PRINCIPLED COMPROMISE OR COMPROMISED PRINCIPLES?

Aboriginal Land Claims and the Problem of Liberal Property

by

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"There's no money in political theory."

Abstract

This thesis examines the nature of Canadian Aboriginal conceptions of property as they have been articulated in the period which began with the federal government's infamous White Paper of 1969 and continues to the present day. It is argued that there is a common and identifiable pan-Aboriginal notion of property in the writings by and about Aboriginals of this period which is fundamentally incompatible with Western liberal notions of property. The improbability that such a commonality should exist, and the issues which spring from the fact that it does, are also discussed. Despite this incompatibility, both conceptions are currently being combined within the same institutions as the relationship of Aboriginals to the Canadian State is renegotiated. How such a seemingly impossible combination has become acceptable to those involved is the primary focus of this thesis.

The characteristics of Aboriginal and Western property are delineated and contrasted. Each is then placed in the context of the general worldview from which it arises, demonstrating that competing notions of property are part of whole systems of belief and understanding which, if taken as seriously as they are offered in the texts which explain them, must be seen as irreconcilable. This irreconcilability is further illustrated through a critique of pluralist models of political organization from the standpoint that such models can succeed only by understating the essential difference between Aboriginal and non-Aboriginal understandings.

The fact that apparently irreconcilable notions are being combined in new institutional arrangements is explained by examining the context of the combination. The power relations which determine the nature of the struggle for Aboriginal empowerment — which is to say, the gross power imbalances between Aboriginal peoples and the various branches of the non-Aboriginal Canadian State —are shown to necessitate, shape, and circumscribe the discourse of Aboriginal property. The result is a discourse which appears intractable in theory and unrealizable in practice. The study concludes with comments on the current struggle, and about the nature of discourse in general.

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Chapter 1

Introduction

Recent encounters between Aboriginal peoples and the Canadian State have produced a series of outcomes which would have been unthinkable at the time of Confederation; these outcomes would have been unthinkable, for that matter, thirty years ago when Prime Minister Trudeau declared that "We can't recognize aboriginal rights because no society can be built on historical "might-have-beens."[1] The Royal Commission on Aboriginal Peoples, releasing its *Final Report* in 1996, renounced most of the history of Aboriginal-State relations, admitting a history of unjust domination and displacement of Aboriginals, and proposing a new relationship based on recognition of Aboriginals' status as "the original inhabitants and caretakers of this land," and "respect for the unique rights and status of First Peoples"[2]; this new relationship will be defined largely through a treaty negotiation process which will see the return of what is now Crown land to its original Aboriginal owners. The Supreme Court decision in the case of *Delgamuukw v. R.*, handed down in December of 1997, has affirmed the validity of oral history as evidence and set down a precise definition of Aboriginal title for use in future land claims cases.[3] Finally, the Nisga'a Treaty between the Nisga'a of the Nass Valley in British Columbia, the B.C. provincial government, and the federal government has been passed in British Columbia and awaits the approval of the federal legislature.

While these outcomes provide a concrete solution to an impending crisis (in which years of government neglect had led to impatience, insurgence, and violence), they

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[1] Fleras, 1992, 119

[2] RCAP, *Highlights from the Report of the Royal Commission on Aboriginal Peoples*, 1996, Ch. 1

present an even greater *problem* at the level of ideas: how can Aboriginal conceptions of property be reconciled with those which continue to dominate in this country--that is, the regime of what is referred to variously as Western or liberal ownership? The RCAP and the Nisga'a Treaty speak a language of compromise, but how is this language derived from the apparently antithetical and absolutist notions of property which are held by the contractors? Aboriginal land claims are based on arguments of inherent right and prior occupancy; Aboriginal title is generally described as being *communal*; the very idea of private property is said to be alien to Aboriginal philosophy and antithetical to its values.[4] Liberal property--to generalize once again--as it is found in the new world relies on an equally intractable insistence on Crown sovereignty. It is *individually* held; indeed, it exists for the convenience of the individual, as does the state built to protect it. On the surface it appears that the notions are fundamentally incompatible. Yet, the Nisga'a agreement will create a third order of government with communal title based on inherent, Creator-given right that is *subject to the ultimate legislative sovereignty and "underlying title" to the land*[5] *held by a liberal government which exists for the protection of individually-held private property*. Two fundamentally opposed systems of property and their attendant states will co-exist within the same political space.

In this thesis I examine the nature of Aboriginal title (title in the broad sense of the word, rather than the narrow definition given it by the Supreme Court) and its problematic relationship to the liberal conception of property, with the ultimate goal of explaining how it is possible that the two can co-exist within the same state. I argue that the answer lies in an examination of the complex power relations between Aboriginals

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[3] Culhane, 1998: 360-367
[4] Lyons, 1992: 9

and the Canadian state. This is an important issue, I believe, because it calls into question the actual value of ideas in concrete political struggles: do they serve a purpose beyond mere strategic rhetoric?

My project is a purely textual exploration; it is the writings which have emerged in recent years, in connection with the recent organization and activism of First Nations in the definition of Aboriginal rights which interest me primarily. I realize that this approach presents some difficulties: Aboriginal history, tradition, and justice are contained in an oral tradition which is only imperfectly mediated by the written word (to say nothing of the fact that to read it in English is to introduce difficulties of translation from language to language in addition to those present medium to medium). It is my hope that an awareness of these difficulties has prevented gross misunderstandings on my part; indeed, the difficulties themselves play a role in illuminating the gulf between cultures and the way in which it makes the reconciliation of conceptions of property problematic.

Furthermore, I will not be making extensive comparisons between Canada and other countries in which Aboriginal title is an issue. An examination of such a complex issue across two or more countries in a study of this size would be hopelessly superficial. In any event, since the prime characteristic of the struggle in Canada—the essential imbalance of power in favour of non-Aboriginal institutions and ideas—is the same in all of these countries (Australia, New Zealand, the United States), it would be shocking to discover that conclusions reached in the Canadian case would not obtain in near-identical fashion in these places as well. Particular attention is given to the First Nations of British Columbia; as most of that province is unceded land, not covered by treaty, it is

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[5] Culhane, 1998:349.

there that the most significant political changes are occurring, and it is in reference to this place that the discourse on Aboriginal title occurs in its most expansive form.

The obvious first task in this project is a definition and comparison of Aboriginal and liberal conceptions of property. It appears that there has been no attempt to compare the two systems of ideas in a serious, systematic way (although some authors have applied Lockean arguments to Aboriginal patterns of land use to demonstrate either that these standards were applied dishonestly or incorrectly,[6] or to demonstrate that the theory is tailor-made to preclude the possibility of native title[7]). The Aboriginal vision appears to be uniform and largely agreed-upon by those articulating it; it is grounded almost invariably in natural law and essentialist arguments. It is uniform because it has been defined for the purposes of the recent struggle for recognition of Aboriginal title by those involved in the struggle "on the ground"--by tribal chiefs, Indian lawyers, and white judges and anthropologists. A liberal definition of property is less uniform or concentrated (having been formed in the context of *several* different political struggles), but in spite of its sprawling nature, it has certain definite and consistent characteristics that are fundamentally opposed to those of Aboriginal theory.

Second, I examine this opposition in the context of the greater gulf between Aboriginal and Western philosophies in general by examining the difference which Aboriginal authors and their Western colleagues assert with respect to Aboriginal aetiology, political theory, and justice. In Chapter Three I reassert the incompatibility of an Aboriginal worldview with that of liberalism, demonstrating this by examining how

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[6] See, for instance, Flanagan, 1989, and Henderson, 1985

[7] Tully, 1994.

various pluralist models have failed in their attempt to bridge the gulf in particular areas, with respect to international relations and political organization.

Having established that Aboriginal and liberal property concepts are incompatible on a theoretical level, the fourth chapter is devoted to an examination of how they are being combined in the current, concrete political struggle. I argue that there is a basic inequality of power between First Nations and the settler culture and State which has structured the struggle and the discourse arising from it.

I conclude my study by summarizing my findings about the way in which Aboriginal property theory has been altered, circumscribed, and subsumed by liberal property theory in Canada, ending with some speculations on the following questions: has the concrete political struggle trivialized the ideas which informed it? What does this imply about the actual importance of ideas in political life?

Chapter 2

Aboriginal and Liberal Property Theory: Definitions, Comparisons, Problems

I. Aboriginal Property Theory

> In your legal system, how will you deal with the idea that the Chiefs own the land?
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> --Delgam Uukw, in the Supreme Court of British Columbia, May 11, 1987[8]

> Indigenous peoples ourselves have to believe in that story first of all, and practice that belief. We must keep in mind, as we tell our story, that we are of one mind, we are unified.
>
> --Sharon Venne, "Understanding Treaty 6"[9]

> they *had* an attitude towards land, and this attitude was an inseparable part of their attitude towards political and cultural integrity as well as economic and social prosperity. If we do not understand the arbitrariness, the political and cultural artifice, of the British frame, we are unlikely to acknowledge, much less to appreciate, the Aboriginal frame--no less arbitrary, of course.
>
> --J. Edward Chamberlin, "Culture and Anarchy in Indian Country"[10]

The very idea of identifying an Aboriginal theory of property should, from the outset, constitute an offence to our sensibilities as social scientists in the present age. It requires us first to accept that there is such a thing as aboriginality: to accept that this is more than a Eurocentric category into which we arbitrarily place divergent groups of people according to criteria which identify them as holding in common the attribute of not being like us. We must accept that there is substance to the idea of aboriginality, and that the substance is significant enough that we can generalize broadly about similarities between hundreds of distinct nations without concern that the existence of different nations implies in itself that there are equally significant differences between nations which we

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[8]Wa, 1992: 8.

[9]Venne, 1997: 206.

[10]Chamberlin, 1997: 31.

identify as 'aboriginal.' These generalizations must be acceptable to the people they describe in order to be valid; otherwise we can be sure that we have committed an act of racism in positing the existence of a transnational aboriginality. Achieving this acceptance should appear an impossible task.

Second, we must assume that this aboriginality contains, or rather, is constituted in part by, a common theory of property. In assuming that we can find *one* theory, we have assumed that that theory is ahistorical: our own experience with Western theory tells us that the notions of property are historical: they evolve or at least generate and replace each other in the course of historical events. A monolithic and thus ahistorical theory of property is a logical impossibility.

Interestingly enough, these caveats appear unnecessary when we examine the literature produced about and by Aboriginal peoples in Canada over the last few decades with respect to issues of land and self-determination. Aboriginals themselves have no qualms about writing from a common Aboriginal experience, whether it is in the course of applying "traditional Native philosophies" (which are, evidently, identical to the point that nation-to-nation distinctions do not warrant mention) to the explanation of Aboriginal rights[11], or of documenting the monolithic experience of "Indian Nations throughout Turtle Island" (i.e. North America) with colonialism.[12] Distinctions are downplayed; wars between Aboriginal nations are characterized as mere disputes over boundaries, always resolved, ultimately, in a lawful manner.[13]

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[11]Lyons, Oren, 1985: 19.

[12]Robinson, 1985: xiii.

[13]Erasmus, 1992: 4.

As far as the question of a single theory of property is concerned, what we discover when we examine a heterogeneity of sources--tribal chiefs, professors of Native studies, Aboriginal and non-Aboriginal lawyers, anthropologists, and political scientists--is a startling homogeneity of opinion, even of language, in the articulation of the Aboriginal view. To illustrate, I will provide some sample passages. These will appear repetitive in nature, but this repetition proves my point. Consider, first, the words of Oren Lyons, Iroquois and professor of American studies:

> What are aboriginal rights? They are the law of the Creator. That is why we are here; he put us in this land. He did not put the white people here; he put us here with our families, and by that I mean the bears, the deer, and the other animals. . . We aboriginal people believe that no individual or group owns the land, that the land was given to us collectively by the Creator to use, not to own, and that we have a sacred obligation to protect the land and use its resources wisely. For the Europeans, the idea that land can be owned by a person or persons and exploited for profit is basic to the system.[14]

Next, Donald Purich, a professor in the Native Law Centre at the University of Saskatchewan:

> As far as native people are concerned they were the owners of the Americas when the Europeans arrived. Native notions of land centered on the community; it was for use by the community and was a source of food and support. Their concept of land was holistic; the land was not to be exploited but rather was given by the Great Spirit to be used not only by man but also by the animals and plants. . . Individual ownership of land was unknown, as were such concepts as selling, leasing or mortgaging land.[15]

Identical notions are evident in the speeches of the Hereditary Chiefs and counsel in *Delgamuukw v. British Columbia*:

> We hold these lands by the best of all titles. We have received them as the gift of the God of Heaven to our forefathers, and we believe that we cannot be deprived of them by anything short of direct injustice. . . Long ago my ancestors encountered the spirit of that land and accepted the responsibility to care for it. In

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[14]Lyons, Oren, 1985: 19, 34.

[15]Purich, 1986: 39

> return, the land has fed the House members and those whom the Chiefs permitted to harvest its resources. Those who have obeyed the laws of respect and balance have prospered there.[16]

Finally, the same themes recur in the findings of the Royal Commission on Aboriginal Peoples, as in this excerpt:

> The Creator gave us life, inherent rights and laws which governed our relationship with nations and all peoples in the spirit of coexistence. . . We as original caretakers, not owners of this great country now called Canada, never gave up our rights to govern ourselves and thus are sovereign nations. Our ancestors did not sign a real estate deal, as you cannot give away something you do not own.[17]

What should first strike the reader is the extent to which these paragraphs appear identical. While it is the case that these samples have been deliberately chosen (each presents the common themes in a relatively brief manner), their selection was not painstaking: not only are passages such as these plentiful in the literature, they are orthodoxy. Wherever the origin of Aboriginal title is discussed, it is constructed in this manner. It seems to be the case that a sort of standard 'line' has emerged with respect to this origin and nature. Of course, this does not mean that the contents of that 'line' are not actually believed, both by those responsible for articulating Aboriginal beliefs to outsiders and by the majority of Aboriginal peoples; it does suggest, however, that a process of editing is going on with respect to this articulation. A consensus exists as to what should be said and how; a precise doctrine has emerged.

The doctrinal character of this literature ceases to surprise when we recall that theory never occurs in a political vacuum; the literature itself exists as a tool in a concrete political struggle. It responds to and challenges the dominant Euro-Canadian discourse, borrowing from that discourse while attempting to shift it with its own terms and ideas.

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[16]Wa, 1992: 12, 91.

It even responds to particular utterances--particular court decisions, for example. This discursive process leaves in its wake profound consequences for Aboriginal culture; I will examine these more closely in Chapter 4. For now it will suffice to illustrate the extent to which the process is at work in the passages above.

To begin, there is much to recommend an argument for title based upon divine right, as is the Aboriginal argument above. Consider the exchange between Nisga'a Chief James Gosnell and Prime Minister Trudeau at the 1983 First Ministers' Conference:

> Gosnell: It has always been our belief that God gave us the land. . . and we say that no one can take our title away except He who gave it to us to begin with. Trudeau: Going back to the Creator doesn't really help very much. So He gave you title, but you know, did He draw on the land where your mountains stopped and somebody else's began. . . ?[18]

Trudeau's obvious frustration reveals the extent to which "going back to the Creator" does in fact help. Of course, he is right in pointing out that divine right doesn't settle disputes over boundaries; in fact, Gosnell's tribe is involved to this day in disputes with its Aboriginal neighbours over the extent to which its claims to land in the Nass Valley have been exaggerated.[19] At the level of general principle, however, divine right offers a defence of title that is untouchable by reason: it cannot be disproved any more than it can be proven, and it carries a much greater normative weight than many of the Western claims against it do (the now-legally bankrupt and morally empty claim of *terra nullius*, which will be discussed later, for example). Furthermore, it is unassailable from within the discourse of multiculturalism which is predominant in Canada (which Trudeau

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[17]Chief Harold Turner, quoted in the *Report of the Royal Commission on Aboriginal Peoples*, vol. 2: 436.
[18]Smith, 1995, 150.

himself was instrumental in building), since the cultural relativism it enshrines puts Aboriginal spirituality on a level field with Christianity (at least in the abstract) and protects it from the simple positivist disdain for the unprovable that is evident in Trudeau's words. That the RCAP report takes the divine right argument at face value so often[20] is proof of the extent to which this line of argument can be taken in a culture of tolerance and spiritual nostalgia such as ours.

To begin, it is worth noting that the notion of Aboriginal title, despite its seemingly eternal roots, is of relatively recent vintage. Peter Kulchyski notes of Aboriginal rights in general that "Aboriginal peoples, of course, did not go around talking about their rights. . . . when others came and established--or forced--dominance, it became relevant to speak of rights as a way of negotiating relations."[21] The same can be said of Aboriginal title. Assuming that belief in the origin of Aboriginal property as described above was as universal among First Nations before colonialism as it appears to be now, there would be no need of discussion: that God had given them the land and had defined a specific relation between them and the land would have been self-evident. Conflicts over boundaries do not call the nature of property into question when that nature is universally accepted.

