treatment of oral histories at "Independence," *supra* note 11 at 31 ("However, the words surrounding this evidentiary breakthrough illuminate that a small legal rule has been nominally changed to include Aboriginal people, nations and ways. The recognition that the problem is one of larger magnitude is not discussed by the court. The rules of evidence have been 'adapted' to 'accommodate' Aboriginal peoples").
71. *Delgamuukw*, *supra* note 38 at para. 112.
72. *Ibid.* at para. 114.
73. *Ibid.* at para. 128.
74. *Ibid.* at para. 131.

Court succeeds in achieving the Aboriginal title equivalent of the enfranchisement policies of the past.[75]

Larry Chartrand identifies another problem with the Court's use of Aboriginal oral evidence. Chartrand criticizes the Supreme Court of Canada in *Delgamuukw* because after stating that Aboriginal laws must be considered, the Court falls short of placing such laws on equal interpretative footing as the common law: "Instead, indigenous laws . . . were recognized only as 'evidence' of the Aboriginal community's claim. Thus, indigenous laws are submerged within the dominant legal systems general law of 'evidence.'"[76] This treatment by the Supreme Court would suggest that Aboriginal legal traditions will only be recognized in so far as they can find a compatible common law principle to be identified with. This poses serious problems for claims of sovereignty or self-government.[77] The way in which Aboriginal people are hampered in sharing their voice in the determination of their rights is a critical flaw in the protections which should be afforded by Aboriginal rights. This is because: "The power to define our own experience is essential to the survival of oppressed and colonized peoples."[78]

Defining one's experience in a legal context would certainly involve being able to provide evidence. In the current relationship, Aboriginal peoples' laws are consistently being interpreted in ways that deny them any independent power. For instance, Aboriginal "perspective" is only used to support the standard of colonialism which the court has chosen to adopt.[79] The courts have taken to their role in the colonial machinery by favouring the voice of non-Aboriginal "expert" witnesses and scholars. It is difficult to receive Aboriginal voice if Aboriginal evidence is not given equal weight by the Court.[80] This illustrates two problems with the Court's treat-

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75. For an examination of how these enfranchisement policies fit into the colonizer's practice of defining Aboriginal peoples, see D'Arcy Vermette, "Colonialism and the Process of Defining Aboriginal People" (2008) 31 Dal. L.J. 211. See also Tracey Lindberg, *Critical Indigenous Legal Theory* (LL.D. Thesis, University of Ottawa, 2007) [unpublished].

76. Chartrand, *supra* note 6 at 81, n. 202.

77. See Asch and Macklem, *supra* note 11 at 503 ("The judicial recognition of the inherent nature of aboriginal rights thus occurred in the context of a tacit acceptance of the sovereign authority of the Canadian state over its indigenous population. As a result, the vision of First Nations sovereignty and native forms of self-government generated by an inherent theory of aboriginal right remained outside the purview of Canadian law").

78. Monture-Angus, *supra* note 11 at 111.

79. Turpel, *supra* note 51 at 34.

80. For a discussion of *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672, 137 D.L.R. (4th) 528 and *R. v. Gladstone*, [1996] 2 S.C.R. 723, 137 D.L.R. (4th) 648, see Barsh and Henderson, "Naïve" *supra* note 11 at 1003 ("It should be noted that the testimony at both trials was given by academic experts, rather than by Aboriginal people. . . ."). In reference to *Sparrow*, *supra* note 45, see Monture-Angus, *supra* note 11 at 91 ("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 just about any individual living in the Musqueam community. The standard to which courts hold Aboriginal people accountable regarding cultural facts is unacceptable").

ment of Aboriginal testimony. First, as discussed earlier, despite guidance from the Supreme Court of Canada in *Delgamuukw* on the importance of treating oral histories and traditions as valid sources of evidence, the Supreme Court itself has not responded. The mistreatment of Aboriginal evidence in *Delgamuukw* is also reflected in *Mitchell* by McLachlin C.J., who cautions: "There is a boundary that must not be crossed between a sensitive application and a complete abandonment of the rules of evidence."[81] McLachlin reminds us that many aspects of oral histories are "tangential to the judicial process."[82] Ironically, all of these elements can be found in judicial decisions: "[T]hey do not convey 'historical' truth, contain elements that may be classified as mythology, lack precise detail, embody material tangential to the judicial process, or are confined to the community whose history is being recounted."[83] And McLachlin provides two grounds upon which Aboriginal oral histories will meet the "test of usefulness."[84] One, if they offer evidence that is not found elsewhere, such as in historical documents. In the presence of written records, oral histories apparently serve no evidentiary purpose. This is not surprising, as Mildon notes that "[t]hroughout the history of colonialism . . ." the distinction between orality and literacy "has been used to maintain and ingrain the hierarchical relationship between the colonizer and the colonized."[85] Two, oral histories can be used to provide an Aboriginal perspective on the claimed right.[86]

The second problem with the Court's treatment of Aboriginal testimony is an inability of the courts to cross the divide in the cultures and histories between the colonizer and Aboriginal people. Colonization and the legal process operate in a way that is resistant to inclusion of Aboriginal voice.[87] To a certain extent, the inability of courts to properly receive Aboriginal voice might be a reflection of restrictions inherent in Canadian courts and law: "[N]o matter how sympathetic the judges may be and how willing they are to take account of Aboriginal perspectives . . . [t]o a large extent, their hands are tied by the role they are obliged to play."[88] This obligation

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81. *Mitchell v. M.N.R.*, 2001 SCC 33, [2001] 1 S.C.R. 911 at para. 39, 199 D.L.R. (4th) 385 [*Mitchell* cited to S.C.R.].
82. *Ibid.* at para. 34.
83. *Ibid.* For similar tangential aspects that can be found in court process see Drew Mildon, "A Bad Connection: First Nations Oral Histories in the Canadian Courts" in Renée Hulan & Renate Eigenbrod eds., *Aboriginal Oral Traditions: Theory, Practice, Ethics* (Winnipeg: Fernwood Publishing, 2008) 79 at 94.
84. *Ibid.* at para. 32.
85. Mildon, *ibid.* at 80.
86. *Mitchell*, *supra* note 81 at para. 32.
87. Mildon, *supra* note 83 at 81 ("That 'truths' are absolute, knowable, and 'out there' waiting to be revealed lies at the very heart of our legal system; what judges do, in effect, is largely dependent on the continuance of this belief. . . . If our courts are to show true hospitality to 'the aboriginal perspective' they may need to question the assumptions that underlie their own processes").
88. Lori Ann Roness & Kent McNeil, "Legalizing Oral History: Proving Aboriginal Claims in Canadian Courts" (2000) 39:3 Journal of the West 66 at 73.

includes maintaining the colonial power structure inherent in Canadian-Aboriginal legal discourse. It is for this reason that the courts still remain violent to Aboriginal people.[89] But the divide in cultures and laws may not be as far as one might imagine, so it is worthwhile exploring whether the Supreme Court has recognized and given weight to compatible Aboriginal laws.

D. Compatibility of Laws

While I assert that the colonial legal system does not reflect Aboriginal traditions, beliefs or values, it could be argued that Canadian law is premised on ideals of justice, fairness, freedom, peace, responsibility and democracy. These are words that might also be used to characterize the Great Law of Peace.[90] While there is commonality in these ideals, they do not reflect the current relations between Aboriginal people and the colonizer. The abstract nature of these ideals means that very opposite approaches can be used to attempt to reach the same goal, with the result being that an apparently liberating reality for some can result in an oppressive reality for others.[91] To say that we share these as common values, with the possible exception of democracy as it is practiced in Canada today, is only to say that we all strive to be decent people and collectively, we strive to be decent peoples. This is not an insignificant point: to hold up the reality of the law against the abstract ideals of justice which it aspires to embrace is the first step in a redemptive process of reform and reinterpretation. However, such a process can only be meaningful for Aboriginal people if they are involved in the creation and interpretation of this process of reform.

