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Critical Indigenous Legal Theory

Tracey Lindberg

Thesis submitted to the Faculty of Graduate and Postdoctoral Studies In Partial
fulfillment of the requirements for the Doctor of Laws.

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Canada

This is for Kelsey, Michael, Brandon, Dawson,
Kalem, Keynan and those who come after.

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ABSTRACT

Indigenous and non-Indigenous peoples in Canada are separated by an enormous knowledge gap. Indigenous knowledge systems, repositories and holdings are generally not written and are not well known in a non-Indigenous context. The vibrant, thriving and living body of Indigenous laws and legal traditions are unknown by most Canadians (and by the Canadian legal system) for many reasons. Some of these include preservation of the sanctity of the information, a dedication to traditional Indigenous protocols in the sharing of information and the inability to translate Indigenous context, philosophy and content as equal parts of Indigenous law. The ability to address Indigenous knowledge related to law and legal theory requires that Canadian legal knowledge and theory be addressed from an Indigenous place. Doing this enables the development of a critical Indigenous legal skill set which will allow for the assessment of transferability of concepts, understandings and laws from a respectful place. Additionally, addressing Canadian legal history enables us to determine if our dissimilar histories, legal histories and laws allow for a lessening of the knowledge gap.

Beginning with the understanding that knowledge is empowering (rather than power), the initial chapter begins by grounding the paper in Indigenous methodology and understandings in *Neheiywak* (Cree) philosophies, principles and law (*Neheiywak* law as home). Researching and detailing the understandings related to Indigenous legal traditions as home allows for the development and discussion of Indigenous law as normative. The first section of the paper constructs a lexicon for the regular fantastic of Indigenous law. Putting Indigenous laws at the forefront of the work allowed for the discussion of our laws with Canadian laws as comparative law and conflict law, a meaningful re-establishment of the boundaries of our legal imaginations.

Looking for home in Indigenous terms and in accordance with Indigenous / *Neheiywak* laws led directly to a discussion (and the second chapter of this work) of home, land and territories in the context of Indigenous authorities and obligations related to the same. Researching and discussing Indigenous conceptualizations of “something more than Sovereignty” allowed a discussion of Indigenous understandings, laws and principles related to our relationship with our lands. This enabled a discussion of international and Canadian conceptualizations of sovereignty and land holdings; the juxtaposition of Indigenous understandings of our relationship with our land contrasting with non-Indigenous notions of the crystallization of sovereignty. Examining non-Indigenous cases where Indigenous understandings of our holdings and experiences leaked through the double filter of foreign laws and foreign jurisdictional review allowed for a discussion of the construction of land as home, home as land, and land as land claim in a non-Indigenous paradigm. Grounding notions of “something more than sovereignty” in home allowed for conceptualization and ideological establishment of an Indigenous constructed paradigm of Indigenous laws related to our homelands.

The next chapter involves the search for Indigenous citizenship in an Indigenous legal context. Outlining the Indigenous / *Neheiywak* laws related to relationships, family, and citizenship enables a thorough discussion of the placement of identificational home for

Indigenous women. Then, examining Canadian law and its impact on our ability to honour our laws related to women, womanhood, and citizenship leads the paper to a discussion of the Canadian legal/legalized deconstruction and devaluation of Indigenous womanhood as a causal factor in the actual erasure (effect) of Indigenous women through Canadian Indian membership determination and physical devaluation/violence. Grounding this work in the notion of actual Indigenous womanhood as home, the work examines the link between legal and actual erasure of Indigenous women. Addressing Indigenous / *Neheyiwak* laws related to inclusion and obligation allows for discussion and analysis of the responsibility of lawmakers for the laws they make when they have an overwhelmingly negative impact on racialized and gendered populations.

The next chapter deals with modern day Canadian legal constructions of Indigeneity and the historical constructions of images of the same perpetuated through colonizer laws. In assessing section 718.2 of the *Criminal Code* and the proposed suite of legislation Canada drafted to address “Indian accountability”, the paper draws upon a critical Indigenous legal analysis of the historical Canadian legal construction of Indigenous illegality in criminal law and as related to our economies. This research and analysis allows for a fuller understanding of the construction of contemporary Canadian legal understandings of Indian / Indigeneity. Reviewing the same does not give us a full sense of Indigenous peoples’ assessment of settler criminality and illegality. In order to address the nonsensical notions of constructions of race through Canadian law, the research and analysis address the construction of an historic and legal path which led to settler identities and legal existences.

Finally, the paper examines how to address the critical analysis and the critical tools required to assess Canadian legal understandings from an Indigenous / *Neheyiwak* place. Constructing / re-constructing an Indigenous legal home as a place from where we can view and assess Canadian law, the paper examines how to address home when definitions and constructions of home run contrary to Canadian law. Looking for reconciliation and rejecting legal translation (as the colonial legislative and legal history is too profoundly entrenched in Canadian law and legal history) as a tool, the paper discusses intellectual and legal emancipation and liberation from an Indigenous place. Promoting ways and means to learn how to learn Canadian law, the paper comes full circle and addresses Indigenous knowledge, legal systems and ways of knowing as the mainstay of Indigenous critical legal theory. Starting from home, being aware of and fluent in Indigenous philosophies, principles and laws is the most empowering place to be. Developing a theory of Indigenous rightfulness and a practice of Indigenous mindfulness is our next step of development as Indigenous critical legal scholars.

I. INTRODUCTION

Readers of this Book

Turtle Island

August 30, 2006

Dear Reader,

I have tried to write to you many, many times and finally decided that the only way that I could speak with a true voice was by writing directly to you. This seems the most truthful way that I can convey my message. You see, I have been educated as a legal scholar, indeed have spent years working at this goal, but have never really understood the import of the tools I have. Part of this is because education is not application; scholarship is not training. My training commenced the day I finished graduate school and I moved back to Saskatchewan. While writing my dissertation, I became keenly aware of my humble toolbox and the dearth of tools within it. Luckily, Harold Cardinal, Maria Campbell, bell hooks, Patricia Williams, Robert Williams Jr., Cornell West, Derrick Bell, Angela Davis, Patricia Monture, John Borrows and Mary Ellen Turpel came to my rescue. By immersing myself in the dialogue which each of these people was able to share, I became aware of the truth of a simple phrase: the personal is political.

My personal has always been political. As a Cree-Métis woman from Treaty 8 territory in Alberta, I am at once a part of a legal history which we, as Indigenous people, have lived for

generations. As subject of this story, I write to you in the hope that my meager training can assist you in traveling down a broken and unpaved path. We do not read this legal history anywhere and it is ill taught in any literature or written form. However, I live it, experience it, understand it and interpret it because of who I am and where I come from. While the authors I mention above have provided square patches of understanding, snippets of thread knowledge, and the fabric of experience, this quilt is my own. My family passed it down and I patch it gingerly with wordlove and teachingcare. No one's quilt has looked quite like this because I believe we, as Indigenous people, have been careful not to show our quilts in public; we have been cautious not to share too much. The cost of sharing that blanket publicly is that it is no longer ours, no longer subject - it becomes something objectified and impersonalized, diminished in importance and abstracted beyond recognition.

My personal is political because my experienceblanket, my lifethreads, are woven throughout the legal history of and by Indigenous people. I am concerned about sharing the same because we know too well the unraveling which occurs when we share our blanket: the wordblanket becomes about, not of and by.

The blanket of Canadian legal history is quite like the Hudson's Bay blankets our people first saw when newcomers came to this land. Foreign and externally produced, it provided some immediate relief, but in the long-term was still foreign and even worse, hid much and attempted to usurp the production and product of our labours and experience. We cannot produce a Hudson's Bay blanket, and should not, but we acknowledge that it has a role in our history and that it is not without its own place. We find that if/when we bring our blanket of experience out, the history we have is unacknowledged, externally devalued, and defiled.

We have a shared history, a shared legal history, which has not been told in this territory. Our experiences as legal objects are documented in case law, the constitution, and legislation. They are told in a way which does not acknowledge us as actors, principal players, holders of our own legal traditions and understandings. The Canadian legal history tells Canadian legal history in the first person posing as a first person telling. We know we are external to this discussion, and that the results often have little or no meaning to us. We see who you think we are in this legal story. In the Canadian legal story we are un and in. Undisciplined. Incapable. Unreasonable. Incompetent. Unable to compete. Indigent. Unaccountable.

In this telling of our shared experience (with your court reporters as the 'official' record), Indigenous people are often silent and silenced. Our collective response to the particularization of our lives, the clearing of our experience and the separation from our understanding has been perceived as quiet acceptance. That this interpretation serves as a further indicator of our perceived acceptance of your blanketgift is just one interpretation.

Our interpretative differences have not been clearly evident on the Canadian legal record for many reasons. One reason is that our laws cannot be separated from life and compartmentalized in the manner which Canadian law can be separated from individual, experience and government. It is a huge testament to our strength as Indigenous peoples that we have not sliced our life into fragments in order to fit into Canadian legal and governmental boxes. Part of this is responsive to Canada's legal history - why would people who were promised freedom of religion and who found it outlawed shortly thereafter explain

the principles, philosophies and laws which made us so vulnerable to Canada's legal regime? Why would peoples who were told we could roam and continue our traditional economies, only to be arrested when exercising those ancient rights, trust in the laws of the newcomers? Particularizing our philosophies, understandings and laws in light of Canada's legal history would be foolish. I write this and try to remember Canada's history and to pay attention to the voices (don't tell them too much, be careful what you say, your words have weight) of experience.

Another reason our interpretative differences have not been clearly evident on the Canadian legal record is due to Canada's inability or unwillingness to acknowledge the weight, credibility and authority of our legal jurisdiction and traditions. Principally, I believe it was (and is) an issue of race-based decision making. As Indigenous people we were perceived as noble, simple, and without laws (at best) because this made usurpation of our territories easier. As time went on, and as newcomers interacted with our people, I think the solid logic of our traditions became evident many times and that it became easier to understand us as savage, remorseless, dying in order to rationalize what is unlawful behaviour in our understanding. In any event, as objects of settler legal regimes and as dehumanized beings, we had to be understood as simple, ungoverned and lawless.

It is important to note that our interpretations of newcomer illegality, legal intrusion and legal/moral failure are relatively unknown to settler peoples. It would shock many to know that as Indigenous peoples with Indigenous legal traditions we have witnessed the illegality of settler people within our own legal context (let alone within theirs) and that there are interpretations and objectification that many would find surprising. Indigenous legal

history has been much kinder to settler people than Canadian legal history has been to Indigenous peoples; make no mistake however that there are penalties and perceptions which have resonance, weight and consequences.

I am writing you, in essence, to begin dialogue about both newcomer legal history and Indigenous legal history. My hope is that by doing so, we can construct a critical Indigenous legal theory that can enable us to reconcile our legal histories in a way which is participatory, critical and respectful. My hope is that you receive this letter with an open mind.

Critical Indigenous Legal Theory involves not only our review of the inequity and illegality of Canada towards Indigenous people in a Canadian legal context; it requires that we address Canada's inequality and illegality in an Indigenous legal context. With that said, the end goal of this dialogue should be to move us from objects of Canada's legal history to the subject of Indigenous legal history, without repeating the moral and legal errors of objectification of newcomer participants in the Canadian legal system.

Beginning to document and analyze the legal history of Indigenous peoples in Canada is a difficult task. The task is challenging principally because of the rigour and integrity which are an integral part of the learning, transmission and operation of Indigenous laws. It is made altogether more difficult by virtue of the impact that Canada's successive colonial regimes have had on the open operation of Indigenous laws. Additionally, the Indigenous legal traditions and their translation include principles, tenets and understandings which are

completely outside the understanding of those who subscribe to "Canadian Aboriginal law". Reconciling Indigenous legal traditions with Canadian legal traditions, particularly those with respect to Indigenous peoples, is a daunting undertaking. It might not be possible. If we are to attempt to do so it will require acknowledgment at the outset that we are not only talking about unlike applications of law; we are also examining unlike conceptual underpinnings, philosophies, intellectual standards and ethical/legal understandings.

Capturing the essence of Indigenous legal traditions and understandings requires that researchers undergo and initiate transformative dialogue. The dialogue of emancipation must be undertaken and applied to the research framework, the interpretation of law and principle, and the analysis of our legal history in both an Indigenous and Canadian context.

Colonization, in all of its various forms, must be examined, a filter for the same developed and audited as the dialogue emerges.

Facilitating dialogue that is transformative is not merely educational, it is revolutionary.

What emerges, then, is a rejuvenation project.

II. DEFINING INDIGENOUS RESISTANT THOUGHT AND ACTION: THE IMPORTANCE OF INDIGENOUS PARADIGMS AND INTELLECTUAL TRADITIONS IN THE RENEWAL AND RESTORATION OF INDIGENOUS NATIONS

A. Introduction

I am walking across the field that separates my home from the Chief's house. His land houses the sweat lodge that I go to. As I walk across, single file behind an old woman, sweat and heat meet the cold air, evaporating and following us across the meadow.

My mind flickers to the pile of work on my desk in my trailer. It is going to be a long day. No matter how hard I try to concentrate on the documents I have to review (negotiated agreements, agreements in principle and contracts for oil companies), the peace within me does not allow for paper. My mind fights occupying that analytical, paper-chasing ever-present. My body relaxes from the cleansing and we walk home in silence, resisting all of the ills we just got rid of.

It comes to me that in the ideal, where I was able to live a good life and in balance, that this would just be a night at the lodge. However in the toxic environment that necessitates reaction and action, I know that for this moment my body and mind reject the pile of paper. I learn that night that my natural inclination is to participate in our ways and resist the false force compelling me to participate in a documentation rather than an emancipation project.

How I choose to translate that into action, rather than my reaction becomes a rejuvenation story.

The steam follows us home like a memory.

I will remember.

The language of resistance is not new in Indigenous nations. Indigenous nations and citizens have listened to and participated in a politic of resistance since we first met settler peoples on our

lands. Many historical sources¹ reveal Indigenous nations' citizens were non-participatory in the efforts to separate us from our people, our land and our ways of celebrating our spirituality and participating in our roles as citizens in our nations. More than passive observers, our ancestors and relations demonstrated active resistance and acts of resistance² as the need arose. How fortunate we are to have had ancestors with foresight and the ability to defend what is rightfully ours. It is necessary to honour that history. It is also necessary to build upon it in order to make sure that their work is given contemporary meaning. Additionally, we need to advance our

¹ There are several examples supported by oral and written history. Of particular interest are the signs of resistance during treaty making. When negotiating Treaty 6 in Cree territory, the historical record reveals that in word and action, many nations were resisting the terms of the treaty. In one particular example, Nus-was-oo-wah-tum said to the Treaty Commissioner:

When we asked the Cree bands what they intended to do with regard to the treaty they would not come to us; it is true we told them 'do not be in a hurry in giving your assent;' you ought to be detained a little while; all along the prices have been to one side, and we have had no say. He that made us provided everything for our mode of living; I have seen this all along, it has brought me up and I am not tired of it, for you, the white man, everything has been made for (224) your maintenance, and now you come and stand on this our earth (ground) I do not understand; I see dimly to-day what you are doing, and I find fault with a portion of it; that is why I stand back; I would have been glad if every white man of every denomination were now present to hear what I say; through what you have done you have cheated my kinsmen.

In Alexander Morris, *The Treaties of Canada with the Indians* (Toronto: Prospero Books, 2000) at 223-224. Additionally, when Lieutenant Governor Morris sensed resistance amongst Chiefs discussing Treaty 4. Morris recorded his interpretation of the statement by O-ta-ka-o-nan (The Gambler). Morris interpreted his statement thusly at 98:

I told the soldier master you did not set your camp in order, you came and staid beyond over there, that is the reason I did not run over there. Now when you have come here, you see sitting out there a mixture of Half-breeds, Crees, Saulteaux and Stonies, all are one, and you were slow in taking the hand of a Half-Breed. All these things are many things that are in my way. I cannot speak about them.

² A few examples: In 1763 the Chippewa of the Great Lakes led an occupation and capturing of Fort Michilimackinac; in 1869 and 1884, Louis Riel, Gabriel Dumont, Pitikwahanapiwiyn (Poundmaker), and Mistahimaskwa (Big Bear) pursued resistant action in the Northwest Resistance; the Temegami people resisted the issuance of mining licenses in their territory in the 1840s; Indian people were arrested for participating in spiritual ceremonies in the early 1900s; the Indian Association of Alberta and Harold Cardinal resisted through words (*The Red Paper*) and action in 1969; in 1974 Aboriginal peoples occupied Anishnabe Park in a resistant struggle about health, dental and housing issues; in 1985 the Haida resisted logging in their territories in the Queen Charlotte Islands; Indian and Métis students across Canada united for a series of sit-ins in 1988 to protest educational funding cutbacks; in 1990 the Mohawks of Kanasetake blockaded land they claimed as traditional territory; in 1988 the Lubicon Lake First Nation launched an international protest regarding the protection of their lands; in 1995 Aboriginal peoples and rights' activists occupied territory upon which they had traditionally held a Sundance at Gustafsen Lake; in 1999 Mi'kmaq fisherman fished in waters they had traditionally fished in for years without Department of Fisheries and Oceans tags; in 2004 representatives of the Secwepeme, Nlaka'pamux, Heltsiuk, Kitasoo, Saulteau, Sumas, Nuxalk nations all demonstrated resistance through protest or blockades, the Labrador Innu resisted colonization in a series of events extending to the present day. We should also remember and honour the countless Indigenous peoples who would not sign treaty or take scrip, who hid their children from residential and industrial school officials, who participated in their ceremonies though outlawed, who continued to exercise Indigenous autonomies at great personal cost. I am grateful to John Borrows for detailing some of this resistance in his work, "Crown and Aboriginal Occupations of Land: A History & Comparison: A Background Paper Prepared for the Ipperwash Inquiry" (15 October 2005), online: Ipperwash Inquiry website <www.ipperwashinquiry.ca>.

resistance in a way that does not only ensure our survival; we must make sure that it is directed at our renewal and rejuvenation as nations.

Indigenous and non-Indigenous citizens are entering a period of our shared history where continuing fissures in our relationship are resultant in greater separation (economically, politically, culturally) between Indigenous and non-Indigenous citizenship than ever before. We are also seeing the impact of the break down of Indigenous and non-Indigenous relations in the erupting violence in urban centres, the overrepresentation of Aboriginal people in prisons, and in the types and numbers of cases brought on a 'rights' basis by Indigenous people to Canadian courts.³ In the face of these factors, it is quite easy to assert that resistant thought is not enough and that only through grounding resistant thought with age old Indigenous philosophical and ethical understandings will we be able to address meaningful and revolutionary resistant and transformative action.

Engaging in the renewal of Indigenous nations necessitates participating in the further development of an Indigenous critical consciousness and the development of an Indigenous critical legal theory. In order to do either effectively, it is essential that we define the same in an Indigenous framework and base our analysis on a well-defined set of Indigenous philosophies and laws (and the corresponding language). In order to do so effectively, we must rely upon those strengths that we have (teachings, Elders, spiritual leaders, and alliances in the larger Canadian community). We need to do so in order to guarantee that any mobilization involving an Indigenous collective consciousness addresses the respectful renewal of the relationship between Indigenous and non-Indigenous peoples as colonial participants (willingly or unwillingly).

³ There are a number of cases which demonstrate the pressure on Indigenous institutions, beliefs and understandings. See, for example, in the area of pressure on family/gender relations: *Weechi-it-te-wein Child & Family Services v. M. (A.)*, [1993] 1 C.N.L.R. 169 (Ont. Prov. Div.); *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285 [*Derrickson*]; *Natural Parents v. Supt. Of Child Welfare*, [1976] 2 S.C.R. 751; *Winnipeg Child & Family Services (Central Area) v. M.(D.A.)* (1999), 137 Man. R. (2d) 181 (Man. Q.B.); *Tom v. Children's Aid Soc. (Winnipeg)*, [1982] 2 W.W.R. 212 (Man. C.A.); *Lovelace v. Can.*, [1981] 2 H.R.L.J. 158 (U.N.H.R.C.) [*Lovelace*]; and *Sawridge Indian Band v. Potskin*, [1985] A.J. No. 695 (Alta. Q.B.).

B. Indigenous Laws: Rooting Language, Action and Renewal in Indigenous Theory and Practice

1) Resistant Thought and Action and the Need for Renewal and Restoration

In discussing resistance, it is tempting to first discuss colonization, emancipation and anti-colonialism. Maybe it is our tendency to want to problem-solve. However, if we have not examined how we as Indigenous nations behaved prior to colonization, where the problem originated, and what our philosophies and beliefs contain as guidelines and instruction (generally and with regard to this colonial relationship), then we risk a partial solution to a partially identified problem. The ability for us to develop a critical paradigm is dependent upon our ability to not only think about resistance and act in a resistant and transformative manner, but to remember, resist and renew according to the terms of our own existences – so we know precisely and in clear terms what it is emotionally, intellectually and physically that we are preserving. Situating resistance in the context of preserving and renewing that which we resist losing, changing, or subverting is the only way in which meaningful resistance and renewal can occur.

For even if I resist invisibility, that in and of itself is not enough. The only way that I can engage in a meaningful discussion of resistance is to acknowledge at the outset that resistance is a foreign term that only partially addresses the state of Indigenous affairs in Canada. In truth, resistance is too close to endurance, subsistence and sheer survival (all of which are fundamentally important goals) to be part of our emancipation from colonial bonds for our struggle (and not just our survival) to be fully realized. It cannot be anything other than a rest stop on a continuum of acknowledgement, acceptance and honouring of Indigenous rights. Resistance starts with knowing where you come from. Informed resistance means knowing both where you came from and where you are going. We can resist occupation, we can resist subjugation and we can resist being subsumed and consumed by the colonial beast. However, surviving and fighting colonization is not enough. Reassertion of our authorities, the reclamation of what is ours and the re-emergence of strong nations have to be both the starting and endpoint of our colonial discussion.

Poko tanotinkestamasoyan kikaya ka tapwehtamon: You have to fight for what you believe in.⁴

Resistant thought is knowing intrinsically the meaning, context and potential ramifications of colonial activity and responding to them in an informed and resilient manner; in terms of resistant thought and colonization, it means knowing when and to what degree an activity is or may be part of an act of taking possession of words, thought, action, land that belongs to us as Indigenous peoples. Resistance means refusing to accept. Resistance means standing firm for what you know is right. Resistance almost never means enduring; that is existence or subsistence. Resistant thought involves determining / knowing how to effectively stop and/or impede colonial activity; resistant action is doing so. Renewal is taking responsibility for revitalization and rejuvenation of those principles which were so worth defending and for which we resisted colonial imposition, eradication and decimation in order to preserve and celebrate them. Reconciliation cannot take place without renewal. Renewal cannot take place without restoration. Restoration cannot take place without resistant action (Indigenous informed action). Resistant action cannot take place without resistant thought including the further development of Indigenous collective consciousness and, I argue, Indigenous critical legal theory. We have been talking about resistance for so long that I fear that we are not moving forward in our reclamation, emancipation and renewal.

Part of our responsibility as Indigenous peoples is to ensure that we teach our children, teach ourselves, to be resistant to colonial thought. I realize I am a product of it; it is interwoven with my understanding of my people. I need to resist and to ask questions. Then, I need to critically inquire and ask questions about the assumptions that I make, the information that is given and the way that stories are told. That is only part of the battle. Response and responsiveness to colonial and imperialist regimes by Indigenous people is reactive and to some degree reflexive. Patricia Monture-Okanee has written of this:

To understand that Aboriginal peoples are resisting is to understand that Aboriginal peoples have been reacting to powerful colonial forces outside themselves. To resist means to push away. To resist means to never be able to be in control of your own life or the destiny of your community. To resist means to be ever focused on the past and the

⁴ Interview with Evelyn Redcrow, Athabasca University (15 December 2006).

roots of our oppression. It means living a life of re-action rather as opposed to action and empowerment.⁵

Resistance is a struggle against occupation. Of lands which are ours. Of our governments which find homes in our nations. Of decisions based upon traditional understandings and principles. Of the areas of authority occupied by our laws and traditions. Of the right to make our own decisions and our own mistakes. The struggle against occupation necessarily involves principles of Indigenous collective authority and notions of Indigenous autonomy. The difficulty with terminology such as resistance is that in using it we connect all of these notions with principles of defense. While protection is important, to be in the position of defensiveness, we are also connecting to defensibility, justification and validation. I see the import of resisting disease, but know as well that we need to address inoculation and holistic health so that we are actors in and not reactors to our colonial experience. Resurgence (renewal) seems to capture all of these concepts in a compelling way, and it is active, not reactive.

It is therefore important that we endeavour not just to respond to colonial action, inaction and thought. We must be sure that we are actors. The task then requires us to participate in a meaningful exercise which shifts the dialogue and paradigm to one predicated on the mutuality of obligation and continuing relationship of colonizers and Indigenous peoples. In this way we will see a shift in which colonizers have to respond to our nations, our actions and inactions. Colonizers must explain, acknowledge, validate, and in some cases apologize for their actions and inactions. Resistance remains important. However, resistance as a starting point (or a space saver) which takes place concurrently with a re-emergent and demonstrated understanding of our position and our rights as defined by our nations is elementally important in moving from reaction to action. Resistance and renewal will allow us to not only re-frame our continuing relationship with colonizers; it will facilitate meaningfully addressing and resisting sub-oppression, lateral violence and acts of omission.

This struggle for resistance and renewal will challenge the Canadian legal system on a fundamental and functional level. The Canadian legal regime insists that Indigenous peoples be

⁵ Patricia Monture – Okanee, “The Roles and Responsibilities of Aboriginal Women: Reclaiming Justice” (1992) 56 Sask. L. Rev. 237 at 11 of 20 (QL).

reactive – ‘tell us why you are right’ – the Canadian judiciary challenges. It perpetuates notions of ownership and onus without understanding the complexity of obligation and responsibility in an Indigenous context. It requires that we translate foreign concepts in a foreign language and apply them in unfamiliar circumstances. Onus and rights’ tests require us to prove our understanding of a foreign interpretation of what is a treaty or Aboriginal right. They require us to cram our collective understanding of a foreign interpretation of our rights into boxes that do not adequately contain them to further a foreign decision-maker’s goal of checking the proper colonial boxes.

It is significant that we have had a few decades now to determine how to effectively address the increased attempts at Indigenous occupation (i.e. hunting and fishing territories, the microcosm of Indigenous governments, political regimes and citizenship standards). Much of the battle has taken place in courtrooms to, arguably, predominantly negative results.⁶ Of interest is that the discussion of rightfulness of occupation (ownership, home) has not occurred in an Indigenous context. Most of the argument has revolved around Indigenous parties attempting to establish that their action was rightful. We rarely discuss the Indigenous laws that are being broken by the occupier. We rarely define the rightful holdings (i.e. law, language, land) as defined in an Indigenous conceptualization. Instead, we take notions of “rights” and require those who are most impacted by colonization to prove that they have them. As if colonization did not and is not happening. As defined by colonizers. Using the laws and philosophies of colonizers. According to the legal standards established by colonizers. It has been important to resist the occupation through these legal struggles, but we have not effectively resisted the encroachment and intellectual encampment set up on the terrain that has been built on our own Indigenous notions of law, legality and rightfulness. We are becoming really strong (if we have money or resistant and rejuvenating citizens) at responding using Canadian law. Legal responsiveness is important, but it too is reactive. It is like being invited as an Indigenous person to participate in a

⁶ I note particularly the straining at the seams placed on the exercise of Indigenous citizenship rights in *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, the Canadian judicial ostensible constraining of Indigenous economies in *R. v. Marshall*, [1999] 3 S.C.R. 456 and *R. v. Marshall*, [1999] 3 S.C.R. 533 [*Marshall I* and *Marshall II*], and the proposed Canadian legal delegitimization of Indigenous governmental authorities in the proposed Bill C-7, *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, *infra* at note 781.

translation exercise, but upon arriving discovering that you are being invited to speak Latin wearing a headdress. The fundamental point is lost.

While elementally important, I am not certain how profound these understandings are. In my quest to strip off the imposed intellectual culture that surrounds Canadian law, in my resistance to Canadian legal/ly compartmentalized thinking, perhaps I am advocating for a purist's vision of the collective space that we all occupy now. In any construction, deconstruction or reconstruction of our resistance, in any implementation of our rejuvenation, we are going to have to reconfigure our understanding of resistance. To reconfigure our resistance means we must expand our understanding of resistance to include teaching and sharing our protocols, ethics and philosophies. To reconfigure our resistance we need to honour those traditions of inclusion, those rights of Indigenous citizenship, and our own right to self-definition. We cannot critique colonization without an understanding of our own strengths, abilities and capacity. We cannot critique colonization without a thorough understanding of the colonizer's governance, laws, politics and economies. If we are to examine onus and obligation, we need to do so with the certainty that we as Indigenous citizens are not solely responsible for the identification, growth, re-growth and entrenchment of those belongings that rightfully accompany us as Indigenous citizens (potentially, an Indigenous understanding of Indigenous rights). Assigning fault may be less important than taking responsibility; apportionment is meaningless without a full and respectful discussion about revitalizing our understanding of the import of Indigenous conceptualizations of law, legality and good relations.