Since Aboriginal peoples are now required to define the content of Aboriginal property theory to the satisfaction of Euro-Canadians, it makes sense that they should define it relative to Euro-Canadian conceptions of property. Consider again Lyons' words: "aboriginal people believe that *no individual or group owns the land*, that the land

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[19]Sterritt, in *BC Studies*, no. 120: 73.

[20]See, for instance, the *Report* of the RCAP at vol. 2: 436-7, 448; vol. 4: 109, 137.

[21]Kulchyski, 1994, quoted in Culhane, 1998: 47.

was given to us collectively by the Creator to use, *not to own*" (emphasis added). Aboriginal property is defined as not belonging to individuals for them to own. For Purich, it was given to man by God "not to be exploited." What we are given, then, is a definition of Aboriginal title which is essentially negative: it is not individually held, so it is collective; it is not to be used for purely human, egoistic uses, it is to be conserved in accordance with divine will. In other words, it is property conceived and constructed in a manner diametrically opposed to Euro-Canadian fashion, which I will examine next.

II. Liberal Property Theory

> Pleased as we are with the possession, we seem afraid to look back to the means by which it was acquired, as if fearful of some defect in our title; . . . not caring to reflect that. . . there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land. . .[22]

Unlike the literature put forth by Aboriginals and their allies in the debate of recent years, the responses of the Canadian state have had little to say about the first principles which constitute the theory of property to which they claim allegiance. Whereas much Aboriginal literature has a standard set of postulates, almost an aphorism, from which all specific arguments stem, the Euro-Canadian position is most often unstated. I said earlier of pre-contact Aboriginal societies that the nature and origin of property was generally accepted, and that it has been only the recent conflict of Aboriginals with the Canadian state which has brought about their articulation. The liberal literature which underwrites the ethos of the Canadian state seems to have adopted the opposite trajectory: in the period of contact and colonization it is very concerned with establishing grounds for Western property in the New World, while in recent years emphasis has shifted to questions of justice in distribution rather than justice in acquisition. James Tully suggests

a plausible reason for the direction Western theory has taken when comparing the foundational writings of Locke and Kant with the more recent elaborations of Nozick and Rawls:

> Whereas Locke and Kant at least presented arguments to justify the elimination of Aboriginal claims to aboriginal property and government, contemporary theorists tend to take the conclusion of their arguments for granted as the original starting point of a theory, without even raising the question of Aboriginal property.[23]

Contemporary theorists write at a time when liberal capitalism is well established in North America. The Aboriginal movement of the last few decades poses a challenge to Western property in that it (the movement) weakens Western claims to certain Aboriginal lands, but it does not seek to eliminate capitalism altogether or to justify aggressive territorial expansion and the assimilation of the descendants of white settlers. Consequently, contemporary liberals have only to consider the possibility of accommodating Aboriginal title within liberal institutions and thought; Robert Nozick, for instance, implies the possibility of redress regarding the theft of Aboriginal lands insofar as that theft violates liberal principles of just acquisition, as derived from Locke's state-of-nature theory.[24] What they do not have to do, however, is account for the actual origin and content of liberal property, which is so widely accepted and firmly entrenched as a concept for us that it requires little comment for most. So secure is liberal property in the mind of Robert Nozick that he is comfortable eliminating the Lockean labour theory of value from his account of just property relations[25] and leaves nothing in its place to justify the existence of property. Locke and Kant, by contrast, find themselves in

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[22]Blackstone, quoted in Christman, 1994: 65

[23]Tully, 1994: 168.

[24]See Nozick, 1974, Ch. 7.

the position of having to meet the challenge of an alternative form of property embodied by Aboriginal societies, and to justify the aggressive incursion of Western states into Aboriginal territory. They must define Western property in opposition to Aboriginal property, and find grounds for the greater legitimacy of the former.

In two closely related essays (which, because they deal with essentially the same material and argument, I wi l treat as a single line of inquiry) James Tully explains how this challenge was approached by John Locke, whose *Two Treatises of Government*, in the course of dealing with Aboriginal property, established the "arguments, contrasts, and assumptions that were widely accepted and taken for granted by later theorists, providing the unexamined conventions of many Western theories of property."[26] Tully makes two significant claims: first, that "Locke defines political society in such a way that Amerindian government does not qualify as a legitimate form of political society," and second, that "Locke defines property in such a way that Amerindian customary land use is not a legitimate type of property."[27] Before I summarize Tully's argument, I would like to examine some passages directly from the *Second Treatise* which are more relevant for establishing the content of Locke's property theory than those which Tully provides.

Locke begins his exegesis of property with presuppositions which are, on a superficial level, strikingly similar to those of Purich and Lyons:

> God, who hath given the World to Men in common, hath also given them reason to make use of it to the best advantage of Life, and convenience. The Earth, and all that is therein, is given to Men for the Support and Comfort of their being. And though all the Fruits it naturally produces, and Beasts it feeds, belong to Mankind in common, as they are produced by the spontaneous hand of Nature;

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[25]Nozick, 1974: 175.

[26]Tully, 1994: 158.

[27]Tully, in Rogers, 1994: 167.

> and no body has originally a private Dominion, exclusive of the rest of Mankind, in any of them, as they are in their natural state. . .[28]

Here, as in the Aboriginal accounts of this century, we find the world gifted to Man in accordance with divine will; also familiar is the insistence that the land was given to Man in common, with no exclusive title given to any individual against others. What is different about this gift is the lack of 'strings attached': whereas in contemporary Aboriginal accounts the land is given on the understanding that it is to be protected and conserved by its human tenants, the world in this instance evidently exists solely for human convenience. Note the primacy of the human in this scheme: according to Lyons' account, humans are to share the land "with our families," by which he means "the bears, the deer and the other animals."[29] Locke's world is strictly hierarchical, by contrast: the "Beasts" which the earth feeds are given to Man as property for his "convenience." If Locke seems sympathetic to Aboriginal cosmology at the beginning of this passage in the sense that he can comprehend land held by humanity in common, it is clear that he takes pains to disassociate himself from them immediately thereafter. He completes the above sentence by revealing that he cannot understand property without interjecting the individual into the equation:

> . . . yet being given for the use of Men, there must of necessity be a means *to appropriate* them some way or other before they can be of any use, or at all beneficial to any particular Man. The Fruit, or Venison, which nourishes the wild *Indian*, who knows no Inclosure, and is still a Tenant in common, must be his, and so his, i.e. a part of him, that another can no longer have any right to it, before it can do him any good for the support of Life.[30]

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[28]Locke, 1996: 286.

[29]Lyons, Oren, 1985: 19.

[30]Locke, 1996: 286. Emphasis in original.

Locke is unable to reconcile the existence of common ownership with individual use: at some point for him, the object must become the exclusive, inalienable property of the individual for it to be of use. From this proposition Locke develops his labour theory of value:

> . . . every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.[31]

Locke has thus laid out the precise character of liberal property: it is individually held because it originates in the individual, from the individual's property in his own person. It is also held to the exclusion of all others. These passages together allow us to address the argument of Tully that Locke has characterized liberal property to the exclusion of Aboriginal conceptions. According to Tully, Locke advances four sets of arguments with respect to property and Aboriginals. The first set asserts that "Aboriginal peoples are in a pre-political "state of nature"; this state is regarded as an early stage in a universal process of historical development which culminates in the development of European-style institutions.[32] We see evidence of this view in the second passage above, in which Locke describes the "wild Indian." Second, as the above narrative demonstrates, Locke only grants a right of property to what is directly touched by human labour; since the Indian (note that we are now speaking of Aboriginals only as individuals) "knows no

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[31] Locke, 1996: 287-8. Emphasis in original.

Inclosure", i.e. does not engage in actual cultivation of the land--cultivation being "defined here in terms of European agriculture and industry"[33]--he is not entitled to the land itself, but only what he kills or gathers from it--the "Fruits and Venison." This means that land can justly be expropriated from Aboriginals by Europeans, since the former "have no rights to the land and thus no reason to complain."[34] Third, Locke implies that Aboriginals stand to gain from adopting Western private property, as it provides more material gain via more intensive use of the land;[35] this is not actually an argument for the justice of private property, only for the utility of private property. Fourth, because Aboriginal government uses direct democracy rather than devolving a significant amount of power to liberal representative institutions, it does not fit the criteria for "political societies;" since Aboriginal society doesn't have a recognizable system of government (within the narrow definition Locke provides), it can't have recognizable system of property, which relies on liberal institutions. Aboriginals are thus not members of nations but are individuals in the state of nature, and can be treated as such by European powers.[36] By defining liberal property in opposition to Aboriginal property, Locke laid the foundation for a credible (if we share Locke's biases) justification for the exercise of European Crown sovereignty in the New World. He also set the basic tenets of liberal property--individual, exclusive ownership--for later liberal thinkers who, whatever else they might have changed, would leave these basic tenets intact.

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[32]Tully, 1994: 159.
[33]Ibid.: 160.
[34]Ibid.: 159-160.
[35]Ibid.: 160.
[36]Ibid.: 162.

I have dealt with the Lockean version of liberal property at length because it is illustrative of the way in which liberal property has come into being as the other side of a mutually-constituting dialogue between civilizations; it is in this sense just as reactionary as contemporary Aboriginal writings, and was so centuries before. Again, that these systems are essentially defined in conscious opposition to one another does not mean that their precepts are not believed by their authors and, to some extent at least, by the societies for whom they purport to speak--it does not mean that, as cultural values, they aren't actually *there*. It simply means that the process of definition is careful and selective, and that the very different Aboriginal and liberal conceptions of property arise out of a dialectic in which the participants were and are interested in discovering difference.

There are, of course, many other derivations of Western property apart from Locke's derivation from labour; for brevity's sake I will not examine each of these with respect to their dialectical relationship with respect to Aboriginal property; I will, instead, look at a few to demonstrate the way in which they contribute to a core of suppositions contained in liberal property theory which is fundamentally opposed to that of Aboriginal theory.

As I mentioned earlier, Tully cites Kant as Locke's co-author of foundational principles of liberal property theory; he does so in the context of establishing how Kant, like Locke, facilitated the elimination of Aboriginal property in practice by eliminating Aboriginal property in theory. Tully summarizes features of Kant's theory that are quite similar to Locke's in this regard:

> . . . the systems of property and government of Aboriginal peoples are misrecognized and dismissed, and European institutions are set in their place and justified as the baseline for moral and political theory and practice. The uncivilized hunting and gathering peoples of America, Kant argues, lack secure

> property because they have not made the transition to the life of agriculture. They have, in their pre-political state of nature, what he calls the "lawless freedom of hunting, fishing, and herding," which, of "all forms of life. . . . is without doubt most contrary to a civilized constitution."[37]

This position makes European institutions (including private property) ripe for export to the New world, since, as Kant argues, "humanity can achieve full moral progress and freedom only after commerce and republican constitutions are spread around the world."[38]

What Tully does not summarize, as he does for Locke, is exactly how Kant explains liberal property. Alan Carter provides a useful summary of Kant's theory of property, Kant being for Carter the most significant thinker to advance arguments for property from the principle of "first occupancy."[39] The existence of property begins with the necessity of making individual freedom possible; since "in order for individuals to act freely, it is necessary that they be able to subject external objects to their wills," it follows that there must be a mechanism for making objects in the world objects of individual will.[40] According to Kant, "(a)n object of my will, however, is something of which I have the physical capacity to make use, a use that is within my power;" however, in order to conceive of something as the object of *my* will, it is necessary that "every object of my will be viewed and treated as something that has the objective possibility of being yours or mine."[41] I take this to mean simply that I can't conceive of something as *mine* unless there is the possibility that it could have belonged to someone else instead. Moreover, in

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[37]Ibid. 167.
[38]Ibid. 166.
[39]Carter, 1989: 79.
[40]Ibid. 81.
[41]Kant, quoted in Carter, 1989: 81.

order for individual freedom to be meaningful, it must be the case that my right to that object be exclusive and inviolable:

> Let us suppose that it were absolutely not within my power *de jure* to make use of this thing, that is, that such power would not be consistent with the freedom of everyone in accordance with a universal law. In that case, freedom would be robbing itself of the use of its will in relation to an object of the same will inasmuch as it would be placing usable objects outside all possibility of being used.[42]

I cannot make use of a thing if it is not within my power, i.e. if that power is in some way circumscribed by the claims of others. Carter is not very clear as to how first occupancy becomes the means by which the individual acquires title to a thing--he himself notes that first-occupancy arguments rarely give reasons for this.[43] However, on the basis of the principles provided, it seems to follow this line of reasoning: (1) Universal individual freedom is primary. (2) Individual freedom can only be realized if external objects can become objects of individual will, i.e. individual use (freedom is meaningless unless it is in some way manifested in the world outside of the individual's head). (3) Individual use is only meaningful if it is exclusive of all others and inviolable; loss of freedom of use means individual freedom in general is diminished. (4) Since ownership of an object exists only because it is necessary for individual freedom (i.e. there is no other qualification for acquisition, such as labour, to account for how a particular object becomes object of a particular will), and since ownership is inviolable, the only logical restriction on the acquisition of an object is that it not already belong, inviolably, to someone else. Thus, (5) first occupancy of an object (i.e. land) is sufficient to confer property rights to it.

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[42]Ibid., 81-2.

[43]Carter, 1989: 85-6.

Notwithstanding the conceptual thinness of this derivation, its basic tenets are compatible with those which Locke advances. The starting point for Locke was individuals operating independent of each other in a hypothetical state of nature; for Kant, the property begins with the goal of individual freedom. For Locke, survival requires that property be removed from the common and granted to the individual; for Kant, the actualization of freedom requires the same. And just as the title granted the individual as a consequence of his her labour is exclusive and inviolable, so too is that which results from first occupancy.

Carter's inquiry into the various derivations of liberal property reveals that the suppositions change little for the theorists who come after Locke and Kant. Consider the example of Mill, whom Carter credits with the derivation of property from 'desert':

> The institution of property, when limited to its essential elements, consists in the recognition, in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it. The foundation of the whole is the right of producers to what they themselves have produced.[44]

The only significant modification from Locke is that here "it is not so much that the product is the desert of the producer, rather that no one else deserves it."[45] Even the derivation from human nature posited by Hume, in which the simplistic individualism of Locke's state of nature is shed for the realization that property "arises socially . . . through the necessity of social interaction between individuals," still ends up concluding, via our nature as inherently selfish individuals, that property as an institution arises from

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[44] J.S. Mill, quoted in Carter, 1989: 26.

[45] Lawrence C. Becker, in Carter, 1989: 29.

our "desire to have the pleasure derived from possessions to be as secure as those derived from the mind."[46]

Contemporary theorists, as Tully observes above, proceed from these suppositions unselfconsciously, whether they follow "some variation of a Lockean state of nature and individual self-ownership," as does Robert Nozick, or "start from a more Kantian premise, such as John Rawls's *A Theory of Justice*."[47] Nozick believes that "'there is no social entity,' there are only different individual people,"[48] that "whoever makes something is entitled to it," and redistribution *per se* violates the rights of individuals."[49] Rawls, even though he waters down the strength of property in the person by positing that we don't deserve our natural talents, opening the door to the sort of redistribution with which Nozick takes issue, still counts among "basic liberties" a "freedom of the person along with the right to hold (personal) property;"[50] he still posits individual property held to the exclusion of others (although he does make a somewhat unclear distinction between personal and productive property, i.e. land[51]).

I began this section by stating that the literature of the Canadian state has been largely silent in elaborating the exact content of its notion of property. I have also set out some of the liberal conceptions which have been taken to be influential in the formation of contemporary Western thought on property. It remains to connect these conceptions to the somewhat elusive stance of the Canadian state. The difficulty in doing so is that law in its actuality doesn't reflect the theories which inform it in a simple or even an

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[46]Carter, 1989: 114-5

[47]Tully, 1994: 168.

[48]Nozick, in Drury, 1979: 363

[49]Drury, 1979: 367.