John Borrows has also recognized the compatibility between First Nations laws and those of the colonizer.[92] He notes that, after the terminology and categorization that law brings to disputes is removed, Aboriginal and non-Aboriginal sources of law are generally compatible. Such recognition should give hope for the future but makes the lost potential of the present state of Canadian law hard to confront. The absence of Aboriginal law in the decisions of the courts is a reflection of the assumed superiority of Canadian law. The failure of the Supreme Court to incor-

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89. Turpel, *supra* note 51 at 40 ("No court has been honest or reflective enough to acknowledge the colonial character of the regulation of aboriginal life in Canada. Meanwhile, aboriginal peoples have had to endure the violence of a colonial regime which silences aboriginal reality and displays disregard for aboriginal peoples' suffering" [footnotes omitted]).

90. For a discussion of *Kaienerekowa* (Great Law of Peace), see Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, On: Oxford University Press, 1999) at xvi, 63–64, 89, 101–02, 104–05.

91. Freire, *supra* note 19 at 26 (the oppressor is also dehumanized by oppressive action: "Dehumanization, which marks not only those whose humanity has been stolen, but also (though in a different way) those who have stolen it, is a *distortion* of the vocation of becoming more fully human" [emphasis in original]).

92. John Borrows, "With or Without You: First Nations Law (in Canada)" (1995) 41 McGill L. J. 629 at 638 [Borrows, "With or Without You"].

porate Aboriginal laws in its judgments and imbue these laws with interpretative powers is evidence that the legal language and legal structure of the colonizer works to exclude Aboriginal voice, making true reconciliation impossible.

For example, in the *Marshall and Bernard* decision, McLachlin C.J. gave no weight to Aboriginal laws beyond a role as part of the Aboriginal "perspective."[93] Indeed, there appears to be no specific role for Aboriginal laws: "The Court's task in evaluating a claim for an aboriginal right is to examine the pre-sovereignty aboriginal practice and translate that practice, as faithfully and objectively as it can, into a modern legal right."[94] The "modern legal right" is encased in the common law.[95] In the dissenting opinion, Justice LeBel and Justice Fish argued that the Aboriginal perspective should do more than simply operate to select a corresponding common law right: "The aboriginal perspective shapes the very concept of aboriginal title."[96] However, the majority of the Court is still reluctant to challenge the strict application of common law colonialism. But even if Aboriginal laws are used to craft the form of Aboriginal rights, how are these rights to be enforced, applied and further interpreted?

IV. The Contradictions Of Colonialism

As discussed above, I was critical that colonial courts rely on cases that did not include Aboriginal participation. However, there is a problem at times with Aboriginal involvement in the courts, especially in legislative interpretation. For example, Aboriginal people were not involved in the creation of section 91(24) and therefore, allowing Aboriginal input operates on the assumption that Aboriginal people condone their existence as a field of federal jurisdiction or that Aboriginal people condone the tenets of legislative interpretation. This is one of the contradictions which appear when examining colonial relationships. These contradictions illustrate the depth of the colonial experience and the courts' inability to properly bridge the divide.

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93. *R. v. Marshall*; *R. v. Bernard*, 2005 SCC 43, [2005] 2 S.C.R. 220 at para. 47, 225 D.L.R. (4th) 1 [*Marshall and Bernard* cited to S.C.R.] ("we must consider both the common law and the aboriginal perspective").

94. *Ibid.* at para. 48. See also *ibid.* at para. 51 where McLachlin summarizes: "[T]he court must examine the pre-sovereignty aboriginal practice and translate that practice into a modern right. The process begins by examining the nature and extent of the pre-sovereignty aboriginal practice in question. It goes on to seek a corresponding common law right."

95. But see Anna Zalewski, "From *Sparrow* to *Van der Peet*: The Evolution of a Definition of Aboriginal Rights" (1997) 55 U.T. Fac. L. Rev 435 at 452–53. Zalewski criticizes McLachlin's model of translating Aboriginal perspective into common law rights: "merely couching the Aboriginal perspective in the common law takes away the significance of the Aboriginal perspective, and can effectively supplant it; resulting in the unequal treatment of Aboriginal peoples."

96. *Marshall and Bernard*, *supra* note 93 at para. 130, LeBel J. See also *R. v. Naqitarvik* (1986), 69 A.R. 1, 26 C.C.C. (3d) 193 (N.W.T.C.A.) [*Naqitarvik* cited to A.R.] where the Court denies local Aboriginal methods of restorative justice in favour of the punishment of prison. The dissent of Belzil JJ.A. in support of local community justice is particularly encouraging.

A. Statutory Interpretation and Aboriginal Voice in *R. v. Blais*

In *R. v. Blais* the Supreme Court of Canada makes an attempt to incorporate a Métis understanding of identity into its decision.[97] The key question in *Blais* rested on the definition of the word "Indian" in paragraph 13 of Manitoba's *Natural Resource Transfer Agreement*.[98] Mr. Blais asserted that "Métis" fell under the term "Indian" in the *NRTA* and, as such, he had a right to hunt for food. In contemplating the meaning of the term "Indian" in paragraph 13, the Court made several references to the Métis understanding of their identity vis-à-vis Indians. The lower courts found that "the evidence demonstrates the Métis to be independent and proud of their identity separate and apart from the Indians."[99] Of course, using standard rules of interpretation, the Métis understanding of their identity is completely irrelevant to the interpretation of the *NRTA*. The Métis were not involved in the creation of these agreements and, therefore, their political voice was not included in the definition of "Indian." Why then does the Supreme Court now apply Métis notions of independence vis-à-vis Indians to this definitional argument? This approach serves to delegitimize the legal arguments of the oppressed. Such an inappropriate use of Métis history moves the debate from the interpretation of the Constitution and onto the history and intentions of a People who did not write the document in question.

Incorporating Métis voice is contrary to the principles of interpreting statutes. On this point, the Court cites with approval P.A. Côté who wrote: "Any interpretation that divorces legal expression from the context of its enactment may produce absurd results."[100] Métis voice was not contemplated by the Court as one of the considerations for investigating the meaning of paragraph 13 of the *NRTA*. Instead, the Court identified the historical context, the meaning of language used in the *NRTA*, and the objectives and philosophies that underlie the statute. Considering this framework of interpretation, the inclusion of Métis conceptions of identity vis-à-vis Indians is puzzling. Perhaps the Court saw Métis understandings as part of the broader historical context. However, the Court fails to show how this context is relevant to the interpretation of the *NRTA*. Mr. Blais' opinion of the language or objectives of the *NRTA* is relevant to the Court's consideration of how to best interpret the *NRTA*. By

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97. *Blais*, *supra* note 43.

98. *NRTA*, *supra* note 43. Saskatchewan and Alberta had similar agreements. S. 12 of the Saskatchewan and Alberta agreements is the same as s. 13 of the Manitoba agreement. S. 13 of the NRTA states that provincial laws will apply to Indians provided they do not interfere with the Indians continuing right to hunt for food. The NRTA's had the effect of transferring the benefit of and jurisdiction over natural resources from the federal government to the Prairie provinces. See also *Alberta Memorandum of Agreement*, s.12, being schedule 2 of the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26; *Saskatchewan Memorandum of Agreement*, s.12 being Schedule 3 of the *Constitution Act, 1930* (U.K.), 20 & 21 Geo. V., c. 26, s.12.

99. *R. v. Blais*, [1998] 10 W.W.R. 442 at para. 19, 130 Man. R. (2d) 114 (Q.B.).

100. Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Scarborough: Thomson Canada Limited, 2000) at 290, cited in *Blais*, *supra* note 43 at para. 16.

introducing Métis voice at this stage the Court seems to be circumventing its own rules of interpretation. The Court's paradigm of constitutional interpretation looks toward history and, in so doing, sanctions particular voices over others. In the present case, the incorporation of Métis voice runs in contradiction to the rules of interpretation. But the result is that Métis voice is used in an entirely inappropriate context. The Court compounds the problem in *Blais* by failing to respond to Métis voice where it is appropriate.

The Court proceeds to further remove the historical analysis from the context of the enactment by citing evidence from 45 and 60 years prior to the enactment of the *NRTA*. As a result, the Court disregards the wording of another Constitutional document, the *Manitoba Act, 1870*[101]:

> The *Manitoba Act, 1870* used the term "half-breed" to refer to the Métis, and set aside land specifically for their use: *Manitoba Act, 1870*, S.C. 1870, c. 3 s. 31 (reprinted in R.S.C. 1985. App. II, No.8). While s. 31 states that this land is being set aside "towards the extinguishment of the Indian Title to the lands in the Province," this was expressly recognized *at the time* as being an inaccurate description. Sir John A. Macdonald explained in 1885:
>
> Whether they [the Métis] had any right to those lands or not was not so much the question as it was a question of policy to make an arrangement with the inhabitants of the Province . . . 1,400,000 acres would be quite sufficient for the purpose of compensating these men for what was called the extinguishment of the Indian title. That phrase was an incorrect one, for the half-breeds did not allow themselves to be Indians.[102]

The legitimacy of the *Manitoba Act* is essentially replaced by the interpretation given by a politician 15 years after the passing of that *Act*. Further, it must be remembered that the words of Sir John A. Macdonald came during the tensions of 1885 when the Canadian government was actively opposing the Métis in the Northwest.[103] However, in the crafting of the *Manitoba Act*, the use of the phrase "Indian title" was most likely used precisely because the government did recognize a connection between the Métis and Indians. Such wording was adopted by the will of Parliament and it should not be turned on its head by the words of one politician 15 years after the fact.

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101. *Manitoba Act, 1870*, (U.K.), 32 & 33 Vict., c.3, s.31[*Manitoba Act*].

102. *Blais, supra* note 43 at para. 22 where the Court cites Official Report of the Debates of the House of Commons of the Dominion of Canada, vol. 20 (6 July 1885) at 3113 (Sir John A. MacDonald), cited in T.E. Flanagan, "The History of Metis Aboriginal Rights: Politics, Principle and Policy" (1990) 5 C.J.L.S. 71 at 74 [emphasis added].

103. D.N. Sprague, *Canada and the Métis, 1869–1885* (Waterloo: Wilfred Laurier University Press, 1988) at 181–82.

The Métis were actively involved in negotiating the terms of the *Manitoba Act*.[104] Yet, in *Blais*, the Supreme Court ignores the Métis contribution in favour of exclusivity for colonial agency.[105] The Court's selective use of Métis voice is apparent in the following quotation:

> This perceived difference between the Crown's obligations to Indians and its relationship with the Métis was reflected in separate arrangements for the distribution of land. Different legal and political regimes governed the conclusion of Indian treaties and the allocation of Métis scrip. Indian treaties were concluded on a collective basis and entailed collective rights, whereas scrip entitled recipients to individual grants of land. While the history of scrip speculation and devaluation is a sorry chapter in our nation's history, this does not change the fact that scrip was based on fundamentally different assumptions about the nature and origins of the government's relationship with scrip recipients than the assumptions underlying treaties with Indians.[106]

The problem with this type of historical accounting is that it denies the Métis contribution to the creation of the *Manitoba Act*.[107] By denying Métis agency in creating this agreement, the Supreme Court can conveniently abandon the tenets of treaty interpretation. Namely, that "treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indians."[108] The fact that the Métis were negotiating for collective rights did not influence the Court's interpretation of the *Manitoba Act*.[109] Instead, interpretative weight was only given to the final draft of the agreement passed in Parliament. There is little fundamentally different between the negotiation of the *Manitoba Act* and treaties with First Nations.[110] First Nations and Métis both negotiated agreements for the collective good. Both First Nations and Métis were not involved in drafting the written documents. However, Métis participation in the creation and interpretation of the *Manitoba Act*

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104. This involvement is recognized on a plaque outside of the Manitoba Legislature: "[Riel's] leadership inspired the creation of Manitoba as Canada's fifth province . . . . In 1992, the Parliament of Canada and the Legislative Assembly of Manitoba formally recognized Riel's contribution to the development of the Canadian Confederation and his role, and that of the Metis, as founders of Manitoba" (George R.D. Goulet, *The Trial of Louis Riel: Justice and Mercy Denied* (Calgary: Thelwell Publishing, 1999) at 156).

105. The Metis Provisional Government in Manitoba formally accepted the terms of the *Manitoba Act*, which might be indicative of their belief it was a necessary step to conclude negotiations. See George F.G. Stanley, *The Birth of Western Canada: A History of the Riel Rebellions* (Toronto: University of Toronto Press, 1960) at 124.

106. *Blais*, *supra* note 43 at para. 34.

107. See generally Sprague, *supra* note 103; Stanley, *supra* note 105 (overview of the Red River Resistance and the establishment of the *Manitoba Act*).

108. *R. v. Nowegijick*, [1983] 1 S.C.R. 29 at 36, 144 D.L.R. (3d) 193.

109. *Manitoba Act*, *supra* note 101. The collective aspect of the half-breed land grant in s. 31 of the *Manitoba Act* is evident in the requirement that the grant be for the "benefit of the families."

110. See Paul L.A.H. Chartrand, *Manitoba's Métis Settlement Scheme of 1870* (Saskatoon: Native Law Centre, 1991) at 127–37. On several occasions, Louis Riel referred to the *Manitoba Act* as the "Manitoba Treaty." See e.g. Thomas Flanagan, "Louis Riel's Land Claims" (1991) 21 Manitoba History 2 at 10.

was not considered by the Court. How can the Supreme Court assert that it is bringing about reconciliation through section 35(1) if it denies Aboriginal voice in the interpretation of treaties or statutes which Aboriginal peoples were involved in creating?[111] The Court's failure to accurately acknowledge Aboriginal voice makes the actualization of reconciliation impossible. The pledge of achieving reconciliation will remain hollow as long as Aboriginal people and their histories continue to be relegated to the margins. The question before the Court in *Blais* should have been restricted to the history of the *NRTA* which is a document that the Métis were not involved in drafting.

Regardless of the intent, the method in this decision only reinforces the myths used in cultural invasion:

> Cultural invasion, which serves the ends of conquest and the preservation of oppression, always involves a parochial view of reality, a static perception of the world, and the imposition of one world view upon another. It implies the "superiority" of the invader and the "inferiority" of those who are invaded, as well as the imposition of values by the former, who possess the latter and are afraid of losing them.
>
> Cultural invasion further signifies that the ultimate seat of decision regarding the action of those who are invaded lies not with them but with the invaders. And when the power of decision is located outside rather than within the one who should decide, the latter has only the illusion of deciding.[112]

By incorporating Métis identity into the decision, the Court casts the illusion of Métis participation in the decision-making process. All the while, the centre of power and authority has not been altered.