I am aware that what I am discussing requires a paradigmatic shift. It may be more elemental to call it Indigenous informed action in the face of colonization (which embraces and includes non-Indigenous peoples in its responsiveness). Of considerable import to this action is an accurate assessment of where we are in our colonial experience. To be resistant (rejuvenate/resurgent) to colonial imposition, we need to acknowledge that there is no post-colonial state and that the colonial state exists and likely will continue to exist as time passes. Acknowledging that consistent and constant pressure allows us to focus on the revitalization and re-emergence of Indigenous intellectual, philosophical and legal traditions. It may be difficult to bring together notions of Indigenous traditions and the colonial and colonizing present. Reconciliation cannot,

in my understanding, be effectively and actually established without a meaningful redress of reclamation, restitution, and reparation. We can talk, intellectually, of getting us to a place where we can reconcile our existences. Perhaps our beliefs and understandings cannot be reconciled but respected. But if we are to meaningfully engage in a rejuvenation project, we must be able to address what was taken from us, what has been squandered and what rights we have been unwilling or unable to exercise as a result of the colonial coercion.⁷

Just as certain is the understanding that theory will not restore us. Resistant rejuvenation will demonstrate our resolve and retain our spaces in terrains which are in our understanding unlawfully occupied. Indigenous informed action will not just retain but also advance Indigenous intellectual, philosophical and legal traditions to rightful occupation of rightful spaces. In spite of the territoriality and protectionism asserted using Canadian law, we are going to have to meaningfully define what rights are “rightful”, what has constituted illegality in an Indigenous context, and what rightful anti-colonialism can be effected. This is resistant thought and performing the same is rejuvenation of informed Indigenous action. However, theory may let us identify shared spaces and it may allow us a translator where we are able to listen to whispers of mutuality, hear echoes of equitability and claim what is fairly ours. Theory may be the filter through which Indigenous reason and Canadian reasonability can be heard. We have no shared language in which shared and dissimilar notions of fairness can be expressed. With dissimilar ideologies, principles and values, Indigenous and non-Indigenous citizens in the territory now called Canada are going to have to rely on a common neutral framework within which to establish dialogue.

⁷ Patricia J. Williams, *The Alchemy of Race and Rights* (Cambridge, Mass.: Harvard University Press, 1991) at 103 writes of this in the context of racism in the United States:

If, moreover, racism is artificially relegated to a time when it was written into a code, the continuing black experience of prejudice becomes a temporal shell game manipulated by whites. Such a refusal to talk about the past disguises a refusal to talk about the present. If prejudice is what’s going on in the present, then aren’t we, the makers and interpreters of laws, engaged in the purest form of denial?

2) Transformative Terminology: Indigenous Values, Laws, Principles and Relationship Restoration

Most importantly, we need to examine what resistant and informed Indigenous action of renewal is in an Indigenous defined and established cosmology. We need to address our own developed and developing Indigenous critical theory in light of that examination. It is not enough to merely translate verbatim English words and English understandings into the Cree (Indigenous) language. The conceptual and philosophical underpinnings related to the words and which incorporate our understandings of our colonial experience require full discussion and understanding. This is part of our own emancipation project: to be able to be free to make decisions with an understanding of the content and fullness of our own Indigenous terminology and framework without impact of colonial mandate, intrusion or subjugation. Using English terms and concepts to define this is further evidence of our dislocation.⁸

Transforming resistant thought into informed Indigenous action requires an understanding of the linguistic parameters of the dialogue of freedom. In the Cree language and context, we have a number of words which translate loosely into the English word “resistance”.

iyisahowin: resistance.⁹

nakinisowin; *maskawisiwin*: resistance.¹⁰

More appropriate to describe the act of living through colonization with honour and while fulfilling your obligation are terms such as *sokkastwawin* (the act of having resilience)¹¹ and

⁸ Frantz Fanon discusses this in the context of Indigenous African peoples: “And the fact that the newly returned Negro adopts a language different from that of the group into which he was born is evidence of a dislocation, a separation.” Frantz Fanon, *Black Skin, White Masks* (New York: Grove Press, 1967) at 25.

⁹ Arok Wolvengray, *nehiyawewin itwewina: Cree Words* v. 2 (Regina: Canadian Plains Research Centre University of Regina, 2001) at 510.

¹⁰ Nancy Leclaire and George Cardinal, *Alberta Elders' Cree Dictionary Alberta ohci kehteyayak neheiyaw otwestamakewasinahikan* (Edmonton: University of Alberta Press, 1998) at 403.

¹¹ *Ibid.*

paspiwin (survival).¹² These words are indicative of the actor being housed in and being a part of the action. In English, the implicitly understood shorthand is understood by many. In Indigenous languages, there is no shorthand and the words represent a pre-colonial and post-contact story that must be told to fully understand the meaning of the translation.

The act of being resilient while threatened by colonization is one thing. Being obligated to do something about it is the other part of the rejuvenation equation. The Cree phrase *Ka tomihk asotamakewin* (being bound to do something)¹³ speaks to the requirement that a person acts because of responsibility. This involves something more than reaction, something greater than resistance: you are committed to do something about a situation. This terminology of commitment, the obligation for action is central to anti-colonialism, Indigenous informed action and to the renewal of and respect for Indigenous philosophies, understandings and laws. This obligation involves not only the laws related to relations¹⁴ but those laws and teachings related to the obligations and responsibilities that Indigenous and colonizer peoples have to each other. We have made promises to each other and are bound to live our lives by the laws which governed our meeting, treaties and our ongoing relationships (while in this instance as between Indigenous and non-Indigenous peoples, but in other instances with each other, the elements, with other Indigenous nations).

We are bound to keep our word to each other. That word includes promises that we could continue to live in certain ways in accordance with our own laws and principles. Honouring and living those laws (which are based upon notions of respect) are shared obligations. Another is to develop our relationship in the context of those understandings we shared when we first met as peoples. Part of the paradigmatic shift that we must address involves contemporary Indigenous emancipation with an understanding of not just the context and impact of Canadian law, but also its prejudices and role in the ongoing attempted colonization of Indigenous peoples. We also need to understand that there is a complex and living set of Indigenous principles and philosophies (perhaps most comparable to common laws) which governed and continue to govern many Indigenous peoples' behaviours and interactions.

¹² *Ibid.* at 441.

¹³ *Ibid.* at 373.

¹⁴ This topic is covered in more detail later in this paper.

We have, in a Canadian legal context, attempted to understand Canadian terminology that has little legal, cultural or philosophical context or meaning to us. If we cannot translate language fundamental to our legal conversation, we need to address our shared translation project in a meaningful way to arrive at terminology. In this dialogue we may find that some concepts and terms do not translate but the process of looking for shared language is important in itself. In this way, we may be able to approach interpretation of concepts in a meaningful way. We have no shared, inclusive or appropriate terminology mutually understood with the colonizer. If linguistically we are not in accord, then there is a multiplier effect conceptually. I fear that at this third wave of colonization (the first being occupation, the second, regulation and legalization) we as Indigenous nations are being defined out of existence, that our obligations and responsibilities are being defined obsolete or extinguished, that our rights to territory, homeland and belonging are implicitly and explicitly illegally being presumed null and void through Canadian exclusionary legal and policy definition. We are not locked in a word war – we are forced to validate the foreign legal and external system and invalidate our own existences and understandings in order to accord with inaccurate (and in our context illegal) definitions with rations (of money, space, pieces of home) meted out to those who best reify the systemic disempowerment from and forcible occupation of our territories.¹⁵

Oyasiwewin: laws of the country.¹⁶ It can also mean a government law.¹⁷

In a Cree context, law was not man made. Laws are natural and a reflection of the environments and territories that we as Indigenous citizens came from. These laws are not man made and are derived from an authentic and Original source. Ways of being and ways of living were both referential to and the basis of Cree laws. Elder Pete Waskahat spoke of this at a Federation of Saskatchewan Indian Nations Elders' focus session:

¹⁵ I note with concern the increasing tendency for Indigenous nations to assert their rights in order to preserve rapidly diminishing resources and the impact that that has on limiting the exercise of 'rights' included in Indigenous teachings, regardless of the impact on autonomy, Indigenous codes of conduct, or on Indigenous citizens.

¹⁶ Wolvengray, *supra* note 9 at 422.

¹⁷ Leclair and Cardinal, *supra* note 10 at 513. This is a new (post-contact) word and does not refer to the sacred principles and understandings which govern us as *Neheyiwak* (Cree people).

On this land, in the past and even today we were very careful about what we were given – what we were given through the uses of everything on the land, Creation. We were very careful, we had our own teachings, our own education system – teaching children that way of life was taught [by] the grandparents and extended families; they were taught how to view and respect the land and everything in Creation. Through that the young people were taught how to live, what the Creator's laws were, what were the natural laws, what were these First Nations' laws...the teachings revolved around a way of life that was based on their values.¹⁸

What I have come to understand from this is that teachings relate to the way to live your life, are value based and are to be shared by family members. Respect is tantamount to that understanding. Those relationships between family members are definitional and inform the laws that govern your activities and interactions with each other. In this context, then, some Indigenous laws can be understood to be how to live your life in relation to your nation and relations. The laws themselves can be thought of as the structure upon which relationships, as a basis for interaction and which define which laws are applicable, in turn were a reflection of the laws and principles derived from the Creator. Applicable laws (think values and principles) therefore¹⁹ seem to come from the Creator, are passed on by teachings, and are based upon the notion of the nature of the relationship between peoples and the responsibilities that we owe each other by virtue of those relationships. Cardinal and Hildebrandt wrote of this:

These First Nations teachings identified for First Nations the framework upon which they were to create relationships with the arriving Europeans. First Nation traditions and teachings required that the relationships they created with the Europeans be governed by the laws, values and principles that First Nations had received from the Creator. These laws and principles described the relationships and responsibilities they possessed to and for the lands given to them by the Creator.²⁰

What I think naturally falls from this is a framework within which we can examine the legality / accordance with Indigenous laws values and principles. In a holistic approach to this information, it might look something like this:

¹⁸ Elder Pete Waskahat, Frog Lake First Nation, Treaty 6, November 15-16, FSIN Elders Focus Session, Saskatoon, Saskatchewan. Translated from Cree. Included in Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan Our Dream is that Our Peoples will One Day be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000) at 6.

¹⁹ I am not an Elder and I am not skilled enough to hold these laws or pass them down. I am an educator and a legal scholar, so my obligation extends to communicating the laws to students in the most accurate and respectful way. Communication includes, in my understanding, presenting them in a meaningful way for study and discussion and can extend to developing conversations about them that invite students to engage in the materials. In being as respectful as I can for the natural laws (which is an obligation/law itself), I do not critique but do compare the same.

²⁰ Cardinal and Hildebrandt, *supra* note 18 at 7.

TEACHINGS → Framework → topic/issue (accordance with Indigenous laws, values, principles)

T → F → t/I x (l, v, p)

A linear approach to such an immense system of checks and balances predicated on the ways most likely to achieve balance due to Original teachings is completely wrongheaded. I liken it to a new mathematical equation with known and unknown variables. If you do not know the teachings, framework, laws, values and principles, your answer will be wrong. In this math, if the question is wrong, and the work is not shown, the answer is also wrong.

According to the seriousness (honesty, respect, and truthfulness) required as part of Indigenous laws is part of the correct answer. The formula itself is dependent upon the relationships between those factors and those topics and issues. In the example at hand, when we talk about the renewal of our relationship as Indigenous peoples and non-Indigenous peoples, we need to examine “renewing our relationship” as an issue. Those relationships that we possess as citizens (of Indigenous and non-Indigenous relations) determine the obligations that we have and those in turn must be completed in accordance with our laws, values and principles to be lawful. Because they were/are from an Original source, the obligation is formalized and governed by a notion of solemnity. Cardinal and Hildebrandt wrote of this that, “In the view of the Elders, the treaty nations – First Nations and the Crown – solemnly promised the Creator they would conduct their relationships with each other in accordance with the laws, values and principles given to each of them by the Creator.”²¹ This solemnity is in accordance with the nature of the ‘undertaking’ to fulfill our obligations and abide by the laws, values and principles. They are part of an inviolable pact, tied as they are to the way in which we live our lives in accordance with the teachings. In this way, law-making and the onus to behave in a ‘lawful’ manner is incredibly powerful. Breaking those laws carries penalties which are not easily understood by those who do not live by the sacrosanct principles.²² The weight and authority of the same is powerful and the

²¹ *Ibid.*

²² *Ibid.* Cardinal and Hildebrandt wrote of this:

The duties and obligations that arise from the laws, ceremonies and traditions that form a way of life for the First Nations are clear. The Elders, for example, explained that when promises, agreements or vows are

failure to live by them also has consequence that is weighty and of which we must be ever mindful. These vows formally made to the Creator (*wiyohtawimaw*) look like guarantees of good behaviour in accordance with age-old principles. As they are principles stemming from an Original source, and they are based upon Original teachings, there is a huge onus to act in accordance with them and a price to be paid if you do not.

Breaking these vows can bring about divine retribution with grave consequences. This concept is known in Cree as “*pastahowin*.” The Elders discussed this concept wondering if the White man understood the consequences that can flow when human beings unleash the wrath of the Creator by breaching fundamental responsibilities to Him.²³

For many who live outside of these laws and who consider British common law the larger part of their legal tradition, there is a real reluctance to observe laws which are linked inherently to a spiritual source. This may be due in part to a lack of knowledge, a resistance to non-Western thinking, or training which established an understanding of law as neutral and objective. As part of a viable rejuvenation project, the fallacy of value free law making and objective law needs to be addressed in a meaningful way. In a western sense, laws are a construct of the community and their values. Part of this understanding is quite the same for us as Indigenous citizens. The obligation to live by your laws can be seen as quite parallel, but the degree to which that obligation must be observed and fulfilled may be different. In a Cree context, our laws have their Originating source in establishing good behaviour and healthy nations to enable the behaviour and nations to flourish. It is an elemental goal, complex and vibrant in its application and interpretation. The laws that have been made were made to ensure that our nations and citizens survived and thrived. In order to do so, our laws had to address how we would get along as peoples with our environment. Upon contact, our laws, values and principles were applied to address how we were obligated to interact with each other, how our relationships were to be established and the responsibilities that we each have to ourselves, our environment and each other as a result of those laws.

Powerful laws were established to protect and to nurture the foundations of strong, vibrant nations. Foremost amongst these laws are those related to human bonds and relationships known as the laws relating to *miyo-wicehtowin* (author’s note: “having or possessing good relations” p. 14). The laws of *miyo-wicehtowin* include those laws encircling the bonds of human relationships in the ways in which they are created,

formally made to the Creator (*wiyohtawimaw*) through ceremonies conducted in accordance with the laws governing them – the promises. Agreements, or vows so made are irrevocable and inviolable.

²³ *Ibid.* at 7-8.

nourished, reaffirmed, and recreated as a means of strengthening the unity among First Nations people and of the nation itself.²⁴

Those relationships are so important that laws were established to require good relationships. Harmony and good relationships as a way of life, as lawful behaviour if you will, are required. Stemming from that principle/law of creating and maintaining good relations comes the understanding that if there is a flux in your relationship, then conflict must be resolved.²⁵ In order for that conflict to be resolved in an Indigenized context, you have to examine the Original teachings related to the topic or issue which requires resolution.

Model

TEACHINGS → Framework → topic/issue (accordance with Indigenous laws, values, principles)

Application

TEACHINGS RELATED TO BALANCE and RELATIONS → Framework for resolution → Conflict between Indigenous peoples and non-Indigenous peoples x (laws, values and principles related to conflict and obligations we have to those in this type of relationship)

The model is only as useful as the effort we make to determine what those teachings are in a way most consistent with and deferent to the Original teachings. It also is reliant upon the accurate and precise sharing of the framework and of Indigenous laws, values and teachings. In order to give effect to this, we need to address the teachings, framework, laws, values and principles as they were intended. We also need to address the interruption of their transmission where that occurred. In this particular example, the development of an Indigenous critical consciousness requires dedication to those truths and to the discovery of the obligations we have to each other as a result of our relationship as Indigenous and non-Indigenous peoples.

²⁴ *Ibid* at 15.

²⁵ Perhaps that construction of the image of the passive Indian is a perversion of this. As we are required by law/principle to develop and maintain harmonious relations, it might be perceived that we are stoic, passive, or docile (as the stereotypes have been established). Additionally, maybe such differential understandings (of ways and means of maintaining and conveying good relations and respect) have been misinterpreted, at times much to our detriment.

It should be noted that specificity is intrinsic to the framework. Again, using our relationship as Indigenous and non-Indigenous peoples as the topic, specificity related to relationships needs to be addressed in applying the accurate values, laws and principles to the topic. There are certainly rules governing how you behave and interact with a person and these are linked to the nature of the relationship that you have with the person. I have an obligation to my grandmother that I do not owe to a cousin. I have an obligation that I owe to an adopted cousin that I do not owe to my sister. These obligations and responsibilities may overlap and mirror each other, but the nature, content and degree of obligation differs depending upon the nature of my relationship to the person in question. How you conduct yourself depends on whom you are interacting with; there are rules / codes stemming from the nature of that relationship that determine the shared obligations inherent and agreed to in that relationship. In fact, in a Cree context, there are codes of conduct that govern a person's behaviour. These are directly connected to and dependent upon the relationship you have with the person or nation that you are interacting with. The Cree principle / word related to this code of conduct is called *wahkohtowin*.²⁶

What should be clear from this discussion is that not only are English and Cree (Indigenous) linguistic indicators not equivalent or parallel, but also that there is an entire Indigenous legal history and linguistic element missing from the Canadian legal discussion of 'Aboriginal and treaty rights'. Without the inclusion and understanding of our Indigenous not-so-common law, we are effectively resisting only that which is translatable (culturally, legally, linguistically) from English to Indigenous languages (to say nothing of contexts). We need to engage in a critical examination of not just Indigenous understandings of the nature of our relationship with non-Indigenous peoples in Canada, but also of our responsibilities, obligations and understandings as Original citizens in our nations. There also needs to be an examination of the commitment made by non-Indigenous peoples to educating themselves about their responsibilities to Indigenous peoples. With no understanding of the laws, principles, and understandings that exist in an Indigenous context, non-Indigenous people will continue to break our laws, conduct themselves in a way which contravenes our codes of conduct, and fail to participate in our shared relationship in a way which is meaningful to Indigenous or non-Indigenous peoples. Briefly, we

²⁶ Cardinal and Hildebrandt, *supra* note 18 at 14 define this as "the laws governing all relations". At page 34 of the same work *wahkohtowin* is addressed and expanded upon in the Chapter related to Indigenous citizenship and the law governing relations.

need to honour the relationships we had before we met settlers and their ancestors, we need to examine why our relationship with Canadians failed and is failing, and we need to renew the relationship we share in ways that are meaningful and which were intended by our ancestors. Then, we can begin to imagine talking about reconciliation.

There is a notion of shared responsibility in initiating, pursuing and activating this discussion about renewing our relationship. I think that Canadian law and its interpretation of accountability and culpability only barely touch upon the nature of the obligations of which I am speaking. Perhaps Canadian law can address some of that accountability and some of that accounting in a meaningful way. However, without addressing the discussion in languages and contexts that are home to us, we are being asked for a trust loan that I don't think we can afford to make. With many of the implicit assumptions of Canadian law predicated upon colonial and oppressive understandings of a false Indigenous existence, value systems and rights, I think there is a huge margin for irresponsible and unethical (and in a Cree legal context, illegal) decision making. And while it is simplistic to say, "I don't believe in that (the Canadian legal) system; it's racist" (which I have heard many people say), I have to concede that in my understanding and experience both are true: many of us do not believe in that system and believe it to be racist. Writing that is hard and it seems too simple and not an academic response to legal racialization and the racialization through Canadian law. Perhaps that is because there is a lack of discussion and writing about the crossover between racism and colonialism, and that in an externally defined dialogue we find ourselves having to choose a representative theory that speaks about or to us. Very little of the discussion is by us *as* Indigenous peoples. That lack of crossover and the falsity of lines drawn between race, culture, gender, and language are so hard to interpret because it requires us to strip ourselves down to the category we are expected to accord with in order for the theory to make sense/apply. Compelling us to do so is a further requirement that we define ourselves through external and foreign understandings. It also belies the fundamental role that the subjugation of Indigenous interests and the occupation of our territories have had on the development of law related to Indigenous citizens, nations and territories.

If our experience, language, principles and laws are not reflected in the law that is applied to us, categorizing the same as racialized does not seem inaccurate. When "racism" and "racial

discrimination” are based upon determinations and understandings about race and race hatred that do not include the experience, understanding, language and principles of racialized peoples (or our culture, spirituality, or notions of relations) “racism” and “racial discrimination” become shells without much substance. The sublimation of Indigenous understandings and laws, the occupation of Indigenous territories and the perversion of Indigenous understandings of our laws (i.e. related to citizenship) are not addressed entirely in an examination of racism. Canadian law purports to be value neutral, but it is a reflection of the peoples (and that largely excludes Indigenous peoples) whose society gave power to that law. Patricia Williams has written of this:

...the word of law, whether statutory or judge-made, is a subcategory of the underlying social motives and beliefs from which it is born. It is the technical embodiment of attempts to order society according to a consensus of ideals. When a society loses sight of those ideals and grants obeisance to words alone, law becomes sterile and formalistic; lex is applied without jus and is therefore unjust...Living solely according to the letter of the law means that we live without spirit, that one can do anything one wants as long as it complies in a technical sense.²⁷

The ‘letter’ of the Canadian law is an apt descriptor; in our language we did not have letters. We had word, form and substance where there was very little grey area. There was and is a vast intellectual and physical territory where the spirit of the law lives and thrives. Compliance was mandatory and the “ideals” that Williams speaks of are the fundamental tenets upon which our laws, understandings and values are grounded. Our law is the spirit of the law. Our law is based on spirit. We cannot live without it.

As I sit and think of this, it seems too grandiose, too overwhelming to address the fundamental lack of understanding and the silencing of Indigenous ways of knowing in a Canadian legal context. It’s too big, it’s too much, how will we ever address this in a way that matters? Perhaps we start by making a commitment to it *because* it matters. We start by indicating there is a fundamental flaw in the way we make invisible the import and content of Indigeneity in Canadian law. We start by saying publicly, in places where it should be said, that the inclusion of Indigenous peoples’ laws and understandings matter.

²⁷ Williams, *supra* note 7 at 139.

Additionally, non-Indigenous peoples need to address renewing their commitment to a meaningful and lawful relationship with Indigenous peoples. To do so, we all need to understand what 'lawful' or conducting yourself in accord with an Indigenous code of conduct means. With regard to the Canadian legal framework, no one has had this discussion in a meaningful way. I think that in a Canadian institutional context we are perceived as so foreign as to make our issues, let alone the substance for the same, unintelligible and indecipherable for many. I also think that in some instances our colonial present (to say nothing of the colonial past) makes it difficult for us as Indigenous peoples to fully understand how rightful we are, how able we can be, and how profoundly powerful our belief systems are today. My thought is that we have segregated our existences and experiences into an area that risks an intellectual chasm. We do not tell our stories or laws because in the past when we did they were taken away, used against us, or outlawed. I am not trusting enough to believe that will not happen again. Partially, my lack of trust is because I think that it is arduous to extricate yourself from a colonial mindset. Given that many, many people and institutions benefit economically (directly or indirectly) from maintaining colonization, I also know very well (because I know what it costs Indigenous citizens and nations to be colonized) what it will cost individuals, corporations and governments to extricate themselves from their complicity in the colonial machine. But I think that if we do not take control of the dialogue that someone somewhere is going to sign on to a version of it written by someone else. I want the Indigenous truth that is told to be actualized.

We need to begin a rejuvenation project which allows us to share our teachings in the hope of renewing our relationship. This does not have to mean we are prepared or even want to do so to advance the inclusion of the same in a Canadian system. We do not need to discuss this as something to include on a Canadian justice or legal system agenda. We need an entirely new agenda that allows for the development and translation of meaningful language and concept. We need to include renewal of our relationship and the development of a respectful platform for the sharing of ideas and ideologies in a forum which will accord respect and meaningfully address different values, laws, and principles.

This forum needs to address Indigenous teachings, framework and our traditions, values and ethics in a meaningful way in order to be effective. Indigenous collective consciousness includes

a renewed understanding and thoughtfulness about Indigenous ways of knowing and ethics. In the Cree traditions, our values and ethics include *manatisiwin* (respect), *yospatisiwin* (gentleness), *kisewatisiwin* (kindness), *kwayaskatisiwin* (honesty and fairness), and *kanatisiwin* (cleanliness).²⁸ Any approach to renewal will need to include a complete discussion of these values, their context and their role in a renewed relationship. Just as Indigenous informed action in a Cree context will be reliant upon these values and ethics, re-construction of our relationship with Canadians will require respect and accord for these principles. It is hard to conceive of a greater *kisewatisiwin* than sitting with each other and discussing with *kwayaskatisiwin* how to accord *manatisiwin* to each other, our beliefs and our laws. Being committed and able to do so would truly be transformative. Frantz Fanon has written of this: “Every time a man has contributed to the victory of the dignity of the spirit, every time a man has said no to an attempt to subjugate his fellows, I have felt solidarity with his act.”²⁹ Anti-colonial dreaming and activism will require that solidarity.

C. Reconfiguring Resistant Rejuvenative Thought and Developing an Indigenous Critical Consciousness

1) Honouring the Past and Committing to the Future

Journal

This week I met with a room full of Indigenous scholars and political organization representatives. Two in the room were historians, but I am almost sure that it makes no difference what their discipline was. We were there to discuss crossing borders and border crossings – how to meet with each other as relations to bridge cultural divides. I was aware as we sat there that only three of the nine people in the room were of Indigenous ancestry. In my head, I kept hearing “Where are all the Indians?”

²⁸ Cardinal and Hildebrandt, *supra* note 18 at 32.

²⁹ Fanon, *supra* note 8 at 226.

Where are all the Indians, indeed. While we sit in rooms with white bread and white fingernails in almost all white institutions, there is a blanching that occurs. Resistance is not futile, and in fact it is a way of life. How we get beyond mere resilience and move towards achieving our goals is sometimes exasperating. Don't get me wrong. I can work with anyone. Often, I do. However, when are we going to point out our obvious absence from our own agendas? To be fair, two other people in the room identified as having great-great-Indigenous ancestors. I don't mean to diminish that. But I couldn't help but wonder if who invites and who gets invited is not a colonial exercise itself.

It is not popular to be the one in the room who points out the stains on the curtains. Being critical, I think, means being "on the case" all of the time. It means making sure the door is open at all times. Asking those questions (who is here, who is not here, who is involved in the planning, whose agenda is this, who are the people impacted, who from the community has experience) before you do one thing. It means not using excuses (there aren't enough qualified Indigenous participants, we have tried it other ways in the past, it has always been done this way, administratively this is a nightmare, we are starting with a small working group and will expand membership later) as exclusion. It also means going further than the politics of exclusion. It means implementing a politic of inception - voices particularly vulnerable to silencing and exclusion must be included in the planning and conceptualization. This is true whether it is a committee, de facto group, organization, judicial review process, royal commission, local group. If you are committed and critical, this must be a part of your every day. This is one small example of reconfiguring resistant thought, but there are many ways in which to address oppression.

We need to forge a new relationship with resistance.

It does us and those who forged paths for us a tremendous disservice to discuss forging a new relationship without addressing the relationship that we currently have and how that relationship has been informed by both our individual and shared histories. It is difficult to discuss our relationship with settler peoples with the honesty, respect and gentleness that are part of our code of conduct.³⁰ This will be a difficult discussion to have because our shared history has been so very painful for so very many. Personally, I am past the point where I think guilt should motivate or perpetuate any activity. Once we have addressed the critical elements of societal renewal (language and tradition preservation, reiteration of laws and principles, statement of authorities and autonomies, and an audit of the impact of colonization on the ability to do what is rightful³¹ (exercise our rights), we need to have an honest and respectful discussion about the responsibility of settler peoples for the impact that colonization has had on our nations and citizens. There is a need for an honest discussion of the potential amends for the impact.³² This may look like an apology. It may be a truth and reconciliation tribunal. It may be a shared court or other room constructed just for this discussion. It may be a commitment to universal Indigenous education. It may be all of these things. It will take a lot of minds to determine what is acceptable, and it will involve many national representatives, and I speak only for myself.

I can state with firm resolve that this cannot be done in a Canadian court room. Our relationship will not be renewed or rebuilt via an adversarial process or one owned by non-Indigenous peoples solely. It cannot be done in a setting where individual concerns and recompense are addressed for the atrocities visited on Indigenous peoples. This was and is a group experience and our resulting disunity is part of the issue that needs to be addressed and corrected. This cannot be done in an arbitration panel, as they often come to resemble mini-Canadian courts in

³⁰ Fanon, *ibid.* at ix. At 29 he quotes Jean-Paul Sartre's "*Orphee Noir*" in *Anthologie de la nouvelle poesie negre et malgache*: "What did you expect when you unbound the gag that had muted those black mouths? That they would chant your praises? Did you think that when those heads that our fathers had forcibly bowed down to the ground were raised again, you would find adoration in their eyes?"

³¹ In Cree, the word *kakeki kwayask* approximates this. Leclair and Cardinal, *supra* note 10 at 406.

³² Generally, legal minds jump to issues of compensation and culpability when this is raised, and that certainly is part of the discussion. However, I am speaking of a broader realm of possibilities that Indigenous nations and the Canadian nation can discuss as part of the renewal of their relationships.

which resource affluence is often a predictor of success (and it requires nations to address their concerns off the record, within the confines of tribunal authority and on a mandated basis). Many tribunals do not allow for the renewal of relationships among Indigenous nations or with Canada as the claims process is quite individualized. Finally, it cannot be done without the full advisory and participatory capacity of Indigenous spiritual leaders and Elders. The wrongs of the past need to be addressed and honestly discussed in a clean space, with a mutually acceptable and informed statement of potential content and process.