[50]Rawls, quoted in Munzer, 1990: 235.

internally consistent way. While it is a truism among liberal authors that liberal institutions and law exist to protect private property, the vulnerability of property to those institutions suggests they don't do a very good job of it. As Joan Williams notes of American law, "(n)uisance precludes an owner from using his land in a way that unreasonably interferes with the rights of his neighbor" and "the property rights enthusiast on public radio probably does not even have the right to burn dead leaves in his own back yard."[52] Thomas C. Grey distinguishes between the commonly held view of property--Williams calls this the "intuitive image"[53]--and the more complex one which is at work in law:

> In the English-speaking countries today, the conception of property held by the specialist (the lawyer or economist) is quite different from that held by the ordinary person. Most people, including most specialists in their unprofessional moments, conceive of property as things that are owned by persons. To own property is to have exclusive control of something--to be able to use it as one wishes, to sell it, give it away, leave it idle, or destroy it. Legal restraints on the free use of one's property are conceived as departures from an ideal conception of full ownership.[54]

Grey argues that the view that is in actual legal practice is that of property as a set of relations between people as opposed to a relation of people to things.[55] This, while it helps to explain why property rights are not as absolute as they would be in Nozick's preferred scheme, does not actually change much of what we have established about liberal property. While property may define relations between people, it is still defining *what individuals can do with things;* it is still concerned with giving individuals as much

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[51]Munzer, 1990: 235

[52]Williams, 1995: 5-6.

[53] Ibid.: 2.

[54]Grey, quoted in Williams, 1995: 4.

[55]Williams, 1995: 2.

exclusive control over things as can be justified under real world conditions which are always more complicated than theoretical models. Joan Williams makes the case that American property law actually adheres to the intuitive image-- which stems from the tradition of liberal writings we have reviewed above--to a much greater extent than is generally thought;[56] examined critically, the sophisticated 'bundle of rights' begins to look very much like the natural law vision of property. I suggest that the intuitive image of property which Grey describes above, and the liberal individualist ethos that informs it, are just as influential on the Canadian state, and that this influence pervades its approach to claims regarding Aboriginal title. Take, for instance, the so-called *Calder* case, in which the Nisga'a tribe of British Columbia first sought legal recognition of title to land in the Nass Valley. In what was to be the first positive response of the courts to claims in this area, and the decision which started the negotiation process which would eventually yield the Nisga'a Treaty, the B.C. Supreme Court derived this first test for Aboriginal title. Dara Culhane quotes from the court record:

> The Court: I want to discuss with you the short descriptive concept of your modern ownership of land in British Columbia, and I am going to suggest to you three characteristics (1) specific delineation of the land, we understand is the lot. . . . (2) exclusive possession against the whole world, including your own family. Your own family, you know that, you want to keep them off or kick them off and one can do so; (3) to keep the fruits of the barter or to leave it or to have your heirs inherit it, which is the concept of wills. . . . the right to destroy it at your own whim. . . the right to destroy at whim, set fire to your own house. . . would the tribe permit that?[57]

Culhane explains in memorable fashion the implications of using these criteria to evaluate the sophistication of Nisga'a property law relative to that of Britain:

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[56] Ibid.: 2.

[57] Culhane, 1998: 79-80

> Interpreted from this perspective, Justice Gould's ruling can be read as defining Euro-Canadian property law, and presumably the more highly evolved cultural values reflected in that law as: individually owning land, building fences around it and kicking your family off it, and burning down your house on a whim.[58]

It is worth noting, also, the degree to which Gould's criteria suit the "ideal conception" of property that Grey ascribes to legal professionals only in their "unprofessional moments." In point of fact, the history of court decisions with respect to Aboriginal land claims in recent years has always been one concerned with divining the relation of Aboriginals to the land--to the relation of the people to the *thing*, rather than the relations between peoples. How else can we explain the court's constant preoccupation with how Aboriginals intend to use the land?[59]

Second, there is the doctrine of Crown sovereignty, which justifies the initial seizure of land in British Columbia from its Aboriginal owners. B.C. is unique in that it was taken almost entirely without legal surrender: few treaties were negotiated with the Aboriginal residents; the land was simply taken over by white settlers. The doctrine itself entails no explicit theory of property; it merely states that the British Crown is entitled to sovereignty over land which is *terra nullius* (i.e. unoccupied); no actual justification for why it should be possible to claim the land by decree is given, and the Kantian justification from first occupancy doesn't seem applicable, since the Crown is not an actual individual exercising his freedom against other individuals. The motivation behind the application of this doctrine in British Columbia reveals an implicit theory of property:

> Of course, Britain never had colonized and never would colonize an uninhabited land. Therefore, the doctrine of discovery occupation settlement based in the

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[58]Ibid. 81.

[59]Even in the most progressive of recent decisions, the Supreme Court verdict in the Delgamuukw v. R., the court was insistent that Aboriginal lands not be used "in a manner that is irreconcilable with the nature of the claimant's attachment to those lands", Ibid. 364.

> notion of *terra nullius* was never concretely applied "on the ground." Rather, already inhabited nations were simply legally *deemed to be uninhabited* if the people were not Christian, not agricultural, not commercial, not "sufficiently evolved" or simply in the way. In British Columbia, the doctrine of *terra nullius* has historically legitimized the colonial government's failure to enter into treaties with First Nations.[60]

The historical justification for the disregard of Aboriginal property and the establishment of Western property in British Columbia is none other than that provided by Locke's theory, with its "wild Indians" who had no right to the land itself because they didn't cultivate it in a way recognized by English prejudices. This would be largely irrelevant today (to the extent that few accept Locke's theory in its entirety, as this doctrine does) were it not for the fact that the legal fiction of Crown sovereignty--the "phantasmic apparition of an ethereal sovereign hovering over the land"[61]--continues to play a role in the recent struggle: in the first round of the *Delgamuukw* case it was argued by the Crown that Aboriginal title, if it had existed, was lawfully extinguished by the declaration of Crown sovereignty.[62] On appeal, Aboriginal title was redefined by the Supreme Court to "reconcile the prior presence of aboriginal peoples with the assertion of Crown sovereignty."

Having differentiated Aboriginal and "Euro-Canadian" property theory, some observations come to mind. The first is that there is an arbitrary element to each in their choice of unit of focus. Aboriginal theory seems to move directly from the granting of the land to Aboriginal peoples by divine will to the assertion that the land is to be held collectively. There is no logical connection between propositions, in this case--no way to

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[60]Ibid., 48.
[61]Ibid., 154.
[62]Ibid., 152.

get to "we" from "He."[63] The notion of guardianship of the land which inevitably appears with these first two propositions does not bridge the logic gap: the necessity of living in harmony does not preclude the possibility of the individual living in harmony with land that he / she owns privately (indeed, liberal economics with its narrative of the 'tragedy of the commons' suggests that this is the only possible way to realize a respectful relationship with the land[64]). To be fair, if the religious origin of property is to be taken seriously, as a respect for cultural difference demands, this becomes a non-issue--if God *tells* you the land is to be held in common, you are unlikely to ask for logical grounds. Conversely, liberal property theory unfailingly and unquestioningly begins with the individual, whether it is the individual living in the state of nature, the individual realizing his / her own freedom, or the individual who, while inseparable from society even in the theoretical manner of Locke or Nozick, is nevertheless driven by the dictates of his / her individual psychology as a matter of human nature.

There are also specific points of intractability in each system of thought. The spiritual origin of Aboriginal property, for example, leaves no room for compromise with respect to the land: the insistence that "you cannot give away something you do not own" means not only that the Creator's land cannot be ceded to whites, but that no claim of outsiders to the land can be tolerated: such a claim would be an affront to divine will, and a contradiction of fundamental Aboriginal belief. While the religious argument for liberal

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[63] Or "She" or "It", as the case may be.

[64] Alan Carter explains: "The tragedy of the commons concerns what befalls a group of villagers who use a communally owned pasture to graze their cattle on. Each member of the village reasons that if he or she were to increase the number of his or her cattle grazing on the commons, then he or she would benefit as a result. Consequently, too many cattle are put on the commons and it is destroyed through overgrazing. The problem appears to be that when anyone sees everyone else increasing the number of their cattle, then he or she has to do so too. That person's cattle are going to become more undernourished in any case, because the commons is becoming overgrazed. But the owner would encourage the maximum number of

property has largely disappeared over time, there is in the doctrine of Crown sovereignty a similarly absolute claim in Euro-Canadian theory. This doctrine is just as non-rational (in the sense that it cannot be derived from reason) as any religious doctrine: it exists because it is said to exist, and belief in it is as much a matter of blind faith, in the absence of empirical proof. It is invested with god-like powers, such as the ability to alienate historic rights to land by simple decree. It is adhered to by legal reason with a dogmatism worthy of the most fanatical religious following: observe the fact that even though courts now admit that British Columbia was not *terra nullius* at the time of contact, as it would have to have been to substantiate a claim of Crown sovereignty, the Crown retains its "underlying title" to the land in negotiated settlements (such as the Nisga'a Treaty, which will be examined later), and in the most progressive legal pronouncements (such as the Supreme Court verdict in *Delgamuukw*).

My point is that there is no means for reconciling opposing sets of arbitrarily chosen postulates and uncritically accepted doctrines. People who *truly* believe they have a collective relationship with and responsibility to the land should not be able to share it with individuals who believe it is meant for their individual ownership and convenience, any more than people who believe the land has been given them by God should be able to accept that foreigners can claim it by mere legal decree. It should not be possible for both sides to be content to accept that the Crown can retain underlying title to land which is Aboriginal by the will of God; one side must regard the other as fundamentally wrong in its beliefs and the actions which stem from them, and there is no room for tolerance of such wrong where one's homeland is at stake. As I will demonstrate in the next section,

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cattle to be grazed without being destroyed, because this would maximize his or her income. Hence, private property appears to be the most efficient solution to this problem." Carter, 1989: 68.

these beliefs belong to whole sets of beliefs. In the following chapter I will argue that if these sets of beliefs are as different as they are made out to be by those who explain them, than the enormity of this difference should make any sort of meaningful dialogue an impossibility.

III. The Bigger Picture: An Aboriginal Worldview

> The limits of my language mean the limits of my world
>
> --Evans-Pritchard[65]

> The beginning of an explanation of why certain criteria are taken to be rational in some societies is that they *are* rational. And since this has to enter into our explanation we cannot explain social behaviour independently of our own norms of rationality
>
> --Alasdair MacIntyre[66]

> The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation
>
> --Assembly of First Nations Conference
> December, 1980[67]

I concluded the previous section by examining the very different presuppositions about property held by Aboriginal and Euro-Canadian societies. In this section I will briefly outline the various other ways in which Aboriginal non-Aboriginal difference has been asserted in recent literature.

A common theme in the assertion of Aboriginal difference is the extent to which Aboriginal languages diverge from their European counterparts; this difference is significant because if we accept that language structures the content of consciousness then we must accept that Aboriginal consciousness is also fundamentally different from

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[65]Evans-Pritchard, quoted in Winch: 90.

[66]MacIntyre, quoted in Ibid.: 95

[67]quoted in Asch, 1984.

European (at least inasmuch as English can be said to be representative of European consciousness). As with property, we should be surprised and sceptical to discover the existence of a single 'Aboriginal reality' captured in 'Aboriginal language,' since historically there have been as many Aboriginal languages as nations to speak them. If we take seriously the claim that language structures reality for the speaker, we should conclude that even relatively minor differences between linguistic communities signify minor *but not insignificant* differences in the perception of reality; if the differences between Ojibway and English are vast enough to produce gross misunderstandings, the difference between the Micmac and Nisga'a languages should still be significant enough to merit comment, as these groups would have been just as isolated from one another as any one Aboriginal language was from English in pre-contact times. And yet, as with property, this is apparently not the problem which common sense makes it out to be. Contemporary authors such as Rupert Ross are just as comfortable generalizing about Aboriginal language as they are about Aboriginal justice or Aboriginal government, and even those Aboriginal authors who begin by discussing their particular languages are willing to speak of "Aboriginal consciousness."[68]

Rupert Ross summarizes some of the commonplace distinctions made between Aboriginal and English. The most profound of these is the tendency of the former to focus on verbs while the latter is noun-oriented. Ross illustrates:

> The differences between Aboriginal and non-Aboriginal understandings can be expressed in terms of Einstein's famous equation, $E=MC^2$. It appears that the English language, with all its nouns, focuses primarily on the *mass* side, on all the "things-out-there," on the collection of water molecules sitting in the shape of a wave. The spotlight of Aboriginal languages, on the other hand, shines primarily on the *energy* side of Einstein's equation, on all the "patterns-and-changes" that

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[68]Henderson, 1998: 103

> exist between and among things-out-there. These are the forces that have not only built the wave-shape we presently see, but are also already shaping different water molecules into new forms for the next moment, and the next after that.[69]

The bald assertion of this comparison is that it is possible, even likely, for an Aboriginal and an Anglo to both observe the same phenomenon but to each 'see' something totally different. How, then, are they supposed to discuss the phenomenon in a meaningful way, let alone come to agreement on its significance or implications? Ross continues, quoting Youngblood Henderson:

> [In] the Sun Dance, the one thing they always instruct is never, when you get into the Sun Dance the last day, never say a word in English, or think an English thought. People who speak English and enter this realm come back deranged. So when you enter this realm, whatever you do, don't speak nouns.[70]

It would be hard to find a stronger statement of the incompatability of languages than the equation of the other's language with *derangement*.

A less strident and more common strategy is to note the extent to which Western prejudices are absent from Aboriginal languages and thought. Boldt and Long, for instance, note that the concept of sovereignty, with its attendant notions of hierarchy and a ruling entity, is foreign to traditional Aboriginal society.[71] Sharon Venne claims that the phrase "cede, surrender and forever give up title to the lands" was meaningless to the Elders of tribes covered under Treaty 6 because "these words do not exist in their languages";[72] variations of this claim appear in much of the literature surrounding existing treaties. Claims such as these have the benefit of opening old agreements to new (and for Aboriginals, fairer) interpretation. They also have the effect of dichotomizing

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[69]Ross, 1996: 119

[70]Henderson, quoted in Ibid.: 119

[71]Boldt and Long, 1984

Aboriginal and European value systems. Leroy Little Bear, for instance, derives from English, Blackfoot and Cree linguistic categories--and their attendant values--a long list of ways in which Aboriginal values are antithetical to those of English speakers. Here is an abridged version of the list:

> The underlying premises of white society can be articulated as follows:
>
> > God created humans in His own image and gave them dominion over everything.
> > Individuals are more important than the group. Nations exist to protect and provide for individuals.
> > Property is individually ownable, including land.
> > Social order is hierarchical.
>
> The underlying foundations of Indian Metis culture can be stated as follows:
>
> > The Creator made everybody, as equals, including humans, animals, plants, and inorganic life.
> > The group is more important than the individual.
> > All land and resources belong to the group.[73]

From postulates such as these, Henderson is able to place 'white' and Aboriginal societies into two opposed realities:

> White society can be characterized as "linear and singular". . . . A linear view implies a number of things. . . In terms of judgments, good is preferred over bad, saint over sinner, faster over slower, bigger over smaller, and newer over older. The singular nature of a line leads to values that imply only one answer, one true way, and so on. Hierarchical orders are the result of a line in a vertical position. The consequences are values that prefer higher over lower, the leader over a commoner. . . A linear / singular worldview leads towards specialist and product orientatation. . . In contrast to white society's linear / singular worldview, the Indian and Metis worldviews can be characterized as cyclical / holistic, generalist, and process oriented. . . The holistic view leads to an implicit assumption that everything is interrelated. Interrelatedness leads to an implicit idea of equality among all creation. . . When a circle is viewed as a whole, implicit convictions arise that, in the case of a society, the whole or the group is more important than a part or the individual.[74]

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[72]Venne, 1997: 192-3

[73]Little Bear, 1994: 188

Len Sawatsky provides a list similar to Henderson's with respect to European and Aboriginal values concerning justice (again, the list is abridged here):[75]

European Retributive	Aboriginal
Crime defined as violation of the state	No word for crime but recognition of injury, harm, conflicts and disputes
Adversarial relationships and process are normative	Consensus of elders chiefs to advise on steps to take towards establishing harmony
Imposition of pain to punish and deter prevent	Holding parties in conflict accountable to each other in context of family, community and Mother Earth
Encouragement of competitive individualistic values	Encouragement of spirituality, self-esteem collective identity

A few observations come to mind with respect to lists such as these. First, they seem to arise out of thin air in that no particular authority is cited for each specific claim. This seems remarkable considering how sweeping and thus open to dispute the characterizations often are (many Euro-Canadians would shy away from Henderson's strong articulation of religious principles as fundamental to our society, for instance). The second is that they tend to admit of no middle ground: on the one hand is community and responsibility, on the other is the self-interested individual. The articulation of Aboriginality in these cases follows the process which I described in the previous chapter, in that it is interested in discovering difference and thus is constructed in

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[74]Ibid : 184-6.

opposition to a perceived 'Westerness.' As Sawatsky's list demonstrates, the characterization of Western values is often pejorative. Whereas European justice is about "imposition" and "pain," Aboriginal justice is about "Mother Earth," "family," "community." Sharon Venne demonstrates the extreme use of this type of terminology when she contrasts 'white man' and Aboriginal Elders: whereas white man has abandoned his promises (with respect to the conditions of Treaty 6) because he is "killing himself" and is "never satisfied," Elders always tell the truth, "for they believe they are governed by a universal principle to do so. It is a part of their spirituality."[75] The Aboriginal is spiritual and truthful; the European is neither.