B. Aboriginal Voice and Dichotomy in *Calder*

The Supreme Court has been divided in the past on how to deal with Aboriginal voice. In *Calder* the various treatments of Aboriginal voice can cause confusion for those looking to the Supreme Court for guidance. The contrasting decisions are worthwhile to show that allegiance to the common law can be maintained whether Aboriginal voice is relied upon or not. The judgment of Judson J. in *Calder* focuses almost exclusively on non-Aboriginal actions and voice. His decision undertakes an extensive review of colonial documents. He finds his justification, authority and intent in these documents. Judson J. looks at the Nishga only to serve as an introduction, in places, to the documents that he relies upon. Judson J. rejects the Nishga claim by applying an incredibly low threshold to extinguish any inherent rights that

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111. For an Aboriginal perspective on treaty interpretation and the stark differences with the interpretation offered by the Supreme Court see Christie, "Interpretation" *supra* note 8.

112. Freire, *supra* note 19 at 141.

may have been recognized, thus achieving a result similar to a contingent rights approach. Judson J. avoids strictly adopting a contingent rights approach by relying on the direction of sovereign action, rather than simply asserting that the sovereign must grant rights to Aboriginal people:

> In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy which the Nishga Tribe might have had, when, by legislation, it opened up such lands for settlement, subject to the reserves of land set aside for Indian occupation.[113]

The reasoning of Judson J. allows the sovereign to implicitly extinguish Aboriginal interests by merely directing its eye over Aboriginal people. After that, any Aboriginal title to lands would have to be explicitly set aside by the sovereign. Being unable to find any colonial document that conferred rights upon the Nishga, Judson J. rejected their claim to Aboriginal title.

The reliance of Judson J. on colonial norms is indicated by his starting point, *St. Catherines Milling*.[114] At the outset, Judson J. adopts a precedential case that was void of Aboriginal input. Additionally, the dismissal by Judson J. of Aboriginal objections to colonial actions is worth noting. This dismissal is evident in his review of the McKenna-McBride Commission. The McKenna-McBride Commission of 1913 was established "to settle all differences between the Dominion and the Province of British Columbia respecting Indian lands and Indian affairs generally in the Province."[115] Judson sets out the following results from this Commission:

> The recommendations of the Commission resulted in the establishment of new or confirmation of old Indian reserves in the Nass area. They are over thirty in number. Frank Calder, one of the appellants, says that this was done over Indian objections. Nevertheless, the federal authority did act under its powers under s. 91(24) of the *B.N.A. Act*. It agreed, on behalf of the Indians, with the policy of establishing these reserves.[116]

Thus, in the view of Judson J., the federal government can not only legislate over Aboriginal peoples' lives, but it apparently has the power to speak on Aboriginal peoples' behalf as well.

In contrast to the treatment of Aboriginal voice by Judson J., the reasons of Hall J. gave some weight to the voice of the Aboriginal claimants by reproducing some of the testimony given at trial and statements given at Commissions. For example, Justice Hall quoted Gideon Minesque, of the Nishga, who stated the following at a hearing of the Royal Commission in 1915:

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113. *Calder*, *supra* note 1 at 344.

114. *Ibid.* at 320 where Judson J. writes: "Any Canadian inquiry into the nature of the Indian title must begin with *St. Catherines Milling and Lumber Co. v. The Queen*."

115. *Ibid.* at 336.

116. *Ibid.*

> [W]e have been living here from time immemorial—it has been handed down in legends from the old people and that is what hurts us very much because the white people have come along and taken this land away from us. . . . We have heard that some white men, it must have been in Ottawa; this white man said that they must be dreaming when they say they own the land upon which they live. It is not a dream—we are certain that this land belongs to us. Right up to this day the government never made any treaty, not even to our grandfathers or our great-grandfathers.[117]

The reproduction of testimony by Hall J. illustrated a profound difference in how he and Judson J. viewed Aboriginal authority. In addition, when examining the question of Aboriginal title, Hall J. was unwilling to limit his legal interpretation to specific indicators of title at common law. Hall J. reflected on the following exchange of the Crown attorney in cross-examining Dr. Wilson Duff, an anthropologist:

> Q. Well, now, I was asking you as to what documentary or other evidence there was that justifies you in using the word "ownership." I suggest that that was a concept that was foreign to the Indians of the Nass Agency?
> A. I am an anthropologist, sir, and the kind of evidence with which I work is largely not documentary evidence. It is verbal evidence given by people who didn't produce documents and it is turned into documentary form in anthropological and historical reports and in the reports of various Commissions.
> . . . .
> Q. Well, the basis of any statement about ownership would lie in the fact that the Nishgas had exclusive possession of the area, it was unchallenged, isn't that true?
> A. For the area marked on the map?
>
> Q. Yes.
> A. Yes.
>
> Q. So that anyone has to be careful about what word you apply because of the legal implications and to speak of ownership simply because someone has an unchallenged possession is to confuse two things, would you not agree?
> A. The point I was trying to make . . . was that although their concepts of ownership were not the same as our legal concept of ownership, they nevertheless existed and were recognized and that is the point I was trying to make.
>
> Q. Well, anyway, you are unable to find any documentary evidence in support other than conclusions drawn by anthropologists?
> A. And also verbatim statements by Indians at the various Commissions. . . .[118]

The Crown seemed to be hinging its point in these questions on word play, namely, since Aboriginal people did not have the same understanding of "ownership" of the land, their claim to such ownership could not be recognized by the law.

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117. *Ibid.* at 359.
118. *Ibid.* at 366–68.

Similarly, in an effort to understand whether or not the Nishga owned their land, the trial judge set out various characteristics of ownership in his questions, including specific delineation of the land, exclusive possession, the right to destroy your own land and the ability to pass the land on to one's heirs. In response to the trial judge's line of questions Hall J. wrote:

> In enumerating the *indicia* of ownership, the trial judge overlooked that possession is of itself proof of ownership. *Prima facie*, therefore, the Nishgas are owners of the lands that have been in their possession from time immemorial and, therefore, the burden of establishing that their right has been extinguished rests squarely on the respondent.[119]

Hall J. refutes the trial judge's common law-based test by himself referring to the common law. Granted the principle he used, possession as proof of ownership, is a fairly broad concept. However, Hall J. had an opportunity to recognize that Nishga laws give rise to proof of ownership.[120] Nonetheless, his attempt to not be bound by all the indicia of the common law's conception of ownership is an important step in making the law a more accommodating place for Aboriginal claims, laws and worldview.[121]

The final decision in *Calder* was delivered by Pigeon J., who denied Aboriginal voice through a legal technicality, which he describes in the following way:

> . . . I have to uphold the preliminary objection that the declaration prayed for, being a claim of title against the Crown in the right of the Province of British Columbia, the Court has no jurisdiction to make it in the absence of a fiat of the Lieutenant-Governor of that Province. I am deeply conscious of the hardship involved in holding that the access to the Court for the determination of the plaintiff's claim is barred by sovereign immunity from suit without a fiat. However, I would point out that in the United States, claims in respect of the taking of lands outside the reserves and not covered by any treaty were not held justiciable until legislative provisions had removed the obstacle created by the doctrine of immunity. In Canada, immunity from suit has been removed by legislation at the federal level and in most provinces. However, this has not yet been done in British Columbia.
>
> I would therefore dismiss the appeal and make no order as to costs.[122]

By this reasoning, Aboriginal claims would be barred from entering the colonizer's courts without the express permission of the colonizer. Such a profound example of exclusion can only occur in a context where the power relations between the parties are extremely uneven. As I will discuss below, this power is essential to silencing Aboriginal voice.

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119. *Ibid.* at 375 [emphasis in original].

120. Compare this (*Delgamuukw*, *supra* note 38 at para. 94) with the position of Lamer C.J. on the "adaawk and kungax" oral histories (*Delgamuukw*, *supra* note 38 at para. 94) where he found that such histories are important *evidence* for establishing Aboriginal title. He stopped short of recognizing them as systems of law equal to the common law.

121. Christie, "Colonial", *supra* note 11 (assesses possible models open to the courts in responding to Aboriginal rights).