Honouring our histories means crossing over the dualism divide and acknowledging that there have been anti-racist and pro-Indigenous rights advocates who have contributed fundamentally to establishing a framework for the further development of an Indigenous critical consciousness. It also means acknowledging that there have been mistakes made by Indigenous peoples and that some of our citizens have stumbled and erred, informing and enforcing the colonial hierarchy. There is no right or wrong side to be on here, and we need to both acknowledge the mistakes and honour the contributions made by individuals and groups. In terms of honouring “white anti-racists”, bell hooks writes:

While it is a truism that every citizen of this nation, white or colored, is born into a racist society that attempts to socialize us from the moment of our birth to accept the tenets of white supremacy, it is equally true that we can choose to resist this socialization... Maybe I would have despaired about the capacity of white people to become anti-racist if I had not witnessed firsthand individual Southern white folks (older people), born and bred in a culture of white supremacy, resist it, choosing anti-racism and a love of justice. These were folks who made their choices in circumstances of great danger, in the midst of racial warfare. To honor their commitment rightly we have to fully accept their transformation. To ask folks to change, to surrender their allegiance to white supremacy, then to mock them by saying that they can never be free of racist thinking is an abomination. If white folks can never be free of white-supremacist thought and action, then black/colored folks can never be free. It is as simple as that. We must accept that black folks/people of color are as socialized to embrace white supremacist thinking and behavior as our white counterparts. If we can refuse to embrace racist thinking and action, so can they.³³

We have all been socialized and colonized in ways which are detrimental to the goals and existences of Indigenous peoples. Some of us, Indigenous and non-Indigenous peoples, made active decisions to resist. We need to honour the spirit and that courage that it took, individually and collectively, for us to survive colonialism and to free ourselves of the vestiges and

³³ bell hooks, *Teaching Community A Pedagogy of Hope* (New York: Routledge, 2003) at 56-57.

responsibility to fulfill the terms of the colonial mandate, but we must also eclipse mere resistance. Choices that individuals made need to be honoured not only because they were courageous, but also because we need to understand the commitment, integrity and power involved in those decisions in order to inform, educate and make those decisions easier for new peoples to make. In the struggle that is emancipation, we will need to maximize our resources; that means we will have to honour those resourceful people who fought the colonial yoke in order to inform and substantiate our commitment to the ongoing emancipation.

2) With Good Reason - Direct and Indirect Benefits

Resistant thought and Indigenous informed action have ensured the survival of our values, laws and principles. Resistant thought on its own is not enough. Resistant thought without action risks submersion and subversion. We cannot afford that risk. Only resistant action as a function of renewal will facilitate the renewal of our relationships and the restoration of our nations.³⁴ Part of that resistant action is housed in the development of an Indigenous critical consciousness. It is an uneasy fit between well-revered principles of conduct [*manatisiwin* (respect), *yospatisiwin* (gentleness), *kisewatisiwin* (kindness), *kwayaskatisiwin* (honesty and fairness)] and developing a critical consciousness as a framework for discussion. However, at this juncture in time, we need to address how critical Indigenous thought and Indigenous informed criticism can be developed. To be able to develop critical Indigenous legal theory using a lexicon of kindness, honesty and fairness is less difficult to do (and is likely to be more painful) than many had imagined.

Developing a meaningful and critical filter through which to translate the nature of our colonial experience and addressing the ways in which Canadian laws and the Canadian legal system fulfill the colonial mandate (or perpetuate the imperial status quo) strengthen our ability to identify and address the ongoing impact of colonization on Indigenous nations. It also allows us to elementally reveal the root causes and ancillary effects of retaining the colonial condition.

³⁴ Even in writing this, I know that there will be those who point to interpretive issues. I use the term restoration to describe the process and substance of renewal, revitalization and recognition of our governments, homelands and traditions in accordance with those principles, laws, values and the code of conduct discussed earlier. This is threatening in some contexts to those who have an interest in the suppression of Indigenous nation development and/or the maintenance of the current state of affairs in Indigenous nations.

Construction of a critical Indigenous legal theory serves four direct and four indirect purposes. Directly, the development of an Indigenous critical consciousness (and in the instance at hand Indigenous critical legal theory) will serve to provide attestation to the value of Indigenous telling of our colonial relationship. While authentication is not required it does initiate a process whereby Indigenous actuality and traditions are discussed in a way which contributes to the reemergence and renewal of Indigenous philosophies, laws, legal traditions (and the terminology that defines them) situated in Indigenous worldviews.

An emerging/re-emerging Indigenous critical consciousness also facilitates a review of the historico-legal sites of the colonial experience and enables the identification of racialized sites of legalized oppression of Indigenous peoples. In addressing the same in a way which allows respectful reclamation, analysis and dialogue, new and renewed relationships can be discussed without reliance on antiquated or racialized understandings related to Indigenous peoples, Indigenous belief systems and law impeding the discussion.

Another direct purpose of the development of a critical Indigenous legal theory as part of a critical Indigenous consciousness is the development of context for and the capacity to deconstruct the discriminatory legal regime that has impacted and continues to impact Indigenous nations and citizens. As part of this development, it will allow us to identify the ongoing impact or influence of legalized oppression and racialization of Indigenous nations and citizens. It will also enable Indigenous peoples to embark on our own methodological approach to rights identification. Addressing external definition and foreign legislation as a deconstruction project will allow us to deconstruct the amorphous blob that is colonialism in order to determine what change it has effected on our understanding of authority, autonomy, identity and the nature of our obligations to and relationship with each other.

Finally, the enrichment of the Indigenous critical consciousness and the development of critical Indigenous legal theory are vital to the re-construction of an intellectual and linguistic platform for a potential meeting of the minds as related to the new and developing legal relationship between Indigenous peoples and non-Indigenous peoples in Canada. Doing so can result in four additional indirect purposes including the continuing intellectualization of Indigenous realities;

shared responsibility for a critical consciousness and recognition of Indigenous critical consciousness; the development of a common vocabulary for discussion; and imagining new systems and systemic responses to the contemporary and developing relationship between Indigenous and non-Indigenous Canadians.

3) Shared Obligations: Colonization, Emancipation and Anti-colonialism

The dialogue of emancipation must be accompanied by the action of anti-colonialism. This is a shared obligation. The obligation to honour the nature of the relationships which we forged as Indigenous and settler nations requires that together we unite to address our own role in strengthening and perpetuating the colonial state. In order to dismantle it, we have to examine how we extricate/d ourselves from it. While it would be revolutionary as Indigenous people to emancipate ourselves from our colonial bonds, it would be a hollow freedom if we replicated the oppression that was forced upon us in our relationship with settler peoples. It would also be an individualized victory which is not in keeping with the tenets, principles, laws and understandings of our nations. We must guide this struggle but know that we have resources, support and tools from many people to work in the de-construction project.

To be part of a liberating exercise, there needs to be a dissemination of the roles that we have played in our relationship together. This is difficult and painful to do; it is rare that any one person let alone a nation abandons a relationship of oppression. In the work, *Liberating Theory*, the authors address this very subject:

In the relationship between oppressor and oppressed, it is the oppressed who must overcome the dehumanization of both. The oppressors must continue to oppress the subjugated community if they are to maintain their economic, political and cultural power and privilege. The oppressors cannot renounce their power and privilege *within* a racist relationship; they must *abandon* that relationship. And while there are inspiring cases of individuals abandoning their racist heritage - South African whites, for example, who work with the liberation struggle – there is no historical example of genuine, peaceful abdication of racist supremacy by the whole ruling group.³⁵

³⁵ Michael Albert, Leslie Cagan, Noam Chomsky, Robin Hahnel, Mel King, Lydia Sargent, and Holly Sklar, *Liberating Theory* (Cambridge, MA: South End Press, 1986) at 29.

An anti-colonial agenda necessarily involves anti-colonial thinkers and actors working towards such goals as emancipation education, anti-colonial writing, anti-racism education, the development of critical Indigenous theories and many other liberating activities. All of these Indigenous informed actions (and many more) can contribute further to an Indigenous critical consciousness which allows us to address historic, contemporary, and comparative colonialism in ways which inform, ignite debate and inspire action. We have been fortunate to have such great Indigenous writers, scholars and leaders as Harold Cardinal, Vine Deloria Jr., Maria Campbell, Russell Means, Winona Wheeler, Winona LaDuke, Leroy Littlebear, Patrica Monture, Howard Adams, and Tompson Highway whose work is rich with resistant thought but who have also lived lives of resistant action.³⁶ We have also been fortunate to have many anti-colonial thinkers of non-Indigenous ancestry who have participated in the emancipation of Indigenous peoples through resistant writing.³⁷ I am thankful for the commitment of all of these people, Indigenous and non-Indigenous, who wrote the stories that many did not have the language, luxury or time to write. How we progress from this rich history of resistant thought to informed Indigenous action is the next issue we need to address together.

The question becomes, how do we change resistant thought into Indigenous informed action and a renewal of the relationship between Indigenous and non-Indigenous peoples? Primarily, I think that we need to address that rich resource and invite those who have participated in the recording and inspiring of resistant thought to sit in the same place as our Elders and spiritual leaders to develop a think tank of receptive and progressive thinkers. With this group of people who support and have created space for the rejuvenation of Indigenous intellectual thought in one place over a period of time, we could collectively problem solve and identify how to proceed. We have worked individually in areas that are important, but that thought needs to transfer to a collective action in order to move beyond paper and to ignite change. We need to

³⁶ Some other Indigenous participants in Indigenous resistance writing (or Indigenous self-determination) include Taiaiake Alfred, Beth Brant, Eleanor Brass, Chrystos, Beth Cuthand, Joyce Green, Emma LaRoque, Teressa Ann Nahanee, Marie Smallface-Marule, Mary Ellen Turpel-Lafond, and Wanda Wuttunee.

³⁷ In a North American context, some of the writers who address Indigenous topics with a gaze fixed on resistance include Michael Asch, Menno Boldt, Cecilia Haig-Brown, Catherine Bell, Thomas Isaac, Patrick Macklem, J.R. Miller, Joan Ryan, Douglas Sanders, Brian Slattery, and Frank Tough.

participate in an exercise which invites the shared discussion of Indigenous emancipation by using the transformative language of restoration and renewal.³⁸

As long as the colonial legacy continues, however, we will need to address more than our past resistance. Resistant thought and the act of informed Indigenous rejuvenation require the development of an Indigenous critical consciousness. We will need to commit to the shared continuing struggle and process and content of renewal. Resistant thought requires that we review, study and commit ourselves to the sharing of ideas and understandings related to pre-colonial existence in Indigenous nations and societies. This can no longer be merely an anthropological exercise; if we do not know them and even if we know them, we need to dedicate ourselves to learning and re-learning the protocols for information gathering, sharing and publication in order to understand what the extent and limitation on our research and publication can be. We need a cadre of scholars who are actively studying traditional Indigenous laws, codes of conduct, principles, philosophies, understandings and worldviews. We need to actively engage in discussions about education, gender balance, governance principles, communal and individual obligations, reverence and respect for humanity, and health studies in a way which accords deference to and critically establishes the existence and rightful exercise of the same. Resistant thought and indigenous informed acts of rejuvenation are integral to the further development of Indigenous critical consciousness and Indigenous critical (legal) theory. We need to establish a research methodology that accords with Indigenous codes of conduct in order to respectfully preserve and pass on that information. In order to be able to launch an informed critique of Canadian and Indigenous colonial practices, we need to have an accurate understanding of the rightful exercise of Indigenous authorities and laws in a pre-colonial context.

From this can emerge a body of pre-colonial academic experts who are informed by Indigenous oral research and traditions who can assert their findings with the credibility of Indigenous

³⁸ Patricia Williams writes of this:

...what is too often missing is acknowledgement that our experiences of the same circumstances may be very different; the same symbol may mean different things to each of us. At this level, the insistence of certain scholars that the “needs” of the oppressed should be emphasized rather than their “rights” amounts to no more than a word game. The choice has merely been made to put needs in the mouth of a rights discourse – this transforming need into a new form of right.

Williams, *supra* note 7 at 149.

community support. It also makes it possible for Indigenous peoples who are no longer fluent in their languages or traditions to access materials which can inform their own identity, understanding and anti-colonial strategies. This is part of the restoration work that has to be done. In a legal studies or Indigenous law context, this means that we have a body of people informed about Indigenous legal theory who can engage in a critical dialogue about the role of imperial law in the colonization of Indigenous peoples.

The development of this information can also inform our actions, whereby we not only address the colonial present, but are able to reflect accurately on the pre-colonial and colonial past in order to make decisions about the future. Developing Indigenous informed action to accompany resistant thought will let us identify and distinguish the attributes of colonial thought and action and begin to examine the amorphous blob of colonization in a way which makes anti-colonialism a manageable exercise. Developing strategies for defining, ameliorating the effects of, and educating about the need to eradicate colonization will take much planning. Planning and executing the same are resistant action. For example, it would be exciting to see colonization discussed as an issue to be resolved, rather than an inevitable evil. If we examine the civil rights struggles and human rights advances, the implication for anti-colonialism statements in the workplace, in human rights codes and in decisions of the judiciary is profound. Advancing an anti-colonization movement based upon good information (much like the anti-racism movement) would be exciting. In a Canadian legal context, education and motivation aimed at identifying the facets and characteristics of colonization, the impact it has on Indigenous and Canadian citizens, and the benefits of anti-colonization law and policy would have immense impact on the Canadian legal imagination. All of these things can contribute to our understanding of our present and inform the decisions we make about our shared future.

Restoration also includes dedicated commitment to researching, examining and implementing ways and means to rejuvenate Indigenous values, laws and principles in a way defined by and important to Indigenous peoples. While fundamentally important to Indigenous peoples, establishing process and substance in terms of restoration is of benefit to all peoples in these territories. This transformative thinking and action will enable us to shift from a colonized existence, to an anti-colonial existence in a way which empowers us. It may eventually allow us

to use the term “post-colonial” honestly and accurately. Participating together in anti-colonial action as informed Indigenous action allows us to move together and address renewal of our relationships in a way meaningful to Indigenous and non-Indigenous citizens. Then and only then can we begin to discuss reconciliation.

D. Conclusion

The new European nations have worked diligently to wipe out indigenous history and intellectual thought and replace these with European history and intellectual thought. The great lie is simply this: *If indigenous peoples will only reject their own history, intellectual development, language and culture and replace these things with European values and ideals, then indigenous people will survive.*³⁹

Our survival as Indigenous peoples is married to retaining our identity and those things (history, intellectual development, language and culture) to which we owe obligations. An Indigenous rejuvenation will require not just that we possess these things, but that we understand them in our every day and move beyond surviving colonization and towards creating our own renaissance of Indigenous thought, action and development. We have participated in a resistance from the time of first contact, but resistance in a contemporary site of colonial oppression requires that we renew our commitment to learning, teaching and living by our own teachings, values, laws, principles, understandings, and codes of conduct. Resistant thought accompanied by informed Indigenous action will enable us to address what is colonized about our existence and what is traditionally and inherently ours. For resistance to become restorative, we will need to examine our obligations. *Ka tomihk as otamakewin*: We are bound to do something. This will involve assessing what is ours and what is not, what is of value and what is not. It will involve acknowledgement and recognition of our rights, but it will require activation and activism by those committed to do something about the restoration of Indigenous nations and nationhood. The role that the development of an Indigenous critical consciousness and Indigenous critical (legal) theory plays in this is quite important. Researching, recording and examining Indigenous teachings, values, laws, principles, understandings, and codes of conduct with an eye to the development of a modern day framework for application and interpretation will allow us to

³⁹ Rudolph C. Ryser, “Nation-States, Indigenous Nations, and the Great Lie,” in Leroy Littlebear, Menno Boldt and J. Anthony Long, *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) at 28 [Littlebear et al].

examine not just the impact of colonization, but the import of the Indigenous teachings and their applicability and comparability. This is exciting work because it enables us to critically examine the renewal and the potentiality for accurate and rightful determinations to be made (with Indigenous guidance) in the areas of law, governance, nationhood, citizenship and a myriad and richness of other topics.

Only then can we address reconciliation in a meaningful way. Once we have addressed and fulfilled our obligations, we can have good relations again. *Miyo-wicehtowin*.

III. SOVEREIGNTY AND SELF-DETERMINATION

Journal

This is the letter that I would have gotten to you had you not gone too early. I miss you and find that those questions that I would ordinarily take to you are ones which I must now answer myself. That is so much harder and is definitely not as much fun as listening to you. I find that without you, the answers are not as clear, beautifully refined or elemental.

First, let me say that there are hundreds, thousands really, of us that owe you a debt that cannot be repaid.

You taught us the importance of honesty and adherence.

To Indigenous ethics. To honest intellectualism of Indigeneity.

To honouring the ways of our people.

I like to think that I learned the fundamental truths of our nationhood from you (that and the importance of grace and humour, passion and agitation, where required). Those fundamental truths, though, are what keep me grounded and I hope that you know how blessed we are as Indigenous citizens to have you.

Humility as a leader is important; you are a servant of the people and a servant is a most humble thing to be.

No one could give up the land. No one gave up that land. We offered to share some of it.

Those rights, our rights, are living rights and are deserving of respect and growth.

We entered into treaties as sovereign nations and retained our sovereign nationhood. That's what we understood and we know that was agreed to by Her Majesty.

We possess and retain the right to determine our own citizenship.

We possess and retain the right to use, occupy and govern our lands.

We possess and retain the right to define our own laws.

We possess and retain the right to define and institute our own governments.

We possess and retain the right to define and control our own future.

When I write them down, it seems so silly to have to record them. We talked on a couple of occasions about how frustrating it is to have to say the same thing over and over again and to re-visit quite elemental understandings so frequently. The truth of the matter as I see it is this: we can not be hurt by teaching settler peoples these things and it will not hurt our people to hear these as a reminder. Sometimes I think I am crazy or a fool as they seem so straightforward. They must have meaning and merit because they are often viewed with such fear.

If they cause that much discomfort, they must be right.

I think they become difficult for some to accept because there is an implicit assumption of worth/cost/expense/loss/sacrifice. Certainly not celebrating these fundamental principles has had great cost/expense/loss for us. No one seems to want to examine that. ("Quit talking about the past." "That happened a hundred years ago." "I will not be accountable for the mistakes of dead men.") Maybe that accounting that everyone seems worried about is predicated on a personal loss presumption; no one seems willing or able to examine the implicit benefit in acknowledgment and recognition of the same.

Thank you for introducing me to the Spiritual Leaders, Elders and Indigenous leaders and academics that you did. I will try to make the best use of the good will you gave me.

A. Introductory Thoughts

After days of sitting in front of this computer, calling all of my friends, getting my gifts in order for the Elders I hope to see, and reading materials which I think open my mind, I am able to write a bit about sovereignty. It seems it has become a dirty word, relegated to some intellectual space that we are not to talk about because it is too contentious, too dangerous, too wrapped in vulnerable paper for us to take out and pass around. My fear is that I am not spiritual enough to know when to stop talking about it, that I am too unaware of the ramifications of my talk to handle this dear thing as carefully as is required. What I decide to do, given the fear, is to think about this dear thing for days, write about it next, and then talk it over with an Elder to make sure that I am treating it with the honour it requires. But I have questions, so many questions, and am unsure what I can add to a quietly whispered chant.

It is the foundation of our home and time and weather have made it no more fragile, and it is all the more beautiful because of its quiet resilience.

We have not discussed sovereignty with Canada for quite some time. We talked with her about it at the hills, valleys and plains where we negotiated treaties and shared understanding. Once it became evident that Canada was not acting in accord with our agreement on that day we tried to discuss it through protest and persevering dialogue. When these were not fruitful, we tried to force her to look at Indigenous sovereignty in rooms that had meaning to Canada. Now, at new negotiating tables we think of and listen for other words and other phrases to capture and address our relationship with our land and our obligations and authorities as First citizens. The dialogue shift – to one which reiterates federal policy regarding self-government and inherent rights – has been profoundly devoid of any full understanding or discussion of sovereignty or self-determination. It is the ghost that lingers. Indigenous governments have invited it into the room, trying to acknowledge it with words and welcome and Canadian representatives are not seeing, not welcoming or acknowledging its presence.

In my cynical mind, I think that there must be a heady monetary value attached to something which is so unwanted by Canadian officials. In some instances there has been a willingness and ability, albeit in a very limited manner, to recognize our obligations, goals and some of our authorities.⁴⁰ This has occurred in some Canadian government policy and in the Canadian judicial system. It must be noted that there have been instances where our principles, laws and understandings have been recognized by Canadian systems and their representatives. However, for the most part I would conclude that the times when we are noticed are when we are noisy,⁴¹ when we are in the way of Canadian political or economic expediency,⁴² or when we are perceived as what Canadians have come to understand as 'Indian' enough.⁴³ With international law conceived as protecting minorities within states and with the moral, legal and economic price tag of sovereignty recognition being quite unknown, we have little in the way of recognition for our role as sovereign peoples.

It is quite humbling to acknowledge my lack of fluency in this language, but I do not think that is a shortcoming. Part of my lack of knowledge is related to my participation in and benefit from the system which refuses to interpret and understand Indigenous rights related to our sovereign status. As a colonized person seeking emancipation, there is very little literature related to our standing as sovereign peoples. Part of my lack of knowledge is due to the reticence of Indigenous leaders, spiritual and governance minded, to address sovereignty in a formal venue because the stakes are so very high. Understanding has not been at a premium when we address our every day: citizenship, nationhood, rights and obligations. I am also uninformed because the language of nationhood, status, sovereignty and self-determination may not absolutely accord

⁴⁰ In categories related to social and cultural understandings and obligations of Indigenous peoples this has occurred (victim and offender sentencing circles, the repatriation of Indigenous cultural items, and Indigenous construction of family come to mind).

⁴¹ *Supra* note 2.

⁴² When Canada is viewed under the international microscope [such as in the *Lovelace* (*supra* note 3) decision of the International Human Rights Tribunal] it is most often addressing its own constitutional needs (for example, addressing Aboriginal rights while trying to complete a Constitution in 1982). Additionally, when there is Canadian government interest in Indigenous lands (for example, the resource rich Nisga'a territory and Inuit territory in Nunavut) we hear about the commitments that Canada has made to and the rights of Indigenous peoples it has recognized.

⁴³ Case law pertaining to those activities which are perceived as culturally Indian (for example, the right to gather the required resources for ceremonial purposes in *R. v. Sioui*, [1990] 1 S.C.R. 1025) and related to subsistence (fishing, see in *Marshall I* and *Marshall II*, *supra* note 6. For hunting, see *R. v. Badger*, [1996] 1 S.C.R. 771) generally garners notice and is often perceived more favourably than Indigenous rights related to commerce, economic development and self-determination (see for example *R. v. Pamajewon*, [1996] 2 S.C.R. 821).

with Indigenous knowledge of our rights and obligations as First peoples. This does not translate well and the gulf between our notions of rights and obligations has led to dissonance in our interpretation.

What I hope to do is to establish a basic primer, an introductory discussion piece for the respectful translation of Indigenous notions of our rights and obligations and our holdings and principles as Indigenous citizens. I hope to shift the discussion from one in which we avoid notions of sovereignty, to one which establishes a starting place for healthy and respectful acknowledgement of Indigenous understandings related to Indigenous notions of our obligations and responsibilities as the First 'sovereign' Nations. I do this noting that all errors in interpretation are mine and that it has no precedent value. As a colonized being I am unable to place my potential errors in the footnotes as error of one in an Indigenous rights model is often ascribed value as a shortcoming of the whole. I speak only for myself and am not a footnote in this piece. This is my journey in developing an intellectual and philosophical framework for Indigenous rights and obligations in the area currently described by international law as sovereignty.

It is hard to be critical of the developed philosophies and laws related to sovereignty. We often need to hang our hat on the benchmarks established internationally as they afford us the only meager protection for what I understand to be our birthright. That does not mean that the decisions and definitions rendered are entirely inaccurate or functionally unacceptable. What it does mean is that there has been good work done with good intentions that often parallels or crosses over into the Venn diagram that signifies our life alongside colonizing peoples. What it also means is that we need to be ever cognizant of the fact that peoples who are radically perceived as or actually disempowered seldom establish the dialogue or define the terminology of sovereignty.

This is our truth:

- We were here first and we have rights that stem from that.
- We were here first and we have obligations that stem from that.

- We were not conquered and we did not give the right to our lands and territories or our autonomies willingly or by force.
- We continue to have obligations, responsibilities and rights to our land, our citizens and our environment.
- The language and terminology of ‘sovereignty’ is difficult to examine in the context of Indigenous principles of obligation. We should examine Indigenous principles of obligation and examine sovereignty in the context of our own, related, parallel, or near understandings of the same.

In order to address this with clarity of vision, I will also address what I think is a fundamental truism of the Canadian legal sovereignty discussion: subjugation and suppression of Indigenous nations is bound to the aggression linked to notions of Western value supremacy and given voice through the English language.

B. Indigenous Authorities and Obligations

1) Understanding the Rights and Obligations of Indigenous Peoples

All beings were placed on this earth, Turtle Island, with obligations to their peoples, places, and environments. These obligations and responsibilities had and have commensurate authorities and these vested in us as citizens, family members and leaders. The degree to which we could and can fulfill our obligations and exercise our authorities is dependent upon a complex set of understandings, principles, laws and codes. We have an obligation to make sure that those obligations are fulfilled in a good way – based upon those understandings, principles, laws and codes.

We can not give, negotiate or have taken away that which has been vested in us by the Creator of all things. It is not for humans to decide what powers or authorities that beings possess. As it was vested in us in the beginning, we have to fulfill our obligations and complete our responsibilities in the way anticipated in the beginning. No person can change the Creator’s laws. It is as elemental as that. As we have been required to fulfill those obligations from the

beginning until now, we do not have the authority to give away nor can we acknowledge presumed or threatened absconding of those obligations. They are an inviolable pact that we have made and not fulfilling the terms of the same is breaking our laws.

We also have limitations on our authority. We would not be able to give up our relationship with the earth or our obligation to our environment. We were told to take care of certain land and the vesting of that responsibility has never been taken away from us by the source that provided it. Man, White or otherwise, cannot change this through gun, blanket, law, or illegality. It is as elemental as that. It does not mean that we are outside of the law; it means that the law is inside us and we are obliged to live and enact it.

This is difficult to reconcile with international law. It is frequently difficult to reconcile Canadian legal decisions and the systemic governmental policy leading to or from this with our own laws, understandings and principles. These cannot be confined in boxes of rights, categories of delineated or defined belongings or in piecemeal accepted ranges of understandings. It is most difficult to accept Indigenous obligation to our land and citizens because we cannot with 100 per cent accuracy call it 'ownership', 'sovereign', or 'self-government'. These are reflections in the mirror of a much broader entity, minute particles crossing our field of view like microbes floating by our entire optic sense of what is surrounding us. The category, the basis and the understanding of what we are talking about, is much more broad and is difficult to capture with English – while still capturing the man-defined fragments.

In a sense, it requires the equivalent intellectual leaps of faith. As Indigenous peoples we have made hundreds of these and many of them have been to our detriment. This is different. It is neither superior nor inferior. The intellectual leap is that the promise to take care of the land and our families is inviolable in our understanding; it cannot be impacted and has not been impacted by foreign constitutional, legal or governmental systems. We could never give up our 'sovereignty' as Indigenous peoples as it cannot be given up. The obligation, or sovereignty plus if you will, to that land is housed in us as recipients but lives with our Creator. The second intellectual leap is that our relationship with the land, stemming from our laws as provided by the Creator, is part of the sovereign law that also teaches us how to relate to the land, each other and

all beings. In that sense, and it is difficult for many to understand who do not function within that world, the law is beyond man-made law and the obligation is the Creator. Our sovereignty, if you will (and I will address more accurate terminology later in this paper) is based upon our inalienable relationship with an Original source. I understand that British sovereignty is advanced on behalf of a sovereign person, and this makes it alterable by design. I respect that and would like to see our understandings respected as well.

The third leap is that it is not dependent upon recognition; it is because that is the law and it cannot be altered by humans.

The fourth leap of faith is that, to be clear, if we are following our laws and living as we are supposed to in our relationship with our Creator (in this one instance, called the source of all things Sovereign), there is nothing threatening in our continuing relationship with the Creator, our acknowledgement of the obligations and authorities that rest with us as a result, or in our continued exercise of rights and responsibilities stemming from that knowledge and relationship.

2) Dialectic Differentials: What our Teachings Provide and How English does not Capture the Essence of our Laws, Responsibilities and Obligations

a. Indigeneity and the Problem of the Amorphous Blob

To begin to think critically about Canadian law in an Indigenous context we need to identify and contextualize Indigeneity in a way which is meaningful. Part of this is making sure that the specificity of our existences is addressed in a respectful manner in identifying general precepts and understandings which can serve as a springboard for more informed discussion. Describing Indigenous centrality without generalizing to stereotype, meaninglessness or the detriment of any particular Indigenous nation is a precarious balancing act. Where possible, I will speak of my identity, experience and understandings to emphasize my meaning. Where necessary I will refer to broader definitional and other categorizations in attempting to secure genuine understanding.

As my understanding is limited to my particular nationhood, I will whenever possible make my meaning clearer by referring to sources and individuals whose work and teachings are well held.

The identifiable and perceived 'Indian' is a small compass marking that lets us know how we are regarded in the broader and other societies. While I was traveling in Mexico, a tradesman tried to sell me a set of earrings that were familiar to me. They were based on the American Indian head nickel, with five silver feathers hanging from them. When in my rudimentary Spanish I let him know that those earrings represented me, the seller offered them to me at a radically reduced price. I could not communicate to him the impact of the romanticized and generic image. I could not ask him who bought these earrings usually. I was able to ask him if he knew of any Indigenous peoples himself. "Si, Steven Seagal!" he said. It would be difficult to translate the emotions and complex ideologies related to the commodification of the American Indian from my heart to his ears. It would be difficult for me to let him know that a Hollywood budget and a pony tail are not Indian. It would be difficult for me to translate the oppressive nature of the regime that regularized and profited from the mass production of our stereotyped selves while I was able to afford a vacation in his territory. What was clear to me was that the understanding of Indigeneity has not grown in many decades and that it is a pretty universal understanding.