Setting aside the pejorative element, it is worth pausing to appreciate the weight of the differences Henderson exposes by separating Aboriginal and European societies into completely separate worldviews. I have already dealt with the differences which relate to land tenure, although I omitted the distinction regarding the nature of what Henderson calls "inorganic life." The notion that inanimate matter possesses spirit and is equal to humankind in Creation places a burden upon Aboriginal use of resources that does not exist for Europeans; this of course is what Aboriginal scholars refer to when they discuss their guardianship of the land. It does not mean that the land cannot be put to use (after all, organic life is used for human survival despite its equality with human life). It does mean that the possibility of a non-Aboriginal and an Aboriginal understanding an object in the same way disappears, since it is impossible for a non-Aboriginal to comprehend that inanimate objects are in some way living; (s)he can at best imagine it, but never believe it, since it offends the operational principles of his / her language and science if

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[75]Sawatsky, 1992 92-3

there are no such things as things. Rupert Ross illustrates this quandary in an amusing fashion:

> There are two different worlds emerging here. There is the world I am learning about, where people will consider someone crazy if, for instance, he *denies* his relationship with rocks, and there is my own world, where we will call him crazy as soon as he *does* start talking to them![77]

Second, the space between the proposition that "nations exist to protect and provide for individuals" and that "the group is more important than the individual" is the space between poles (a fact which contemporary solutions to Aboriginal claims forget too readily, as I will demonstrate later): the tendency of these poles to repel has been responsible in this century for dividing the world into the two most powerful ideological and political empires it has ever known. It would be crude to equate Aboriginal ontology with communism, and I am not doing so here. (Oren Lyons claims that what separates indigenous political systems from communism is that the latter employs centralized decision making and lacks spirituality. He distinguishes indigenous systems from capitalism on the same grounds.[78]) My point is simply that this difference makes it very difficult (and often impossible) for otherwise-similar people to get along, without even entering colonialism and racism into the equation, as we must do when trying to reconcile Aboriginal and Western liberal ideas.

The logical corollary to the vast difference asserted in the literature regarding Aboriginal title and rights is that different worldviews must necessarily yield different forms of political organization, since "how a government is structured and how it

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[76]Venne, 1997: 204-6

[77]Ross, 1996: 67, emph. in original

[78]Lyons, 1992: 11

operates cannot be disassociated from paradigms that arise from philosophy, norms, and the environment;" government evolves out of these paradigms and norms[79] and cannot be maintained in violation of these (except, temporarily, by extreme force). Aboriginal nations, if they are to exist as nations, must have political structures which distribute power, administer justice, and govern property relations in a manner consistent with the Aboriginal worldview. Any compromise in these structures is a betrayal of the values and beliefs which the structures are meant to embody and protect. Aboriginal authors (and sympathetic non-Aboriginals) demonstrate how different from our own structures Aboriginal government and justice must be. As with descriptions of Aboriginal property, these structures are defined relative to Western concepts:

> The above philosophical differences results [sic] in a government for white society that is hierarchically structured, where power is divided among several units, and is operated according to 'the rule of law,' with a belief that everything other-than-human is for the benefit of humans. In contrast, aboriginal governments are horizontally structured, where power is shared by the whole, law is applied contextually, and balance and harmony are taken into consideration with all creation.[80]

The 'horizontal structure' to which Little Bear refers appears, at first glance, to resemble anarchy more than government; by definition, government must entail some organizational hierarchy, for the purpose of co-ordination. Indeed there is a hierarchy of sorts, in that there are chiefs, councils, Elders, and so on; what is meant by 'horizontal' is that the power of these officials is attenuated by two main principles. The first is consensus: decisions aren't made unless agreed to by all, on the assumption that those excluded by any non-consensual decision "are just going to lie back and wait their chance to get even." On issues where agreement is impossible, decisions are postponed until

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[79]Little Bear, 1994 184

conditions change to make consensus possible.[81] The second principle, although it is not understood as such by Aboriginal authors, appears something akin to the "rule of law" which Little Bear criticizes above. Aboriginal authors refer variously to the predominance of spirituality or custom in decision-making. Lyons explains that "as chiefs we are told that our first and most important duty is to see that the spiritual ceremonies are carried out. Without the ceremonies, one does not have a basis on which to conduct government for the welfare of the people."[82] Boldt and Long approach this point historically:

> In place of personal authority, hierarchical power relationships, and a ruling entity, the organizing and regulating force for group order and endeavour in traditional Indian society was *custom* and *tradition*. Put another way, Indians invested their customs and traditions with the authority and power to govern their behaviour. . . . Customary authority protected individuals from self-serving, capricious, and coercive exercise of power by contemporaries.[83]

Consensus and custom together form the basis of claims to the superiority of Aboriginal political systems over those of Western extraction; Tom Porter, for instance, asserts that "Traditional Indian government is foolproof because it is based on integrity, justice, and real democracy."[84] Claims such as these fall only slightly short of ascribing to Aboriginals a superior human nature to that of Europeans.

Consensus is clearly out of place in the Canadian political structure (Lyons describes it in explicit contrast to voting[85]); Canadian pluralism and the party system are involved to an extent in consensus building but this never approaches unanimity. It is less clear

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[80]Ibid., 188.
[81]Lyons, 1992, 5.
[82]Ibid., 5.
[83]Boldt, 1984, 543, emph. in original.
[84]Porter, 1992, 21.
[85]Lyons, 1992, 5.

how customary rule differs from rule of law (Boldt and Long in fact refer to it as comparable to Western "procedural authority"[86]), as Little Bear claims. The fact that he juxtaposes rule of law with the contextual nature of Aboriginal decision-making indicates that he is taking it to task for its abstract nature--a common claim about Aboriginal consciousness is that it does not contain abstractions to the extent that European consciousness does. Indeed, there is something terribly abstract about the notion that the opinions of people we will never meet and who could never have anticipated our immediate situation should have ultimate control over how we react to that situation (this is the essence of the rule of law). However, the Creator (from whom custom is ultimately derived[87]) is no less an abstraction for the secular liberal legal mind than is the Law for the Aboriginal mind; what we have is an arbitrariness in the choice of abstraction which, because it is arbitrary, is as intractable as that regarding the choice between title based on divine grant and title flowing from Crown sovereignty.

The administration of Aboriginal justice is just as alien to Western norms as is Aboriginal government. Recall Sawatsky's list of attributes of European and Aboriginal paradigms of justice, for instance. Differences between paradigms occur on two levels in the contrast Sawatsky provides. The first level concerns the proper end of the justice system, and the way in which that end is achieved. Sawatsky explains:

> Aboriginal peoples do not perceive the adversarial, retributive model of criminal justice as being an adequate response to the problem of crime. For one thing, it does not meet the need of either the victim or the offender. From an aboriginal perspective, victims need to meet the offender face to face, receive personal restitution and be directly involved in a fair settlement.[88]

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[86]Boldt, 1984: 543 (footnote 17).

[87]Boldt, 1984: 543

[88]Sawatsky, 1992: 93.

Of course, Sawatsky is almost certainly oversimplifying the character of Western justice by setting it in opposition to a sensitivity to the needs of offenders and victims; the focus in recent years upon rehabilitation of offenders, and upon counselling and therapy suggests that the system is not simply interested in punishing acts which offend the power of the state. These considerations may be less prevalent than in Aboriginal sentencing circles, but they are not wholly absent either. It is at the second level, at which the origin and nature of justice are articulated, that the difference between Aboriginal and European justice is most pronounced:

> For aboriginal people, norms and laws are inherent in the natural order, not imposed from the outside. The "state" is a foreign concept; justice depends upon the internal order and relations of a given society or community. . . When deviations from the norm and conflicting interests break the harmony of aboriginal communities, the traditional way of responding is to do whatever is necessary to restore harmony.[89]

If Aboriginal justice abhors the imposition of norms upon the community by the state because the state is foreign to the internal order of the community, how can it tolerate the imposition of norms by a foreign state? Taken seriously, Sawatsky's depiction places the proper administration of Aboriginal justice outside of the authority of the Canadian legal system and the norms it represents; hence his insistence that, if Aboriginal justice is to be respected, "the dominant institutions will have to be open to a *revolutionary* approach,"[90] i.e. the prospect of an independent Aboriginal justice system. A pluralist approach which integrated Aboriginal approaches into Western law would be logically impossible because Aboriginal justice emphasizes local context and internal norms, while Canadian

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[89]Ibid.: 91-2.

[90]Ibid.: 90

institutions are defined by uniformity and the existence of "one unifying set of rules and principles."[91]

What we see in the writings of the last few decades, then, is a definition of Aboriginal reality and the structures which result from it which is fundamentally incompatable with Western reality and structures. To combine these is to do damage to them (recall Henderson's warning to those in the realm of the Sun Dance: English thought leads to derangement). To subordinate Aboriginal structures to Western structures is to betray the reality which the structures are meant to protect.

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[91]Ibid.: 90.

Chapter 3

Implications: Failings of Pluralist Models

Despite the apparent irreconcilability which I have described, attempts to bridge the gap between Aboriginal and liberal realities and structures are commonplace. In this chapter I shall examine a few of these in the hope of demonstrating that, if we take the differences which have been articulated at face value, such attempts cannot possibly succeed.

Constitutional Tinkering

I will begin with the least sympathetic of treatments with respect to Aboriginal difference. Alan Cairns typically begins his treatments of Aboriginality by viewing it as an obstacle. For instance, his essay *Why is it so Difficult to Talk to Each Other?* starts by quoting Lord Acton: "The co-existence of several nations under the same State is a test, as well as the best security of its freedom."[92] These things are sent to try us. His brief examination of Aboriginal nationalism says little about its content, focussing instead on its current popularity as a movement (with regret, it seems--he points out that recent advances are "tenuous" and "have had little impact" on the worst conditions of Aboriginal life in Canada, but that the "overall direction" in favour of recognizing Aboriginal rights is "unlikely to change"[93]). He then proceeds to sympathize with the plight of academics who are afraid to provide "honest reporting" on the validity of Aboriginal aspirations for fear that "their motivations could be misinterpreted."[94] Cairns

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[92]Cairns, 1997, 65.
[93]Ibid., 80.
[94]Ibid., 81

finishes his discussion of Aboriginal nationalism by characterizing its claims and then dismissing them:

> . . . the powerful symbolic message is the same: "We are not part of you. You do not represent us. We meet as equals." Officially, none of these claims is constitutionally valid.[95]

There is little to say about the manner in which Cairns attempts to integrate Aboriginal and Western theory, since the content of Aboriginal nationalism does not interest him.

Cultural Rights

In both *Multicultural Citizenship* and *Liberalism, Community, and Culture*, Will Kymlicka attempts a more genuine compromise between Aboriginal difference and liberal values than is seen in Cairns. Proceeding from the assumption that cultural membership is of value because "it allows for meaningful individual choice," Kymlicka sets out a defence of cultural rights designed to empower disadvantaged cultural minorities relative to the majority so that group members may benefit from a "rich and secure cultural structure."[96] Aboriginal rights are considered legitimate because they are grounded in unequal circumstances, which must be compensated for,[97] and because they are rights of nations (defined as historical communities, institutionally complete, occupying a given territory and sharing a distinct language and culture).[98] This distinction empowers nations with a limited right of self-government which is withheld from ethnic minorities.[99]

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[95]Ibid.: 88

[96]Kymlicka, quoted in Kukathas, 1996: 240-241.

[97]Ibid.: 241.

[98]Kymlicka, 1995: 11.

[99]Ibid.: 27.

Kymlicka's approach has some problematic features which merit brief comment. First of all, Kymlicka divorces Aboriginal rights from rights to the land--at least, he appears to do so; he makes no mention of land claims in *Multicultural Citizenship*, even though at the time of writing land claims occupied a significant portion of the debate over Aboriginal rights in Canada. The implicit assumption is that Aboriginal title and Aboriginal rights are in some way separable. This seems to fly in the face of what Aboriginal authors say about their rights, as when Oren Lyons claims that "Land is the central issue."[100] Aboriginal rights stem from a claim of prior sovereignty, which in turn stems from prior occupancy and control of the land. As Patrick Macklem observes, the reduction of Aboriginal rights to a tool of collective cultural protection "does not do justice to the nature of Aboriginal claims," since Aboriginal self-government properly understood must include Aboriginal exercise of "governmental authority over lands and peoples."[101] Pragmatically speaking, there is little value to a right of self-determination without the independence that control over a land base provides.[102] A group without such a base must rely on outside sources to fund its exercise of sovereignty--a dependency which makes a mockery of that sovereignty. Consider Alan Cairns' warning (or, perhaps, threat) with respect to increasing Aboriginal independence:

> The new relationship, however, is to be among equals--symbolized as nation to nation--to which hierarchical conceptions of duty and moral superiority will, quite properly, not apply. In relationships between equals, every weakening of the bonds of community attenuates the responsibility of the larger, wealthier party for the disadvantaged as the latter's relationship to the former becomes increasingly tangential.[103]

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[100]Lyons, 1992: 9

[101]Macklem, 1995: 36

[102]Miller, 1991: 237.

[103]Cairns, 1995: 258.

Second, Kymlicka bestows collective rights upon Aboriginal peoples for the wrong reason, i.e. not out of a recognition of the difference of Aboriginal consciousness, but out of a concern for Aboriginals as liberal individuals. Chandran Kukathas explains:

> Kymlicka's foundation is essentially an argument about the primary importance of individual *autonomy*. Cultural rights protect autonomy. They do this inasmuch as they look to guarantee the stability of the cultural environment within which the individual is able to exercise the capacity to make meaningful choices. Unfortunately, many cultures do not place such importance on choice. . . Often the individual and his interests are subordinated to the community.[104]

This in itself would not be a problem; a group which wishes its right to self-determination recognized by the dominant society is likely to accept that recognition regardless of how the dominant society rationalizes the recognition to itself, as long as the recognition is substantive enough to be meaningful. In this case, however, the rationalization limits the content of that recognition. Kymlicka shares Kukathas' disapproval of the 'subordination of the individual to the community' (indeed, he probably feels it more intensely than Kukathas, who is willing to concede to cultures the right to inhibit individual choice, and criticizes Kymlicka for not doing likewise).[105] This informs his views on self-government, against which he mounts several criticisms. It also leads him to an insistence on either the continued imposition of the Canadian Charter of Rights and Freedoms on Aboriginals, or the adoption of parallel charters by Aboriginal nations so that Aboriginal government will be prevented from oppressing individual members.[106] This approach is fundamentally flawed. To recognize Aboriginal sovereignty upon condition that it be exercised in the same manner and according to the same values as it is *already subject to in Canada before the recognition* is to miss the

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[104]Kukathas, 1996: 239-240

[105]Ibid: 243

point. It's their sovereignty, and it ceases to exist when you begin dictating terms. Moreover, it proceeds from the assumption that Aboriginals value the liberal concept of individual protection as the supreme cultural value, or if they don't, then they should. This betrays the difference of Aboriginal consciousness that the sovereignty is meant to protect. Fleras and Elliot state:

> As put by Pearl Keenan, an elder of the Teslin Tlingit band. . . , the Canadian Constistution is poorly equipped to accept either aboriginal justice or self-government since the constitutional rights of the individual take precedence over those of the group. 'In our group', Ms Keenan notes, 'the rights of the group must come ahead of the individual.' What is required instead is a model more cognizant of aboriginal cultural values and geared towards collective aboriginal rights--even if these violate Charter rights and freedoms and fall outside the criminal code.[107]

Boldt and Long cite Laslett's "onion skin" analogy to explain the nature of the individual according to Aboriginal thought:

> To apprehend the individual in tribal Indian society, he says, we would have to peel off a succession of group-oriented and derived attitudes as layers of onion skin. The individual turns out to be a succession of metaphorical layers of group attributes which ends up with nothing remaining.[108]

An extreme interpretation of this analogy would hold that there is, in effect, no individual. A more cautious one suggests that any people that truly subscribes to this perception of the individual is going to be more concerned with keeping the layers of group attributes intact than in constantly stripping them away in search of a core.

Common Law as Common Ground

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[106]Kymlicka, 1995: 39, 203 (note 4).

[107]Fleras, 1992: 124

[108]Boldt, 1984: 541.