122. *Calder*, *supra* note 1 at 426–27.

C. Past Precedent and Stagnation of Colonial Legal Thought

Perhaps the Court would produce more equitable results if it referred to some case law of the past for guidance. While I pointed out the problem of using past precedent earlier in this paper, the extent of the problem can be exacerbated by how and what precedent is being used. Mark D. Walters suggests that the tendency of "judges to say that the customs of tribal peoples were 'barbarous,' 'savage,' or 'uncivilized' and incapable of recognition at common law. . ." was "increasingly common" in the nineteenth century.[123] Legal pluralism was seen as impractical because "savage" and "civilized" were separate puzzles whose pieces would not fit together because "the common law is not part savage and part civilized."[124] However, Walters suggests that this tact was a "detour from proper common law principles. . . ."[125] This interpretation is supported by cases such as *Connolly v. Woolrich*[126] and *Amodu Tijani v. The Secretary, Southern Nigeria.*[127] While both come packaged with common law restrictions, they illustrate that more inclusive principles of fairness can be found in prior jurisprudence. While using different precedents may not cure the court of its colonizing ways, it could soften the blow.

In *Connolly,* a Cree woman and Connolly, a non-Aboriginal trader, were married under Cree custom. Later, Connolly married a non-Aboriginal woman. He left his estate to his second wife. Connolly's children from the first marriage challenged the will and, in so doing, put the validity of customary Cree marriages on trial. In *Connolly,* the Court found that Aboriginal laws were not abrogated by English common law. Instead, marriage according to Cree custom is valid in Canadian courts and therefore, the Aboriginal wife was entitled to her share of the community of property created by the marriage. Still, these customary laws were vulnerable to directed colonial legislation: "It is competent; it has been competent during the last hundred years, for the parliament of Great Britain to abrogate those Indian laws, and to substitute others for them. It has not thought proper to do so, and I shall not."[128] It is not

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123. Mark D. Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill L.J. 711 at 721 [Walters, "Golden Thread"].

124. Robinson C.J. in *Dodem Sheldon v. Ramsay* (1852), 9 U.C.Q.B. 105 at 123, cited in *ibid.* at 721, n. 40.

125. Walters, *ibid.*

126. *Connolly v. Woolrich and Johnson et al.* (1867), 17 R.J.R.Q. 75, 1 C.N.L.C. 70 (Que. Sup. Ct.) [*Connolly* cited to R.J.R.Q.], aff'd *Johnstone v. Connolly* (1869), 17 R.J.R.Q. 266, 1 C.N.L.C. 151 (C.A.). For a more recent review of the recognition of Aboriginal laws post-Confederation see *Campbell v. British Columbia (A.G.)*, 2000 BCSC 1123, 189 D.L.R. (4th) 333 at paras. 97–110 [*Campbell*]. For a comparison of British and American protection of Aboriginal customary laws see Walters, *ibid.* at 716–18. See also *Vielle v. Vielle* (1992), 130 A.R. 357, 93 D.L.R. (4th) 318, [1993] 1 C.N.L.R. 165 (Prov. Ct. (Fam. Div.)) (the Alberta Court of Queen's Bench recognized the jurisdiction of the Blackfeet Tribal Court in the Blackfeet Nation in Montana and proceeds to enforce the custody orders made by that court).

127. [1921] 2 A.C. 399 (P.C.) [*Amodu*]

128. *Connolly, supra* note 126 at 138.

a surprise that a court would find such power in the colonial government. As a colonial institution, the court owes ultimate allegiance to its creator. Still, *Connolly* remains a powerful statement on how colonial courts can accept the legal validity of Aboriginal peoples' laws.

In *Amodu* the Privy Council cautioned against seeing Aboriginal title only with colonial blinders on:

> Their Lordships make the preliminary observation that in interpreting the native title to land, not only in Southern Nigeria, but other parts of the British Empire, much caution is essential. There is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely. As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with.[129]

Dickson J. in his judgment in *Guerin v. Canada*[130] referred approvingly to *Amodu*. Indeed, Dickson J. explains the inconsistencies in previous descriptions of Indian title as being a result of "applying a somewhat inappropriate terminology drawn from general property law."[131] Beyond the issue of inappropriate terminology, *Amodu* provides another recognition that the common law does not need to be used to blindly enforce colonial norms. Instead, it can be argued that there is room within the common law for some recognition of Aboriginal laws. But even after the approval of Dickson J., the focus on colonial power emerged in his judgment when he proceeded to characterize the Aboriginal interest as follows:

> 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.[132]

Here, the "nature of the Indians' interest" is wholly encompassed by colonial action. The imposition of colonial rules of inalienability and the colonizer's duties as a fidu-

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129. *Supra* note 127 at 402–03.

130. [1984] 2 S.C.R. 335, 13 D.L.R. 321 [*Guerin* cited to S.C.R.].

131. *Ibid.* at 382.

132. *Ibid.* For a discussion on the various tools of treaty interpretation see Henderson, "*Sui Generis*", *supra* note 10. For an analysis of some of the benefits and challenges of the common law adoption of the principle of "*sui generis*" Aboriginal rights, see John Borrows & Leonard I. Rotman, "The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta. L. Rev. 9 at 28 [Borrows & Rotman] ("[T]he *sui generis* translation of Aboriginal rights at once avoids and reinforces the problem of rendering common law concepts in terms that are inappropriate to Aboriginal systems which have grown up under another law. While *sui generis* definitions forge tools to raise Aboriginal conceptions of rights, this edifice is constructed on common law domain. Thus, while the doctrine may avoid hammering the square pegs of indigenous laws into the round holes of conventional legal categories, its use reinforces the larger common law system with all of its associated improprieties. For Aboriginal people, it may not matter that a few pegs are made to fit, if the territory on which the house is being erected is the wrong one" [footnotes omitted]).

ciary constitutes the "Indians'" interest. The language used by Dickson J. would suggest that he is more aptly describing the *colonizer's* interest in Aboriginal title. That is to say, the colonizer has the exclusive right to obtain Aboriginal title from the previous title holder, and along with that right, the responsibility to act in the best interests of Aboriginal people. Still, the use of broad principles by Dickson J. to characterize the colonizer's interest remains less damaging than the more recent articulation of Aboriginal title by the Supreme Court of Canada.[133]

Disputes between Aboriginal people and the Crown should be directed toward finding just solutions, not merely legal wordplay. The relation between "legal" and "justice" is laid out by Williams:

> The word *legal* has as its root the Latin *lex,* which meant law in a fairly concrete sense, law as we understand it when we refer to written law, codes, systems of obedience. The word *lex* did not include the more abstract, ethical dimension of law which includes not merely consideration of rules but their purposes and effective implementation. The larger meaning was contained in the Latin *jus* from which we derive the word *justice.* This is not an insignificant semantic distinction: the word of law, whether statutory or judge-made, is a subcategory of the underlying social motives and beliefs from which it is born. It is the technical embodiment of attempts to order society according to a consensus of ideals. When a society loses sight of those ideals and grants obeisance to words alone, law becomes sterile and formalistic; lex is applied without jus and is therefore unjust.[134]

Recent Aboriginal jurisprudence reflects such a "sterile" situation. Although, the sterility doesn't come from "obeisance to words alone," it instead comes from obeisance to oppressive colonial traditions. This is the current situation with Canadian Aboriginal rights discourse. *Sparrow* and *Van der Peet* rejected the aim of justice and inserted in its place the formalistic legal norms that we had grown accustomed to prior to 1982.[135] That is to say that modern Aboriginal rights discourse is part of the status quo of the colonial legal order. Williams goes on to note that defining our relationships purely by legal means results in stagnation: "Cultural needs and ideals

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133. See *Delgamuukw*, *supra* note 38 at paras. 128, 154 where the Court asserts that there are "internal" limits to Aboriginal title which prevent Aboriginal people from putting the land to uses which are "irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land." In a fashion typical of colonial logic, the majority and minority decisions of the Court at paras. 165, 202, respectively, assert that the Crown is authorized to act in a myriad of ways which are contrary to Aboriginal title.

134. Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge: Harvard University Press, 1991) at 138–39. See also Alfred, *supra* note 90 at 43, who describes justice as "the process of healing relationships so that each element in creation can live its natural power and fulfil its responsibility."

135. See *Sparrow*, *supra* note 45 at 1106, where the Court ignores Aboriginal participation in the interpretation of s. 35: "The approach to be taken with respect to interpreting the meaning of s. 35(1) is derived from general principles of constitutional interpretation, principles relating to aboriginal rights, and the purposes behind the constitutional provision itself. Here, we will sketch the framework for an interpretation of 'recognized and affirmed' that, in our opinion, gives appropriate weight to the constitutional nature of these words."

change with the momentum of time; the need to redefine our laws in keeping with the spirit of cultural flux is what keeps a society alive and humane."[136] Indeed, when we look to the decisions of the Supreme Court we can see that, instead of turning its eyes to the dynamic present, it reverts back to "pre-contact" to find out what is truly Aboriginal.[137] This approach of looking back also involves incorporating past prejudice embedded in previous legal decisions.[138] While courts have spoken out against overtly prejudicial statements,[139] the Supreme Court has failed to resist incorporating decisions which were exclusive of Aboriginal participation. This action, or lack of action, severely limits Aboriginal peoples' ability to define and redefine themselves. The law denies Aboriginal people the effects of the "momentum of time" by projecting a historic ideal upon their rights.

V. Conclusion: Softening The Edges Of Colonial Law

The colonizer's ability to frame disputes with the colonized within colonial law is a key process in perpetuating the norms of colonialism. This action involves removing disputes from Aboriginal peoples, communities and ways, and into an arena and discourse where the colonizer has a monopoly on the interpretation of Aboriginal peoples' existence. Colonial law provides the colonizer with the ability to exclude and with the exclusive power to interpret. Aboriginal rights discourse shows us that the colonizer can completely dominate the debate. This domination is displayed in the colonizer's ability to create the laws, interpret the laws, and force Aboriginal people into the courts. Aboriginal people must respond to this power by accommodating the courts' language, engaging in a foreign legal system and debating their rights outside of the context of their community. The inability of the courts to receive Aboriginal peoples' histories, laws and worldviews illustrates that the courts remain a wholly inappropriate venue for settling questions of Aboriginal rights.

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136. *Supra* note 134 at 139. In a similar call for reformative thought Asch & Macklem, *supra* note 11 at 512–17, call for a s. 35(1) response based on the "equality of peoples."

137. See *Van der Peet*, *supra* note 13 at para. 44.

138. See Asch & Macklem, *supra* note 11 at 510 ("In our view, the assertion of Canadian sovereignty over aboriginal peoples, as well as the contingent theory of aboriginal right that it generates, ultimately rest on unacceptable notions about the inherent superiority of European nations").

139. See e.g. *R. v. Simon*, [1985] 2 S.C.R. 387 at 399, 71 N.S.R. (2d) 15 at para. 25, where the Court, commenting on the decision of Patterson J. in *Rex v. Syliboy*, [1929] 1 D.L.R. 307, 50 C.C.C. 389 (N.S. Co. Ct.), wrote: "It should be noted that the language used by Patterson J., illustrated in this passage, reflects the biases and prejudices of another era in our history. Such language is no longer acceptable in Canadian law and indeed is inconsistent with a growing sensitivity to native rights in Canada. . . . [H]is conclusions on capacity are not convincing."

The hierarchy upon which the law is based becomes oppressive when it reaches beyond the people beholden to that legal system and assumes jurisdiction over others. Aboriginal people have resisted imposition of colonial law in the past and continue to have objections to the imposition of the Canadian legal system over Aboriginal cultures and communities[140]: "It is precisely because First Nations have their own systems of laws that courts can borrow from them to analogize to Canadian laws."[141] It is these existing systems of laws which demand recognition which they are not receiving in colonial courts. I stated above that the Canadian courts remain a wholly inappropriate venue to settle Aboriginal/Crown disputes. Can I now adopt John Borrows' approach and encourage Canadian courts to receive Aboriginal laws? Wouldn't this mean exposing those laws and ways of knowing to the colonial legal system which is ill-equipped to properly receive them?

Borrows points out that "the Aboriginal source of law is generally not applied because of its perceived incompatibility with, or supposed inferiority within, the legal hierarchy."[142] However, Borrows sees this approach as unnecessary, arguing instead that "[i]t is, therefore, incumbent upon Canadian judges to draw upon First Nations legal sources more often and more explicitly in order to assist them in deciding Aboriginal issues."[143] The courts have, at the very least, recognized a need to be more inclusive. For example, Borrows argues that the words "pre-existing, customary, *sui generis,* un-extinguished and beneficial"[144] have all been used to "illustrate that Canadian law dealing with Aboriginal peoples draws upon First Nations law in giving meaning to the content of Aboriginal rights."[145] I see little tangible evidence that the courts have drawn from Aboriginal laws in creating the content of Aboriginal rights. Indeed, such designations have not resulted in a consistent or meaningful role for Aboriginal law in Aboriginal rights litigation. Even when the court does attempt to reach out to First Nations law, as with cases like *Delgamuukw* and *Marshall and Bernard,* I submit that the attempt is cursory and falls terribly short of the intention embodied in terms like "pre-existing, customary, *sui generis,* un-extinguished and beneficial."

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140. See Henderson, "Inheritances", *supra* note 11 at 18 (in an attempt to reject state imposed criminal process in the Mikmaq Compact of 1752, the Mikmaq restricted the application of colonial law to the civil arena, thereby retracting earlier consent to English criminal law). See also Indian and Northern Affairs Canada, *1752 Peace and Friendship Treaty Between His Majesty the King and the Jean Baptiste Cope* (Transcribed from *R. v. Simon*, Supreme Court of Canada, 1985), Article 8, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/al/hts/tgu/pubs/pft1752/pft1752-eng.asp>. For modern objections to Canadian criminal jurisdiction see *R. v. Kahpeechoose*, [1997] 4 C.N.L.R. 215, S.J. No. 861 (QL); *R. v. Lachance*, [2000] S.J. No. 850 (QL).

141. Borrows, "With or Without You", *supra* note 92 at 662–63 [footnote omitted].

142. *Ibid.* at 633 [footnotes omitted].

143. *Ibid.* at 634.

144. *Ibid.* at 636 [footnotes omitted].

145. *Ibid.* [footnotes omitted].

Considering the current relationship between Aboriginal people and the courts, it is dangerous to push the court too hard to incorporate First Nations law. If Aboriginal people continue to lack the power to control how their laws are incorporated into Canadian law, then incorporation should be undertaken with much trepidation or avoided entirely.