That commodified image and the amorphous blob of non-understanding that accompanies it is as difficult for me to address as gaining actual understanding of the nature of Indigeneity was from a badly translated discussion on a beach about the nature of Indigeneity. And as my commitment is to informing where I can and contributing to the replacement of the image with an accurate self-representation, it seems to me that non-Indigenous people have also to commit to replacement of the image (the amorphous blob) with the most accurate information and understanding they can achieve. Both are difficult tasks, but I undertake writing this in that spirit.

We understand that we as Indigenous peoples are nations. As nations, we are a union of Indigenous citizens who belong to and are obligated to the land from which we come. As nations, we have our own governments. As nations, we have our own laws. As nations, we have our own standards for lawfulness and our own system that addresses and punishes lawlessness.

We have our own standards for determining citizenship. We have come into contact with some very aggressive colonizing countries, governments, individuals and forces. None of those detract from our understandings of the obligations, laws and principles which were given to us.

Requiring, in any discussion of Indigenous 'rights', that Indigenous peoples and nations separate spirituality from the discussion is somewhat comparable to asking the Canadian government to discuss constitutional rights in the absence of law. It is also like asking Canadians to think of themselves without any reference to their histories. It is too much to ask and it is, if we are being honest, impossible. The amorphous blob can be somewhat differentiated if we acknowledge that those assumptions of ethical choices and behaviour which appear as the values and principles entrenched in Canadian law (think: philosophical underpinnings) and which are entrenched in the legal codes and common law of Canada are often actually parallel to law in an Indigenous context. The laws, the natural laws that were provided to us as Original peoples, are how we guide our lives. They tell us how to live. They are not, in a Canadian context, dogmas or morals (while they include ethical standards). This principled and guided existence is based upon those understandings/laws. We have codes of conduct that flow from them. We have standards for lawful/good behaviour. There are consequences that stem from a failure to observe them, to live them. In my understanding, Canadian laws are a conglomerate that are supposed to reflect (and do not always do so) the principles and ethics of Canadian society; they are a goal. We live our goal. Our goal is a good life. The good life (and all of the requirements to adhere to the principles of the same) is the law.

We have not had the opportunity, or perhaps inclination, to codify and legislate our laws in a context which is more easily understood to Canadians. There are principles and understandings related to recording of the same. Without colonization, who knows what would have occurred in our celebration and provision of the same. However, in the absence of colonization and in an Indigenous world where things are as they should be, recording is not required because every citizen has not only the obligation to know the principles, values, laws and codes of conduct, they also have the obligation to live and emulate them.

So it simplifies things to say, “Live a good life”. It also epitomizes the clarity, truth, and elemental nature of the obligations that we were given as original inhabitants. Asking us to leave out the origin of those or asking us to break them into manageable chunks, is asking us to deny the source, meaning and content of the same. This cannot be done.

Relations: The amorphous blob that is Indigeneity is really part of a complex system of interactive values, principles, laws and understandings. These all come from one place and underlie all things: action, inaction, statements, thoughts and behaviours. You will find that the relationship between those values, principles and laws and the actions that accompany them are essential. In fact, relationships as a whole would be a governing framework through which you can more accurately view Indigeneity. I have an obligation as a being in this world, to make sure that my relations are good ones. This sounds so elemental but it is fundamentally challenging. I have an obligation to make sure that my relations are guided by the laws governing that particular relationship. My words must correspond with my action. My relationship to my family members requires obligations, depending on the nature of the relationship. My obligations are differentiated and there are a variety of responses to a set of circumstances, depending on the relationship to which I am obligated. There is no amorphous blob here, but a clear and delineated complex code of conduct depending on the nature of the relationship that I have with a person, place, thing or time.

The relationship may be difficult to conceive of for some, in part because it is so elemental. Relations are to be good relations, and there are complex codes and understandings related to how to create, maintain and possess good relations. The Cree word for this is *miyo-wicehtowin*:

“*Miyo-wicehtowin*” is a Cree word meaning “having or possessing good relations.” It is a concept that arises from one of the core doctrines or values of the Cree Nation. The term outlines the nature of the relationships that Cree people are required to establish. It asks, directs, admonishes, or requires Cree peoples as individuals and as a nation to conduct themselves in a manner such that they create positive or good relations in all relationships, be it individually or collectively with other peoples.⁴⁴

We have a relationship that requires respect with the settler peoples who came to our territories.

⁴⁴ Cardinal and Hildebrandt, *supra* note 18 at 14.

Similarly, we are Original peoples and we have an obligation to those who arrived on our lands as settlers. Those settler peoples have a corresponding obligation to us. Our ancestors took that obligation seriously and knew that we would need to address our relationship as cohabitants of the lands entrusted to the Original peoples. Those complex interrelations were anticipated and our people came to the relationship informed about the coming of the settlers and the need for good relations with them. Elder Simon Kytwayhat said of this:

When our cousins, the White man, first came to peacefully live on these lands (*e-witaskemacik*) with the Indigenous people, as far as I can remember, Elders have referred to them as “*kiciwaminawak*” (our first cousins). I heard [from my Elders] that the Queen came to offer a traditional adoption of us as our mother. “You will be my children,” she had said.⁴⁵

Perhaps the amorphous blob is not so difficult to particularize if we think of it in terms of the relationship we forged, committed to and share. As our cousins, *kiciwaminawak*, we have a relationship that requires we act in a certain way towards each other. We are not strangers and are not so separate as to have no responsibility to each other. We have to treat each other in the good way – with respect, with honesty, with humility and cleanliness⁴⁶ – in order to maintain our kinship. We are required to follow the laws agreed to when we met and forged our relationship. These are but a few of the obligations we have to each other as cousins.

Obligation and laws: Further, in giving structure to the unstructured external construction of the Indian, it is important to know that our actions and words are to be made ever-cognizant of the relationship that we have with our land. In the Cree language, you can see life and relations in things largely regarded as inanimate in a western conceptualization of the same things. There is a relationship and an obligation that we have to the earth (Turtle Island) and those things placed here to ensure perpetuity – water, stone, fire, air, moon and sun. In understanding the ethos of Indigeneities it is important to dismantle the myth of Indian ‘oneness’ and look at the multiplicity of Indigenous understandings related to our obligations to the places that we come from and which must sustain us. We have an obligation to take care of the land and that is the reason that we are here. If it seems that we do not adapt and change, perhaps it is because that understanding of the obligation and our fulfillment of the same will never change. Perhaps it is

⁴⁵ *Ibid.* at 33.

⁴⁶ *Ibid.* at 32.

because our understanding of modernity does not accord with non-Indigenous understandings of modernity. Settlement and technology and foreign economies may challenge us, but we are still required to follow our laws and fulfill our obligations. Not doing so would be lawlessness.

Cardinal and Hildebrandt have written about those laws:

For First Nations, these are integral and indispensable components of their way of life. These teachings constitute the essential elements underlying the First Nations notions of peace, harmony, and good relations, which must be maintained as required by the Creator. The teachings and ceremonies are the means given to the First Nations to restore peace and harmony in times of personal and community conflict. These teachings also serve as the foundation upon which new relationships are to be created.⁴⁷

In a Canadian legal context, there is an undertaking made to the Original source to live in a certain way. Failure to do so has dire consequences. Perhaps when we are being “unreasonable” or “archaic” at the negotiating table we are being lawful. Perhaps what Canadian courts perceive as oral testimony/history is an attempt to address Indigenous laws alongside Canadian laws.⁴⁸ In any context, we are now and still in a relationship that requires mutual respect and honesty. As it has not been beneficial to enforce Canadian standards (and they are not really enforced when we do not believe in them, subscribe to them, or live by them) it is a good time to examine what our authorities, obligations and laws are. As we enter our quarter millennium as relations, it is a good time to visit Indigenous legality and laws and the nature of the sacred covenant that we entered with each other.

b. A Spirited Dilemma

Senator Hilliard Ermine said:

You see, [we] Indian people, we have law; it's not man-made law; that law we have was given to us by God.⁴⁹

⁴⁷ *Ibid.* at 15.

⁴⁸ Certainly, the Gitksan and Wet'suwet'en nations attempted to do this in the evidence, materials and information they brought before the Supreme Court of Canada. At trial, the Gitksan gave detail of their *adaawks* (oral history detailing) as evidence only to have the trial judge refuse to admit them. In their hearing of the appeal, the Supreme Court of Canada wrote: “Had the oral histories been correctly assessed, the conclusions on these issues of fact might have been very different.” As per Lamer C.J. and Cory, McLachlin and Major JJ in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 (S.C.C.) (Q.L) at paragraph 107 (S.C.C.) (QL) [*Delgamuukw*]. What “correct” means in the context of colonial presumed supremacy is determinant on who makes the best argument. In an Indigenous context “correct” would mean most in accordance with Original Indigenous laws.

⁴⁹ Cardinal and Hildebrandt, *supra* note 18 at 41.

It is difficult for many people, western peoples in particular, to accept that there can be a completely balanced, respectful and functional governmental and legal system that is linked to spirituality. I think I understand that. With corruption in their places of worship and a not-so-enviable past that tied their places and people of sanctity to exploitation and abuse, I can understand an asserted need to disengage government from religion. I am not writing this to condemn anyone or to blame, but do note that perhaps this is one small miracle of colonization: our spirituality remained spirituality and did not become organized and funded religion; as a result our spirituality was not corrupted. This is not to say that individuals have not manipulated the same for the advancement of ill objectives. Our colonial existence provides some measure of that (although not comparable in scale). However, it seems to me that with a very few exceptions, our spirituality was not used to advance agendas which were not represented in the tenets of our teachings. There is no English language correlate for the intersection between Creator, teaching, understandings, values, laws, authorities, obligation, government of the people (who are of the Creator), and sovereignty plus. In fact, I can almost understand the reluctance of non-Indigenous peoples or Indigenous peoples who do not / can not adhere to these belief systems any longer to address the same. This is, I think, due to three factors (which I will address individually). The first is an unwillingness/inability to address Indigeneity and facets of the same as a total entity. The second is a reluctance to engage in a dialogue based upon spirituality as an ideal. The third is an unwillingness/inability to advance discussion without an agenda or informed comparable experience. When I am kind and calm, I have all measures of understanding for this dearth of information. When I am impatient and tired, I am frustrated by the ignorance.

Part of the colonial experience is that we have received the message from a number of sources that religion and law must be separate. As a colonized person, who attempts de-colonization daily, I can tell you that the compartmentalization of law and religion is something for which I have a respectful adherence to in the non-Indigenous North American context. I also think that it is a falsity that the law has actually been separated from religion. It may be harder in a contemporary context to find religion in the law, but it informs and has historically grounded many pieces of legislation, constitutional documents and treaties. That's not to say that the

reasons for its separation have not been important ones given the milieu within which church and state interact in a western context.

Contextually, however, Indigeneity and Indigenous philosophies, values, beliefs and laws have their inception in a highly spiritualized and sacrosanct place. In this sense, the amorphous blob is more evident than ever if we are not informed about the particularities of the Indigenous context. We received our laws from an Original source. We were made protectors of the land from an Original source. We were required to act in a certain way towards relations according to the rules provided by an Original source. We derived authority and obligations towards land and territory (governance) from an Original source. All of these statements are shorthand for a very intricate and divine set of values and instructions which established for us a mode of living that would allow all beings to live in a good way. It would minimize the import and weight of this way of life to categorize it as “ways to live in balance”, but the essential and elemental nature of the Original instructions and teachings lead many to reinforce a simplistic understanding of Indigenous philosophies, laws and obligations.

In order to best honour and acknowledge the import of the gifts (physical and temporal), it is important that we address a meaningful way to respect the unknown and the unlike. It is also important that we acknowledge with humility our own shortcomings (i.e. an inability to understand some things) and that we take responsibility for our own education (i.e. approaching a spiritual leader to discuss traditional teachings). In order to embrace differential value and legal systems, and we can do so on blind faith and sheer trust, it is likely important that we address the nature, content and seriousness of the gifts provided by the Creator to Indigenous peoples in a way which perpetuates understanding and which enables us to make the unknown known and to cross the border between unlike and like.

I am not an apologist for Indigenous spirituality and its inclusion in the every day; I celebrate the same, and try very hard to be a practitioner and live a good life. I have seen pure and fundamental teachings waved away, a gift rebuked, and called antiquated by our people and non-Indigenous people in boardrooms, at negotiating tables and in the courtroom. What is functionally missing, I have come to understand, is a respectful common ground that allows us to

discuss comparative principles and systems in a way that does not require us to devalue one to substantiate the other. The difficulty comes with acknowledging the validity of Indigenous systems and that difficulty is compounded when we examine the same in light of attributing value to it. Value in a Canadian legal context is equated with valuation. Valuation with cost, cost with loss. Loss with blame and blame with liability. Liability is equated with a financial burden to be assumed by one who has been at fault. When one is trying to lessen the financial liability there are all sorts of maneuvering and impediments which can be undertaken and constructed, completely lawfully, in a Canadian legal context. However, in a Cree context the requirements that we are humble, honest and act with cleanliness are not met and greater distrust results.

Aside from valuation, there is also a dissonance in the valuing of differential laws, values, principles and mores. No system is neutral if it is predicated on the values and beliefs of one society to the exclusion of or having an entirely negative impact on another society. What emerges when your laws, values, principles and mores are not valued, are devalued and valued is an understanding that your belief system, obligations, laws, spirituality, language and culture are in a state of constant colonial coercion. This is the ongoing impact of colonization; it may sometimes be difficult to discern and next to impossible to prove, but the systemic and steady encroachment on your land, laws and self is palpable and cognizable. This is the amorphous blob that requires deconstruction as an aid to understanding, so in attendance is it every place we look.

We often speak of valuing difference, but even our understanding of value is dissimilar. How can we value difference when our values are so unlike and our understanding of *what it is* that is different is not clearly understood? To address these issues, the next section of this paper discusses Indigenous understandings as they relate to particular topics relevant to our shared relationship.

C. Indigenous Understandings of Reciprocity-Based Relations: Indigenous Something More Than Sovereignty, Reciprocity and Responsibilities

In a Cree context, all life (including laws governing life) is based upon reciprocity. The elemental basis for this is that there is mutuality to the relationship between one and another. It is stronger than that, though, and it is based upon a pact or commitment that you have to each other as a result of the nature of your relationship. Interdependency, fostered by the establishment of a relationship, brings with it proportionate and absolute requirements (duty, contract) that are binding in the most permanent sense. It is more than a promise, it is a duty and it commits those who are involved in the relationship to a positive set of protocols/conventions that govern the relationship.

Unison and accord are inherent in the nature of the relationship itself; fulfilling the terms of this accord is fundamental to the relationship. Those terms of the relationship are inherent. They are inalienable. They are inviolable. In a real sense they are duties owed as part of the relationship that you have entered. This notion of relations extends to almost every thing and everyone. In a Cree context, the word encompassing the reciprocal and committed relationships is *wahkohtowin*. *Wahkohtowin* speaks to the behavioural standards and obligations existing between those who have entered a relationship. Cardinal and Hildebrandt, after sitting with a number of Elders in Saskatchewan, described it in this way:

As an example, the Cree doctrine of *wahkohtowin* sets out an unwritten code of conduct, which, among other things, sets out the conduct and behaviour that must be maintained between:

...

cousins and other relatives: setting out behaviour that was permitted and not permitted – social codes – social codes of behaviour setting out the relationships that were to be maintained between uncles and nephews, aunts and nieces, and cousins – the relationship codes encouraged respectful though less stringent codes of behaviour that allowed the persons to maintain happy and noncoercive relations;

unrelated persons: codes that required *manitisiwin* (being respectful) and *manacihitowin* (treating each other with care and respect).⁵⁰

⁵⁰ *Ibid.* at 34.

In my understanding,⁵¹ we have answerability for those duties and responsibilities extending from our relationship. As cousins on this territory, we have an obligation to settler peoples and they have a commensurate obligation to us to behave in ways that speak to our relationship, our *wahkohtowin*. To me, it sounds like a gift, but I can readily transfer that to western terminology and say that this is the burden that we have. It is required effort and responsibility and there are obligations/prerogatives that arise as a result of the relationship.

You had to treat the land, your territory, you had to take care of that and treat it with incredible respect because that land was given to you by Creator. That's the bottom line. ...And you had to take care of it, otherwise it would not take care of you. It is important that we look at the word "reciprocity" and that is applied to the land as well. You can't treat everything else that way and not treat the land that way.⁵²

Elder Campbell spoke to both the inherent rules regarding the land (respect and reciprocity) and of the nature of the obligation to our territories. The relationship, responsibility and obligations/prerogatives arising from the Original source placed a requirement on us to take care of the territories given to us. Elder Campbell said of this:

We (Original peoples) were all responsible for taking care of the land. The land is like our mother, uhh? She's our mother and she provides us with food and everything that we need we have to treat her with the same respect and dignity that she treats us. So much so that there were even ceremonies to celebrate that. Everybody had a relationship with the land and that relationship began almost before you were born. You know you were hearing those stories all the time that taught you how to take care of it. Everything is built into the stories.⁵³

Those stories provide teachings. About our relationships with each other. About our relationships with our land. About the fundamental and inherent relationship between those lands we were given and the obligations flowing towards them as a result of that gift. This gift is both material and metaphysical and is defined very specifically in Cree.

"Iyiniw miyikowisowina" (that which has been given to the peoples) and *"iyiniw saweyihtakosiwin"* (the peoples' sacred gifts) are generic terms that are used to describe gifts deriving from the peoples' special relationship with the Creator, whether those gifts are material in nature (land) or metaphysical (as in the case of laws, values, principles and mores that guide or regulate the peoples' conduct in all their many and varied

⁵¹ My understanding comes from studying with, listening to, and asking questions of Elders and Spiritual Leaders. I am an infant in my understanding and am thankful to have the counsel of some brilliant teachers. In this instance, I am particularly grateful for the discussions I had with Métis Elder Maria Campbell. While we sat and spoke of this together the understanding (correct or incorrect) is mine. Interview with Maria Campbell, Métis Elder and Storyteller, Athabasca University (11 October 2005) [Elder Campbell].

⁵² Elder Campbell, *ibid.*

⁵³ *Ibid.*

relationships). The Elders are emphatic in their belief that it is this very special and complete relationship with the Creator that is the source of the sovereignty that their peoples possess.⁵⁴

Our relationship with the Creator is greater than the relation between sovereign and subjects, but sovereignty was an inalienable part of the gift given by the Creator to us in our relationship with him.⁵⁵ Sovereignty is certainly an inalienable part of our relationship with the Creator, and the complete relationship includes not just that responsibility but obligations as well. Inherent in our relationship with Creator is the understanding that we have authority in our relationship with the land (and that it has authority over us). Reciprocity also means that we are obliged to act responsibly in carrying out our obligations; with authority comes responsibility.

Cree authority has been defined as *otsimaw* by former Assembly of First Nations Chief Matthew Coon-Come:

Otsimaw, that is what my people call the leader of a Cree hunting camp. He is the one who decides where the group will go. He presides over feasts and, following our traditions, determines the way the camp will operate. *Otsimawin* is Cree leadership and authority. It surpasses government, *Tibeytachewin*, because it sets the rules for good government. It is with our term *otsimaw* that we translate European concepts referring to leadership and sovereignty.⁵⁶

Clearly there is inherency and inalienability of our bundle of (sovereign) rights, coming as a part of our *iyiniw miyikowisowina* and *iyiniw saweyihtakosiwin*. These gifts, as a broader part of our relationship, *wahkohtowin*, with the Creator oblige us to act in certain ways with respect to our citizens, our leaders and our lands. These are obliging gifts, reciprocal obligations, with concurrent teachings about how to do this in a good way. What is entirely clear is that there is something in place that cannot be touched and that is greater than and encompasses western notions of sovereignty.

⁵⁴ Cardinal and Hildebrandt, *supra* note 18 at 10-11.

⁵⁵ I am unable to interpret this accurately as I have not been given permission and do not possess the facility with the language to interpret the same, but I have elected to paraphrase and attempt to address the information in the context of this discussion.

⁵⁶ Matthew Coon-Come, "Essay" in Frank Cassidy, ed., *Aboriginal Self-Determination* (Lantzville, BC and Montreal: Oolichan Books and the Institute for Research on Public Policy, 1991) 114 [Cassidy].

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You know, it is not really called sovereignty, not really. There is not a correlate that is directly transferable. This nonsense about translation - generally it requires you to strip meaning, context and stories bare to place a piece of wordbread on the ground for their consumption. All I can think of is that the land owns us and we are obligated to it. Our relationship with the Creator is the source of our relationship with that land.

It is something else and is an awesome thing. It has its root in the Creator - they will not get that - and the word itself means something like "Creator" in Cree.

It is starting to hit me how dangerous this is; to open a door to a guest who has really proven to be quite damaging to our home. If I think of it as simply telling them the rules before they enter, maybe that is more appropriate. I keep thinking: Do no damage, put good words out there, and make sure that your Elders see this before it goes too far. But still, I don't want to give anyone leverage at tables that do not recognize and respect this information.

I am wondering what it feels like to be reading this as a person who has benefited from Canadian crystallization of sovereignty. Will they feel remorse / be moved to do something about it? Will they be angry / unable to hear it? Will they intellectually be able to process the immensity of it and be able to honour the information by accepting responsibility?

I have nothing but admiration for those who first understood Canada and Canadian law in our nations. How complex and rational these endless words seem. How without relevance, actually. Not to dishonour them, but there seems to be a complexity which masks some really

quite simple understandings. Why not just say it and be done with it: We will do what we want, when we want and how we want. We will explain afterwards. In this way, I think the Canadian courts have become something of a system of rationalization for protecting affluence and influence in Canada. Legal cynic or Indigenous realist? Hard to tell the difference some days.

There are so many kinds of wealth that are overlooked.

D. The Land Owns Us/We Are Obligated to the Land – Something More Than Sovereignty

1) Oral Traditions

It is necessary to discuss the importance of oral traditions in the communication, preservation and transmission of our stories. The oral tradition, as I understand it, is so intricate and demanding that no one person can record significant occasions. The recording of important events was shared among a number of people to insure accuracy, honesty and shared transmission. Histories and events were recorded as a collective so that there was individualized responsibility in a collective endeavour. Particularization and detail was very important in the recollection and preservation of the history. Sharon Venne has written of this (in the context of Treaty 6 Cree Elders):

Recounting the smallest details indicates the memory is accurate...There are positive benefits to having many Elders keep the stories. The Elders with their age and wisdom have the time and patience to teach. Each Elder keeps stories like a sacred trust to be handed down to the next generation. It is through continuous contact with the Elder that one will hear the complete story known by that Elder. It is not a process of sitting for one hour or every afternoon. The history of Indigenous peoples is learned over many years, as the depth of an Elder's knowledge is immeasurable.⁵⁷

That precision and definitive chronicling is important in the realm of passing on our knowledge of our relationships and positive responsibilities through our oral histories. These are our inherent laws transmitted in accurate and precise form. It applied to our Original instruction and was essential for the transmission of our relationship with the Creator, the lands, and each other. Chief Gordon Peters said of this:

We must understand the legends and the stories that we have about the creation of this land and why we call this land Turtle Island – our songs, our dances, our ceremonies – all of these oral things that tell us how we were put here and what we must do in order to remain here. Those songs and those oral ways and those traditions are so strong and so powerful in being able to relate to us our existence that they were some of the first things that the European people tried to diminish, and then eliminate, so that we would no

⁵⁷ Sharon Venne, "Understanding Treaty 6: An Indigenous Perspective" in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press, 1997) 173 at 175.

longer have the connection with the original instruction, so that our authority would then come from the same kind of documents that were being provided for their people.⁵⁸

Knowing both where the stories came from and what lesson they taught you, about where you come from, what your reciprocal relationship with the land is, and how to live your life in accordance with those Original gifts, is so much a part of us that it is inherent. There is no mistaken understanding. There is no claiming something that is not yours. These holdings and responsibilities taught through storytelling were so known and repeated that they become a part of you. Elder Campbell said of this:

When you hear it from the womb on, you hear those stories again and again at home in the winter time or on the land in the summer; there was a repetition of them. That became like N. Scott Momaday says, “memories in your blood”, first you inherit it in your genes, but you are also hearing those stories over and over again so they become a part of you...It’s almost like you can push a button on a part of your body and you will remember. And when you went out on the land, when you went on the land, every single thing on the landscape was like a mnemonic device. What you did had to be in accordance with the stories.

We were never told this is a rule, this is a law. Sometimes there was a story, a ceremony or a song or sometimes all of them together...and they became inherent. Inherent means all through out you and you just inherently knew.⁵⁹

The strict protocols regarding teachings, laws, holdings and responsibilities are in place to guarantee accuracy and certainty. The inherent nature of those relationships is what should be most considered in any discussion of sovereignty or the land owning us/our obligation to the land. The format of our teachings and laws is as important as the content. The everlasting nature of the compact made by virtue of those relations and that they cannot be unilaterally changed are also of exceptional import in our discussion of our relationship with our land (as created via sacred trust through our Creator/Sovereign) and the rights and obligations that come to us as reciprocal relations in that relationship.

⁵⁸ Chief Gordon Peters, “Essay” in Cassidy, *supra* note 56 at 33.

⁵⁹ Elder Campbell, *supra* note 51. This obligation/relationship to protect the land, relationships as steward/protector of the land as per original instructions has been called sovereignty. It is, I think, akin to having a sacred obligation.

2) Treaties

It is also vital that we address and acknowledge the central tenets of Indigenous obligation/relationship to our land. Making treaties is entering into a new relationship. That new relationship has context and is of great consequence in any discussion of our relationship, our obligation and relationship with our lands. The first thing to note is that when our ancestors sat with our White cousins, *wahkohtowin* was known to be the law of relationships that governed our discussion. As that land owns us, we had obligations to maintain. It was with the utmost significance and solemnity that our relationship was discussed. As an indicator of the weightiness and authenticity of these meetings, the treaty parties (Indigenous and settler) participated in a ceremony that was demonstrative of intent and effect of the meetings.

Two tenets and principles arise from the ceremony and laws attaching to the meeting and the entering of relations with each other:

In the pipe ceremony, treaty parties signified their oneness in the undertaking that nations represented in the treaty would place their new relationship created by treaty in the hands of the Creator.⁶⁰

The sweetgrass used in the ceremony represented an undertaking between the parties that their relationship would be governed and conducted according to the principles symbolized by the sweetgrass and the pipe.⁶¹

Those principles include those of *wahkohtowin* and the law that relations would be based upon fundamental acknowledgements and the preservation of our ways of life (including adherence to our laws and maintenance of our something more than sovereignty as peoples endowed by the Creator).

The first principle affirmed by the treaties was the joint acknowledgment by the treaty-makers of the supremacy of the Creator and their joint fidelity to that divine sovereignty. This was in part the meaning of the ceremonies conducted by the First Nations during the treaty ceremonies where they used the pipe and sweetgrass.⁶²

This elementally clear understanding is an essential understanding. Yes, we understood ourselves to be obligated to divine sovereignty, perhaps as responsible to protect the Original sovereignty. But we also *understand* ourselves to be a party to that continuing relationship

⁶⁰ Cardinal and Hildebrandt, *supra* note 18 at 31.

⁶¹ *Ibid.*

⁶² *Ibid.*

with/obligation to land (that looks like, is more than, and is interpreted as sovereignty). In total, that sacred agreement, that solemn obligation that is more than sovereignty and those relations are alive and continuing and we have an obligation to continue them in accord with the protocol, laws and honesty that enlivened the relationship then and which runs forever. Elder Norman Sunchild described the treaty as:

Okimaw miyo-wicihitowiyecikewin, witaskeosihcikewin – an agreement between the sovereign leaders to establish good relations and to live together in peace.⁶³

That agreement and the continuing relationship with and obligation to our land (which is more than sovereignty) cannot be given or taken away by anyone but the Original source, and claims to the contrary are incorrect. Our philosophies, laws and principles have as an essential component of their composition that no person can alter the Original instructions. No person. For starters, no one person has authority or representative capacity to do so. Allegations that our chiefs altered the relationship or agreed to alter the Original instructions are unsubstantiated and incorrect. They do not have that authority. In no way could they accede or agree to alter the instructions of divine sovereignty. In no way could they alter our relations with the land, nor would they understand that as a possibility. Venne has written of this:

In a Cree Indigenous community, the *okimaw* (Chief) and Headmen are only empowered to implement decisions made by their citizens. An individual who is chosen as a Chief or Headman does not have any prerogative to make unilateral legal or political decisions binding the citizenry without their express consent. The Indigenous peoples who selected the Chief and Headman are the boss.⁶⁴

Authority did extend to making good relationships and fulfilling the obligations that extend to you by virtue of those relationships. However, different Elders from different nations provide proof that our relationship with the Creator and with the lands entrusted to us was not to be altered, was not altered, and was in fact entrenched in the treaty itself. Indigenous scholars/Elders (based upon different Elders' oral histories) support this.

From Venne:

⁶³ *Ibid.* at 33.

⁶⁴ Venne, *supra* note 57 at 179.

The legal and political capacity of the Indigenous peoples to enter into treaty is clear. It flows from the traditional laws which govern the role of the Chiefs and Headmen...The Chiefs were trying to do something for their children's children. The role of the Chiefs and Headmen was to ensure that the agreement entered into with the British Crown did not destroy their relationship to the land and their citizens.⁶⁵

And from Cardinal and Hildebrandt:

They [the Elders interviewed] emphasized that the First Nations' first and foremost objective in the treaty-making process was to have the new peoples arriving in their territories recognize and affirm their continuing right to maintain, as peoples, the First Nations relationships with the Creator through the laws given to them by Him.⁶⁶

Establishing good relations meant that our sovereign leaders were able to discuss how to live near each other and continue our own ways of life (including living a life informed by our Sovereign obligations) without breaking peace.