James Tully, who criticizes Kymlicka and other liberal theorists for their inability to step outside of liberal paradigms in addressing Aboriginal issues,[109] claims to have found in English common law "a form of recognition and negotiation of Aboriginal and European-American systems of property that meets the criteria of justice shared by both Aboriginal peoples and non-Aboriginal North Americans."[110] Tully draws on the Marshall decisions of nineteenth-century America and the doctrine of "domestic dependent nations," which allows for a "weak state" to "place itself under the protection of one more powerful, without stripping itself of the right of self-government, and ceasing to be a state." Properly understood, this doctrine allows nations to maintain "internal sovereignty" while the stronger state (for our purposes, the Canadian government) reserves external powers to itself; areas not explicitly allocated to the stronger state must be negotiated by treaty.[111] He compares this to the Two Row Wampum Treaty of the Haudenosaunee:

> The two central and parallel rows of purple beads symbolize two paths or two vessels, travelling down the same rivers together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own boat. Neither of us will try to steer the other's vessel.[112]

Tully draws from these two models a general principle of non-interference in which Western and Aboriginal theories of property are each to be determinate in issues of property which don't concern the other, and that when an issue concerns both Aboriginal

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[109]Tully, 1994, 168.
[110]Ibid., 153.
[111]Ibid., 175-6.
[112]Ibid., 177.

and non-Aboriginal property, it is to be resolved with both sides on equal footing according to principles of mutual recognition, respect and consent.[113]

The first thing to note regarding Tully's proposed middle ground is that it is not a theory of property at all, but a theory of international relations. Tully identifies a willingness to *attempt* to reconcile opposed ideas and worldviews, in this case opposed views concerning property, but does not offer a means by which the attempt can be made successful. People may respect that others operate according to different premises, but when the premises of others lead to actions that are abhorrent and harmful to them, respect for the others' view is not going to alter the existence of the conflict. As an Aboriginal I might be willing to respect that Europeans understand their relationship to the land differently than I do, but if they have taken and exploited land which I believe I am required by the Creator to protect, recognition of difference is not going to make me *understand* the difference or *accept* the loss. Recognition of difference does not erase difference.

Second, Tully conflates two models that are essentially different. The Two Wampum Treaty explicitly states that neither civilization will attempt to steer the other's vessel. This is irrelevant to the current relationship of First Nations to Euro-Canada, since the latter has evicted the former from their vessel and left them treading water for over a century. The Treaty requires a separation of the peoples, each with its own space. This requirement has not been honoured in Canada since before the nineteenth century.[114] The doctrine of domestic dependent nations is only applicable once one vessel has capsized, i.e. once the spirit of the Treaty has been voided: it allows for a certain amount of self-

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[113]Ibid.: 180.

management, but in removing control over external matters to the bullies who have tipped the canoe, it removes to a considerable degree the power of self-direction and self-definition proper to a nation. Tully understates this loss.

Consociation

Asch , building on a theory of M.G. Smith, acknowledges that in countries such as Canada and the United States, there is a tendency toward universalism, i.e. the rejection of special political rights for selected groups on the basis of equality of consideration. It was this universalism, for instance, which caused the ultimate rejection of the "separate but equal" doctrine which informed U.S. policy concerning segregated schools.[115] He argues that Canada should strive for a relationship with First Nations that is "consociational" rather than universalist:

> In this form of incorporation, the nation-state explicitly acknowledges that it is composed of members who share different linguistic, cultural or ethnonational traditions. . . Equality of consideration, then, is reconciled by identifying areas of jurisdiction, such as education, within which a universalistic theory of incorporation will apply only within segmental boundaries. Here, "separate but equal" is not considered antithetical to democratic ideals, as long as there is real equality.[116]

Asch proceeds to demonstrate how Belgium and Switzerland have successfully incorporated consociation into their liberal-democratic theories of the state.

Asch succeeds in demonstrating how *certain* types of nationalism can co-exist within a liberal state. However, his demonstration suffers from false analogy when it attempts to reconcile Aboriginal and liberal nationhood. Note, first of all, that in the above quotation

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[114]Miller identifies this as the century in which white domination of Canada was consolidated, making Aboriginals impediments rather than allies. 1991: 272-3

[115]Asch, 1984: 76-7.

[116]Ibid.: 77

Asch speaks of "ethnonational traditions." He speaks of these later with respect to the French and Dutch segments of Belgium and the French and German segments of Switzerland. The thing to note about these nationalities is that they all descend from more or less *liberal* traditions. What separates ethnonationalities are the particularities of ethnic inheritance: language, elements of culture, and so on. They are not separated by fundamentally different worldviews, incorporating divergent understandings of property, time, and reality. First Nations *are* separated in this way from Euro-Canada, according to the Aboriginal discourse of the last few decades. Consociation resembles the Two Wampum Treaty which Tully mentions. The thing to remember is that the Treaty was modeled on treaties between First Nations, which encountered each other as groups with different cultures but not opposed realities. The application of the Wampum model to relations with the West was misguided in that it could not hope to bridge an ocean of difference; that it failed to do so is evident in the common assertion by Aboriginals that historic treaties between the Crown and First Nations were understood in completely different ways by the signators.[117]

Note also that none of the ethnonationalist entities from which Asch draws his examples suffers from a legacy of cultural domination, genocide, or assimilation at the hands of another, nor is any one of them completely surrounded and outnumbered by members of the other as First Nations in Canada are. Euro-Canada is in a position to dictate terms to Aboriginal peoples to an extent that is not found in the consociational relations of Belgium or Switzerland. First Nations negotiating from within this framework are not "separate *but equal*" in any sense.

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[117] See, for instance, Venne, 1997.

Conclusion

What should be clear at this point is that attempts to bridge the gap between Aboriginal and Western worldviews are undone by the enormity of that gap. *if we take recent descriptions of the gap seriously and at face value.* What follows logically from these descriptions is a demand for radical separation of Aboriginal lands and structures from those of the West. As I will demonstrate in the following chapter, this is not at all the conclusion which Aboriginals and sympathetic and unsympathetic non-Aboriginals have come to; their demands are comparatively mild. I shall also explore why this is so.

Chapter 4

Unequal Power: A War on Two Fronts

I. Aboriginal Demands: In All Modesty . . .

So far, this thesis has examined the extent to which Aboriginals and non-Aboriginals are said to be possessed by different realities; these realities contain opposed value systems which are enshrined in equally opposed political structures. The logical corollary to this proposition, if we accept it, is that these realities are best preserved through a separation of their attendant structures: preservation of an Aboriginal worldview requires that Aboriginals enjoy a power of self-definition and self-determination that isn't ultimately circumscribed by the structures and values which it seeks to preserve itself against. This is possible only to a limited extent. Aboriginal societies exist in the context of a world controlled by capitalist economics and transnational corporations, which undoubtedly can and do circumscribe the freedom of societies; even in liberal capitalist nations there is great concern over the loss of national sovereignty in the process of globalization. This is not, however, an excuse for withholding from First Nations the freedom to exercise as much of the sovereignty to which nationhood entitles them as the context allows. The fact that the outside world has limits is not a sensible reason to confine First Nations to Canada's backyard. What we have is a complex relationship of identity, sovereignty, and property: sovereignty is rooted in the existence of national identity, and is exercised for the preservation of that identity; national identity is defined, in part, by the relationship of a people to the land; the unfettered realization of that relationship to the land (i.e. ownership and control of the land according to the values of the nation) is necessary for the realization of sovereignty.

It would appear a logical absurdity for a people to accept, for the purpose of reclaiming their land and thus regaining sovereignty, an arrangement which severely limits both of these (and thus limits both the power of self-determination and self-definition). Yet that is exactly what Canadian First Nations are doing. The actual demands of First Nations regarding Aboriginal title fall dramatically short of their theoretical justifications.

Take, for example, Donald Purich's *Our Land*. Purich points out the antithetical understandings of property held by Aboriginals and non-Aboriginals,[118] and reveals the extent to which this incompatibility problematizes the possibility of mutual understanding (as in the historic treaty process[119]); he describes the longstanding occupancy and control of the land by Aboriginal societies prior to European discovery,[120] the incompetence of the Canadian government with respect to Aboriginal policy,[121] and the importance of empowering native people to "define their own structures."[122] All of these points culminate in a definition of self-government which "means native people having a greater say about the terms under which they are incorporated within the federal system."[123] Purich's ideal system purports to give natives "full control over lands" subject to their governments, but gives up control over banking, the monetary system, and foreign affairs to the federal government[124] and envisions Reserve police enforcing the Canadian Criminal Code (with as-needed assistance from the RCMP).[125] All the institutions which define non-Aboriginal society, from capitalist economics to liberal justice, would hover over Aboriginal control of the land.

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[118] Purich, 1986: 38-40.
[119] Ibid.: 109.
[120] Ibid.: ch. 1.
[121] Ibid.: 212.
[122] Ibid.: 216.
[123] Ibid.: 216.
[124] Ibid.: 217.

Conclusions similar to Purich's have been reached by Aboriginal groups all over Canada throughout the post-White Paper era. J. R. Miller summarizes the claim of the Dene Nation of the N.W.T.:

> The case for Dene control of their own political institutions is based on the argument that they were self-governing peoples before the white population arrived, that they did not sign any treaties that required recognition of Canadian sovereignty, that they were never conquered, and that, therefore, they are still sovereign and hold title to their lands.[126]

From this strong claim comes the demand of the Dene Declaration of 1975.

> What we seek then is independence and self-determination within the country of Canada. This is what we mean when we call for a just land settlement for the Dene Nation.[127]

The terms "independence and self-determination" are in keeping with the assertion that they have not recognized Canadian sovereignty in treaties and that they "are still sovereign and hold title to their lands." What is not in keeping with the assertion is the proviso "within the country of Canada." This arrangement presumably includes a minimum reservation of powers to Canadian governments similar to that which Purich outlines, otherwise the Dene could not properly be said to *be* within the country of Canada. This allotment of powers, especially if combined with the recognition of underlying Crown title which even the most radical of court decisions and recent agreements includes, means the Dene have in effect used their historic refusal to recognize Canadian sovereignty to demand an arrangement which *de facto* recognizes that sovereignty over their lands.

The Dene fall into the category of groups making comprehensive claims, i.e. claims to land not surrendered by treaty. The Nisga'a and the Gitksan Wet'suwet'en provide

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[125] Ibid 210
[126] Miller, 1991: 260

more recent examples (recent in the sense that the current Nisga'a Treaty and the 1997 *Delgamuukw* case have provided us with fresh articulations of this sort of claim) of a category which, as Miller explains, has the potential to produce more radical demands than those of, for example, Purich:

> The argument that various native groups have claims to extensive lands by virtue of unextinguished aboriginal title is potentially revolutionary. It is revolutionary in its scope alone, for such claims could embrace most of British Columbia, the Yukon, and the Northwest Territories . . . The argument on which comprehensive claims are based is also dramatic in another sense. Claims based on aboriginal rights are not only about land; they are also connected to native claims to unsurrendered political sovereignty. These contentions that Indians, Inuit, and Metis have a right to establish their own order of government within Canada . . . are unsettling to many Canadians because they are based on assumptions about political organization that many Canadians find uncongenial and perhaps unacceptable.[128]

The actual content of these claims is far from revolutionary. Like the Dene, the Gitksan and Wet'suwet'en conclude that the "just resolution of their relationship with Canada"[129] is that they are to define their notions of ownership and government "within the context of Canada."[130] The Nisga'a consider their objectives to have been met by the Nisga'a Treaty because it has, as Chief Joseph Gosnell puts it, allowed them to join British Columbia and Canada as "full and equal participants in the social, economic, and political life of this province, of this country."[131] As I will demonstrate later on in this chapter, the actual outcome of each claim makes the claim of full and equal participation hard to accept. For now, it is enough to note that these claims, in beginning with the ultimate sovereignty of the Canadian state, sell short their assertions of nationhood based on fundamentally opposed understandings and values. Their nation-to-nation

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[127] Ibid., 260.
[128] Ibid., 264.
[129] Wa, 1992: 11.
[130] Ibid.: 9.

confrontation with Canada does not take the form of two alien and equal entities facing each other; it doesn't even take the form of a David-and-Goliath encounter, in which the smaller entity can at least lay claim to a certain freedom of movement *vis-a-vis* its opponent. It has more in common with the meeting of Jonah and the whale.[132]

With this image in mind, I would like to use the remainder of this chapter to explore the way in which Aboriginal title and the rights which stem from it have developed in the current political struggle. I will contend that there is a basic inequality of power between Aboriginal and non-Aboriginal societies in Canada which has structured the debate over Aboriginal title along two fronts: the first is intellectual – legal, the second is political. My basic premise, which will be reviewed at the end of the chapter, is that this inequality has two effects. First, it tends to shape the way in which Aboriginal notions of property and reality are articulated. This articulation, as discussed in Chapter 2, has occurred primarily for the purpose of this struggle, and the nature of the struggle affects the nature of the discourse used by its participants. Second, it tends to set a ceiling, not a particularly high one, on what gains Aboriginal peoples can reasonably expect from the struggle.

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[131] Gosnell, 1998: 5.

[132] It is significant to note that Canadian First Nations are not unique in their willingness to adopt this model to express their position in the world as a nation. Fleras and Elliott observe that "aboriginal peoples in Canada, the United States, and New Zealand share a commitment to 'nations within' status (i.e., sovereignty) as a fundamental characteristic of their political culture. Such a commitment carries with it a dual objective to restructure their relational status in society and to secure the entitlements that derive from formal recognition of this restored status. In other words, aboriginal peoples share a common experience in terms of who they are, what they want, and how they propose to get it, through decolonization of their relations with the state and restoration of their once subjugated status to one consistent with the self-determining ethos of a nation within a state." Fleras, 1992: 220. What separates the Canadian experience from others, according to the authors, is that Canada is less bound by historic judicial decisions (such as the so-called Marshall decisions of the nineteenth century which inform American Aboriginal policy) and is more experienced in mediating national aspirations (e.g. those of Quebec) within the context of federalism. Ibid.: 222.

It will probably strike the reader that there is something artificial in my choice of categories. Indeed, there is. Intellectual writings are fodder for the legal and political processes at work regarding Aboriginal rights; these writings respond to legal and political outcomes, and use the terminology which these outcomes (especially court decisions) provide; finally, political processes such as treaty negotiations build on the foundation of court decisions regarding what Aboriginals are entitled to and what governments are required to provide. The three interpenetrate in such a way that it is questionable to separate them. Nevertheless, for the sake of giving this discussion structure, I will do so on the tentative assumption that the intellectual - legal category will provide us with most of our insight into the way in which the inequality of power has structured the discourse surrounding Aboriginal title, and that the political category (by which I mean, primarily, negotiations with the Canadian state) will be instructive with respect to the range of possible practical outcomes for Aboriginals.

II. Intellectual Discussion and Legal Struggle

> Aboriginal rights must exist, or else the Canadian and provincial governments wouldn't be so worried about them [133]

> We understand everything about aboriginal rights except the legal talk, so governments try to make a legal issue out of it. Then our white brother can go to his highest tribunal and gain from it (by an act of Parliament) the right to never have to drink water again, then I will respect their legal version of our aboriginal rights [134]
>
> --Oren Lyons

Language

> acquiescence in the terminology is to concede the debate
>
> --Melvin H. Smith, Q.C. [135]

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[133] Lyons, 1985: 19
[134] Ibid.
[135] Smith, 1995: 284

Smith makes this statement with respect to his refusal to use the term 'First Nations' in his rather scathing treatment of Aboriginal rights.[136] The above words could also be applied, and with greater justification, to the experience of Aboriginals attempting to define their title and way of life in print and in court. The discourse of the past few decades has concerned itself with convincing the dominant society of the existence and the implications of native title. This process is not the dialogue which participants and observers have made it out to be, in that it is not a case of two conscious entities attempting to understand each other on the other's own terms—it has attempted to be so, but the attempt is coloured by the fact that one participant controls all the institutions to which the other must appeal.

One such institution is the language through which discourse on Aboriginal title is mediated. The language of Canadian government and the courts —for most purposes—is English; this has meant that First Nations have had to articulate their understandings of title and the rights that stem from it in a foreign language. As we have seen in the previous two chapters, this has meant that they must define them relationally in terms of Western concepts that are alien and imprecise for this purpose; this puts First Nations at a distinct disadvantage. The disadvantage is compounded by the fact that it is not even English as we speak it, but rather a highly specialized variant, of it—what is often referred to as 'legalese.' Stan McKay summarizes the problem eloquently:

> The political process that has become known as "land claims," and in which many of our First Nations are involved with the federal and other governments, is devastating to our cultural values. In order to participate in the process, our statements and language are forced to become sterile and technical. Our documents must be written in language suggested by lawyers and understood by judges. The legal jargon we must use contains concepts of ownership that directly

[136] Among Smith's chapter titles: "Sacrificing Our Northern Inheritance", "Carving Up the Yukon", "'Topping Up' Existing Treaties and Other Largesse."