This problem can be exposed by looking at what Aboriginal rights litigation is and is not. Litigation is not, at least in cases where an Aboriginal right is affirmed, a final settlement of the broader issues. In this regard the particulars of litigation are not of vital importance. It could be argued that litigation is merely a means to trigger negotiation. As such it is the negotiated agreement that plays a more meaningful role in settling the broader Crown/Aboriginal dispute. However, litigation does represent a settlement of principles. Aboriginal people do not appear before the colonial courts without impacting rights or negotiations outside the court. The law determines what principles apply and how these principles will be interpreted. The legal particulars of each case are then adopted by the Crown in support of their negotiation strategies. As a result, even when Aboriginal people win they face principles which undermine their position in further negotiation. For example, after the *Sparrow* decision in 1990 the Aboriginal Fisheries Strategy developed shared-management agreements with First Nations.[146] This strategy was highly reliant on the principles set forth in the *Sparrow* decision. Another example can be found after the *Powley* decision in 2003 when the Métis Nation of Ontario and the Ontario Ministry of Natural Resources reached an interim agreement on harvesting in July of 2004. Under the agreement, the Métis Nation of Ontario would issue Harvester's Certificates to its citizens. Holders of the Certificates were not to be charged unless they were violating conservation or safety guidelines.[147] During this same time, the Natural Resources Minister for Ontario insisted that any agreement reached with the Métis must be "consistent with the Supreme Court of Canada's ruling in the Powley decision."[148] While noting that more negotiated agreements are being completed in the

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146. Musqueam Indian Band, "Musqueam Fisheries", online: Musqueam Indian—Band <http://www.musqueam.bc.ca/Fishing.html>. See also Library of Parliament, *The Aboriginal Fisheries and the Sparrow Decision* by Jane Allain & Jean-Denis Fréchette (Ottawa: Parliamentary Information and Research Service, 1993) at Part B4, "The Right to Manage the 1992 Fishing Effort", online: <http://www.parl.gc.ca/information/library/PRBpubs/bp341-e.htm> ("In 1992, some 57 bands in B.C. signed 80 agreements providing for their participation in salmon management and development. In particular, these agreements provided that the aboriginal communities could issue fishing licenses and monitor catches").

147. Métis Nation of Ontario, "Harvesting Policy", online: <http://www.metisnation.org/harvesting/harv_policy/home.html>.

148. Ontario Ministry of Natural Resources, Media Release/Fact Sheet, "Ontario recognizes Métis Nation of Ontario harvest cards" (6 October 2004), online: <http://ogov.newswire.ca/ontario/GPOE/2004/10/06/c8054.html?lmatch=&lang=_e.html>.

shadow of litigation, Kathy Brock points out that, "despite its admonitions to Aboriginal and non-Aboriginal politicians and representatives to negotiate in good faith and find compromises, the judicial decisions have provided limited common ground upon which meaningful political compromise could be found."[149] Indeed, by insisting that the colonial courts set the parameters for further negotiation we are seeing that "judicial reasoning is assuming precedence over political compromises in the development of the dialogue on Aboriginal rights."[150] So, while negotiation is necessary to achieve results on the ground, the Crown needs to remain flexible to ensure that the parameters of those negotiations will reflect Aboriginal legal and cultural contributions as well as those of Canadian law.

Borrows recognizes that power relations are a "daunting" obstacle to presenting Aboriginal peoples' laws to decision-makers in non-Aboriginal cultures.[151] This is evidenced by the care, translation and accommodations that Aboriginal people need to make in order to get Aboriginal content before the courts. Still, Borrows recommends that through access to Aboriginal "legal institutions and texts," Canadian judges can incorporate Aboriginal laws, making a law that is more "truly Canadian" and equitable.[152] However, it is vital that there is a role for Aboriginal peoples beyond being mere donors to the Canadian legal system. Even in this era of section 35(1) protection, Aboriginal rights cases are best characterized as inter-cultural disputes. It does not follow, therefore, that a uni-cultural resolution should lead to a just outcome. Indeed, if we are searching for this shared goal of justice then we must become partners in that journey. This includes respecting Aboriginal laws as equal to colonial laws.[153] No matter how hard it tries to incorporate Aboriginal laws the colonial legal system can never make it there alone. In order to achieve the goals set forth by Borrows, additional direction is needed to overcome the imbalance of power.

One way to address the imbalance of power is to create an Aboriginal Attorney-General.[154] Aboriginal rights are constitutionally protected; however, fed-

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149. Kathy Brock, "One Step Forward . . . . Accommodating Aboriginal Rights in Canada" (Paper presented to the 96th Annual Meeting of the American Political Science Association, Washington, August 31-September 3, 2000), Queen's University School of Policy Studies, Working Paper 5 (August 2000) at 12, online: <http://www.queensu.ca/sps/publications/working_papers/05.pdf>. Brock also explains at 11 that litigation might remain the lesser of evils: "However, given the Canadian policy history of interference with Aboriginal governance and lives, perhaps the courts are the logical alternative until political representatives convince Aboriginal peoples that they will negotiate in good faith."

150. *Ibid.* at 11.

151. Borrows, "With or Without You", *supra* note 92 at 657–58.

152. *Ibid.* at 653–54.

153. See also Mark Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 412–13 as cited in *Van der Peet*, *supra* note 13 at para. 42.

154. James (Sákéj) Youngblood Henderson, "Aboriginal Rights: Aboriginal Attorney General" (2003) 22 Windsor Y.B. Access Just. 265 (QL).

eral and provincial Attorneys-General consistently advocate against expressions of Aboriginal rights.[155] Henderson sees this as inconsistent with the constitutional order, as well as duties owed to Aboriginal people through principles such as fiduciary duty and the "honour of the Crown."[156] Because of this, the ultimate value of creating an advocate for the constitutional rights of Aboriginal peoples is, as Henderson concludes, the affirmation of the "idea of constitutional supremacy and the rule of law."[157] Without such affirmation, there can be little reason to believe "in the possibility and the desirability of both order and justice and in the capacity of law to help achieve them."[158] In addition to participation at the highest levels, such as the role played by an Aboriginal Attorney-General, Aboriginal legal participation is needed at all levels.

The exclusion of Aboriginal voice within colonial law serves notice that Canadian law could benefit from increased Aboriginal participation—as law students, lawyers, scholars and judges. But with much of the section 35(1) legal apparatus already established, what role do Aboriginal legal practitioners and thinkers have in bringing about impactful change in Aboriginal rights discourse? Perhaps the largest gains are to be made outside the courtroom. Aboriginal judges, students, lawyers and scholars can provide insight into how the law can best receive Aboriginal claims and they can emphasize the importance of respecting Aboriginal authority. Supporting Aboriginal inclusion in all aspects of the intellectual, policy and legal institutions of Canada serves to bridge divides between cultures, overcome prejudice and mend economic disadvantage. However, for the reasons set out in this paper, it is difficult to see a near future where Aboriginal legal minds are able to create a space within Canadian law for Aboriginal voice. After all, Canadian law has to be willing to receive that voice.

The failure of the courts to receive Aboriginal voice reflects an underlying prejudice that promotes the superiority of colonial norms over Aboriginal culture. Until Canadian law is willing to recognize that Aboriginal people have rights beyond mere "customs, traditions and practices" which take shape in the authority and responsibility to govern their communities, Aboriginal voice will continue to be stymied by Canadian law. It is the expression of Aboriginal political authority which the courts have effectively eliminated through a reliance on customs and traditions. For example, the Supreme Court of Canada has identified that claims based upon notions of self-government are too broad,[159] that Aboriginal laws are useful only for

155. *Ibid.* at 268.
156. *Ibid.* at 281–82.
157. *Ibid.* at 308.
158. *Ibid.*
159. See *Pamajewon*, *supra* note 63 at paras. 26–27.

evidentiary purposes rather than as effective means to govern those rights identified by the courts,[160] and that the Crown can infringe upon and regulate Aboriginal rights despite the presence of section 35(1).[161]

The limited ability to alter established colonial norms through litigation reminds us that we should seek alternative solutions.[162] While alternatives might have their problems and critics,[163] it is apparent that other solutions need to be pursued in place of the shortcomings of the courts. John Borrows has reminded us of the importance of Aboriginal peoples' involvement in defining their world. He explains that "a truly autonomous body of law which 'bridges the gulf' between First Nations and European legal systems" is necessary for just relations.[164] While the components of the "bridge" are essential to fairness, so too are the builders. Without meaningful Aboriginal involvement the relationship becomes one where Aboriginal peoples' laws are interpreted, defined and enforced for them, rather than by them. Indeed, Chartrand argues for carving out a "political dimension" of Aboriginal rights within which Aboriginal people would decide the particulars of their litigated rights according to their internal laws.[165] As this paper has shown, the law remains rigid to the adoption of either of these recommendations.