3) Conceptualizing Indigenous Notions of Relationships with and Obligations to Land (Something More than Sovereignty)

There have been many attempts to infuse the sovereignty discussion with widely held beliefs about power and authority. There are language, cultural and spiritual barriers in place which make translating sovereignty into an Indigenous context difficult at best and inaccurate at worst. What is clear is that there is not the definitiveness or presumed accuracy that there is in an English definition of the same. As the word itself is constructed from non-Indigenous principles related to authority and dominion, it is dangerous to address Indigenous notions of rightful obligation and national authority without using the term or its related definition, understandings and precedents. It is an awkward reconstruction project to apply our obligations and rights to this term; what usually develops is space between the concept and the applicable components of Indigeneity related to the same. The definition in an Indigenous concept is hard to arrive at via the roadmap created by the English language and English legal traditions. Kirke Kickingbird has described the definitional difficulties thus:

⁶⁵ *Ibid.* at 189-90.

⁶⁶ Cardinal and Hildebrandt, *supra* note 18 at 6-7.

Sovereignty is a difficult word to define. It is a difficult word to define because it is *intangible; it cannot be seen or touched*. It is very much like an awesome power, a strong feeling, or *the attitude of a people*. What can be seen, however, is the exercise of sovereign powers. Sovereignty is also difficult to define because the word has changed in meaning over the years. For our purposes, a good working definition of sovereignty is: *the supreme power from which all specific political powers are defined*. Sovereignty is inherent; it comes from within a people or culture. It cannot be given to one group by another. Some people feel that sovereignty, or the supreme power, comes from spiritual sources. Other people feel that it comes from the people themselves.⁶⁷

This space that exists between English and Indigenous understanding of the same is not unoccupied; it is full and rich. It is something greater than and not quite equal to a literal or generally held definition of sovereignty. We fit into and overfill that wordbox. Part of the space created and potential inaccuracy stems from the source of sovereignty. As we understand the source of our obligations to our lands and the peoples on them, they are an Original gift, a gift which endows us but similarly obligates us. Former President of the Native Council of Canada Doris Ronnenberg said of this:

The Creator gave us the mandate and the responsibility to live on this continent. To do that successfully, we must obviously have the capacity to make the decisions necessary to exercise that mandate and carry out that responsibility.⁶⁸

In this configuration and understanding of Indigenous responsibilities, that relationship/obligation which is more than sovereignty bears with it the obligations to act in accordance with the mandate provided by the Creator and the obligation to carry out the original instructions.⁶⁹ Perhaps our obligation is comparable to an inalienable delegated responsibility or authority. Our obligation and responsibility (authorities plus) are those we possess by virtue of a delegated authority from the Original source; no other body can delegate or take away those obligations and responsibilities. Other forms and understandings of Indigenous 'authority' do not touch upon or correctly address the nature of our Original instructions.⁷⁰ While the Canadian

⁶⁷ Kirke Kickingbird, "Indian Sovereignty: The American Experience" in Littlebear et al, *supra* note 39 at 46.

⁶⁸ Doris Ronnenberg, "Essay" in Cassidy, *supra* note 56, 36 at 37.

⁶⁹ Sharon McIvor, "Essay", *ibid.* 82 at 83. The author indicates that there are role specific obligations extending to women and men in this understanding. She said of this:

We have the right to control over the way we live. The debate isn't whether that right is there. The debate is over who recognizes that right, and whether we talk about pigeon-holing it in different kinds of concepts or not. We as aboriginal women know we have that right.

⁷⁰ Taiaiake Alfred, *Peace, Power and Righteousness* (Don Mills, Ont.: Oxford University Press, 1999) at 53-54. Alfred writes of Vine Deloria's distinction between nationhood and self-determination:

and American legal debates have tended to address categories of derived power, there is no clear western legal understanding of Indigenous Original authority, the meaning of Indigenous obligations and how this impacts Indigenous peoples' actions and control over their original territories and peoples. Part of the reason for this is that western conceptualizations of sovereignty are based upon power over peoples and relationships in terms of who has control over whom. Hegemonic language and understandings cannot be applied to the dialogue of 'rights' and 'authorities' (*a la* sovereignty) meaningfully as they have been formed from and subsumed in an archetypal language of domination. Gerald Taiaiake Alfred has written of this:

The challenge before us is to detach the notion of sovereignty from its current legal meaning and use in the context of the Western understanding of power and relationships. We need to create a meaning for 'sovereignty' that respects the understanding of power in such Western notions as 'personal sovereignty' and 'popular sovereignty'. Until then, 'sovereignty' can never be part of the language of liberation.⁷¹

This is a real challenge, and one which if linguistically rooted in the English language is likely to be contextualized in a Western context (and a Western legal context). The history of subjugation and suppression in our nations is very closely related to the English language and Western value-informed action. We need to address healthier relationships and healthier understandings in order to advance together in a meaningful and non-oppressive way. Alfred quite aptly writes of this: "...sovereignty is an exclusionary concept rooted in an adversarial and coercive Western notion of power."⁷² It is also more than exclusionary, it is prohibitive and segregationist. The Western conceptualization of sovereignty omits Indigenous understandings of relationships. The Western interpretation of sovereign powers disregards Indigenous standing, standards and complexities because they will not fit into, and in fact overflow, the sovereignty box.

The great Lakota scholar Vine Deloria, Jr., has distinguished between the indigenous concept of nationhood and the statist concept based on a sovereign political authority (sovereignty). Deloria sees nationhood as distinct from 'self-government' (or the 'domestic dependent nations' status accorded indigenous peoples by the United States). The right of 'self-determination', unbounded by state law, is a concept appropriate to nations. By contrast, delegated forms of authority, like 'self-government' within the context of state sovereignty, are appropriate to what we might call 'minority peoples', or other ethnically defined groups within the polity as a whole.

⁷¹ *Ibid.* Alfred goes on to state, at page 55:

The concept of sovereignty as Native leaders have constructed it thus far is incompatible with indigenous notions of power. Nevertheless, until now it has been an effective vehicle for indigenous critiques of the state's imposition of control; by forcing the state to recognize major inconsistencies between its own principles and its treatment of Native people, it has pointed to the racism and contradiction inherent in settler states' claimed authority over non-consenting peoples.

⁷² *Ibid.* at 59.

Sovereignty, in a western context, is always related to (and some may say is a rationale for the use of) power. Sovereignty is different in an Indigenous de-construction and non-Indigenous construction. ‘Power’ is a self-actualizing term in western construction and is based upon reification and assertion and forceful or other recognition of the same. “Power” in an Indigenous de-construction is not based in humans originally and is not limited to humans. If ‘power’ translates (and I would argue that it largely does not), then is it somewhat translatable to the power based in our Original Creator. That Creator has the power to bestow gifts on all beings. The gifts bestowed upon Indigenous peoples as Original peoples can be, as stated, material and metaphysical. We received gifts as a result of our relationship with the Creator. One of our physical gifts was our territories. This Original gift encompasses sovereignty, but it does not end there. If it were only a gift, we might not have commensurate obligations to the land and the peoples on it. Those obligations do not translate easily into a western intellectual paradigm. That, I think, is the crux of the problem. These obligations, sometimes stereotyped (the “environmental” Indian, the stoic and unyielding protector of the earth) and oft misunderstood, are somewhat akin to sovereignty and look somewhat like they are imbued with power. Our obligation to the land - to ensure that we treat it in accordance with the principles and laws established by our Original instructions – imbues us with authority, control, influence, command, and rule.⁷³ All of these look like power but I readily eschew the foreign terminology for something more accurate and informed.

⁷³ Ruling as related to the traditional principles and obligations does not usually resemble that as legally constructed (and imbued with legal powers) in a Canadian context and in fact contradicts and constitutes illegality in many Indigenous nations. Marie Smallface Marule, in Littlebear et al, *supra* note 39 at 36, has written of sources of Indigenous authority and the oppressive and value laden Canadian system:

In traditional Indian societies, whether band or clan, authority was a collective right that could be temporarily delegated to a leader, under restrictive conditions, to carry out essential activities. But the responsibility and authority always remained with the people. In situations where the collectivity temporarily delegated authority to a leader, that person had to have the respect of the entire tribe, not merely the support of a majority of voters. Obedience to the leader derived from the respect that the people had for him. The coercive impositions by the Canadian government of an elected form of government on Indians is in direct conflict with traditional forms of government. The elective model is based on individual ownership of land and the delegation of authority from above, and it has created serious problems in our Indian communities.

The Cree language provides verbs (not nouns) to describe the relationship – *kwayask ka totaminkh* – s/he performs a duty, or to obligate – *awiyak ka sihkiskaht kikway tatotahk*. In English, the closest term applicable is something that resembles reciprocity.⁷⁴

The ill fit between Indigenous conceptualizations of obligations, responsibilities and the rights and authorities provided to Indigenous peoples by the Original source is compounded by Western governmental legal regimentation of the form of governments on reserves (which contradict Indigenous values, principles and laws and require illegality in an Indigenous context). Form does not effect substance. The imposition of foreign governmental structures in an oppressive system cannot be confused with nor equated with an interruption or dilution of Indigenous authorities (in this case called sovereignty). Kickingbird has written of this:

What kind of government it is or how it functions does not affect the sovereignty of the nation. Throughout the world, democracies, monarchies, theocracies, and dictatorships all exercise sovereign powers to one extent or another. The exact methods of governing also vary widely. Some governments operate under written constitutions, others under customary or spiritual laws handed down from generation to generation. Some have highly structured institutions; others have relatively simple, informal organizations. Many nations operate under a system that allows for orderly change in leaders and powers. A change in the form or procedures of government or in one of its institutions, however, does not affect the sovereignty of a nation.⁷⁵

Another compounding difficulty with examining sovereignty through an Indigenous lens is that sovereignty as defined, interpreted and established in a western context is immersed in the language of subjugation and infused with alienable majority driven rights. The very notion of Indigenous original rights to land and related authorities is entrenched in the language of shared obligation with inalienable and inherently held rights. It is not merely a feeling of something quasi-sovereignty like; the authority is actual, long-held and internally and externally acknowledged.⁷⁶

⁷⁴Leclaire and Cardinal, *supra* note 10 at 293 and 373.

⁷⁵ *Supra* note 39 at 47. Kickingbird goes on to describe what powers must be exercised by a sovereign nation at 47-48: "There is no magic formula about how many and which of these powers a nation must exercise in order to be sovereign. How and if a nation uses any or all of these powers is dependent upon many things, including: 1/ the will and needs of the people; 2/ the history and ideology of the people; 3/ internal and external economics; and 4/ internal and external politics."

⁷⁶ *Ibid.* at 48. Kickingbird stated of this:

While the exercise of sovereign powers by Indian governments has been restricted to some extent, there can be no doubt that the United States and other nations have recognized the inherent sovereignty of Indian nations and their right to self-government. Consequently, we know that Indian governments are sovereign because:

1. Indians feel they are sovereign.

Kickingbird has likened this to a bundle:

The distribution of governmental powers between the United States government and each Indian nation was somewhat similar. It may be viewed as a process of dividing up each bundle of sticks. Each stick represented a sovereign power. So there was a power to declare war, a power to impose taxes, a power to regulate property, and so forth. Originally the tribe held the entire bundle of sticks and so had complete power over the geographical area it controlled and the people living in that area. The tribe was absolutely sovereign. Over the decades and for various reasons, each tribe granted certain of those powers to the United States government in exchange for certain benefits and rights. This was done by treaty or agreement or statute. The point to remember is that all of the powers were originally held by the tribes, not the United States government. Whatever powers the federal government may exercise over Indian nations it received from the tribe, not the other way around.⁷⁷

This addresses the cultural, spiritual, political and other authorities held by Indigenous people in a way which is especially meaningful to the anti-colonial dialogue. There is an intellectual shift required to address rights in this way and significantly deconstruct our thinking in terms of what Indigenous people 'gave up'. We need to address the source of authorities and their modern day application and interpretation, being mindful that a discussion of authority retention may require another intellectual shift.

Dismantling the colonial apparatus which perpetuates colonization of Indigenous people and deconstructing colonizing thought necessitates an informed examination of Indigenous relationships with our land and the basis for the same. Shifting a colonizing mindset demands that we peel off layers of colonial thought, colonizing legislation, colonial policies and histories. It requires that we acknowledge and recognize Indigenous ways of knowing, Indigenous laws and the source of Indigenous understandings related to Indigenous conceptualizations and critical understandings of our holdings. There is no mono-dimensional enactment of those holdings. Capacity, desire, the accurate nature of the holdings and obligations, and the impact of colonization will affect the degree to which our holdings have been maximized and our

2. Indian governments historically exercised sovereign powers.

3. Other nations have recognized the sovereignty of Indian governments.

I do not contradict the above but do hold that in my understanding (something more than) sovereignty is greater than feeling and we should not confuse the source with the impact. We have sovereign powers from an Original source, and which cannot be transferred. In an international context, we have always had these and they have been acknowledged by other governments. However, while these characteristics demonstrate how we fit into the western model of sovereignty, of greater interest to this paper is demonstrating that there is something beyond and a part of sovereignty that has vested in us as Indigenous land protectors. Those obligations and responsibilities require a more taxing standard of exactitude and a greater onus on the holders of the same.

⁷⁷ *Ibid.* at 49.

undertakings to the Creator to fulfill them will impact the degree to which we have acted on them, not the degree to which they are reserved to us.

There are, of course, great differences among Indian nations in their abilities and desire to actually exercise their sovereign powers. Some have well-developed and sophisticated governmental institutions that function efficiently and exercise power wisely. Other Indian governments are in great need of technical assistance, training programs, and a stable source of funding in order to function to their full potential and serve the needs of their people. When we recognize that almost 83 per cent of all United States 'federally recognized tribes' have very small populations and limited resources, it is readily apparent that the practical problems of exercising sovereign rights are formidable for many Indian nations.⁷⁸

There are basically two reasons why many Indian sovereign powers have not been fully exercised since the early 1800s: suppression by non-Indians and a reluctance on the part of many Indian governments to exercise the powers they retain. Historically, the non-Indian attitude towards Indian self-government was influenced by the pervasive belief that Indian culture, social institutions, and governmental forms were inferior to those of European immigrants.⁷⁹

We should not confuse the nature of the holdings with the capacity or impeded capability to fulfill our obligations. In some ways, the concept of self-determination allows us to address the split between our holdings and our ability to give them effect. Self-determination, for the purposes of this paper, is defined as a collective right which is grounded in our Original teachings and which requires us as a collective to determine the ways and means within which our Original teachings can be effected given the natural laws and codes of conduct which govern our behaviour as Original citizens. If our Original rights and obligation to land is the bundle of rights that come to us as peoples obligated to our Sovereign, nations and peoples originally in and continuing on our territories, then self-determination is the inherent right to act in accordance with our laws in fulfilling our undertaking to the Creator. Frank Cassidy has defined self-determination thusly:

Self-determination is the right and ability of a people or a group of peoples to choose their own destiny without external compulsion. It is the right to be sovereign, to be a supreme authority within a particular geographical territory.⁸⁰

While I agree in principle with his statement, there are some western conceptualizations deep within this statement, and the discussion related to sovereignty and self-determination which

⁷⁸ *Ibid.* at 51.

⁷⁹ *Ibid.*

⁸⁰ Cassidy, *supra* note 56 at 1.

makes the meaning intellectually inaccessible to me. The supreme authority in our territories, if we acknowledge the spiritual influence and underpinnings for our existence, comes in the form of an Original being who gave us Original instructions. Our instructions are the basis for our Original rights and obligation to land (which is often interpreted as sovereignty) and if we exclude a hierarchical approach to the discussion, the bundle of holdings/obligations rests with us because we were given and took authority in those territories. It has not been taken from us, by force or paper, and our right to determine what happens in those territories is limited to those understandings provided in our Original instructions. We cannot transfer the land, we cannot give it up and we had and have no process or authority for that which is termed “cede, surrender and release”.

E. Western Conceptualizations of Sovereignty

1) International Law and Indigenous Sovereignty

In both an international and Canadian legal context, it seems that self-determination is a box constructed on the basis of notions of control and protection of borders by states. Generally, it does not in its current construction possess the substantive or procedural basis for Indigenous nations to successfully assert Indigenous holdings and obligations in spaces occupied by international standards and determinations related to power and jurisdiction. The definition is seemingly statist⁸¹ in nature and creates understandings of self-determination which are premised on hegemonic understandings of rights which are expressed in systematized understandings of owned and ownership. Assertion of the obligations and holdings of Indigeneity as international rights is important. The ability to do so in a space, climate or venue that enables you to express, honour and invigorate those rights is equally so. The nature of our colonial existence as Indigenous peoples has meant that expression and invigoration of the same has been through filters of oppression and asserted colonial control/ownership. Given the current international statist principles and understandings of nationhood, there is a need to inform the international

⁸¹ Michael J. Bryant in his paper, “Aboriginal Self-Determination: The Status of Canadian Aboriginal Peoples at International Law” (1992) 56 Sask. L. Rev. 267 (QL) says, at 1, that self-determination is a statist conception, giving rise to a paradox:

The basic statist nature of international relations further entrenches this paradox the very party able to invigorate self-determination law—the State—is the opponent of most groups unsuccessfully seeking self-determination status.

community about Indigenous understandings and laws related to nationhood and Indigenous holdings and obligations. Equally important is that we reformulate the definition of self-determination in international law to include Indigenous understandings and instructions related to our own obligation to and nationhood situated on our land. Defining our relationship to land and informing ourselves and all Canadians about the nature of our obligations to the Sovereign / something more than sovereignty is an important first step in an informed discussion about what Indigenous relationship with and obligation to our land and sovereignty looks like. This is anti-colonial work and an important part of our emancipation project. We cannot merely address the inequities and illegalities of the current formulation of Indigenous self-determination and self-determinative capacities. We need also to promote understanding about the basis and criteria for the assertion of self-determination and sovereignty as Indigenous nations. Not doing so leaves us reactors to the action of economically privileged entities possessing the means to supplant our efforts. If we do not activate, renew and re/construct spaces, vocabulary and Indigenous legal context for an Indigenous value-reflective definition and understanding of Indigenous notions related to authority, sovereignty and self-determination, we will have no emancipation project. We would be reliant upon external definition of the same, if at all. It is a bit like asking the warden for permission to leave.

In order to fit within the definitions, structures and processes required for self-determining peoples as established by the United Nations, we need to address the perspective and milieu of rights discussion in a UN identified framework. Some commentators have noted that the United Nations has weakened its capacity to address Indigenous self-determination by virtue of its initial and ongoing recognition of colonial states fragmented and separated by geography from the colonial territories which sprang from them.⁸²

The Charter of the United Nations in Article 2 states that the “Organization is based on the principle of the sovereign equality of all its Members”.⁸³ Indigenous nations are not currently considered members. This is not oversight and by design the Charter looks to build bridges

⁸² Both Bryant (*ibid.* at 6 of 28) and S.A. Williams in “International Legal Effects of Secession of Quebec” in *Final Report of the York University Constitutional Reform Project, Study No. 8* (North York: York University Centre for Law and Public Policy, 1992) at 18, address the limitation of self-determination to settler populations/nations and colonial states.

⁸³ *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945, No. 7. Art. 10 [U.N. Charter].

between acknowledged states based upon principles of statehood established by the participating member states. When colonizers rule the body which defines inclusion and fairness, colonized peoples are relegated to verbal and legal categories which accord their presumed spheres of influence with their standing. So, we are not *members*.

It has been determined, by exclusion, that we are likely not peoples either (although the 1980s brought about a special working group on Indigenous peoples whose work may someday change this). There is still an argument that while we may be peoples, we are not *international* peoples. The United Nations' *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* both provide at Article 1:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁸⁴

Linguistically, seemingly, we are relegated to a category of *not those peoples* in the discussion of Indigenous rights. While Indigenous Populations are recognized as peoples by the United Nations,⁸⁵ we have also been included in the broader category of minority peoples who often find themselves on the receiving end of majority oppression. Seemingly, the United Nations' commitment to the eradication of colonization extends to a line just short of the one which locates state oppression towards minority citizens. It is a narrower, more specific type of continuous colonization originating in, perpetuated by and not always addressed by member states. Presumably, it is *not that kind of colonization*. Article 27 of the *International Covenant on Civil and Political Rights* provides:

27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.⁸⁶

⁸⁴ *Common 1st Article of the International Covenant on Civil and Political Rights*, 19 December 1966, Can. T.S. 1976 No. 47, 999 U.N.T.S. 171 (entered into force 23 March 1976) and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Can. T.S. 1976 No. 46, 993 U.N.T.S. 3 (entered into force 3 January 1976).

⁸⁵ Subcommission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Populations*, UN Doc. E/CN.4/Sub.2/1988/24 (1988) at 18.

⁸⁶ *Supra* note 84. In 1992, the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, UN GA Res. 47/135 (1992) clarified the meaning and breadth of minority rights. While the General Assembly committed to the "promotion and protection" of the enumerated minorities, protections listed included principally those related to "cultural, religious, social, economic and public life". Participation in decision making was in state decision making at a national and regional level. All "culture, language, religion, traditions and

There is an interchangeability of peoples and states presumed within this drafting that eliminates spaces which would rightfully be occupied by Indigenous peoples in our nations. Seemingly, we are *not those types of nations, not those types of states*. While characterization as minorities is inaccurate and belies the realities of our Original (something more than) sovereignty and territoriality in our nations, it is also established on a false premise. When we look to it for any type of protection of the rights that we know are housed within our nations, we are told that states, not peoples, are protected.

The *Declaration on the Granting of Independence to Colonial Countries and Territories* provides that the General Assembly recognizes:

that the peoples of the world ardently desire the end of colonialism in all of its manifestations...Convinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory.⁸⁷

At Article 6 that:

6. Any attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations.⁸⁸

If we were to seriously examine the end of colonialism in all of its manifestations, we would address the colonialism that places Indigenous peoples in an inferior category of colonization – colonization which ostensibly occurs naturally, rightfully, and in the name of progress. Ending colonialism would require the United Nations to include Indigenous nations as nations, members, Original peoples, sovereigns. If the purposes and principles truly include national unity and territorial integrity, then Indigenous nationhood and territories require that protection as well. If we look for protection in the Covenants on Civil and Political Rights or Social and Cultural Rights, we are told that we are not nations and that we should seek protection as peoples. Seemingly, our colonialism is *not that type of colonialism*. What happens is a UN sponsored shell game where we can never find the ball.

customs” are to have state provided favourable conditions for operation, except when “in violation of national law and contrary to international standards.”

⁸⁷ *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UN GA Res. 1514 (XV) (1960).

⁸⁸ *Ibid.* art. 6.

Then, the question becomes why, in UN lexicon, are we not considered *those peoples*, colonized, nations, and/or sovereign? If we are not *those peoples*, subject to *that colonialism*, in *those types of nations*, how we can arrive at a shared and accurate understanding of Indigenous sovereignty in an international context is almost impossible to imagine. The General Assembly Resolution with respect to “Permanent Sovereignty over Natural Resources” declares that:

Considering that it is desirable to promote international co-operation for the economic development of developing countries, and that economic and financial agreements between the developed and the developing countries must be based on the principles of equality and the right of peoples and nations to self-determination...

1. The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the State concerned.⁸⁹

What happens when we *are* the developing country and we are found to be partial peoples, quasi-nations and near-states? With no exhibited understanding of the multi-faceted and complex nature of Indigenous nationhood, (something more than) sovereignty, and peoplehood, the international community has demonstrated something of a commitment to finding out about those holdings and obligations.

The Draft United Nations *Draft Declaration on the Rights of Indigenous Peoples* addresses many of these shortcomings. Article 3 provides:

3. Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.⁹⁰

Additional articles also acknowledge and recognize the rights to:

- Maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as legal systems and retain the choice to participate in the state’s
- Nationality
- The international nature of Treaties and Agreements
- Maintain and develop their distinct identities and characteristics, including identification as Indigenous and the right to be recognized as such

⁸⁹ *Resolution on Permanent Sovereignty Over Natural Resources*, GA Res. 1803 (XVII), UN GAOR, 17th Sess., Supp. No. 17 at 15.

⁹⁰ *Draft Declaration on the Rights of Indigenous Peoples*, UN Doc. E/CN.4/Sub.2/1994/Add.1 (1994).

- Freedom from forcible removal from their lands or territories
- Full participation in the way they choose in devising legislative or administrative measures that impact them
- Maintain and strengthen their distinctive spiritual and material relationship with their traditional territories (including lands, territories, seas, sea-ice, flora and fauna) and the right to effective measures by States not to interfere, alienate or encroach
- Collectively determine their own citizenship in accordance with their own customs and traditions.⁹¹

The state concerns with the draft are probably quite clear, but an attendee at the 2000 Working Group proceedings reports that Indigenous delegates expressed clear frustration with the process (i.e. states failing to discuss their objections and/or justifying them).⁹² Indigenous representatives wanted the objections to the Draft justified in terms of international law. Indeed a “Proposed American Declaration on the Rights of Indigenous Peoples” does not mention sovereignty and declares at Article I, Section 1 sub. 3 that “the use of the term ‘peoples’ in this Instrument shall not be construed as having any implication with respect to any other rights that might be attached to that term in international law”.⁹³ The preamble does include notions of control and ownership at paragraph 5.⁹⁴ Rights that are addressed include those tied to Indigenous “legal personality” (the right to which should be fully recognized by states),⁹⁵ self-government,⁹⁶ and “control, ownership, use and enjoyment of territories and property.”⁹⁷ There is a real sense of trying to avoid the inflammatory issues of self-determination and sovereignty in

⁹¹ *Ibid.* Articles 4, 5, preamble, 8, 10, 20, 25, 32 respectively.

⁹² Email from J.W. Zion (Navajo Working Group for Human Rights) (22 November 2000) to the University of Saskatchewan Native Law Centre, online: <<http://www.usask.ca/nativelaw/ddir.html>>.

⁹³ *Proposed American Declaration on the Rights of Indigenous People* (Approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/II.95 Doc. 6 (1997).

⁹⁴ *Ibid.* at preamble, paragraph 5.

⁹⁵ *Ibid.* at Section 2, Art. 3.

⁹⁶ *Ibid.* at Section 4, Art. XV. In this Article, at sub 1, Indigenous peoples right to “freely determine their political status...and accordingly, they have the right to autonomy or self-government with regard to...land and resource management...”. At sub 2 of this Article, Indigenous peoples have the right to decision-making without discrimination in all matters that might affect their rights, lives, and destiny.”

⁹⁷ *Ibid.* at Section 5, Art. 1, sub. 1. Sub 2 of this section provides that “Indigenous peoples have the right to the recognition of their property and ownership rights with respect to lands, territories, and resources they have historically occupied, as well as to the use of those which they have historically had access for their traditional activities and livelihood.”

this document in order to achieve some sort of consensus with respect to Indigenous peoples' rights. In an Indigenous context, avoidance has almost always led to silence, and silence itself has often been interpreted to be accord. We can no longer have the luxury of quiet disavowal; we cannot allow ourselves the trust that we will be able to achieve better results later. The pressures of time and the continuing colonial machine do wear at our resistance, but resisting the documentation of a falsity is an obligation which we must undertake to make.

As we are part of the human race, human rights must respond to our realities, and it cannot be done the other way around. These are wordboxes which we cannot fit in to, and we should not do so. As we are human, the human rights movement needs to include us respectfully in the dialogue. As we are human, our existences require acknowledgement and preservation just as they are and as defined by Indigenous peoples. Under Article 21 of the *Universal Declaration of Human Rights* it is provided that:

21. (1) Everyone has the right to take part in the government of his country directly or through freely chosen representatives.⁹⁸

We must be, at least, included in the *everyone*. Perhaps we need to revisit that; it seems elemental and a given, but our countries are actual, existing and rightful. The refusal to acknowledge our borders and the reality of our nations' rightful existences is a stunning failure on the part of human rights advocacy, the movement, and the United Nations. Maybe it complicates things to have to examine the borders within borders. Maybe it is too painful to examine the understanding that that silence is complicit and that the organization itself perpetuates the colonialism it states it exists to defeat. In a way it reminds me of those buffalo bred in captivity and penned all over the prairies. We all acknowledge the beauty, strength and majesty of the beast, maybe even think poetically about its ancestors. We do not make the link between that magic and the processed fat free buffalo burger and why we can only see them in pens. Intellectually, we have captured the beast without ever having to admit it was our doing that brought it to near extinction. The beast is internally understood to be owned and part of the hierarchy, with our needs and satisfaction at the top of that chain. Some days, I feel that we are as captured as the buffalo. Domesticated in some instances with rogue thinkers ostracized or

⁹⁸ *United Nations Universal Declaration of Human Rights*, UN GA Res. 217 A (III), UN GAOR, 3rd Sess., Supp. No. 13, UN Doc. A/810 (1948) Art. 21.

lionized. We are owned by implication and our ownership is perceived as a necessary and progressive. We can live and move within borders identified and established by our captors. With United Nations' Covenants tied to territorialism and the preservation of borders asserted by settling states, it is hard to imagine the space that can be created for Indigenous peoples. We will have to make room for ourselves as actors, not reactors, if any advancement of international recognition of our standing, holdings and obligations is to be given effect.

On July 28, 2000, the Economic and Social Council of the Office of the High Commissioner for Human Rights established a Permanent Forum on Indigenous Issues.⁹⁹ The first annual session of the Forum recommended that eight "government expert members" of the Forum (representatives coming from each of the regional groups represented by Indigenous members at the Forum) be elected to participate.¹⁰⁰ While I have concerns about the infusion of statist ideology and interpretations into the Forum, an issue of greater importance arises. How marginalized and defined by sub-committee status do Indigenous peoples and our issues become? To what degree does the categorization and relegation of our issues to sub-committee status correspond with our marginalization?¹⁰¹ To what degree does the implicitly understood (by some) shorthand of imperialism leech into the discussion and entrenchment of Indigenous rights? If we are linguistically misrepresented and organizationally rendered insignificant, what hope can we have for appropriate legal representation and entrenchment? If, by a colonial shorthand, we are devalued as humans then the intricacies of those rights that accord to us as humans are overlooked. And if our worth and exceptional circumstances as Original peoples in our territories are not understood, then they will not be acknowledged.