> contradict our spiritual understanding of life . . . As a marginalized people, forced to live on tiny plots of land, we encounter the worldview of the wealthy and powerful in the land claims process and are forced to compromise or die.[137]

To convince the dominant society's institutions of Aboriginal claims requires using the language and logic of those institutions against them, in a sense. This leads to a strategic use of language and ideas which, while potentially efficacious for Aboriginal purposes, sacrifices something of the substance of Aboriginal ideas in the translation. Take for instance the concept of sovereignty. Writing in 1984, Boldt and Long note that "the claim to tribal sovereignty is regularly asserted by Indian leaders in Canada and is virtually always explicit in the written representations that provincial and national Indian organizations have made to the Canadian government." The authors go on to provide a list of such assertions.[138] More recent literature is equally insistent upon the sovereignty of First Nations: the *Report of the Royal Commission On Aboriginal Peoples*, for instance, collects numerous definitions of sovereignty by tribal Elders. It is described variously as "the unrestricted right of a people to organize themselves in social, cultural, economic and political patterns that meet our needs," and "the inherent right of our people to define ways and means in which to utilize our lands,"[139] and its root is the same as that given for Aboriginal title:

> Sovereignty comes from the Creator. The Creator placed us on this land and gave us laws to live a good life and to live in peace and harmony with one another and with all creation.[140]

This is an impressive pedigree for a concept which other scholars maintain has no meaning in the Aboriginal lexicon of ideas. As mentioned in the previous chapter, Boldt

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[137] McKay, 1992, 30.
[138] Boldt, 1984, 537.
[139] Canada, 1996. *Report of the Royal Commission on Aboriginal Peoples*, vol. 4, 130.

and Long find in the concept of sovereignty an inescapable connotation of hierarchical and near-absolute power, linked to a Hobbesian primacy of individual self-interest, for which it is said there is no analogue in most Aboriginal societies.[141] The authors explain the reason for and the implication of the use of sovereignty to advance Aboriginal claims:

> Indian leaders, in their discussion of sovereignty, focus attention almost exclusively on its instrumentality for checking the intrusion of external authority and power into their social and political structures and territory. That is, sovereignty is very narrowly conceived of as a strategy to free themselves from external intrusions into their society. In their preoccupation with the goal of self-determination they overlook almost entirely the significance that the doctrine of sovereignty potentially has for ordering internal tribal authority and power relationships. Thus, Indian leaders have ignored the latent peril that the idea of sovereignty may hold for their traditional tribal customs, values, institutions, and social organization.[142]

The use of Western concepts to secure Aboriginal gains has the potential to pervert or pollute the values which the gains are meant to protect; the result is reminiscent of the derangement of which Henderson spoke in Chapter 2.

Similar in the confusion it creates is Aboriginal description of an 'inherent' right of self-government. Thomas Isaac notes the strategic value of such a description:

> . . . the inherent right of Aboriginal self-government, by its very nature, precludes government recognition or affirmation. In this way, it is absolute. As well, inherent self-government has significant symbolic value to Aboriginal people, in that it demonstrates that their governments are not dependent upon Crown recognition.[143]

An inherent right is as unassailable as title given by the Creator. Its somewhat metaphysical origin makes the term problematic within the context of law-and-rights discourse:

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[140] Ibid.: 131.
[141] Boldt, 1984: 540-2.
[142] Ibid.: 539.
[143] Isaac, 1992: 15.

> An inherent right is inherent and does not have to be put forward in a certain way. It cannot be subject to any conditions or qualifications. Once it does, it is no longer inherent . . . An inherent right of self-government, by its very nature, means absolute Aboriginal sovereignty. Anything other than absolute sovereignty is not inherent, notwithstanding any 'label' attached to it.[144]

Isaac presents a solution, following the opinion of the Royal Commission, in which the right is effectively split in half, with an inherent justification and a contingent application, i.e. self-government would be recognized by law, subject to limitations.[145] This may work at the level of practical politics, but in backing down from the logical conclusion of the above passage, Isaac reduces the Aboriginal assertion of inherent right to mere political posturing. If it *is* mere posturing, that is acceptable. If it is truly believed, the reduction is insulting.

Finally, there is the question of Aboriginal use of rights talk in the current struggle, be it rights of self-government, rights to the land, or to more specific entitlements under the law. Mary Ellen Turpel questions the propriety of this use, as it appears incompatible with Aboriginal consciousness: rights are a product of a culture that is centred on individual obligations and entitlements. The primacy of the collective in Aboriginal cosmology means that relationships are defined not by rights against others but by duties to Creator and to the whole, thus the notion of rights in the way they are discussed under Canadian law is mismatched with an Aboriginal worldview.[146] Turpel draws this conclusion:

> In my opinion, when Aboriginal peoples discuss rights and borrow the rhetoric of human rights in contemporary struggles, they are using the discourse of human rights, both within Canada and internationally, as an instrument for the recognition of historical claims of cultural difference. In many cases, they appropriate this conceptual framework as the only (or last) resort without sharing

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[144] Ibid., 22.
[145] Ibid., 24.
[146] Turpel, 1991: 518

> or accepting the distinctly Western and liberal political vision of human rights concepts.[147]

The potential for damage to Aboriginal cultures through the instrumental use of rights talk is similar to that with sovereignty: the instrument has the potential to change the user. Rights talk may enter Aboriginal consciousness as a sort of Trojan Horse of Western values.[148]

Climate

The language that mediates discussion of Aboriginal title is one symptom of a larger imbalance at work at the level of the intellectual and legal climate in which the discussion occurs. We have already seen, in examining various attempts at a reconciliation of Aboriginal and Western worldviews, that the starting point is almost invariably the need to incorporate the former *within* the latter; the debate is only to what degree the dominant culture will have to loosen its grip. Little attention is paid to why this should be the starting point; usually it is baldly asserted that this is what Aboriginals want, without examining the context of that 'want.' Statements about the dependent nature of First Nations come close to uncovering that context, in that they recognize that Aboriginal nations have been disempowered to the point that they could not survive alone if simply cut loose in an instant. But would they stay if they didn't have to? Alan Cairns alludes to the possibility that they wouldn't when he likens the transitions of the current period to the drive for decolonization and independence in the Third World. Cairns then dismisses the possibility by intimating that First Nations are incapable of improving their situation

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[147] Ibid., 519.

[148] Turpel draws an even stronger conclusion, citing the potential of the imposition of a system of individual rights to cause the abandonment of traditional Aboriginal methods of dispute resolution from within the community; the imposition would thus be "threatening, perhaps even ethnocidal." Ibid., 525

without the charity of Canada, which independence ("constitutional and institutional distancing") would eliminate.[149] Peter H. Russell summarizes the dominant view among progressive observers:

> In my own view of the prospects of Fourth World decolonization, the recovery of full independence and "sovereignty" for most Indigenous peoples is neither a desired nor possible objective. The descendants of the settlers and of the original inhabitants of these "new world" countries are fated to live together, sharing their lands and waters, and sharing also citizenship in a common political community. But this inescapable integration and sharing of citizenship, it if is to be based on mutual respect and consent, must at the same time have room for Aboriginal people to enjoy a significant degree of autonomy in their traditional country.[150]

I would add to this only that there is an interesting contrast here between the positive notions of "sharing" and "community" and the assertions that Aboriginal peoples' place in Canada is "fated" and "inescapable." This combination of pleasantry and intractability is characteristic of the current discourse of the dominant society on this issue.

We begin, then, with the assumption of First Nations as 'nations within.' This rather soft definition of the nation is the one accepted by the legal system in Canada. While some observers claim that Canada is free of the nineteenth-century legal pronouncements with which the U. S. must contend, it is worth noting that the Marshallian legacy of 'domestic dependent nations' has found its way into our Supreme Court as well. It is cited at length in the *Calder* case, for example, to establish the somewhat ambivalent proposition that the Aboriginals were "conceded to be the rightful occupants of the soil" but that their "rights to complete sovereignty as independent nations were necessarily diminished" to recognize the equally rightful (and evidently superior) title to the land granted Europeans by discovery or conquest.[151] My point is simply that First Nations are

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[149] Cairns, 1995: 258-9.
[150] Russel, 1998: 275
[151] Kulchyski, 1994: 103-4

asserting their nationhood in a context in which the benefits conferred by nationhood are greatly circumscribed.[152]

Another element of the Marshallian legacy illuminates the extent to which the courts can be of use to Aboriginal peoples with respect to title. The following statement is cited in *Calder* with respect to Crown extinguishment of title:

> . . . the exclusive right of the United States to extinguish Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its justness is not open to inquiry in the courts.[153]

The court, no matter how strong its commitment to uphold justice, must inevitably do so as the judicial arm of the State: were it not for the authority conferred upon it by the State it would cease to exist. It is for this reason that any judicial opinion on Aboriginal title must necessarily begin with the assertion of the Crown's underlying title; otherwise it might find itself destroying the State in accordance with fundamental justice. Can we conceive of the Supreme Court of British Columbia surrendering the province to its rightful inhabitants, or the Supreme Court of Canada returning Parliament Hill to the Golden Lake Algonkin band?[154] Richard H. Bartlett argues that native title in Canada and elsewhere is being defined as a balance between genuine equality between Aboriginal and settler culture, and "pragmatic limitations," i.e. the protection of non-

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[152] Although they could be even more so. Thomas Flanagan writes that "The claim of Indians to be nations has arisen as part of a new vocabulary whose main terms are nation, sovereignty, self-determination, and aboriginal rights"; in other words, the claim to nationhood is as much a posture as claims of sovereignty and rights. Flanagan argues that because of their relatively small size and their 'closed' nature (closed in the sense that citizenship cannot be gained except by birth or marriage) they are not nations in the Western sense of the word. Since they are not nations, we should find ways to provide them with more "local autonomy," but shouldn't allow our "sympathy" for them to "make us forget the foundations of our own polity." Flanagan, 1985: 369-70, 373-4.

[153] Kulchyski, 1994: 73

[154] Miller, 1991: 264.

Aboriginal interests which intrude upon an Aboriginal enjoyment of the land comparable to that of settler society. He argues against this approach:

> A rationale of equality and the application of universal principles does not admit of limitations being placed on the content of Aboriginal title merely to shore up title security of non-Aboriginal interests. It suggests the need to give "full respect" to Aboriginal title . . . . the principle of equality, and accordingly giving "full respect" to the Aboriginal interest, dictates that Aboriginal title entails exclusive use and enjoyment over the land.[155]

Bartlett argues that the Supreme Court must begin to guide its treatment of Aboriginal title with more recourse to principles of equality.[156] What he does not provide is a way to press the Court to do so. This is unsurprising since it would require the logically impossible task of separating the Court from the State and the interests that it represents.

A final condition to bear in mind that determines the climate in which title claims are received is that the courts are now empowered and governed by the Constitution Act, 1982, and in particular by the Charter of Rights and Freedoms. The Constitution Act, 1982 is significant to Aboriginal causes for a few reasons: first, it provides a constitutional guarantee of Aboriginal rights under s. 35(1).[157] The clause itself says little, promising that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." The indeterminacy of this sentence is demonstrated by fact that writings shortly after the adoption of the 1982 Act interpret it as a narrow guarantee of rights already entrenched in common or statute law[158] while

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[155] Bartlett, 1998: 380-1
[156] Ibid.: 391
[157] Although a sparse guarantee at that. Arrived at as a considerable retreat by Aboriginal leaders from the substantial claims presented to the government during negotiation of the 1982 Constitution, nearly eliminated altogether in order to gain greater provincial support for the deal, the section appears mostly as a topic sentence for promised constitutional conferences which would follow—a promise to talk about substantive promises later. See Mandel, 1994: 354-7
[158] See, for example, Slattery, 1985: 126

more recent writings take it to guarantee an inherent right of Aboriginal self-government.[159]

Second, the Charter provides a guideline for judicial interpretation that is expressly liberal, focussing on the primacy of the individual and individual rights over collective or national rights. While some Aboriginal scholars are supportive of the protection offered by the Charter,[160] others believe that it is potentially destructive to Aboriginal cultures:

> Native Indian leaders hold that the Canadian Charter of Rights and Freedoms, with its western-liberal principles of legal, social, political, and economic individualism, not only lacks relevance but threatens the destruction of their cosmocentric philosophy, their spiritual unity, and the customary precepts of their tribal society . . . They fear that disgruntled members of their communities will exploit the Charter's provisions to their individual advantage, thereby undermining existing norms. They believe that a series of judicial decisions in favour of individual rights versus group rights will result in a 'snowballing' of individualism.[161]

Mary Ellen Turpel provides a similar critique, casting the Charter as a tool of cultural hegemony that excludes Aboriginals, from the actual text with its recognition of "the supremacy of God and the rule of law" down to the individual-rights paradigm which drives its logic.[162] These authors demonstrate that the European worldview that we have characterized as irreconcilable with that of Aboriginal peoples is the guiding principle of Canadian law. Any claim of Aboriginal title is tried by this worldview rather than met respectfully as an equal.

The Power (and Burden) of Definition

Having reviewed the context in which legal contests about Aboriginal title occur, the next logical step is to examine, in somewhat general terms, what happens in the course of

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[159] See Isaac, 1992.
[160] Youngblood Henderson claims that "(t)he Canadian Constitution creates a protected sphere of inviolable Mickmaw conscience, belief and practice from other religious freedoms and powers," 1997: 103
[161] Boldt and Long, 1985: 170-1.

these contests. Cases regarding Aboriginal title and rights entail a dual process of definition. The first component of this process concerns the power of the courts to define title and rights—this, of course, is the function they are meant to serve in these cases. Without clear definitions, meaningful negotiation is impossible.[163] There is no guarantee that these definitions will be formed in an impartial manner; as Aboriginal leader Fred Plain contends, there may be a guarantee of the opposite:

> The government makes the law defining aboriginal rights, and the government appoints judges who interpret the law dealing with aboriginal rights. If the government of Canada has its way, the white man's law and the white man's courts will determine how the concept of land tenure is defined in practice.[164]

According to Plain, the power of definition should not be entrusted to courts:

> Aboriginal rights are a riddle only to those who do not want to hear or face the truth, who do not want their taking of the land interfered with by the aboriginal owners of this continent. The aboriginal people have a clear concept of land tenure in their minds; therefore our chiefs, our elders, our people, our children should define our aboriginal rights -- not the federal government, the provinces, or the Canadian courts.[165]

There is no ambiguity in the charge Plain makes. As he describes it, it is not that courts are defining Aboriginal rights for the sake of Aboriginals-as-Canadians; it is rather that the courts are defining Aboriginal rights for the benefit of non-Aboriginals.

David Ahenakew is equally suspicious of the Canadian state with respect to its supposed impotence in the absence of legal definitions; writing in 1985, he claims that government officials "pretend that they are unable to make a political determination of

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[162] Turpel, 1991: 505-9.

[163] A report by the Canadian Bar Association, released in 1988, cited the "failure of the judiciary to provide clear definition to crucial elements of Aboriginal title and rights" as the primary reason for the "never ending loop of inadequate processes for resolving Aboriginal claims." The report demonstrates that there is a circularity to the problem here: a lack of precise judicial definition leads to unsuccessful political solutions, which cause Aboriginals to seek redress in courts instead, and thus contend with a system unsympathetic to Aboriginal laws and understandings. Canada: *Soliloquy and Dialogue*, 105-6.

[164] Plain, 1985: 38-9.

the question of aboriginal rights" in the absence of judicial clarification, and that the refusal to decide "is itself a political decision" for which "no minister of government is prepared to take responsibility."[166] This argument is possibly less applicable to the current situation, in which all parties seem agreed upon the preferability of negotiated settlements to legal ones. Now that the Supreme Court has had over a decade to define Aboriginal title--just as Plain had feared--there is either enough judicial clarity, enough Aboriginal frustration with the legal process, or enough public pressure upon the government to resolve issues of title (most likely, a combination of all three) that a willingness to do so politically exists.

What hasn't changed since then, however, is the other inequality Ahenakew describes with respect to the task of definition: the necessity of Aboriginal self-definition (this is the second component of the process I began to describe above). He writes:

> . . . the First Nations find themselves now in such a situation--they must 'identify and define' all the natural human rights, rights the Creator gave to them when he placed them on this land. They are asked to define these rights in a manner that will suffice for all time and that will meet with the approval of the provincial governments.[167]

This situation is a consequence of the unique way in which Aboriginal peoples have gone about struggling for their rights:

> What would the constitution of the United States look like today if, instead of leading a revolutionary army, George Washington had gone to London to hold a special conference with ministers of the crown 'to identify and define' the rights of the American people in the same way the First Nations and other aboriginal peoples are forced to submit to in Canada? . . . Would it have been possible for the people to make an exhaustive list of the rights they believed they had? And even if such a list had been made, would it have been valid for decades and

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[165] Ibid.: 39
[166] Ahenakew, 1985: 28.
[167] Ibid.: 29.