Progressing against colonialism will prove extremely daunting in Canadian courts because the courts are not the venue to argue for sovereignty, autonomy, self-government or to put forward an anti-colonial agenda. The reason for this is simple: the law is designed to perpetuate the norms of the majority. Professor Waddams expresses this in terms of "common values" when he writes: "societies share certain values in common. The law manifests the common values of a society, and, at the same time, supplies a system for resolving its conflicts."[166] While Canadian law might be well established to resolve conflicts *within* Canadian society, it is less well equipped for resolving conflicts *between* societies. This is why negotiation, rather than litigation, is so crucial. No matter what the venue of settling Aboriginal rights or claims, either specific or comprehensive, it is important to remain cognizant of the law's role in

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160. See *Delgamuukw*, *supra* note 38 at paras. 93–98, 148–49.

161. See *R. v. Marshall*, [1999] 3 S.C.R. 533 at paras. 24–28, 179 D.L.R. (4th) 193 at 207–09.

162. One example is the Specific Claims Tribunal which was established with negotiation between the Assembly of First Nations and the Government of Canada (*Specific Claims Tribunal Act*, S.C. 2008 (2nd Sess.), c. 22). The agreement is represented in the enacting legislation as well as a political agreement. See also the British Columbia treaty process, Ministry of Aboriginal Relations and Reconciliation, "Treaties and Other Negotiations", online: <http://www.gov.bc.ca/arr/treaty/default.html>.

163. The principles which the governments of Canada and British Columbia adopted for treaty negotiations are criticized in Alfred, *supra* note 90 at 119–28. As well, the legality of the Nishga'a treaty agreement was challenged by several members of the British Columbia provincial legislature in *Campbell*, *supra* note 126.

164. Borrows, "With or Without You", *supra* note 92 at 642.

165. See generally Chartrand, *supra* note 6.

166. S.M. Waddams, *Introduction to the Study of Law* 4th ed. (Scarborough: Thomson Canada Ltd., 1992) at 2.

establishing the values upon which a resolution is built. As Gordon Christie reminds us: "It is the imposition of the European vision to which Aboriginal peoples were, and continue to be, vulnerable."[167] The silencing of Aboriginal voice within Canadian law has prominently demonstrated Aboriginal peoples' vulnerability to European vision. It has been more than 25 years since section 35 Aboriginal rights were introduced. The courts' reliance upon oppressive norms of colonial law and the dispossession of Aboriginal voice leaves little room for optimism that just resolutions can be achieved through litigation of constitutional Aboriginal rights.

But one can be optimistic about lesser goals. The principles which Borrows identified are important reminders that the court is not principally opposed to the reception of Aboriginal voice. Recognizing the need and acting on it are different matters. Overcoming the imposition of colonial norms is another barrier entirely. While this should remain a focus for those concerned with just resolution of Aboriginal/Crown disputes, colonial law is typically resistant to rapid change. The use of Borrows' and Henderson's writings in this conclusion is relevant because of the practical advice they offer and because their critical works have been used by the Supreme Court in the *Sappier* decision.[168] That decision is of importance because it shows the value of critical scholarship, both Aboriginal and non-Aboriginal, and shines a light on the importance of Aboriginal contributions to legal thought. In *Sappier,* critical scholarship was used to help steer the court away from a more restrictive interpretation of the meaning of Aboriginal rights offered in previous case law.[169] Far from a revolutionary decision, *Sappier* merely represents a softening of the edges of colonial law.[170] Without the dedication to Aboriginal rights that would be necessary to undertake recommendations such as Henderson's call for an Aboriginal Attorney-General, we are left with trying to manipulate the edges of colonial legal tests. This is no small matter. While the effect on legal doctrine might appear minimal, the efforts of Aboriginal scholars and legal practitioners are extensive. But the

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167. Christie, "Interpretation", *supra* note 8 at 198.

168. *R. v. Sappier; R. v. Gray,* 2006 SCC 54, [2006] 2 S.C.R. 686, 274 D.L.R. (4th) 75 [*Sappier* cited to S.C.R.].

169. Ibid. at para. 42 where the court cites C.C. Cheng, "Touring the Museum: A Comment on R. v. Van der Peet" (1997), 55 U.T. Fac. L. Rev. 419, and Barsh & Henderson, *supra* note 11. Also at para. 45, the Court cites Borrows & Rotman, *supra* note 132.

170. See *Van der Peet*, *supra* note 13 at para. 79 ("As such, the appellant's claim cannot be characterized as based on an assertion that the Sto:lo's use of the fishery, and the practices, customs and traditions surrounding that use, had the significance of providing the Sto:lo with a moderate livelihood. It must instead be based on the actual practices, customs and traditions related to the fishery, here the custom of exchanging fish for money or other goods"). Compare *Sappier*, *ibid.* at para. 46, where a broader conception of the right is offered: "I have already explained that we must discard the idea that the practice must go to the core of a people's culture. The fact that harvesting wood for domestic uses was undertaken for survival purposes is sufficient, given the evidence adduced at trial, to meet the integral to a distinctive culture threshold" [footnote omitted].

responsibility to decolonize legal thought does not only rest with Aboriginal peoples. Both Aboriginal and non-Aboriginal people must make efforts to establish dynamic relationships to guide us into a prosperous future. Canadian law is not meeting this responsibility.

This conclusion has been crafted, in part, to point the reader toward practical recommendations for the reception of Aboriginal voice by Canadian courts. It is not an unreasonable inquiry to ask: "Where do we go from here?" I could have attempted to meet this challenge by arguing for the modification of rules of evidence which might be more receptive to Aboriginal voice. However, at several points throughout this paper I have stated that the courts remain an inappropriate venue for settling Aboriginal rights. To merely argue for modifications to court processes would disregard the larger argument being put forth. A further problem with adopting such an approach is that it implies that the analysis throughout this paper is not practical. By examining the colonial relationship and encouraging Canadian courts to examine Aboriginal peoples' colonial experiences, meaningful changes can result. This examination would include the court considering its own interpretative monopoly which allows it to be a conduit for the delivery of colonial norms upon Aboriginal lives. Here the courts can undertake an analysis in the spirit of the Supreme Court of the United States in *Worcester:* "It behooves this court, in every case . . . to examine into its jurisdiction with scrutinizing eyes; before it proceeds to the exercise of a power which is controverted."[171] For a court to turn its "scrutinizing eyes" toward its role in the colonial structure would prove an extremely practical step in moving Canadian law towards a post-colonial era. But this alone would not be sufficient. Before meaningful change can occur the court must be truthful about its role in the colonial process. It must recognize its foundation as a colonial institution and, if it is to carry legitimacy with its words, it must acknowledge its role in denying and diminishing Aboriginal voice. Once that is accomplished, a thorough reassessment of how to reconcile Aboriginal and non-Aboriginal interests could include the colonial courts taking on some of the overwhelming burden of finding a path toward Aboriginal voice. Until that time, renewing and reinterpreting colonial analysis in legal scholarship remains an important function for Aboriginal peoples and the broader Canadian legal community.

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171. *Worcester, supra* note 34 at 536. But see *Worcester, supra* note 34 at 540, where the Court reverted back to a standard legislative analysis of its own jurisdiction: "It is, then, we think, too clear for controversy, that the act of Congress by which this court is constituted, has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the subjects to be brought before them."