⁹⁹ *Establishment of a Permanent Forum on Indigenous Issues*, ESC Dec. 2000/22, UN ESCOR, 2000, Supp. No. 1, UN Doc. E/2000/99, 50, online: United Nations <http://www.un.org/documents/ecosoc/dec/2000/edec2000-inf2-add2.pdf> [Permanent Forum].

¹⁰⁰ *Ibid.* ESC Dec. 2001/316, UN ESCOR, 2001, online: United Nations [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.DEC.2001.316.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.DEC.2001.316.En?Opendocument).

¹⁰¹ I acknowledge and respect the efforts of participants in the United Nations process, including those in the United Nations Working Group on Indigenous Peoples and the Permanent Forum. This critique in no way is intended to undermine the hard work they have undertaken. Instead, this paper attempts to identify at a macro-level, the functional and theoretical issues that potentially impact their work and the work of others at an international level. They do have a prolonged history of marginalization of Indigenous peoples to deal with. See, for instance, *Conditions of Admission of a State to membership in the United Nations (Article 4 of Charter)* [1948] International Court of Justice Advisory Opinion of 28 May 1948 in which the ICJ rules in a nine to six decision that a member State could not, in consenting to admission of a new State, make the consent dependent upon the admission of other States. The reification clearly evident on the face of the ruling is that those who self-define as States make determinations as to who may be a State. In this decision, it is clear that attempts to address similarity of circumstance cannot be successfully made under the *Charter*.

Reclamation, emancipation and renewal are challenging in this particular set of circumstances. It is difficult to address how to proceed in the face of a fundamental misconception about the rights of Indigenous peoples and Indigenous nations. This is a situation of dominance and it requires that we effectively communicate *in ways which are meaningful and accurate to Indigenous peoples* the language through which the dialogue has to occur. bell hooks has addressed this in her work:

Within any situation of colonization, of domination, the oppressed, the exploited develop various styles of relating, talking one way to one another, talking another way to those who have power to oppress and dominate, talking in a way that allows one to be understood by someone who does not know your way of speaking, your language. The struggle to end domination, the individual struggle to resist colonization, to move from object to subject, is expressed in the effort to establish the liberatory voice - the way of speaking that is no longer determined by one's status as object - the oppressed being. That way of speaking is characterized by opposition, by resistance. It demands that paradigms shift - that we learn to talk - to listen - to hear in a new way.¹⁰²

Indigenous formulation of Indigenous standards and requirements in the rights dialogues is challenging for all sorts of reasons (including capacity, cost, multi-lingual and multi-national understandings). With many of our people struggling to get meals on the table it is hard to imagine a financial or personal commitment to a broader and international conceptualization and institutionalization of Indigenous sovereignty and other Indigenous rights. This is the colonial reality and one with which the participants in the United Nations' Working Group on Indigenous Peoples and the Permanent Forum must be well aware. And while it is fundamentally important that they have achieved some quasi-status for Indigenous peoples in an international forum, there

¹⁰² bell hooks, *Thinking Feminist, Thinking Black* (Boston: South End Press, 1989) at 15. Several Indigenous nations have been trying to convince the United Nations to listen in a new way. See also *Mikmaq People v. Canada*, Communication No. 205/1986, UN GOAR, 47th Sess. Supp. No. 40 at 213 UN Doc. A/45/40 (Adopted 26 March 1990) in which the Mikmaq People contested Canada's decision not to include their peoples in the constitutional conferences contravened their right to self-determination under article 1 and the right to take part in the conduct of political affairs in article 25 of the *International Covenant on Civil and Political Rights* (*supra* note 84). In this case, the UN Human Right Committee determined that failure to invite the Mikmaq people did not constitute a contravention of the convention nor an unreasonable restriction to participation in the conferences. See also *Kitok v. Sweden*, Communication No. 197/1985, UN GOAR 47th Sess. Supp. No. 40 at 207, UN Doc. A/43/40 Annex 7(G) (Adopted 1988) in which self-identifying Sami Ivan Kitok claimed that his rights under articles 1 and 27 of the *International Covenant on Civil and Political Rights* were violated. Mr. Kitok, a reindeer breeder, was found not to be able to bring his concern forward as an individual (as the right to self-determination is a peoples' right, and seemingly not a person's right). With regard to section 27, although the tribunal found that Mr. Kitok was able to substantiate a claim that he could not enjoy his right as other Sami people could, it was determined that he was not denied the right to "enjoy [his] own culture" (at paragraph 9.8 of the decision).

needs to be community level participation and resourcing for the input and development to have meaning and currency for Indigenous peoples. Sometimes exposure to the same message by many peoples is more effective than one beautifully enunciated message from one well versed person. It may well be that there is no universality in the understanding of Indigenous rights. However, respect for the same is not too big a goal. Neither can be achieved without the participation of our Elders and Spiritual leaders. Good intentions and informed minds are important, and I think the United Nations has plenty of those. However, there is a translation system missing, that much is clear, in which the international community can translate the formulation of idea, the development of action, and the cost of complicity in silence. There is a cost in maintaining Indigenous oppression and until we can effectively translate the notion that suppression of Indigenous rights costs more than the revenues from our lands and benefits from our silence, we are unlikely to see much acknowledgement in international human rights movement. States have a vested interest in our designation as near-peoples, demi-states, quasi-colonized, nations-lite, and sort-of-sovereigns. That indoctrinated understanding of our diminished humanity and the devalued rights of Indigenous nations needs to be contended with and responsibility for the same needs to be owned. While emancipation is ours alone, education is a shared obligation. International law at the time of contact was premised on notions of Indigenous peoples' inferiority and racialized understandings of our capacities, holdings and laws. Compounding and giving effect to that historical falsity in a contemporary human rights and international law capacity is reprehensible. Giving it credence by silence and refusing to address the same in a contemporary and informed context is not acceptable. And while "demonstrating the moral bankruptcy of the historical justification may not end the inquiry"¹⁰³ acknowledging the same in a framework dedicated to reparation and reconciliation should be human rights and international law subject matter.

¹⁰³ Patrick Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government" (1995) 21 Queen's L.J. 173 page 12 of 14 (QL).

2) Canadian Law and Indigenous Sovereignty

Canadian jurisprudence related to Indigenous sovereignty has a notoriously one-sided history. Conspicuously absent is a sophisticated analysis of the existence of the particularities and intricacies of Indigenous obligation to the Sovereign / (something more than) sovereignty prior to settlement of Indigenous territories by non-Indigenous peoples. Also missing is a contextualized examination of the numerous Indigenous holdings and sovereign pieces of our existences. Not surprisingly then, Canadian judicial history is peppered with not just a lack of understanding about Indigeneity and the corresponding obligations and holdings that belong to Indigenous peoples (including in the area of sovereign authorities) but also with an absence of discussion related to the sovereign capacities and holdings of Indigenous peoples as Original peoples in our territories.

Historical jurisprudence on this terrain is marked by implicitly held assumptions (stated and unstated) about Indigenous peoples' humanity. The Canadian legal history addressing Indigenous sovereignty is also informed by a subjective and implicitly held assumption about economic subjugation: to the economic victor go the spoils. Given that both presumptions (of Indigenous inferiority and Indigenous subservience to European economic superiority) were (and some would argue are) unsupported beliefs, what we should still understand from the case law is that they were widely held.

Much reference is made to and reverence is given to the *Royal Proclamation* of 1763 as a starting point in this discussion.¹⁰⁴ I do not want to detract from this argument as it has worked well in many instances as an historic record of the approach that was to be taken with respect to Indigenous peoples' and settler peoples' relations in their new world. However, it should be very clear that those two widely held understandings of Indigenous inferiority are deeply entrenched in even that document. This necessarily begs the question, if it is protectionist, rather than say assimilationist, is the import radically different as long as it is predicated on incorrect

¹⁰⁴ See, for example, John Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1-47. At paragraph 28 of his article, Professor Borrows notes that the Royal Proclamation "uncomfortably straddled the contradictory aspirations of the Crown and First Nations when recognizing Aboriginal rights to land by outlining a policy that was designed to extinguish these rights."

and racialized understandings about Indigenous peoples, our birthright and our holdings? Falsely premised statements about our nature and documentation arising from those statements are still cataloguing us by our presumed deficiencies. While the intent (segregation of interest) is important and the effect (protection) is important, we still need to be aware in a critical context that this definition by deficiency has weight and significance regardless of era. It also leads us to understand that Indigenous *some things* (rights, autonomies, authorities, sovereignty) are to be protected. The interpretative exercise is one the result of which weighs heavily in favour of those who have the resources to commit to writing the history (in this case, a legal history).

In this instance, the historical legal record weighs heavily in favour of the haves. Having is predicated on affluence, affluence by owning, and owning by any means possible. Taking control (because I do not acknowledge ownership of lands taken illegally) of Indigenous land has been made possible through a variety of means in what looks like a model for land holdings determinism. In this paper, control through legal force and legal enforcement by Canada takes the forefront of discussion. Her Majesty and later Canada as her agent and as an independent actor were further represented through the agency of the courts. Court officers as actors, it must be said, held and (some) hold beliefs related to the inferiority of Indigenous peoples, interests and holdings. We must be ever cognizant of the understanding that perceptions of Indigenous inhumanity and incapacity remain a well-documented part of Canadian legal history. Those presumptive and almost prescriptive beliefs about Indigeneity have resulted in our legal categorization and further dehumanization. It has been useful to think of us as stewards and savages in order to access our territories. It has been essential and integral to Canada's legalized prevention of Indigenous maintenance of our obligation to and relationship with our lands to imbue the law with value laden meanings related to possession, tenure, occupancy and limited interests. The legal dialogue has not shifted or advanced very far from its finding that we could occupy and possess a reserved amount of land (all as externally defined).

Central to this discussion is a notion of derived and dependent privilege. That there is a presumption that our land-based holding evolved in response to settlement and settler rights is evident throughout Canada's legislative history. These derivative rights, it is alleged repeatedly, are the product of goodwill, parliamentary or legislative authority, settler bestowment, gift, or

penultimate vestment. There may be an acknowledgement of a sad supposed reality (that Indians must make way for progress, that Indians held but do not hold rights in the face of progress, that European dominion has animus and that Indigenous nationhood is inert) or there may be allusion to a formerly empowered state of Indigenous affairs. Indigenous empowerment in historic and contemporary cases is relegated to some sector of the Canadian legal imagination dealing with “the past”. What is constant is the message sent by the legal messenger (while the form may vary): Indigenous rights are dependent upon settler recognition of the same for their existence. With little deviation¹⁰⁵ (usually dependent on the nature of the right claimed, rather than the participating judiciary), the Canadian historic legal path to contemporary discussions of Indigenous sovereignty looks like this:

POSTULATE 1: Indigenous assertions and understandings of sovereignty are largely unexamined in an Indigenous context. Pre-settler holdings are not understood or held not to be applicable.

POSTULATE 2: A mystic balloon of settler sovereignty (predicated on notions of supremacy and superiority) rises upon contact. Indigenous understandings of the nature of our shared relationship are not understood or held to be applicable.

POSTULATE 3: Presumed authorities that have in many instances already been asserted (wrongfully) are entrenched in legislation or case law that is self-justificatory in nature. The legislation or case law reifies settler presumed supremacy with a legal understanding of the presumed supremacy of settler interests and authorities. Indigenous understandings of our authorities and obligations are not understood and are held to be inapplicable. Indigenous rights are dependent upon settler recognition of the same for their existence.

POSTULATE 4: Indigenous assertions of authority are met with a back dated and monochromatic review of settler justification for settler seizure and illegal acquisition of

¹⁰⁵ For an American context that deviates somewhat from this pattern, see the oft-cited Marshall judgments in *Johnson and Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543 at 572-4 (1823) [*M'Intosh*] and *Worcester v. State of Georgia*, 6 Peters 515 (1832) [*Worcester*].

Indigenous lands predicated on self-justifying notions of rightful tenure, sovereignty and 'ownership'. Indigenous understandings of the nature of our sovereign holdings and relationship with our land is not understood or held to be applicable. Indigenous rights, the Canadian legal fiction goes, are dependent upon settler recognition of the same for their existence.

POSTULATE 5: Over time, imperial understandings related to Indigenous sovereignty become entrenched in Canadian jurisprudence, stereotypical and inappropriate statements with respect to Indigenous inhumanity are silenced (but present), and the assumption of the usurpation of Indigenous sovereign authorities becomes represented by formulaic and systematized linguistic indicators. Indigenous peoples are presumed to be linguistically and legally subjected¹⁰⁶ to Canadian citizenship standards. Indigenous peoples' interpretation of our understandings or our responses to summarily being ascribed subject status are quickly dismissed, not addressed (deemed not worthy of address), or are reconciled with the language of "conquered" peoples. Internalized imperialism results and replicates. Indigenous rights dialogue becomes more difficult to address as the rights discussed and authorities and holdings housed in Indigenous legal systems must be reconciled in a system that requires settler recognition of the same for their existence

This is not meant to follow a linear time line. However, elements under each heading appear to become more prevalent as time passes. Elements of each category of this model, let us call it "Legal Imperialism and Indigenous Sovereignty Elements" cross timelines and categories depending upon the analysis of the court, the issue addressed, and the desired resolution related to the given context. For clarity, then, it is useful to examine some of the decision making in each category as related to Canadian case law and legislation.

¹⁰⁶ By subjected, I mean legally entrenched standards of citizenship become Canadian standards. We become Canadian legally constructed subjects, not Indigenous citizens with misunderstood, unexamined or with an alternate bundle of rights.

POSTULATE 1: Indigenous assertions and understandings of sovereignty are largely unexamined in an Indigenous context. Pre-settler holdings are not understood or not held to be applicable.

Indigenous holdings (authorities, lands, or authorities for lands) have been addressed without examination in a number of instances. This is true in the discussion related to the *Royal Proclamation*¹⁰⁷ and some early case law coming from the United States Supreme Court. The *Royal Proclamation* of 1763 is often held up as the “Indian Magna Carta”. The *Royal Proclamation* recognizes the right of Indigenous peoples to lands in their possession and provides that these lands (and the rights related to them) can only be addressed through the Crown. It should be noted that it also provides that specific lands and territories are reserved to the Indians “under our Sovereignty, Protection and Dominion...”.¹⁰⁸ It should be noted that the *Royal Proclamation* insofar as it addressed that Indian Nations and Tribes should not be disturbed or molested in their “possession” of land, also included a statement that this land was to be land located “in such Parts of Our Dominions and Territories”.¹⁰⁹ Nationhood was integrally understood and the right to land was also. However, Indigenous nations’ holdings and the basis for the same are not interpreted. Indigenous rights exist and they are not dependent upon settler goodwill. Indigenous holdings were included in the *Royal Proclamation*, but in a British context. Peter Hutchins, Carol Hilling and David Schulze wrote of this:

[The *Royal Proclamation*] recognized First Nation nationhood, the political alliances of the British with the First Nations and their rights to continue in the possession of their territories until ceded or purchased through a formal treaty process.¹¹⁰

In *Johnson and Graham’s Lessee v. M’Intosh* the United States Supreme Court did address Indigenous holdings outside of the context of conquest. Indigenous title was recognized in this case, in which Chief Justice Marshall referred to the rights of “discovering nations” and the unlimited independence (curtailed in the decision) of the Original nations. The case refers to the right of possession of Indian peoples and also to the “exclusive title” of discoverer nations.¹¹¹ It

¹⁰⁷ *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*].

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Peter W. Hutchins with Carol Hilling and David Schulze, “The Aboriginal Right to Self-Government and the Canadian Constitution: The Ghost in the Machine” (1995) 29 U.B.C.L. Rev. 251-302 at para 47 (QL).

¹¹¹ *M’Intosh*, *supra* note 105 at 572-4 Chief Justice Marshall cited in Thomas Isaac, *Aboriginal Law Cases Materials and Commentary* (Saskatoon: Purich Publishing, 1999) at 16-17:

also states that Indigenous peoples' rights were not to be entirely disregarded, but would be impaired (sometimes to a considerable extent), with interests in those lands being subject to an Indian right of occupancy. This case and the *Worcester v. State of Georgia* do not view Indigenous rights as dependent upon, but rather impacted by, colonial settlers. In this case, Chief Justice Marshall, again for the United States Supreme Court, said:

The principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements on it. It was an exclusive principle which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but it could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell. ...

On the discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all, and the character and religion of its inhabitants afforded an apology for considering them as people over whom the superior genius of Europe might claim as ascendancy. The potentates of the old world found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But, as they were in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle which all should acknowledge as the law by which the right of acquisition, which they all asserted, would be regulated as between themselves. This principle was, that discovery gave title to the governments whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession.

The exclusion of all other Europeans necessarily gave the nation making the discovery the sole right of acquiring the soil from the natives and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented.

Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded, but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as a just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy.

See also *Worcester, supra* note 105.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed...The very term "nation," so generally applied to them, means "a people distinct from others...". The Cherokee nation, then, is a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves or in conformity with treaties and with the acts of Congress.¹¹²

In this construction, Indigenous holdings/rights are not perceived as entirely contingent upon recognition or entrenchment in a settler legislative or constitutional regime. There are pre-existing and inherent rights situated in Indigenous peoples by virtue of their Original citizen status. However, as the need for Indigenous lands for settlement increases, the rationalization for seizure of the same also expands.

POSTULATE 2: A mystic balloon of settler sovereignty and settler right to land (predicated on notions of supremacy and superiority) rises upon contact. Indigenous understandings of the nature of our shared relationship are not understood or held to be applicable.

The Judicial Committee of the Privy Council decision in 1888, *St. Catherine's Milling and Lumber Company v. R.*¹¹³ addressed Indigenous holdings. It did so in the context of a legal battle between Canada and Ontario to determine the ostensible impact of allegedly extinguishing Indian title on the beneficial interest from the same (Canada, assuming it had beneficial interest issued a permit to a milling and lumber company, the province assuming it had beneficial interest sought a declaration and injunction against the company). Lord Watson addressed the notion of sovereignty and Indigenous rights in the land:

Whilst there have been changes in the administrative authority, there has been no change since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the royal proclamation in favour of all Indian tribes then

¹¹² *Worcester, ibid.* at 21-22.

¹¹³ *St. Catherine's Milling and Lumber Company v. R.* (1888), 2 C.N.L.C. 541 at 23-28 (J.C.P.C.) [*St. Catherine's Milling*].

living under the sovereignty and protection of the British Crown...the tenure of the Indians was a personal and usufructuary right, dependent upon the good will of the Sovereign....There was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their lordships do not consider it necessary to express any opinion upon the point. It appears to them to be sufficient for the purposes of this case that there has been all along vested in the Crown a substantial and paramount estate, underlying the Indian title which became a plenum dominium whenever that title was surrendered or otherwise extinguished.¹¹⁴

What we can understand from this case, and from Canadian policy and law at the time, is that there is an assumption that Indian title was subject to an underlying title (in which case Indian legal title was constructed as a burden on the Crown's title) and that Indian title and Crown sovereignty are interlinked and some sort of imperial perfect storm created a state where regardless of the topography, Indian title and Crown sovereignty allegedly materialized at the time that Dominion was asserted. That it was not a fact for Indigenous nations and that our sovereignty and relationship with the land could not be changed and were not acknowledged seems to be of little relevance to the discussion.

In a 1939 decision of the Ontario Supreme Court, *R. v. Commanda*,¹¹⁵ Joe Commanda was charged with having moose and deer in his possession during a closed season contrary to the Ontario *Game and Fisheries Act*.¹¹⁶ Mr. Commanda argued that for treaty Indians included in the Robinson Treaty and who hunted on the territory described in the treaty, the legislation was *ultra vires*.¹¹⁷ This territory was not sold or leased by Ontario.¹¹⁸ Greene, J. addressed the court's interpretation of the land status:

In 1850 the lands were situate in the Province of Canada, formerly Upper Canada and Lower Canada, and in 1867 by the *B.N.A. Act*, returned to the previous division of Upper and Lower Canada, under the names of Ontario and Quebec. The lands involved are now situate in the Province of Ontario.¹¹⁹

¹¹⁴ *Ibid.* at 24-25.

¹¹⁵ *R. v. Commanda* (1939), 72 C.C.C. 246 (Ont. S.C.) [*Commanda*]. For a thorough examination and discussion of the Canadian policy at this time see: Raoul J. McKay, *A History of Indian Treaty Number Four and Government Policies in its Implementation, 1874-1905* (M.A. Thesis, University of Manitoba, 1973) [unpublished]; John L. Tobias, "Canada's Subjugation of the Plains Cree, 1879-1885" (1983) LXIV Can. Hist. Rev. 4; and John L. Tobias, "Protection, Civilization, Assimilation: An Outline History of Canada's Indian Policy" in Ian A.L. Getty and Antoine S. Lussier eds., *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies* (Vancouver: University of British Columbia Press, 1983) at 39.

¹¹⁶ *Game and Fisheries Act*, R.S.O. 1937, c. 353 cited in *Commanda*, *ibid.* at 247.

¹¹⁷ *Commanda*, *ibid.* at 247.

¹¹⁸ *Ibid.* at 248.

¹¹⁹ *Ibid.*

Mr. Commanda argued that a trust was created by the Government of Canada with respect to lands reserved to Indians and that that trust or interest can only be interfered with / taken away by Canada.¹²⁰ In a mantra that appears frequently up until the *Calder*¹²¹ decision, Greene, J. stated that “The rights of the Indians are dependent upon the royal proclamation of His Majesty King George the Third issued on October 7, 1763....”¹²² He went on to find that the Indian land was ceded and that there was no trust, and that the Indian people had no interest “other than that of the Province in the same”.¹²³

Our experience in the Canadian courtroom has been one not only of rationalized and mythologized disempowerment, but also of objectification. In *Rex v. Syliboy* a Grand Chief of the “Mick Macks” of Nova Scotia was charged with unlawful possession of furs.¹²⁴ The Grand Chief argued that not only was he not bound by the legislation but also that he had a treaty right to hunt and trap. Patterson, J., Acting County Court judge, said in his decision:

Treaties are unconstrained Acts of independent powers. But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such a country as its own until such time as it was transferred to some other civilized nation. The savages’ rights of sovereignty even of ownership were never recognized. Nova Scotia had passed to Great Britain not by gift or purchase or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession; and the *Indians passed with it* (emphasis added).¹²⁵

Seemingly, intrinsically, it was understood that we were the land and that as ownership of it was taken, ownership of us as Indigenous peoples was taken, too.

In the *Logan v. Styres*¹²⁶ case the plaintiff, representing the Hereditary Chiefs of Six Nations, sought to prevent by injunction the surrender of 3.05 acres of land, and to have declared that two

¹²⁰ *Ibid.*

¹²¹ *Calder v. Attorney General of British Columbia* (1973), 34 D.L.R. (3d) 145 [*Calder*].

¹²² *Commanda*, *supra* note 115 at 249 referring to *St. Catherine’s Milling*, *supra* note 113.

¹²³ *Commanda*, *ibid.*

¹²⁴ *Rex v. Syliboy*, [1929] 1 D.L.R. 307 (N.S. County Ct.).

¹²⁵ *Ibid.* at 313. In this decision Judge Patterson found that there was no treaty and that the Governor at the time (Hobson) did not have the authority to make a treaty.

¹²⁶ *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.) [*Logan v. Styres*].

Orders in Council were *ultra vires* Canada (represented by the Governor General).¹²⁷ The plaintiff alleged that the Six Nations were not subjects of the Crown. King, J. addressed the jurisdictional issue succinctly:

It would appear that many of the Six Nations Indians, a great majority in fact, do not recognize the authority of the Parliament of Canada to provide for elected Councillors or to provide for the surrender of Reserve lands by means of a vote. Such members of the Six Nations Indians, it would appear, simply refrain from voting at all and in the proposed surrender of the lands in question when a vote was held on July 27, 1957, only 53 votes were cast out of which 30 voted for surrender and 23 against surrender and this out of about 3,600 eligible voters.¹²⁸

The court reviewed the history of the land beginning at the Haldimand Deed/Treaty of 1784 and the Simcoe Deed, leading it to pronounce (with regard to the exchange of promises in the documentation):

In my opinion, those of the Six Nations Indians so settling on such lands, together with their posterity, by accepting the protection of the Crown then owed allegiance to the Crown and thus became subjects of the Crown. Thus, the said Six Nations Indians from having been the faithful allies of the Crown became, instead, loyal subjects of the Crown.¹²⁹

He went on to find that Parliament had the authority to surrender their land and that was not *ultra vires*, even while “it might be unjust or unfair in the circumstances...to interfere with their system of internal Government by hereditary chiefs...”.¹³⁰ A mystical balloon of settler sovereignty and settler right to adjudicate and authenticate surrender of land (predicated on notions of supremacy and superiority) seemingly arose upon accepting protection of the Crown. Allies become subjects in instances where allies’ opinions, beliefs and existences are deemed subject to the will and law of settler governments. Indigenous understandings of the nature of our shared relationship are not understood or held to be applicable.

POSTULATE 3: Presumed authorities that have in many instances already been asserted (wrongfully) are entrenched in legislation or case law that is self-justificatory in

¹²⁷ *Ibid.* at 417.

¹²⁸ *Ibid.* at 418. This was the second vote; in the first vote 54 persons voted, 37 for the surrender, 16 against the surrender and one rejected ballot. The judge did state that “From the evidence given at the trial it is difficult to see what advantage would accrue to the Six Nations Indians by surrendering the land in question.”

¹²⁹ *Ibid.* at 422.

¹³⁰ *Ibid.* at 424.

nature. The legislation or case law reifies settler presumed supremacy with a legal understanding of the presumed supremacy of settler interests and authorities. Indigenous understandings of our authorities and obligations are not understood and are held to be inapplicable. Indigenous rights are dependent upon settler recognition of the same for their existence.

In the *Calder v. Attorney-General of British Columbia*¹³¹ decision, the existence of Aboriginal title as a whole (and when it arose) was discussed by the Supreme Court of Canada. The Nisga'a spokesperson (as per Martland, J. and Judson, J.) spoke of the nature of his peoples' relationship with their land and the continuing right to the land:

What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land – our own land. These chiefs do not talk foolishly, they know the land is their own; our forefathers for generations and generations past had their land here all around us; chiefs have had their own hunting ground, their salmon streams, and places where they got their berries; it has always been so. It is not only during the last four or five years that we have seen the land; we have always seen and owned it; it is no new thing, it has been ours for generations.¹³²

The judicial history and understanding that Indian title originated as a result of the *Royal Proclamation* was rejected. The *St. Catherine's* "personal and usufructuary" right distinction was also rejected by three of the judges. However, that right was still found to be "dependent on the goodwill of the Sovereign."¹³³ In this portion of the Court's decision, there is an implicitly acknowledged and understood Crown sovereignty. Judson, J. wrote of this:

In my opinion, in the present case, the sovereign authority elected to exercise complete dominion over the lands in question, adverse to any right of occupancy, which the Nishga Tribe might have had, when, by legislation, it opened such lands for settlement, subject to the reserves of land set aside for Indian occupation.¹³⁴

In this telling, there need be no discussion or decision related to Crown sovereignty: it exists and is because it exists and does. Crown sovereignty, in this way, is ascribed life. Indigenous

¹³¹ *Calder*, *supra* note 121 at 145.

¹³² *Ibid.* at 150 (as per the decision of Justices Judson, Martland, Ritchie).

¹³³ *Ibid.* at 156.

¹³⁴ *Ibid.* at 167.

sovereignty is lifeless and has seemingly been replaced without Indigenous knowledge or acknowledgment.

Justice Hall wrote that the principal issue was whether “right or title the Indians possess as occupants of the land from time immemorial has been extinguished.”¹³⁵ It is interesting to see a *mélange* of awkward fitting legal principles applied to actualities of Indigeneity and the results achieved. In this instance, the pleadings clearly established the recognition of Indian land rights and sovereignty requested, and it was clear that the Court (in the way of Hall, J., Spence, J. and Laskin, J.) heard the message:

In the present case the appellants are not claiming that the origin of their title was a grant from any previous Sovereign, nor are they asking this Court to enforce a treaty of cession between any previous Sovereign and the British Crown. The appellants are *not* challenging an Act of State – they are asking this Court to recognize that the settlement of the north Pacific coast did not extinguish the aboriginal title of the Nishga people – a title which has its origin in antiquity – not a grant from a previous Sovereign.¹³⁶

Presumed authorities that have in many instances already been asserted (wrongfully) are entrenched in legislation or case law that is self-justificatory in nature. The legislation reifies settler presumed supremacy with a legal understanding of the presumed supremacy of settler interests and authorities. Indigenous understandings of our authorities and obligations are not understood and are held to be inapplicable.

Justice Hall had to address common tenets of property law to arrive at a new understanding of Indigenous rights related to land holdings. Prescriptive land rights could not be argued in this case, as no one had an ability to claim prior possession.¹³⁷ Possession as *indicia* of ownership was also examined.¹³⁸ While all of the judges (excepting Pigeon, J. who dismissed the appeal on a technicality) agreed that Aboriginal title existed at common law (with Justices Judson,

¹³⁵ *Ibid.* at 173 (decision of Justices Hall, Spence and Laskin).

¹³⁶ *Ibid.* at 211.

¹³⁷ *Ibid.* at 174.

¹³⁸ *Ibid.* at 189-90. Justice Hall wrote of this:

In enumerating the *indicia* of ownership, the trial Judge overlooked that possession is in itself proof of ownership. *Prima facie*, therefore, the Nishgas are the owners of the lands that have been in their possession from time immemorial and, therefore the burden of establishing that their rights have been extinguished rests squarely with the respondent. What emerges from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their cultural and capable of articulation under the common law....