> centuries ahead, or would changing circumstances have rendered the list invalid before the narrow interpretations of the king's lawyers?[168]

Ahenakew is here speaking specifically of the outcome of political discussions with First Nations, rather than court cases, but the analogy holds in the legal realm as well: the dominant society has never been put in the position of having to define its values in a permanent and comprehensive way.[169] Yet this is what is expected of First Nations in Canadian courts.

The rather tortuous path that must be negotiated by Aboriginals in courts is this: they must define themselves in ways that Western law can recognize as a basis for conferring title and rights—Aboriginal society must be shown to have the institutions and characteristics that distinguish a people with sovereignty and rights, in the way that European societies do—while at the same time setting themselves apart from mainstream society enough to merit the differentiation of rights that Aboriginality implies. Dara Culhane demonstrates the difficulty of this position, in the context of the legal issue of implicit extinguishment:

> From a social evolutionary perspective, to the extent that Aboriginal cultures are understood as not having changed after contact with Europeans, they are analyzed as being "arrested" at a "lower stage" of development, and incapable of "advancement." Such "primitive peoples must not have had any concepts of property or law, and clearly cannot—today—be considered capable of being granted the same rights as those of "civilized" peoples. *They are too different to be considered equal.* To the extent, on the other hand, that Aboriginal cultures are understood as having changed and adapted some European ways to their own, then they are said to have voluntarily "assimilated" into the colonial culture, and clearly then have no grounds on which to claim "special" rights different from

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[168] Ibid. 29.

[169] Some would argue that the Canadian Constitution Act, 1982, represents such an act of self-definition. What separates this act from the one First Nations engage in before the courts is that Canada didn't have to define itself to the satisfaction of another nation, which was empowered to reject, ignore or reward the definition—Britain was only too happy to let Canada define itself for itself. And the fact that Charter criticism has evolved into an academic genre reveals the extent to which this act has failed as one of permanent and exhaustive definition.

> everyone else's. *They are too equal to be considered different.* Heads, the Crown wins. Tails, Indians lose.[170]

The *Baker Lake* case provided courts with a test for the validity of claims to Aboriginal title which requires that the claimants prove themselves to have been an organized society with definite and exclusive territorial boundaries, maintained consistently up to the assertion of British sovereignty.[171] Thus a title-specific variation of the above quandary emerges:

> This is another double bind: if Aboriginal people emphasize the *similarities* between their land tenure systems and British ones, the courts may look more favourably on their claims because they appear familiar, but then the Aboriginal litigants sacrifice the opportunity to demonstrate the cultural uniqueness and ongoing validity of their own relationships to land, and surrender to the colonizer's language and legal concepts. If, on the other hand, Aboriginal peoples emphasize the *differences* between their relationships to land and those of British-derived cultures, they risk them being classified as too different to be understood as equal. Heads, the Crown wins. Tails, Indians lose.[172]

The difficulty—Culhane might say the impossibility—of satisfying all aspects of the test makes the articulation of an internally consistent position problematic. The submissions of the hereditary Chiefs in the first round of the *Delgamuuukw* case, for instance, assert strongly that "The Gitksan and Wet'suwet'en worldview is of a qualitatively different order" and warn lawyers and judges against trying to understand that worldview in Western terms.[173] They then proceed to define Aboriginal property in Western terms:

> . . evidence will be presented which shows the existence of what we [i.e. Euro-Canadians] would call "property law"; rules which deal with the delineation and public recording of boundaries, the right to exclusive possession . . . rules which deal with rights of access to land by children and spouses; rules which deal with trespass and the right to protect the land from trespassers; rules which regulate the succession of property and which determine its alienability.[174]

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[170] Culhane, 1998 76, emph in original.
[171] Ibid.: 95.
[172] Ibid.: 96, emph. in original.
[173] Wa, 1992: 22-3
[174] Ibid.: 35.

The submissions are also unable to decide between a discourse of self-assurance or victimization; whereas they begin proclaiming that "beyond the farm fences the land belongs to the Chiefs" and that "We do not seek a decision as to whether our system might continue or not. It will continue",[175] they end with the Chief's lawyer saying of the Aboriginal understanding of land as heritage and the identity of people with the land that "We took that away, we who came later. We took it away as an inevitable consequence of our civilization and the compensation we offered was often meagre, often mean, and sometimes nothing at all" and that consequently "Our treatment of them . . . has increased our obligation."[176] To succeed, Aboriginals must define themselves simultaneously as confident equals and as dependent victims.

Proof?

The method by which claims to Aboriginal title are substantiated brings us back to the imbalance of power between Aboriginal and mainstream society. Just as these cases take place within the language of the dominant group, the evidence presented must satisfy the requirements of the dominant conceptions of truth and fact. Take for example the evidence presented in the initial *Delagmuukw* case, in which the ada'ox (the verbal record of events in tribal history) was entered as evidence. The proper performance of the ada'ox, for the claimants, was proof that the facts described in it were true.[177] This did not satisfy the trial judge:

> In hearing testimony in *Delgamuukw*, Chief Justice McEachern went to great lengths to determine its validity, allowing it to proceed, although, as he said, within the letter of the law it was hearsay . . . Its manner of presentation he

[175] Ibid., 9
[176] Ibid., 84
[177] Chamberlin, 1996, 7

> deemed "fatal to the credibility and reliability" of its truth and of the witnesses themselves. In contrast, written texts were perceived to be true historical texts, regardless of the capacity of colonial observers to comprehend the Aboriginal social . legal order . . . Further, "what the Gitksan and Wet'suwet'en witnesses describe as law is really a most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves."[178]

Justice McEachern was uncomfortable with the way in which Aboriginal evidence was presented partially because he was unable to assess it from within the guidelines of Western justice, in which witnesses are relied upon to testify only to what they have directly experienced, and texts are the purveyors of historical truth. Witnesses can be 'read' in the way they speak, as to whether or not they lie,[179] and texts can be weighed according to their conformity to other texts and to the conventions of the written word. Correctly to evaluate the ada'ox, a judge would need to be versed in the conventions of the oral record, and be prepared to accept these as equal to the written.[180] McEachern's estimation of oral tradition is the most infamous of recent court pronouncements, and therefore not entirely representative; the recent Supreme Court decision in *Delgamuukw* repents McEachern's hard line, recognizing the validity of oral tradition as evidence and advising that it must be understood on its own terms.[181] It is perhaps the most honest in its response, however. If we disregard the pejorative element (for instance, McEachern's contention that Indians do not obey their own laws), we see in McEachern's judgement the inevitable response of a mind irretrievably steeped in Western legalism to an alien system of truth. The former takes for granted the supremacy of the written word and the (perhaps illusory) existence of objective facts and universal reason. An oral record,

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[178] Fiske, 1997: 286

[179] Chamberlin, 1996: 8

[180] Accepting the traditions as equal is a task which not even the more enlightened of Canadian scholars, such as McLuhan, have been unable to accomplish. Ibid.: 13

[181] Culhane, 1998: 366.

according to such a mind, must lack the possibility of permanence and objectivity (why else insist on the written word if *it* did not present this possibility?), and the contingent nature of oral narratives[182] offends the possibility of permanent universal truth and reason---the foundation of the binding nature of precedent in Western law is that things don't change so much that we can't almost always find a pre-existing correct answer to current dilemmas. Scholars who (quite accurately) point out that Common law precedents change from telling to retelling in that they, like Aboriginal narratives, are reinterpreted to fit the occasion[183] forget that these interpretations are not seen as being created to suit the need, but 'discovered' in what was already there. The Western system is prefaced on the myth of permanence, and to compare it correctly to a more *obviously* contingent system of truth does not endear the second system to practitioners of the first; it merely exposes the vulnerability of the first. One can only incorporate two different systems of truth and proof into one if at least one system is willing to unground itself, betraying its own founding myth.

While the above argument would seem to imply that it is Western law that would have to give ground in an integrated approach, it is Aboriginal law that is doing so according the present terms of inclusion of oral tradition in Canadian law:

> If, indeed, the dominant legal order, through its courts, establishes what prevails as a right in any Aboriginal society, then the plaintiffs and their legal counsels are in a position to exclude the possibility of alternative meanings and other discourses that might arise within their communities. Do we now see a lawmaking class emerging within Aboriginal nations? Will the end result be a reified "truth discourse" devoid of the flexibility and process inherent to the legal order from which it emerged?[184]

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[182] John Borrows explains that stories in this tradition "can change from one telling to another" to recognize "that context is always changing, requiring a constant reinterpretation of many of the account's elements." 1996: 648.

[183] Ibid. 648, note 98.

[184] Fiske, 1997: 287-8.

The worst-case scenario, presented by the initial *Delgamuukw* decision was the exclusion of Aboriginal evidence in Canadian courts where Aboriginal title was at stake. The best-case alternative, made possible by the Supreme Court revision of *Delgamuukw*, is the inclusion of this evidence on its own terms, but still from within the confines of the Canadian legal system. This means that Aboriginal narratives will be presented in and interpreted for the courts; once entered into the (written) law, these narratives will, to an extent, become creatures of the courts, relatively static, and subject to the interpretation and application of the Western legal system—at best, with the advice of a few Aboriginals recognized as experts by that system. In short, Aboriginal law will be largely taken out of the hands of Aboriginal peoples. The cost of inclusion may become as high as that of exclusion.

Aboriginal Title

The saga of Aboriginal rights and title in Canadian courts is already well-documented;[185] a brief summary of the more significant decisions should suffice to demonstrate the degree to which unequal power has shaped the legal meaning and consequences of Aboriginal title.

Calder, 1973

This was the first instance in which the concept of Aboriginal title was accepted by the courts (bearing in mind that in 1927 Ottawa had spared courts the trouble by enacting a law which made it illegal to raise funds for land claims until 1951[186]). Six of seven justices agreed that the Nisga'a people held title to their land at the coming of the British

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[185] See, for instance, Slattery, 1987; Kulchyski, 1994; Cuhane, 1998
[186] Foster, 1998 25

Crown; this title was held to have its origin in the fact of prior occupancy of the land by organized Aboriginal societies.[187] The precise nature of this title was ambiguous; the six split evenly on whether or not that title was extinguished by British Columbia's pre-Confederation government.[188] The recognition that title had existed, and the possibility that it may still exist, lead to government negotiations with the Nisga'a, culminating in the current Nisga'a Treaty.

Guerin, 1984

Over a decade later, the Supreme Court heard the appeal in the case of *Guerin v. R.*, concerning the Musqueam First Nation of British Columbia. As Culhane notes, the majority decision "reiterates these fundamental points: that the Crown in the form of the hovering sovereign holds underlying title to all land, and that aboriginal title is not proprietary and can only be surrendered to the Crown."[189] Also established is that Aboriginal title can apply to off-reserve lands, that rooted in this title is a fiduciary duty on the part of the Crown, that Aboriginal rights are inherent, and that Aboriginal rights and title are *sui generis*, i.e. they constitute a class unto themselves.[190] Both *Calder* and *Guerin* affirm the Crown's underlying title and concern themselves with the question of how Aboriginal title may be lawfully extinguished.[191]

Bear Island, 1985

The *Baker Lake* test of Aboriginal claims is expanded to require claimants to prove the nature of rights enjoyed on the land in question, the existence of systems of land-holding and social rules and customs; they must also prove exclusive occupation of the

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[187] Culhane, 1998: 82
[188] Slattery, 1987: 731.
[189] Culhane, 1998: 85
[190] Ibid.: 85-6.

land up to the date of the court action, i.e. occupation against not only other First Nations, but against European incursion.[192]

"*A Still-Life Out of Dynamic Objects*"[193]

The Supreme Court begins to pronounce on Aboriginal rights in ways which betray their origin in inherent Aboriginal title and the sovereignty which stems from it. In *Pamajewon*, it prevents a nation's right to regulate on-reserve gambling because such regulation is "not an Aboriginal right traceable to a pre-contact practice," and is not "an integral part of the distinctive cultures" of the appellants. In *Van Der Peet*, a right to fish is reduced to a right to fish for sustenance but not for profit, for largely the same reasons.[194] While consistent with the commitment in *Sparrow* to grounding rights in the cultures from which they arise rather than in existing acts of state, these decisions ignore other commitments to acknowledge rights in their modern forms and to uphold a "generous, liberal interpretation" of the existing rights affirmed by the Constitution Act, 1982.[195]

Delgamuukw, 1993

Finally, there is the Supreme Court ruling on the *Delagamuukw* case. As noted previously, this decision overturns McEachern's ruling on the admissibility of oral histories. It is perhaps interesting to note that the Court does not refute the trial judge's logic with respect to oral history, but instead finds that he "expected too much of the oral history," and that his approach is unacceptable because it would cause Aboriginal oral histories to be "consistently and systematically undervalued by the Canadian legal

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[191] Ibid. 86
[192] Ibid., 99.
[193] This is the title of an article by Leonard I. Rotman, 1997
[194] Rotman, 1997, 2-3

system"[196]—in other words, there would be no evidence left to rule on. Little is decided about the claim itself (a new trial is ordered), but the nature of Aboriginal title is finally addressed in detail. Title constitutes "a right to the land itself," protected by s. 35(1) of the Constitution Act, 1982, which in turn should be seen to "reconcile the prior presence of aboriginal peoples with the assertion of Crown sovereignty." Title is inalienable, communal, and can only be transferred or surrendered to the Crown. Finally, there is an "inherent limit" on title in that it "cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands."[197]

This decision is progressive in that it achieves many of the strategic objectives of Aboriginal claimants: title is constitutionally recognized, it is precisely defined, and it is somewhat free of the "frozen rights" logic of *Sparrow* which held that it could only be used for activities integral to the culture. It is negative in the sense that, even if it expands the degree of freedom Aboriginals will enjoy on their own lands, it retains ultimate control and sovereignty over these lands for the State: underlying title belongs to the Crown, conflicts between Canadian and First Nations claims will be decided by the judicial arm of the Canadian state, and the courts will decide what Aboriginal uses are in keeping with the "nature" of Aboriginal attachment to the lands—it will be the courts who determine this nature, which Aboriginals claim as central to their law, society and spirituality, rather than Aboriginals themselves.

Michael Mandel argues—somewhat cynically, but accurately—that the main function of the *Charter* has been to manage rather than to promote Aboriginal claims by keeping Aboriginals working within the legal system where "nothing radical could possibly

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[195] Ibid., 5.
[196] Culhane, 1998, 362.

happen."[198] Even if we entertain the possibility that some progress has been made through the courts in terms of providing precise definitions and terms for the political resolution of Aboriginal claims, the most recent of decisions should demonstrate to us that even in this limited capacity nothing radical has happened: Aboriginal claimants have emerged from the process with highly circumscribed descriptions of their title, nationhood and sovereignty, and non-Aboriginal law and values continue to hold the leash, no matter how long that leash may now appear.

III. Political Processes

Expressly political avenues (which Mandel himself does not examine, and which I shall in the following pages) yield outcomes similar to those of the legal proceedings Mandel describes, and for the same basic reason: the Canadian state has a near-monopoly of control over the political processes by which Aboriginal title is settled. Chief John Snow observed this with respect to Aboriginal participation in the constitutionally-mandated First Ministers' Conferences: "Our status at the conferences is that of a powerless minority group, which may deserve some kind of special recognition but which is not entitled to share in any real power."[199] The Royal Commission on Aboriginal Peoples recognizes it when it implores the Canadian State not to abuse its superior position in the treaty process:

> We acknowledge that the Crown, by exercising bargaining power, could easily subvert the specific purpose of such a provision by resorting to drafting techniques that ensure wholesale paramountcy of Crown rights with respect to land and governance. Yet it must not be forgotten that there exists a fiduciary relationship between the Crown and Aboriginal peoples.[200]

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[197] Culhane, 1998: 363-4.
[198] Mandel, 1994: 368.
[199] Snow, 1985: 43.
[200] Canada, 1994: *Treaty Making in the Spirit of Co-existence*, 63.