Martland and Ritchie finding Nishga title in this instance had been extinguished by properly constituted authorities), presumed Crown sovereignty seemed to be an intrinsic understanding of six of the seven Supreme Court justices. Subjectification (making of subjects) due to declaration or discovery was entrenched in the decision. This case reifies settler presumed supremacy. A legal understanding of the presumed supremacy of settler interests and authorities is entrenched in the decision.

In *Davey v. Isaac*¹³⁹ the Supreme Court of Canada examined governmental authorities and autonomy in an Indigenous context. In this decision, elected members (plaintiffs and respondents at the Supreme Court of Canada) of the Council of Six Nations Band were barred from entering the Council House on the Six Nations reserve by members of the band who were returning to the traditional Hereditary Chiefs based form of government (defendants and appellants at the Supreme Court of Canada). In his decision, Mr. Justice Martland addressed the defendant traditionalists' position that the Orders in Council which provided for the selection of the council of the Band (via section 73(1) of the *Indian Act*) were invalid because the Nation did not constitute a band as defined within the *Indian Act*.¹⁴⁰ The appellant traditional Hereditary Chiefs' main argument was based upon their understanding that the legal title to the Six Nations lands was in fee simple.¹⁴¹ Justice Martland reviewed an April 2, 1835 "indenture" which described a tract of land as surrendered for the purpose "of being sold and the moneys arising therefrom to be applied for the use and benefit of the Six Nations Indians and their posterity"; Martland, J. stated that absent contrary evidence, he thought he was entitled to presume that these were the lands referred to in the Statement of Defence.¹⁴² This finding is directly tied to his implicit understanding of the relationship between Indigenous peoples and Indigenous lands. Martland, J. found that:

[t]he statement of defence...denied that the respondents had any status to maintain the action, alleging that the Six Nations were by right a sovereign and independent nation. There was no allegation in the pleadings that P.C. 1629 and P.C. 6015 were invalid and no request for a declaration that they were invalid. The allegation of sovereignty and independence was later abandoned.¹⁴³

¹³⁹ *Davey v. Isaac* (1977), 77 D.L.R. (3d) 481 (S.C.C.).

¹⁴⁰ *Ibid.* at 482 and 483.

¹⁴¹ *Ibid.* at 484.

¹⁴² *Ibid.* at 485.

¹⁴³ *Ibid.* The Orders in Council referred to in this decision are P.C. 1629 made on September 17, 1924, and P.C. 6015 made on November 12, 1951.

That presumption and the notion that there is no contrary evidence are predicated on the false understanding that Indigenous sovereignty is unsupportable. The chasm between traditional Indigenous understandings of their right to their land is met with a paper trail that almost always establishes a more understandable (to Canadian systems) and acceptable mode of proof (to Canadian judges). What evidence could possibly be acceptable is more in question than what evidence would prove sovereignty. The onus was on the appellants to show that Six Nations was not a body of Indians as defined in the *Indian Act* and that it was arguable that the Six Nations were a band and that the respondents were entitled to use the Council House.¹⁴⁴ How can you disprove colonization? How is it acceptable that colonization is evidence supporting colonization? What evidence and understanding could possibly be sufficient and acceptable in the face of this trail of White legal pages? In this instance, in order to receive Canadian judicial protection you need to prove that you adhere to a colonial model, implicitly accepting domination through definition.

In a case where Mohawk appellants were charged with assault on Mohawk victims on the Caughnawaga Reserve, the Quebec Court of Appeal found that the appellants had not demonstrated that the Caughnawaga peoples are a sovereign nation. Bernier, J.A. dismissed the argument that the court did not have jurisdiction and found that:

I am therefore of the opinion that the appellants have not shown that the Iroquois of Caughnawaga are a sovereign nation; that it has been established, as they have admitted, moreover that they are subject to the application of federal laws, including the *Indian Act* and the *Criminal Code*, that it follows that the treaties they rely on have no relevance to his case except if the Judges before whom they appeared and pleaded derived their jurisdiction from a provincial Act, which is, however, not the case.¹⁴⁵

In this case, it is perceived that acknowledging the noted legislation indicates acceptance of Crown sovereignty. A lack of compliance indicates illegality. How is this a choice? Respectful non-conformity is not acceptance or acceding to foreign authority. In essence, the law itself reifies settler presumed supremacy. The argued Indigenous understandings of Indigenous

¹⁴⁴ *Ibid.* at 486.

¹⁴⁵ *Re Stacey and Montour*, [1982] 3 C.N.L.R. 158 (Qc. C.A.) (QL).

sovereignty were not understood or held to be applicable. By inference, Indigenous sovereign holdings are dependent upon settler recognition of the same for their existence.¹⁴⁶

In *R. v. Sparrow*¹⁴⁷ the Supreme Court of Canada interpreted the meaning of section 35(1)¹⁴⁸ of the *Constitution Act* for the first time. The case involved a Musqueam Indian Band citizen who was charged under provincial legislation with fishing with a drift net longer than those permitted by the Band's Indian food fishing license.¹⁴⁹ The appellant defended the charge on the basis that the net length restriction constituted a violation of section 35(1). The judgment of the court was delivered by the Chief Justice and Justice La Forest. In their decision they addressed the nature of the Aboriginal right. In doing so, the court examined the notion of Indigenous occupancy and the impact of settler (presumptive) sovereignty:

It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the Royal Proclamation of 1763 bears witness, there was from the outset never any doubt that sovereignty and legislative, and indeed the underlying title, to such lands vested in the Crown....¹⁵⁰

Whose doubts may have been alleviated and the degree to which Indigenous understanding of the same was addressed is unclear. Michael Asch and Patrick Macklem reviewed the case and

¹⁴⁶ There has also been an expanded notion of Crown recognition of Indigenous land holdings and obligations the Crown has to Indians as a result of that recognition of obligation. *Guerin v. Canada*, [1984] 2 S.C.R. 335 (S.C.C.) (QL) [*Guerin*]. It is important to note that the pre-existing (prior to the *Royal Proclamation, Indian Act* and other legislation) legal rights were acknowledged but that the paternalistic notion of Crown fiduciary obligation set the stage for a legal discussion about obligation to consult (which may impact the discussion of Indigenous legal land rights as a whole).

¹⁴⁷ *R. v. Sparrow*, [1990] 1 S.C.R. 1075, (S.C.C.) (QL) [*Sparrow*].

¹⁴⁸ Section 35(1) of the *Constitution Act, 1982* provides that:

The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

- (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Metis peoples of Canada.
- (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
- (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

Canadian Charter of Rights and Freedoms, being Part I of the *Constitution Act, 1982*, 1982, Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.) [R.S.C., 1985, Appendix II, No. 44], s. 35 [*Charter*].

¹⁴⁹ *Sparrow*, *supra* note 147 at paras 1-2.

¹⁵⁰ *Ibid.* at para 49. The court referred to, among others, the *M'Intosh* decision, the *Royal Proclamation*, and *Calder* cases.

assessed the Supreme Court of Canada's determination with respect to Aboriginal sovereignty.¹⁵¹ The authors establish a framework drawn from the case that addresses two conceptions of Aboriginal self-government. One is predicated upon what they call a "contingent rights approach".¹⁵² The other is called the "inherent rights approach."¹⁵³ They note at the outset that "the Court initially embraces an inherent theory of aboriginal right but attempts to avoid one of its implications, namely, a constitutional right to aboriginal sovereignty, by abruptly switching to a contingent theory of aboriginal right and unquestioningly accepting Canadian sovereignty over its indigenous population."¹⁵⁴

The mythical sovereignty balloon is given flight and is presumed accurate and correct, predicated upon colonial beliefs about the superiority of European nations. The unfortunate understanding is not only that imperial presumed authorities are entrenched in legislation or case law that is self-justificatory in nature, but also that they are held and believed by Indigenous and non-Indigenous citizens. Asch and Macklem wrote of this:

The Court...unquestioningly accepted that the British Crown, and thereafter Canada, obtained territorial sovereignty over the land mass that is now Canada by the mere fact of European settlement. The Court's acceptance of the settlement thesis appears to exclude any possibility of the recognition and affirmation of a constitutional right to aboriginal sovereignty.¹⁵⁵

This notion of the assumption of presumed sovereignty over Aboriginal peoples is somewhat of an intellectual departure in a case that is often quite thoughtful in terms of Indigenous rights. Viewing the rights as inherent to a degree and then contingent when sovereignty is mentioned is a bit of legal determinism and shorthand that makes short work of opening the Pandora's Box of Indigenous sovereignty.¹⁵⁶ The argument for Crown sovereignty in the face of an earlier and

¹⁵¹ Michael Asch and Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1991) 29 *Alta. L. Rev.* (no. 2) 29 (QL).

¹⁵² *Ibid.* at 3.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.* at 9-10.

¹⁵⁶ *Ibid.* at 5:

A contingent theory of aboriginal right gives rise to a particular conception of the meaning of First Nations sovereignty and self-government. Under a contingent rights approach, First Nations sovereignty could not exist as a constitutional right until expressed by way of constitutional amendment. Until such a time, aboriginal self-government exists only to the extent it is given force by legislative or executive action... Thus, under a contingent theory of aboriginal right, self-government is a label for a bundle of rights that attach to Native people as a result of legislative or executive action or constitutional amendment,

pre-existing Indigenous sovereignty becomes a rationale for subjugation.¹⁵⁷ In this instance the case itself reifies settler presumed supremacy with a legal understanding of the presumed supremacy of settler interests and authorities.

POSTULATE 4: Indigenous assertions of authority are met with a back dated and monochromatic review of settler justification for settler seizure and illegal acquisition of Indigenous lands predicated on self-justifying notions of rightful tenure, sovereignty and 'ownership'. Indigenous understandings of the nature of our sovereign holdings and relationship with our land are not understood or held to be applicable. Indigenous rights, in this telling, are dependent upon settler recognition of the same for their existence.

Subjugation of Indigenous sovereignty through silencing is another means to effect Canadian court-sanctioned limitation of the exercise of Indigenous authorities and holdings. In the *Delgamuukw*¹⁵⁸ decision of the Supreme Court of Canada in which the Gitksan and Wet-suwet'en people sought a declaration from the court affirming their ownership, jurisdiction and Aboriginal rights over a large part of British Columbia, the court had to address presumed Canadian authority to extinguish and the extent of self-government. Again, in this case, we see the Supreme Court address Crown sovereignty as factual, referencing the "assertion of Crown sovereignty" as a date to be reconciled with Indigenous prior occupation. The court wrote of this:

On appeal, that original claim was altered in two different ways. First, the claims for ownership and jurisdiction have been replaced with claims for aboriginal title and self-

and is not dependent upon a prior acceptance of First Nations sovereignty. In fact, a contingent theory of aboriginal right implicitly denies any assertion of First Nations sovereignty by viewing the existence or non-existence of aboriginal rights, including rights of self-government, as dependent upon the exercise of Canadian sovereign authority.

Stephen Gray has argued that there are contexts in which Indigenous law has been recognized as surviving the assertion of common law. Stephen Gray, "Peeking Into Pandora's Box: Common Law Recognition of Native Title to Aboriginal Art" (2000) 9 Griffith L. Rev. (no. 2) 227.

¹⁵⁷ Michael Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30 Alta. L. Rev. (no. 2) 465 (QL). Asch writes of this at 19:

The "settlement" thesis is perfectly justifiable, even within contemporary ideology, in one case: where there really were no previous occupants of the land. The justification becomes troublesome only in the situation where the assertion is made in the face of evidence of human occupation contemporaneous with the first assertion of sovereignty. In this case, the justification must be transformed into an argument about the nature of the population that occupied the land base and its attributes, in particular, with respect to indigenous sovereignty and its survival.

¹⁵⁸ *Delgamuukw*, *supra* note 48.

government, respectively. Second, the individual claims by each house have been amalgamated into two communal claims, one advanced on behalf of each nation.¹⁵⁹

Accordingly, Indigenous assertions of authority are met with a back dated and monochromatic review of settler justification for settler seizure and illegal acquisition of Indigenous lands predicated on self-justifying notions of rightful tenure, sovereignty and 'ownership'.¹⁶⁰ With regard to the notion of the mystic balloon, Lamer, J. alludes to it succinctly in language which both denies Indigenous sovereignty and re-constructs legal and political history to accord with an imperial notion of sense and nonsense:

Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at the time sovereignty was asserted ...Finally, from a practical standpoint, it appears that the date of sovereignty is more certain than the date of first contact...I conclude that aboriginals must establish occupation of the land from the date of the assertion of sovereignty in order to sustain a claim for aboriginal title.¹⁶¹

What sense can be made of this from an Indigenous perspective, where we know that we have been endowed with Original instructions, lasting forever, from our Sovereign? It is immutable. Attempting to alter it without even an inkling of understanding about the Indigenous perspective on the same speaks volumes about the faith Indigenous people can place in the impartiality of decision makers at the Supreme Court level. This mythic balloon floats at some unnatural and unsupported date which accords with a time line when the land is perceived as most justifiably stolen. It is quite mild and apt of Professor Borrows when he writes "How can lands possessed by Aboriginal peoples for centuries be undermined by another nation's assertion of sovereignty? What alchemy transmutes the basis of Aboriginal possession into the golden bedrock of Crown title?"¹⁶²

Notably, a linguistic and legal separation between *acceptable* Indigenous authority (title and rights in externally definable categories) and *unacceptable* Indigenous authority (sovereignty –

¹⁵⁹ *Ibid.* at para 73.

¹⁶⁰ John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall L.J.* 537 (QL) at para 19.

¹⁶¹ *Delgamuukw*, *supra* note 48 at para 145.

¹⁶² Borrows writes at *supra* note 160 at para 20:

...Crown sovereignty is the standard against which Aboriginal rights must be measured. Sovereignty disciplines and defines the terrain on which Aboriginal peoples must operate if they are going to dispute the actions of Canadian governments in Canadian courts.

self-determination extending “excessively general terms”¹⁶³ arises in this case. A distinction between internal management and external exercise of authorities arises in this case. In effect, from a Canadian perspective the potential exercise of sovereign Indigenous rights is diluted.¹⁶⁴ Besides this separation, there is also a legal and philosophical divide that we have to cross. According to this case, we have to date our relationship to land in accordance with the assertion of a sovereignty we do not accept to support our claims. We therefore have to support the lie that is crystallizing sovereignty with another lie – we must acknowledge the same in order to establish a framework for the advancement of our own (now more limited) claims to Aboriginal rights and title. This validation process has weight and precedence in a Canadian system; using the Canadian justice system we authenticate Canadian sovereignty and devalue our beliefs, understandings and knowledge related to our own.¹⁶⁵

The case also reiterates the long held understanding that Indigenous rights and holdings are a problem to be dealt with, a bush path to be paved on the road to progress. It is almost a mantra: “Aboriginal title is a burden on the Crown’s underlying title. However, the Crown did not gain this title until it asserted title over the land.”¹⁶⁶ There is a right way and a wrong way, seemingly, to deal with this *burden*.¹⁶⁷ Casting aside the burdensome nature of our existence, we present in actuality an opportunity to explore meaningfully what shared responsibility can look like in light of Canada’s Constitution.

The inherent right to self-government is also a part of the Constitution of Canada. Contrary to theories of constitutional absolutism, our history is one of shared or co-existing sovereignty.¹⁶⁸

As long as Indigenous understandings of the nature of our sovereign holdings and relationship with our land are not understood or held to be applicable, courts have not undertaken or fulfilled

¹⁶³ *Delgamuukw*, *supra* note 48 at para 170.

¹⁶⁴ Hutchins, Hilling, and Schulze, *supra* note 110 at para 33. The authors wrote of this:

Internal self-government, as opposed to independence, is exercise within the borders of a sovereign state bound by conventional as well as customary standards of human rights protection.

¹⁶⁵ The test for proof of Aboriginal title was found by the court to be: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive. *Delgamuukw*, *supra* note 48 at para 143.

¹⁶⁶ *Ibid.* at para 145.

¹⁶⁷ I note, ironically, that in this construction we are still the “White man’s burden”.

¹⁶⁸ Hutchins, Hilling, and Schulze, *supra* note 110 at para 104.

their obligation. As long as Indigenous rights are perceived to be dependent upon settler recognition for their existence, self-government and inherent rights will be empty and foreign shells housing empty and foreign meaning.

POSTULATE 5: Over time, imperial understandings related to Indigenous sovereignty become entrenched in Canadian jurisprudence, stereotypical and inappropriate statements with respect to Indigenous inhumanity are somewhat muted (but present), and the assumption of the usurpation of Indigenous sovereign authorities becomes represented by formulaic and systematized linguistic indicators. Indigenous peoples are presumed to be linguistically and legally subjected¹⁶⁹ to Canadian citizenship standards. Indigenous peoples' interpretation of our understandings or our responses to summarily being ascribed subject status are quickly dismissed, not addressed (deemed not worthy of address), or are reconciled with the language of "conquered" peoples. Internalized imperialism results and replicates. Indigenous rights' dialogue becomes more difficult to address as the rights discussed and authorities and holdings housed in Indigenous legal systems must be reconciled in a system that requires settler recognition of the same for their existence.

The Statement of Claim for the Ochapowace First Nation in *Ochapowace First Nation v. Canada*, a 1999 decision of the Saskatchewan Court of Queen's Bench, provided:

3. Native oral history is that the said treaty as explained and understood at the time of signing was intended to reinforce and protect the said native sovereignty, and, if that is not what the treaty's words in English say, then its words must be rectified so as to conform to the contractual intent.¹⁷⁰

¹⁶⁹ By subjected, I mean legally entrenched standards of citizenship become Canadian standards. We become Canadian subjects, not Indigenous citizens with misunderstood, unexamined or with an alternate bundle of rights.

¹⁷⁰ *Ochapowace First Nation v. Canada*, [1999] S.J. No. 56 at para 1 (Sask. Q.B.) (QL). Also of note in this case is that the First Nation included United Nations' documentation related to genocide in their pleadings. See: *Convention on the Prevention and Punishment of the Crime of Genocide* GA Res. 260 (III) A, UN GAOR, (1948) G.A. Res. 260 (III), U.N. Doc. No. A/810 (Dec. 9, 1948), online: Human Rights Web <<http://www.hrweb.org/legal/genocide.html>>.

Article 2 of the Convention defines genocide as:

Article 2

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

In this case, there was an application by the defendants Attorney General of Canada and Saskatchewan to strike the claim as it demonstrated no reasonable cause of action or material facts upon which the plaintiff relied. The First Nation were questioning the federal and provincial governments' ability to assert authority over their First Nation and asserting their own sovereignty. The application was allowed without prejudice to the plaintiff. Form dictated the finding, and the plaintiffs are able to bring the action forward in accordance with generally held principles of Canadian law. The case is an example of the enforcement of procedural standards in the face of substantive issues. The case is interesting as the broad nature of the claim (sovereignty of the First Nation) was met with the requirement that the scope be narrowed, or at least squished into procedural boxes so that the court could address the claim in manageable chunks. Perhaps Indigenous sovereignty itself is an amorphous blob to the Canadian judiciary and the rules of court are the process through which it can examine manageable chunks. The size of the blob must be massive and the questioning of judicial authority terrifying.

In an Alberta criminal case, *R. v. Crow Shoe*,¹⁷¹ a member of the Blackfoot Nation was charged with theft after requesting a commission from two men who were selling merchandise to patrons of Mr. Crow Shoe's on-reserve business. When they refused, he confiscated the items. Mr. Crow Shoe argued that as his Nation had never signed a treaty, the court had no jurisdiction as the Blackfoot Nation was a sovereign nation.¹⁷²

Secondly, he asserts that because the Blackfoot Nation is an independent sovereign nation, the laws that apply to him on the reserve are the laws based on historical custom of the Blackfoot Nation, not the laws of Canada, unless they are in fact adopted by the Blackfoot Nation. The Criminal Code has not been so adopted and therefore is not applicable to his actions on the reserve.¹⁷³

-
- (a) Killing members of the group;
 - (b) Causing serious bodily or mental harm to members of the group;
 - (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
 - (d) Imposing measures intended to prevent births within the group;
 - (e) Forcibly transferring children of the group to another group.

¹⁷¹ *R. v. Crow Shoe*, [2004] A.J. No 1170 (Alta. Prov. Ct. (Crim. Div.)) (QL).

¹⁷² *Ibid.* Crow Shoe also stated that as the alleged offence had taken place in his Nation that he was entitled to have documents submitted to him in his language.

¹⁷³ *Ibid.* at para 2. Interestingly, Mr. Crow Shoe stated that the signatures representing the Blackfoot Nation on Treaty 7 were not indicative or representative of acceptance, but rejection of the Treaty.

...it is Mr. Crow Shoe's position that Treaty No. 7 is not binding on the Blackfoot Nation, that the Blackfoot Nation is a sovereign nation, that such sovereignty is an inherent attribute and is conferred by the Creator, not by other men and cannot thus be taken away by other men or laws. This sovereignty gives them, according to Mr. Crow Shoe, the right to govern themselves, including the making of laws that relate to wrongful behaviour. It is his assertion that the sovereign nation of Blackfoot or Pikani never adopted the Criminal Code, and therefore are not bound by it on the reserve. The law that governs the Blackfoot Nation is its historical or customary law as developed over the centuries and passed from generation to generation.¹⁷⁴

The court reviewed the self-referential case law which supported the "fact" of "sovereignty of the Crown over all lands and peoples situate within the boundaries of Canada"¹⁷⁵ and went on to examine the right to self-govern as a function of sovereignty. It referred to the Supreme Court of Canada's statement in *R. v. Pamajewon*¹⁷⁶ (in which the Court stated that it would assume, without deciding that section 35(1) protected the right of self-government) and the *Delgamuukw* decision¹⁷⁷ and stated that there was not enough evidence before it to make a decision with respect to whether the right of self-government includes the right to apply Traditional Blackfoot law and not the *Criminal Code of Canada* or whether such a right survived the assertion of Crown sovereignty.¹⁷⁸ Mr. Crow Shoe was found to have acted with colour of right and acquitted. The court found that *prima facie* the *Criminal Code* applies to the Indigenous parties to Treaty 7 by virtue of the wording of the Treaty. It is that presumption of authority, on its face, which is embedded in the colonial mentality. Seemingly, the assertion of Canadian governmental authority is at root an essentialist and spiraling authority. It need not be specific. This asserted form of control is automatic and imperialist. Case law used to affirm the understanding is no more informed or eloquent than this case. The difficulty that exists in colonial precedent is that the precedent was predicated on non-Indigenous supremacy. Using precedent to inform contemporary case decisions embeds that understanding in the decisions.

¹⁷⁴ *Ibid.* at para 6.

¹⁷⁵ *Ibid.* at para 12. Cases referred to include the *R. v. Noltcho*, [2000] S.J. No. 394 (Sask. Q.B.) (QL) [*Noltcho*], *R. v. David*, [2000] O.J. No 56 (Ont. S.C.J.) [*David*]; *R. v. Edenshaw*, [1985] B.C.J. No. 307 (B.C. S.C.) (QL); *R. v. S.V.*, [1994] O.J. No. 2454 [Ont. Ct. J. (Prov. Div.)] (QL); *R. v. Jones*, [2000] A.J. No. 715 (Alta. Q.B.) (QL); *R. v. Poitras*, [1994] S.J. No. 336 (Sask. Q.B.) (QL) [*Poitras*]; *R. v. Ignace et al* (1997), 156 D.L.R. (4th) 713 (B.C. C.A.); and *R. v. Avrett*, [2001] B.C.J. No. 2345 (B.C. Prov. Ct.) (QL).

¹⁷⁶ *Pamajewon*, *supra* note 43.

¹⁷⁷ *Delgamuukw*, *supra* note 48.

¹⁷⁸ *Crow Shoe*, *supra* note 171 at para 15.

Clarence Chief argued in an application to dismiss charges against him under the *Criminal Code*, that the Saskatchewan Court of Queen's Bench did not have jurisdiction to hear the case because the laws of Saskatchewan and Canada do not apply to a Dene Sovereign Nation citizen.¹⁷⁹ Justice Krueger found that, "The court cannot question its own jurisdiction..." and that all people in Canada are subject to the Criminal Code.¹⁸⁰

James Kogogolak was charged with shooting a muskox and contravening a game ordinance in the Northwest Territories.¹⁸¹ The court determined that "In the early days the Eskimos were considered as a tribe or nation of Indians."¹⁸² Justice Sissons reviewed case law which defined the term Indian, the authorities contained in the *The Department of Northern Affairs and National Resources Act*,¹⁸³ and the *Royal Proclamation*. He found that the Northwest Territories was not part of the territory 'granted' to the Hudson's Bay Company in 1670 and that the "hunting rights of the Eskimos existed at all times."¹⁸⁴ In examining the case law, including the *St. Catherine's Milling* case, he referred to principles of treaty interpretation, the *Natural Resource Transfer Agreements*, and a report of the Minister of Justice which provided that the ordinance should not apply to Eskimo peoples and that none of the treaty rights should be infringed without Indian concurrence.¹⁸⁵ In finding that the Game Ordinance of the Northwest Territories does not apply to Eskimos, Sissons, J. found:

I think the Royal Proclamation of 1763 is still in full force and effect as to the lands of the Eskimos. The Queen has sovereignty and the Queen's writ runs in these Arctic [*sic*] "lands and territories". This is the Queen's Court and it needs to be observant of the "Royal will and pleasure" expressed 200 years ago and of the rights royally proclaimed. The Queen's justice is a "loving subject" and would not wish to incur "the pain of the Queen's displeasure." The lands of the Eskimos are reserved to them as their hunting grounds. It is the royal will that the Eskimos "should not be molested or disturbed" in possession "of these lands". Others should tread softly, for this is dedicated ground. This may be *obiter dictum*, but I question whether other persons have, or should have, the right to hunt or fish on the lands reserved to the Eskimos as their hunting grounds, except by special leave or licence of the government of Canada.¹⁸⁶

¹⁷⁹ *The Queen v. Clarence Chief*, [1997] S.J. No. 912 at paras 6 and 7 (Sask. Q.B.) (QL).

¹⁸⁰ *Ibid.* at para 6.

¹⁸¹ The Northwest Territorial Court decision provided by Justice Sissons appears at *R. v. Kogogolak* (1959), 31 C.R. 12, online: Canadian Native Law Cases <<http://library2.usask.ca/native/cnlc/vol01/065.html>> [*Kogogolak*].

¹⁸² *Ibid.* at 13

¹⁸³ R.S.C. 1953-54, c.4.

¹⁸⁴ *Kogogolak*, *supra* note 181 at 14.

¹⁸⁵ *Ibid.* at 17.

¹⁸⁶ *Ibid.* at 19.

That understanding of the nature of the relationship between Indigenous peoples and settler peoples addressed in the *Royal Proclamation*, while it may be protectionist in its approach, is rarely addressed in a contemporary context in discussions related to modern Indigenous rights and claims to sovereignty.

A 2000 decision of the Ontario Superior Court of Justice examined both the process and substance required to establish Indigenous sovereignty claims. In *R. v. David*¹⁸⁷ Mr. David was charged under the *Customs and Excise Act* (related to the selling of contraband tobacco) and under the *Criminal Code* for breaches of bail. Mr. David stated that he was a member of the Mohawk nation, the Haudenosaunee, and that the court had no jurisdiction.¹⁸⁸ Like Mr. Crow Shoe, Mr. David represented himself in this action. Mr. David stated that he would not participate in the proceedings and would not enter a plea; Rutherford, J. entered a plea of “not guilty” on Mr. David’s behalf.¹⁸⁹ Dwayne David was invited to present submissions once the jury was sent home. At that time, he made an oral presentation and filed documents in support of his argument. These submissions included the *Royal Proclamation*, *The Covenants that are known to exist with people of the Long House*, and an excerpt from a Six Nations submission to the Special Joint Committee of the Senate and the House of Commons from the May 2, 1947 session (when the *Indian Act* was deliberated and reviewed).¹⁹⁰

¹⁸⁷ The Ontario Superior Court of Justice decision appears at *David*, *supra* note 175.

¹⁸⁸ *Ibid.* at paras 1-2.

¹⁸⁹ *Ibid.* at para 3.

¹⁹⁰ *Ibid.* at para 9.

Mr. David's submission included the following argument:

I understand that this court has criminal jurisdiction to try indictable offences such as the charges brought before this court today. I also understand that the court has jurisdiction to convict and sentence persons who are found guilty of committing offences such as these, but I would also like the court to understand that I as a Kanienkeha:ka or Mohawk have laws, the Keyanerekowa. The common English equivalent of Keyanerekowa is The Great Law and Path of Peace. It is the constitution and fundamental law of the Kanienkeha:ka and other Onkwehonwe or Turtle Island aboriginal peoples. My name is Roriwio, aka: Howard Dwayne David of the clan known as Rotiskarewaka with the symbol of the bear. The Mohawk are of the Haundenosaunee, people of the Longhouse, Keepers of the Eastern Door. The Longhouse, both physical and metaphorical, is the traditional seat of spiritual beliefs and values and of Legal principles of the Kanienkeha:ka. The lives of people of the Longhouse are governed in all matters of law, policy and spirit by their traditional law, Keyanerekowa. I make a motion to the court to be tried by the Kanienkeha:ka Nation, I believe this is a matter of sovereignty and jurisdiction. There are provisions and protocols that are established in the Albany Treaty of 1664, otherwise referred to as the Two Row Wampum and the Silver Covenant Chain Treaties, The Royal Proclamation of 1763, as further defined in the Northwest Territories Act of 1982, and subsequent legislation and common law, I would like to further state to the Court that I am not Indian in terms of the Indian Act, but am "others" as protected in the Constitution Act of 1982. Not to say that this is the basis of my argument, but to only use the Constitution Act of 1982 to help the Court to understand the definition of "Indian", and become aware of who I rightfully am, an Onkwehonwe. Further, that I am under the Keyanerekowa, The Great Law and Path of Peace which explicitly forbids our submission to any type of foreign law or authority. The terms of the Treaty of Albany, the Two Row Wampum calls for the extradition of "Indians" who may be charged before Canadian/British Law, to be extradited to his/her own people. With respect to my situation, with the subject of these proceedings in the Court. With all due respect to your Honour and the Court I am prepared and willing to resolve these issues under Keyanerekowa. If requested by my elders to subject myself to Mohawk legal process in respect to the conduct that is the subject of the complaints or charges presently before Ontario Court. I am willing to do so and would honour and abide by the determinations and instructions of my people. However, until such time as new nation to nation treaties are developed that bind the Kanienkeha:ka as Nation and People, I take the position that I cannot subject myself to foreign legal process, for to do so would be going against the very law by which I live by: The Great Law.¹⁹¹

The court found that Mr. David did not provide evidence with respect to the charges facing him. The judge also seemed to address a mercantile argument in which he saw Mr. David as providing contraband with which "honest retailers could not compete."¹⁹² He went on to determine that:

Mr. David's claim, essentially a claim for full aboriginal Mohawk sovereignty, is not a novel one. It is a proposition that has been considered by Canadian courts on numerous

¹⁹¹ *Ibid.* at para 10.