The Commission implicitly recognizes that treaties emerging from this process could be entirely to the advantage of the State, unless it exercises superhuman restraint in its negotiations, to say nothing of the fact that only one party in such treaties will be capable of enforcing them to any genuine extent. Elsewhere the Commission is explicit:

> The controlling party can choose who participates, how they participate, and what options are available. This is particularly evident in the claims process . . . Aboriginal groups are left to react to and cope with this process, recommend changes that the government is in no way compelled to consider, and if time and money permit, seek redress through the courts.[201]

This describes precisely the difficulties encountered by Aboriginal groups participating in the First Ministers' Conferences that followed the 1982 Constitution. The Assembly of First Nations' participation required that it accept its role as invitee in a process in which the agenda was set solely by federal and provincial governments and in which First Nations had no voting privileges. It did so at the cost of a quarter of its membership; the AFN that represented First Nations at the talks was thus representative of only the most mainstream Aboriginal opinions. This homogenized version was given federal funding to prepare for the talks, and attempted to buy further Aboriginal support by offering the more radical groups money in exchange for their guaranteed participation and a promise not to discuss the Constitutional process abroad. In this way, "the AFN became prisoners within Canada, and hardly Sovereign First Nations."[202]

As for the Commission's concern about the government's ability to pre-determine the outcome of the political process, one needn't look beyond the recent Nisga'a Treaty to find justification. Whereas in judicial proceedings there are usually clear winners and losers, the treaty process is less obvious in its outcomes. The former is intended to be

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[201] Canada, Soliloquy and Dialogue, 1996: 350.
[202] Robinson, 1985: xxii-xxiii.

adversarial, while the latter is supposed to be collaborative in nature, ending when both sides come to an agreement that they find acceptable. This, of course, only really holds when both parties are roughly equal in bargaining power; if they are not, the process *may* end when the weaker side settles for what it can get in an agreement which, for the sake of saving face, it then feels compelled to defend. Ignoring this second possibility leads us to reach means-justify-the end conclusions, as does one commentator on the Nisga'a Agreement, who reasons that "It is highly unlikely that the Nisga'a would be a party to a negotiated government that they did not believe in."[203]

Consider the speech of Chief Joseph Gosnell to the BC Legislature in December 1998, in which the Treaty is celebrated. Gosnell casts the historic process leading up to the treaty as a sort of epic journey, proceeding through over a century of adversity and opposition, through a lengthy process of negotiation. Gosnell notes that "a generation of Nisga'a men and women has grown old at the negotiating table"[204]--to arrive at an agreement in which his people "will collectively own about 2,000 square kilometres of land, far exceeding the postage-stamp reserves set aside . . . by colonial governments."[205] Gosnell mentions "self-reliance" and "personal responsibility," and of being "free and equal citizens." Notable for their absence are the terms "self-government" and "sovereignty."[206]

Gosnell succeeds in construing the treaty in a positive way; to an extent, he is correct in doing so. The treaty will provide for Nisga'a paramountcy over their own constitution,

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[203] Mitchell-Banks, 1998, 134
[204] Gosnell, 1998, 9
[205] Ibid., 6
[206] Ibid., 6-9

institutions, citizenship, and lands.[207] However, the same facts which Gosnell emphasizes in his speech as positive have been used by others to convince non-Aboriginals that the Nisga'a have actually given up much to secure the deal. For instance, the almost-2000 square kilometres of land are only 8 to 9 percent of the lands to which the Nisga'a lay claim.[208] Even if we were to look at the allocation instrumentally, reasoning that the currently reduced Nisga'a population *needs* less land than it originally held, then the Nisga'a should properly receive at least 18 percent of the total claimed land.[209] Thomas Berger, counsel for the Nisga'a, notes that there are at least two privately owned ranches in B. C. which are larger than the amount granted by the treaty.[210] While there is no clause in the treaty requiring the extinguishment of Nisga'a title in exchange for concrete benefits -and this is significant, considering how controversial the extinguishment issue has been in Canada- the Nisga'a are releasing their claim to 90 percent of their ancestral lands;[211] this means that the Crown has won the *de facto* extinguishment of the largest share of that title. Furthermore, recognition of Nisga'a "paramountcy" over assets and lands does not preclude the fact that the quality of Nisga'a title will evidently be less respected than that of fee-simple lands belonging to non-Aboriginals: the former will be subject to provincial forestry laws while the latter are not, increasing Aboriginal harvesting costs considerably. A similar situation will obtain

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[207] Gibson, 1998: 65
[208] Foster, 1998: 28.
[209] Based on Gosnell's estimate that the Nisga'a population has decreased from 30,000 to 5,500 persons Gosnell, 1998: 7
[210] Berger, 1999: 1
[211] Ibid., 1.

in the case of manufacturing.[212] The Nisga'a will also be obliged to allow a far higher degree of public access to their lands than is required of private property owners.[213]

That Nisga'a property rights should be different from those of non-Aboriginals should seem entirely consistent with what was established in the first chapter regarding conceptions of property. What must be remembered, however, is that the purpose of demonstrating this difference, for Aboriginals, is part of explaining why they should be allowed to control the land themselves. Treaties such as this may well place limits on Aboriginal property similar to those which Aboriginal societies themselves might sanction, but they do not allow Aboriginals to set those limits themselves. To withhold this control from Aboriginals and expect them to be satisfied with external limitations because they are not supposed to believe in full liberal property rights is to use their beliefs and their discourse against them.

Under the Nisga'a Treaty, control will be largely retained by non-Aboriginals. In terms of finance, the Nisga'a will now be subject to Canadian income and sales taxes;[214] this means that a people who were once merely Canadians with special rights will now be citizens of a Nisga'a nation paying into the coffers of a foreign government. Of course, Canada will not really be foreign to the Nisga'a, since its laws, provincial and federal, with a few "limited and defined" exceptions, will still apply to the new nation,[215] including the Charter of Rights and Freedoms which so many Aboriginals hold as

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[212] Mitchell-Banks, 1998: 120.
[213] Ibid.: 124.
[214] Ibid.: 1.
[215] Foster, 1998: 30.

antithetical to their values[216]—all this in spite of the fact of Nisga'a "paramountcy" over constitution and institutions.

The overall picture, then, is that this "first modern treaty in B. C. history"[217] will provide a precedent of extreme sacrifice in exchange for a limited sphere of "self-reliance"—a precedent of Aboriginals taking what they can get. Most nations will be well-advised to do so, it seems, if they wish to get anything at all. It took the Nisga'a over a century to secure 2,000 square kilometres—approximately 200 hectares—with numerous strings attached and much public outrage resulting. Conversely, it has taken five years for MacMillan Bloedel to convince the province of British Columbia—with the aid of a lawsuit, like the Nisga'a—to surrender 20,000 hectares to the company, with exemption from environmental controls on logging for another 90,000 hectares.[218] This decision is particularly troubling since it involves land currently subject to Aboriginal claims, as the government is evidently aware;[219] the government appears to see no contradiction between inviting tribes to enter the treaty process and, at the same time, unilaterally giving away the land for which the tribes seek treaties. It demonstrates that the RCAP was correct in its estimation that government is "in no way compelled to consider" Aboriginal claims.

Political outcomes like the treaty process are similar to those of the legal process that Mandel describes in that the determinant in both cases is a gross imbalance of power. In what sense, then, are the effects similar? For Mandel, the legal process served mostly to keep Aboriginals within a system in which they exert little influence in order to prevent

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[216] See, for instance, Boldt and Long, 1985, and Turpel, 1991.
[217] Berger, 1999: 1.
[218] Armstrong, 1999.
[219] Ibid.

them from pursuing more drastic and effective means. Fleras and Elliott, writing before the RCAP Report or the Nisga'a Treaty, describe a possible course of action for mainstream institutions with respect to Aboriginal demands:

> . . . political authorities may decide to relinquish some power through genuine concessions and substantial reforms. This need not, however, amount to actual power-sharing. Loss of control over the political agenda is kept to a manageable minimum, while the pace of reform is carefully monitored and regulated. Substantial changes are introduced that accommodate aboriginal demands to some extent, but simultaneously (perhaps even inadvertently) reinforce the status quo, often by co-opting aboriginal groups into the institutional structure of society.[220]

This co-optation has the further effect of transforming the actors so that they mirror the objectives and practices of the institutions with which they interact, and of separating Aboriginal movements into "relatively isolated units, without much capacity for co-ordinated, pan-tribal action."[221] The concessions and reforms to which the authors refer are certainly more modest in scope than those which the Nisga'a agreement embodies; nevertheless, the overall pattern they describe continues at even this level of compromise. I have already alluded to ways in which the Nisga'a Treaty reinforces the status quo in power relations between First Nations and the State, even though the treaty does give the Nisga'a a considerable amount of freedom relative to what they have enjoyed previously. That a greater degree of co-optation and isolation of Aboriginal nations is occurring in British Columbia under the current treaty process is evident in the fact that as of June, 1999, there were 51 tribes participating in 42 sets of negotiations through the Treaty Commission, which is to say that even though some tribes have consented to sit at common tables, there are still effectively 42 groups negotiating separately with both

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[220] Fleras, 1992: 225.
[221] Ibid.: 226.

levels of government.[222] The current legal debacle concerning competing Gitanyow claims to land granted under the Nisga'a Treaty suggests that the "modern era of treaty-making"[223] will consist not only of tribal separation but of tribal conflict.[224]

IV. Conclusion

I quoted Chief John Snow earlier, describing Aboriginal peoples as "a powerless minority." This is not entirely accurate; even if it were true of the decades leading up the White Paper, the subsequent amalgamation and mobilization has empowered First Nations in the sense that it allows for co-ordinated action against the state. Were First Nations powerless, the struggle of the last 20 years would not have taken place. The Royal Commission recognizes the fact and nature of Aboriginal power in the opening pages of its *Highlights* publication, listing among the reasons for a renewed relationship with Aboriginals the fear that "continued failure may well lead to violence."[225] This blunt explanation is jarring, following as it does the more softly worded concerns about Canada's reputation as a "fair and enlightened society" and a concern for "the life chances of Aboriginal people;"[226] it concedes that the Commission itself is the product of Aboriginal power. The Commission itself consists of government and Aboriginal peoples; thus the explanation appears simultaneously to express a fear and a promise of violence. The other component of this power is the qualified support of mainstream public opinion. In this, Aboriginals are the benefactors of a culture of at least superficial respect for cultural difference (so long as this difference does not cost too much or offend a modern liberal understanding of equality). This power has its limits, however; it is

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[222] BC Treaty Commission, 1999.
[223] To use Thomas Berger's optimistic phrase. Berger, 1999: 1.
[224] For details on competing Gitanyow claims, see Sterritt, 1998 / 1999.
[225] Canada, *People to People, Nation to Nation*, 1996: 1.

great enough to force the State to entertain change, but not great enough to control the process of change. For Aboriginal peoples, this process must still come about through the actions of institutions that are controlled by their opponent. They must play the game according to the opponent's rules, holding relatively few cards.

What a people says about itself in the context of such a game is inevitably shaped by the game's rules. A people would never have to define its understanding of property and the values which inform it except for the purpose of defending these to—and from—someone else; in this case, to defend these is to demonstrate that they are different enough to warrant their preservation (this logic appeals to a culture which professes to value difference for its own sake). Emma LaRocque notes in passing (while discussing the application of Aboriginal practices to criminal justice; she does not substantiate the following claim with respect to land issues, as this thesis has attempted to do) that "Native peoples have been forced to make their case for Aboriginal (land) rights on the basis of cultural differences" and that their leaders, "faced with convoluted, self-serving, and shrewd legal arguments, have had to scramble for proof of cultural difference." She suggests that this has made it necessary to overemphasize collectivity in the discourse of Aboriginal identity for the purpose of proving difference.[227] This should not be taken to mean that this collectivity is a fiction; it may well be that it is significantly more evident in Aboriginal societies than in those of Western extraction. It may be the case, however, that Aboriginals discuss their collective selves more readily than their individual selves because to present these more equally would be to weaken the assertion of difference—to become, in Culhane's words, "too equal to be different." If this is the case, then

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[226] Ibid., 1.
[227] LaRocque, 1997, 87.

Aboriginal peoples will have to deal with the consequence of successfully proving themselves different: their title is now defined in law and in treaty as collective in nature. The process has reified a difference that could have been strategic in nature.

To whatever degree, the necessity of proving difference has helped to shape Aboriginal discourse on Aboriginal title. So, too, has the necessity of framing this discourse both in English and in the language of the law. Each of these media is capable of translating foreign ideas only imperfectly; the confusion over Aboriginal use of terms such as 'sovereignty,' 'inherent' right, and rights talk in general suggests that the act of translation cannot avoid producing obscure results. Aboriginal authors themselves have said as much.

All of this is compounded by the way in which Aboriginal self-definition occurs. It should be impossible to define an entire culture, an entire experience of reality. Setting aside the fact that this experience constantly changes as individuals, we spend our whole lives in a process of self-definition--there is the sheer enormity of the task: imagine trying to condense all of Canadian history, belief, culture, into a single book or a single submission to a court. This is what is expected of First Nations, however. Its result must inevitably be the reduction of "pan-Indianized cultural values to a handful of 'traits.'"[228]

The result of all these factors is a discourse that appears intractable and radical if we take it at face value. We may chose not to take it face value, but the same factors make a more complex reading of it no more credible than guesswork. These factors are the symptomatic of the larger problem of unequal power: the superior political and economic position of mainstream Canada has dictated the conditions of the discourse. It has also

had the cruder effect of circumscribing the horizon of possible outcomes for First Nations, by setting Crown sovereignty and nations-within status as the presuppositions behind any legal or political solution to Aboriginal grievances. Proceedings based on this foundation will lead to only heavily qualified victories for Aboriginal peoples, as the Nisga'a Treaty (once approved by Parliament) and those which follow its precedent will prove. Even those who follow the logic of radical Aboriginal discourse to its separatist conclusion must realize that their demands will be ignored or bought at the price of bloodshed. In short, the imbalance of power assures lower expectations.

Somewhere between the shaping of discourse and the lowering of expectations fit the effects of co-optation, the price of participation in Canadian institutions to secure Aboriginal title and sovereignty. Whether this co-optation is part of a calculated new assimilationism or the inevitable outcome of regular interaction with foreign institutions, the effect is the same: participation begins with the giving up of radical actions, and may well end with the abandonment of radical ideas.

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[228] LaRocque, again referring to cultural difference in criminal law, 1997 89

Chapter 5

Conclusion

I began this inquiry with broad questions about the significance of ideas in political struggle. I proposed to answer these by tracing Aboriginal notions of property in the course of a concrete political struggle, namely the recent resurgence of Aboriginal activism for the purpose of regaining ancestral lands in Canada, proceeding from the assumption that the nature of the conflict would determine the significance of those notions to the conflict. In the process of describing the nature of the conflict, which is to say, the enormity of the imbalance of influence working against First Nations in Canada, a more immediate question has presented itself, as it must to anyone sympathetic to Aboriginal causes: what can be done to correct this imbalance? The unfortunate answer to this question is: probably nothing. I referred earlier to the pursuit of Aboriginal aspirations through non-Aboriginal institutions as a process of playing a game according to the opponent's rules. Even when if your opponent is sympathetic, perhaps embarrassed by the ease of his victory in the game, it is his game, and it is structured so that he cannot help but win. While it is an unpromising way to regain what should never have been taken in the first place, it is, as the expression has it, the only game in town. While they remain in Canada, Aboriginal peoples are, in terms of population and economic power, a minority on their own soil. This basic imbalance is beyond the power of Aboriginals to change. This leaves the option of becoming a majority in a smaller setting via independence, and of course, the prospects of Aboriginal independence in whatever form or degree it is sought are fenced in on all sides by the imbalance of power.

The future for Aboriginals in Canada will consist of the ongoing attempt to make whatever gains are possible from within a system that is beyond their control.

This brings us back to the broader questions again, about the significance of ideas in political struggle. I may have been tempted to conclude, in the beginning, that ideas serve little actual purpose in political struggle: they may at first provide the catalyst for struggle, and become weaponry for struggle as strategic rhetoric, but they are somehow discarded or betrayed in a cynical manner in the pursuit of short-term gains as the conflict wears on. They are not determinate with respect to political outcomes. This would have accounted for the fact that Aboriginal peoples seemed to enter their recent encounters with the Canadian State with strongly held opinions about property and the institutions which should flow from it, and to depart from those encounters having surrendered the essence of these opinions. There is an element of truth to this conclusion: Aboriginal notions of property have had to pass through a filter of Western values, and the horizon of possible gains has always been narrowed by the fact that Aboriginal issues haven't been a government priority since the days when what was at issue was the best way to separate Aboriginals from their land. There is more to it than that, however.

The nature of the struggle not only determines what becomes of ideas; it also necessitates and shapes the becoming of ideas. The Aboriginal understanding of property, as it appears in the texts examined in this paper, is a product of the need to convince non-Aboriginals that there exists a difference which sets Aboriginals apart at the level of ideas, and that institutions should mirror this separation. As I have stressed previously, this does not mean the ideas did not exist previous to the struggle and are not in some way 'real'; if that were the case, the struggle itself would not have come about.

It does mean that the precise form in which they are presented is tailored for a particular situation: the tone of the discourse, the choice of emphasis, are calculated to achieve a specific effect for its intended audience. If this articulation is taken to heart by its audience, and if it is adhered to by its proponents, it becomes the accepted interpretation of the original idea—the version of the idea which survives, whether it is more or less than the original. The struggle in which ideas are presented is thus determinate with respect to the content of those ideas.

This seems to present a further quandary: do we take ideas, as they are presented to us, at face value? It seems we have little choice. While we may be aware that what we are shown is only a surface, we can only guess at what lies beneath. We can, at best, aspire to a perfect understanding of surfaces.

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