¹⁹² *Ibid.* at para 11.

occasions. It has never been accepted and *I am certainly bound to reject* it as well. Canadian sovereignty is a legal reality recognized by the “law of nations”...Cornwall Island is a part of Canada. Whether any part of Canada came under British control by conquest, was ceded by treaty, it was simply annexed in a peaceful fashion, the whole country became a “settled colony”...It seems probable that some observers have misconstrued this shaping of certain laws to accord with treaty or other aboriginal rights, particularly where activity is governed by variable regulation, as deference on the part of the government of Canada to another sovereign authority. To construe the process that way is wholly erroneous and has been the root of much trouble and frustration...The right to control who and what crosses its borders and raise a revenue upon which to govern are fundamental features of a sovereign nation.¹⁹³ [Emphasis added].

The motion to quash the proceedings was dismissed. Being bound in that manner not to address the potentiality of judicial error, of the inclusion of Indigenous understandings, or the potential of differential understandings is part of the unexamined Canadian judicial amorphous blob of supremacy.

In *R. v. Noltcho*,¹⁹⁴ Mr. Noltcho asserted that he is a member of the sovereign nation of Dene people and that they have never signed a treaty and Canada does not, therefore, have jurisdiction over their territories. The court found, in a seven paragraph judgment, that Canada has sovereignty over all lands and peoples residing in its boundaries.¹⁹⁵

In a decision affirmed by the British Columbia Court of Appeal, the British Columbia Supreme Court addressed jurisdiction as it related to the enforcement of provincial wildlife legislation and federal legislation. In *R. v. Williams*¹⁹⁶ the Aboriginal appellants appealed their convictions under both the *Wildlife Act* and the *Criminal Code*. Notably, two other acquitted appellants also appealed the basis of their acquittals. At trial, they argued that there was no authority to establish courts of adjudication over Aboriginal people.¹⁹⁷ Bruce Clark, counsel for the appellants, contended that the courts of the Province assumed jurisdiction and did not legally possess the same. Cohen, J. re-stated the appellants’ argument:

They argue that in those prior decisions the courts have not distinguished the Imperial Crown, which held the underlying title to all lands, from the federal and provincial

¹⁹³ *Ibid.* at paras 14, 16, 18 and 18a.

¹⁹⁴ *Noltcho*, *supra* note 175.

¹⁹⁵ *Ibid.* at para 6.

¹⁹⁶ *R. v. Williams*, [1993] B.C.J. No. 2296 (B.C. S.C) (QL).

¹⁹⁷ *Ibid.* at para 2. This decision was later affirmed at the British Columbia Court of Appeal in *R. v. Williams*, [1995] 2 C.N.L.R. 229 (*Williams* [B.C. C.A]).

governments, which are constitutional governments whose jurisdiction is limited by constitutional law. Hence, according to their argument, any statute or decision rendered with respect to jurisdiction over aboriginal people that was not made by the Imperial Crown, has no effect on the sovereignty of aboriginal people; that neither the federal nor provincial governments, nor institutions established under their authority, can assume jurisdiction over aboriginal people, as they are not the Imperial Crown and therefore do not hold underlying title to unceded native lands.¹⁹⁸

Unilateral assumptive power cannot be given effect, the appellants argued. The court accepted the respondent's position: that the Provincial Court has absolute jurisdiction via the *Provincial Court Act*¹⁹⁹ and that Wallace J.A.'s statement with respect to sovereignty in the *Delgamuukw* Court of Appeal decision²⁰⁰ stood, and that common laws superseded any powers and jurisdiction of the government of aboriginal people.

In a 2003 decision of the Alberta Provincial Court in which the defendant was charged with hunting elk out of season (in addition to abandoning and wasting big game carcass) as defined in the Alberta *Wildlife Act*, the court had an opportunity to hear Indigenous knowledge as it applied to sovereignty in Treaty 6 territory. Maher, Prov. Ct. J. in *R. v. Quinney*²⁰¹ heard argument from the defendant that the written document presented as Treaty 6 is not a true and accurate copy of the Treaty made.²⁰² An Elder testified that according to his knowledge nothing was ceded under

¹⁹⁸ *Williams* [B.C. C.A.], *ibid.* at para 8.

¹⁹⁹ *Provincial Court Act*, S.B.C. 1969, c. 28.

²⁰⁰ *Delgamuukw v. British Columbia*, [1993] 5 C.N.L.R. 1 at paras 480-482 (B.C. C.A.) (QL).

Wallace, J.A.'s statement was that:

A claim of self-government of the nature which the plaintiffs advance; namely, a right to govern the territory, themselves and the members of their Houses in accordance with Gitksan, and Wet'suwet'en laws, and a declaration that the Province's jurisdiction is subject to the plaintiffs' jurisdiction, is a claim which is incompatible with every principle of the parliamentary sovereignty which vested in the Imperial Parliament in 1846.

Thus, upon the exercise of sovereignty, any powers of government of the indigenous people were superseded by the introduction of the common law and the jurisdiction of the Imperial Parliament. ...

Any possibility that aboriginal powers of self-government remained unextinguished was eliminated in 1871 by the exhaustive distribution of powers between the Province and the Government of Canada when British Columbia joined Confederation pursuant to the Terms of Union, 1871. Sections 91 and 92 of the Constitution Act, 1867 which provide for this division of powers have been repeatedly interpreted as distributing all legislative jurisdiction between Parliament and the provincial legislatures.

This presumed preemptive and superior power is at the crux of the relationship between Canada and Indigenous nations.

²⁰¹ *R. v. Quinney*, [2003] A.J. No. 313 (Ab. Prov. Ct.) (QL).

²⁰² *Ibid.* at para 38.

treaty and that Aboriginal people are sovereign.²⁰³ The judge found that the evidence of the Elder was unreliable, not oral history but a current understanding, and that there was no evidence of the Elder being a “reasonably reliable source”.²⁰⁴

In a case related to the charge of smuggling cigarettes and tobacco products, the Saskatchewan Court of Queens Bench, Barclay, J. presiding, determined that “...the sole issue for this Court to determine is whether or not the accused, being treaty Indians and members of *a sovereign nation*, are subject to Canadian customs and excise tax (emphasis added).”²⁰⁵ The court reviewed the treaty negotiation Commissioner’s Report for Treaty 4, specifically the term dealing with the administration of justice and found that the Indian peoples had made undertakings as to law and order. The issue was a jurisdictional one and the court dealt with the issue by stating that: “In my opinion the Indians have agreed to obey and abide by our law and therefore they are bound by all Canadian and provincial laws unless they conflict with the treaty.”²⁰⁶

Post-*Delgamuukw* a Canadian judicial shorthand has developed within which imperial understandings related to Indigenous sovereignty become entrenched in Canadian jurisprudence. As seen in all but one of the above cases, it is clearly evident that the assumption of the usurpation of Indigenous sovereign authorities has become represented by formulaic and systematized legal linguistic indicators. Indigenous peoples are presumed to be linguistically and legally subjected to Canadian citizenship standards. Indigenous peoples’ interpretation of our understandings or our responses to summarily being ascribed subject status are quickly dismissed, not addressed (deemed not worthy of address), or are reconciled with the language of “conquered” peoples. Internalized imperialism results and replicates. Indigenous rights dialogue becomes more difficult to address as the rights discussed and authorities and holdings housed in Indigenous legal systems must be reconciled in a system that requires settler recognition of the same for their existence.

²⁰³ *Ibid.* at para 43.

²⁰⁴ *Ibid.* at paras 43, 45, and 46.

²⁰⁵ *Poitras, supra* note 175.

²⁰⁶ *Ibid.* at para 56.

F. Indigenous Analysis

1) Anti-Colonial and Critical Legal Theory Related to Indigenous Obligations

White people's laws are different; the way they live their life is only to better themselves. The purpose of their lives is to get ahead (progress). As *Niitsitapi* we live *Niipaitapiiyssin*; that is the reason we are sitting in this room. I am here because I have lived our ceremonial way of life. As part of our way of life, I am here for all *Niitsitapi*. I am here to assist anyone who wants to live as *Niitsitapi*.²⁰⁷

The process of decolonization refers to deconstructing colonial interpretations and analyses and includes solutions to problems that are imposed upon tribal peoples through the processes of colonialism. Decolonization can occur simultaneously with the process of reconstructing tribal relationships because it displaces colonial thought and behaviour while reconnecting with the alliances of a cosmic universe.²⁰⁸

Journal:

Stupid. Stupid. Stupid. I have to say, I am learning these lessons very slowly. In my quest to understand our laws and why they don't look like Canadian laws, I keep making the same mistake. I look to teachings and traditional knowledge of our people. This is really hard if you don't speak your language. And I don't. So I take pieces of memory: car rides with my Cree dad, post-ceremony talks with my teachers, chats with Elders and people whom I respect for their understanding of Indigenous knowledge and critical understandings of Canadian law grounded in our teachings. This mismatched quilt of pieces of us. I read anything that I can get my hands on that sounds real, feels right, resonates with truth. And I am so hurt. I am so angry not to have my language, not to be able to get it perfectly right. I know it is a journey, so I think of it as growth and traveling down the right path, but god I am hurt. Humble is one thing, this feels like a vacuum of knowledge that I have had pulled

²⁰⁷ Betty Bastien, *Blackfoot Ways of Knowing: The Worldview of the Siksikaitstapi* (Calgary: University of Calgary Press, 2004) at 75. Dr. Bastien is quoting one of her Elders in this paragraph. .

²⁰⁸ *Ibid.* at 151.

out from me whole. And these little pieces, I sock them away, little snippets of actuality that vibrate and sit patiently for me to understand them.

I looked at it like it was supposed to make sense. Like if I read enough, re-read enough, thought about it enough, searched through it enough, I would understand where White law is coming from. I thought I was uninformed and that my first impressions were simplistic and jaded.

There is no "rights dialogue". There is a pile of self-perpetuating and affluence-reinforcing paper which is premised upon hateful notions of who Canadians think we are as Other. What we could not possibly understand and now are continually faced with proving - our antiquity and our belief in a false interpretation and false time and false understanding of the right to enter into another nation's territory, see what you like, and write down why we do not deserve it.

A burden on the title? Still the White man's burden at law, in law and by law (Canadian style).

How did they get so much paper? How did they get so much money? How can we possibly advance our understandings in the face of this huge body of rationalization they have collected and integrated so that it seems like logic, like history, like truth? And there I sat, for these weeks and months, reviewing the legislation and case law, looking for anyone, anything, that looked familiar. Stupid. Stupid. Stupid.

I can feel it; if our blood has a memory, mine has a painful one because my blood actually feels like it is boiling under my skin. Fleeting thoughts, really fast ones, are rushing into my room and I will try to record them because my visceral response to what I have read, what I let my guard down to read, is making me physically ill.

Oh god, they don't get it. They don't get it and I don't know if they can.

There is such superiority, such supremacy, how do we overcome indoctrination of subjugation?

Such lies, such self-deception and justification for wealth and usurpation.

No one gave them that right, they took it and claimed it and here we sit, painfully dis (believed, enfranchised, owned, placed) and not rich enough and too late westernized enough to know what they were saying.

I had faith in this, that reason and understanding would eventually win out. I am faithless in this now.

It was so easy. So particularly painless for them. There were a couple of near misses when I saw a flicker of something approaching honesty. Then, with the swipe of a pen, a tap of a typewriter, the click of a tape recorder: invalidated, uninvited and violated.

Who knows how much of this nonsense we absorb if exposed to it. It is corrupting. It feels like rust.

I should have written this whole thing and then come back to the Canadian stuff. What if I took some of that nonsense in and convert it to faux understanding? It is so deliciously appealing and frightfully undermining. It feels like a blanket. A kettle. And we all know how well that turns out.

They are going to think I am crazy. There will be attempts to discredit me/us. I challenge everything in those cases and I am not sure my halfbreed logic will be respected by my community or theirs.

It is actually we versus them. I can't believe it.

I can't believe it.

So. I structured this research to give me grounding by looking at our ways and understandings related to our laws and understandings related to the authority and obligations that are grounded in us as first peoples. Let me tell you, the first two weeks flew by. I sat down with people I love. Books I love. Read about Elders and spiritual teachings. Talked to Elders about spiritual teachings. Opened my mind and looked for places that were dry and made them fertile. I live a good life. There is no drinking in my home. I smudge for purity. Go to ceremonies. Try, try, try to be humble. Am actively pursuing respect everyday. The part that I thought would be easy, to re-read the cases dealing with Canadian interpretations of sovereignty, has now tripled my timeline. RE: I AM FIGHTING THIS EVERY WORD OF THE WAY.

I think it is easier to write a standard academic paper than to read and write for life. The anxiety level increases as you see your people rendered invisible on paper. The emotions boil as you see your history re-written and your understandings eviscerated. If I include myself in this, then I have to let go of the paper mask. If the story is about me, then those attacks, those attempts to sublimate and subjugate are also about me. Taking those risks means that I am open to attack and I am so tired of fighting. For understanding. For space. For honesty.

As it turns out, I have embarked upon my own personal anti-colonial struggle. It seems important to record this.

Who on earth can justify showing up and taking over without any discussion of the same with the Original peoples? It is morally AND legally untenable. And they justify it time and time again with no conscientious examination of the basis for the same. I am stunned. Maybe it is the order that I read them in, maybe it is the intensity of my study, maybe it is the perfect intellectual storm. I have read all of these cases before. Some of them many, many times. Did I never put them in one place and think about them as a whole?

In answer to my question: They did.

Question: Who gave them the right?

If we had known it was that easy....

I have awful thoughts. Simply awful. A world of what ifs.

What if they were stopped when they showed up at the shore?

What if we had made examples of a few at the start?

What if we had laws forbidding intermarriage (let's see who makes it through more than one winter then)?

What if we had conquered?

What if we had been left alone? What would we look like now? Who could we have been without lives of fight, reaction, imperialized deaths and colonial murder?

I understand bell hooks and I understand the Killing Rage. It scares the hell out of me.

I am so proud to be of a nation that learned, teaches and lives (at times) respect.

I am happy to live an honest life.

I am full of pride in my ancestors.

I am taking responsibility for my own education and am learning our ways for a purpose.

I am thankful to Wayne, Harold, Maria, Bernard, John, Mary Ellen, Trish, Larissa, and those who broke the path of resistance for us.

Oh, and by the way, I want to have dinner with John Borrows, Patrick Macklem and Michael Asch.

a. Thinking Critically as an Obligation

The Iroquois people or the Ho-de-no-sau-nee people were given a Constitution more than one thousand years ago by a Messiah that the Creator sent to North America to stop war and the evilness and sadness that came about when there is war and killing. The Messiah sought to introduce Indian government and Indian law to stop war and killing. The Messiah did miraculous things; he was certainly the equivalent of any other great prophet of the world. The Messiah, the Peacemaker, introduced a law to ban Indian warfare, and he gave us a formula for a constitutional government. This was probably the first constitutional government in the world and certainly one of the longest lasting. Our people still follow that law, that Constitution, and the formula for peace.²⁰⁹

In order to construct an Indigenous critical legal theory, we need to rejuvenate, continue to teach and re-teach the fundamental principles of Indigenous values, laws and understandings so that there is fluency and open discussion of the same. In order to do this, individuals and societies need to address their relationship with those laws and the requirement for introducing reciprocity into our every day. This does not mean that they have not been practiced; it means that they have been practiced in an oppressive climate and imperialist societal context. Of necessity, we have managed our information sharing in a very careful manner. That care has meant that the dearness of the principles has not been lost and that their meaning and impact is as powerful as ever. It also means that individuals need to work harder to get the information.

Additionally, we need to take care not to confuse humility with silence. Silence has filled the spaces where our beliefs met non-Indigenous beliefs and we as nations need to carefully examine whether we can fill them rightfully. Establishing spaces for critique and assessment of Canadian law as it impacts Indigenous peoples is a necessary development in order to slow and stop the course of imperial oppression. Colonialism requires our silence to fully establish itself. The danger is, of course, that others speak for us. Those who are uninformed, with differing agendas, who do not have representative capacity – these are lessons readily learned from our colonial past.

Developing an Indigenous critical legal theory also means developing the capacity for critical thought grounded in places that are balanced and where reciprocal relations based upon philosophies and the language of respect and rightful relations is fluent. Moving from reactor to

²⁰⁹ Tom Porter, "Traditions of the Constitution of the Six Nations", in Littlebear et al, *supra* note 39 at 15-16.

actor requires that many Indigenous voices speak about the source of dissonance, not just the effects.

In terms of this discussion, the source of our relationship with the land is our Original source, the Creator. Never have I heard this mentioned in English at a negotiating table, and perhaps it doesn't belong in those places. However, for an Indigenous critical legal perspective to be honest to its source, we cannot shorthand that either. We have been cramming our understanding of whom we are, where we come from and the relationships that we have into boxes that do not fit and we continue to lose the Canadian legal fight. We make some ground, but what measure of victory is it to say that we are a burden? What Canadian legal theory welcomes the debate related to the degree of retention of our relationship with our land? What Canadian forum can understand it? *It does not translate. We are talking about unlike conceptualizations, philosophies, worldviews, laws and codes of conduct. There is very little shared space for this discussion in a colonized and colonizing system.*²¹⁰ It is impossible fully to discuss Indigenous legal thought without the language, stories and context for their Creation, being and life.

Finding common ground with those who stole your land is hard work. We are so well schooled in the Canadian laws and the systems that support them; I have heard Chiefs and Councilors speak fluently about the source, content and meaning of Canadian laws. This is a survival instinct and a responsibility that they accepted on behalf of their people, I think. Learning that language (Canadian legal language) has been directly tied to survival. To responsibly learn this language is concurrent with our responsibility to learn, relearn and rejuvenate Indigenous legal

²¹⁰ When speaking with Elder Campbell about the meaning of one word we arrived at the understanding that it does not translate and that translation from one meaning or world to another will simply not achieve understanding. This discussion was lengthy and thoughtful and was related to one word – and we could not arrive at a translatable concept or term. Elder Campbell, *supra* note 51. For additional readings on Indigenous worldviews, philosophies, and the problem of translation, I note the profound and thoughtful work of a number of scholars and authors, including: Vine Deloria Jr., *God is Red: A Native View of Religion* (Golden, Colorado : North American Press, 1994); Harold Cardinal, *The Unjust Society: the Tragedy of Canada's Indians*, 2nd ed. (Toronto: Douglas & McIntyre, 1999); Harold Cardinal, *The Rebirth of Canada's Indians* (Edmonton: Mel Hurtig Publishers, 1977); Marie Battiste, in James Youngblood Henderson, *Mi'kmaq Concordat* (Halifax: Fernwood Press, 1997) 13; Winona LaDuke, *The Winona LaDuke Reader* (Penticton: Theytus Books, 2002); Betty Bastien, "Voices Through Time" in Christine Miller and Patricia Chuchryk, eds. *Women of the First Nations: Power, Wisdom and Strength* (Winnipeg: University of Manitoba Press, 1996) 127; Beverly Hungry Wolf, "Life in Harmony with Nature" in Christine Miller and Patricia Chuchryk, eds. *Women of the First Nations: Power, Wisdom and Strength* (Winnipeg: University of Manitoba Press, 1996) 77; and Wilson Manyfingers, "Governance and the Natural Society" (1985) 1(1) Fourth World Journal 1.

language and concepts. It is part of our continuing colonial reality that we read and write about Canadian law without requiring the same of Canadian legal actors. Critically thinking about law requires all of us – colonizers and colonized – to examine our role in perpetuation of the systemic oppression of Indigenous peoples as actors and reactors. Ethically thinking about the legal perpetuation of oppression requires that we learn a third language. A language of legal emancipation.

We need to address whether that silence and that unwillingness to address our participation in the continued subjugation of Indigenous peoples make us complicit or participant, or survivors of colonization.

b. Developing and Establishing a Framework for Critical Indigenous Legal Thought

In the indigenous tradition, the idea of self-determination truly starts with the self; political identity - with its inherent freedoms, powers and responsibilities - is not surrendered to any external entity. Individuals alone determine their interests and destinies. There is no coercion; only the compelling force of conscience based on those inherited and collectively refined principles that structure the society.²¹¹

The recognition that we are talking about entirely different worlds with entirely different mores, philosophies, understandings and laws is important to address in establishing a framework for critical Indigenous legal thought. This is not about valuation, but valuing difference and accepting without ego that there are other worlds than the one most prevalent and represented in Canadian legal thought.

It really is a foreign language, and I think many Indigenous citizens have done very well to learn the sentence structure, etymology and phraseology of colonization in Canadian law:

Subject (Her Majesty, Crown, Canada) Object (Indians, Natives, Savages) Verb (Takes, Owns, Extinguishes)

Reciprocity in this context is very important. In order to contextualize those very elemental understandings of Indigenous relations with land and with settler peoples, we are going to have to look at them from Indigenous places. It should go without saying that any rights discussion

²¹¹ Alfred, *supra* note 70 at 25.

needs to include the language and understanding of responsibilities from each party involved. However, in the complex legal regime that is Canadian law what is noticeably absent is even an elemental understanding of those understandings / positions held by Indigenous parties who have come into conflict with Canadian laws. And we need to understand that this is really where conflict of laws is taking place. To reconfigure the discussion, we cannot focus on what Indigenous peoples are doing wrong in a Canadian context, we need to shift the field of view to one which acknowledges differing perspectives and which addresses that Indigenous behaviours and actions may bring them into conflict with Canadian laws, but that in engaging in certain activities and behaviours we are following our own laws.

We have been operating in a space of presumed Canadian legalized imperialism and legal supremacy since settler people settled in our territories. Predicated on notions of Indigenous inferiority, our holdings and responsibilities became first personally categorized as “Indian ways” and “Indian fetishes” that at once mythologized and compartmentalized our understandings as pagan or simple beliefs. These personal understandings became institutionalized and systematized, hidden over the years in legislative schemes and legal findings that perpetuate the belief that Indigenous people need to be “managed”. The complexity and intricacy of our own systems of governance and management, dependent upon a complex and contextualized set of shared societal values, laws and systems to enforce the same, became devalued through systematized administratively expedient laws addressing the idea of managing the Indian and not the actuality of Indigenous lives. That entrenched and hidden history of the Canadian legal Indian is entrenched in the *Indian Act* and it is entrenched in the case law which dealt with Indian people participating in our customs, economies, governments, and spiritualities. In order to address an anti-colonial approach to the object Indian, we need to address Indigeneity as active and alive. We need to understand ourselves to be and be understood as actors subscribing to laws which are completely valid, relevant and binding. De-colonizing thought means acknowledging those systems, beliefs, worldviews, understandings and laws and acknowledging the complicity required to perpetuate their suppression. Indigenous anti-colonial action means developing and enacting a plan to facilitate their re-emergence and the removal of the colonial vestments that cloaked them for so long.

To linguistically represent this, we need to address context and shared Indigenous understanding in a way that is meaningful. My awareness of the need to subscribe to protocol has been strengthened in the writing of these words. I have a reciprocal relationship with the words and with the conceptual underpinnings for the same. In order to be able to talk about some of these things, I also need to learn about them in context and become aware of my responsibilities and limitations as a writer. Developing a critical framework in English has proved daunting and required much more than paper research and paper writing. The first step that I took I would call, "Developing Context". It was actually nine stages and quite energy and time consuming. None of this was done over night or in the years that it has taken to write this paper.

Journal:

How to de-colonize yourself.

1. *Know where you come from. Learn your language. Take responsibility for learning about your relations, your land and your relationship with that land. Learn what your responsibility to that land is.*
2. *Know what you have the responsibility to protect (laws, language, land) and what you have the right to talk about.*
3. *Learn the protocols re: information gathering and sharing. Take care of yourself and your work in ways that are meaningful to your people.*
4. *Learn to listen. To your Elders, to the voice inside you, to the land, to the papers that you read.*
5. *Learn when that voice inside of you needs amplification. Learn to interpret and understand the physical responses that you are having to the cases that you read, the legislation that you thumb through and the audiences that you sit with. Your physical response will inform your intellectual understanding.*
6. *Be smart enough to ask every question. Know that if you do good work you will challenge. Challenge is painful and necessary.*
7. *Write down your thoughts and perceptions.*
8. *Sit with your Elders and Spiritual Leaders to talk about your understanding.*
9. *Write it and let those who are trusted review it; send it where it needs to go.*

Part of de-colonization is wrapped up in de-mythification. To be quite honest, there is wealth and affluence in silencing Indigenous concerns. There is wealth to those who silence. There is

also wealth flowing to some who profess to speak on behalf of those who chose or who face enforced silence. Taking away the myth and retaining that which is incredible about our ways is a challenge. In a way, it is really hard to imagine normalizing the fantastic.²¹² Acknowledging the spirit in all of us and acknowledging that the sovereign is actually the Creator is an intellectual leap that I am not certain that many who live outside of that understanding are ready to take. Whether or not the masses can accept it is not of concern to me, getting to a place where it is acknowledged, understood and respected is the fundamental first step. De-colonization requires that we are prepared to say the same thing over and over again (and if the quote by Benjamin Franklin is to be believed, so does insanity) expecting a different result.

As part of this, critical thought and action requires that we review the decisions, cases and laws based upon non-Indigenous perspectives and understandings. We look not only for what is familiar to us but like a word excavation crew we must examine what the uses, rationale and community meaning affixed to the words were and are. Critical Indigenous legal theory may, if it is possible, lead to reconciliation. However, to understand the process and aims of colonization, the journey in this case is as important as the destination.

Review and define the historical context from an Indigenous place and have an awareness of the non-Indigenous contextualization. Primary research into such areas as Indigenous holdings and reciprocity in the context of our relationship with the land would be invaluable research if undertaken in a way cognizant of and deferential to our protocols and ways of being.

Review and define English words looking for English meanings, etymology and end result which are important. Colonial words and phrases have taken on new meanings over time yet we continue to use them as if language does not grow and alter. Meaning and intent have become

²¹² In many instances, Canada has normalized the fantastic. Imagine how fantastic it must be to believe you have ownership of a country by traveling there and claiming it. Imagine how preposterous it must seem that you can define, with the swipe of a pen, where a person can live and how they can legally be defined. Imagine the leap of faith required to believe that a Queen Mother had come to provide for her relatives and that she would make sure that life for those relatives would be largely unchanged. The intellectual leap of faith required to examine with truth and integrity the understanding that Indigenous peoples are obligated to our land, hold and celebrate sovereignty of it, and have blood and bone claim to that land is one which is seemingly less fantastic than leaps Canada has made before. The underlying values of the Indigenous fantastic, are less hierarchical and shared more universally than those underlying the Canadian fantastic, I would argue.

subsumed in syntax and determining how legal determinism was entrenched in and given effect by language requires thorough analysis and critique.

Do not repeat the mistakes of the past. Do not replicate your experience as oppressed by using oppressive language.

Re-build and renew your capacities, languages and build new spaces for your ideologies and laws to flourish.

In developing a framework for critical Indigenous legal theory, we need to ask several questions at the outset. The first is, what is the basis and understanding which you are trying to inform about from an Indigenous understanding? Starting with Indigenous understandings and grounding yourself in Indigenous knowledge is the first requirement. This is actually quite difficult and time consuming. It is also the most enriching part of the work and is directly tied to de-colonization. Anti-colonization requires that we address the relationship between Indigenous knowledge and the impact of colonization on our willingness or capacity to talk about that knowledge. It is functionally important work.

The second question to be asked in developing this framework is what colonial law/understanding/case/policy has impacted the ability to transmit, at least, the Indigenous understanding/law? Using Cree principles of reciprocity, we can examine the impact and effect of British policy and Canadian jurisprudence on the ability of Indigenous people to participate in a reciprocal relationship with our lands. The “crystallization” of presumed British sovereignty (or illegal occupation, if you will) at the time of contact had little or no effect upon contact as Indigenous peoples continued to live in reciprocity with the land until settler peoples encroached on our relationship with our lands (encompassing our economies, spiritualities, and kinship patterns). Once Canadian policy limiting our ability to travel and congregate together was given effect through law (arrest and detention) our capacity and willingness to participate openly in our spiritualities was impacted. Once Canadian law entrenched individual property rights and the limitation of Indigenous rights to certain reserved areas, our ability to participate in kinship patterns, our economies and spiritual ceremonies became impacted.

How does the Canadian law/understanding/case/policy differ from the Indigenous understanding/law (in terms of source of and basis for the same, rationale, historico-political climate, universality, etc.)? In terms of reciprocity, it is our duty to participate in certain portions of our societal responsibilities to maintain the holdings left to us in a sacred trust. Participation in these formal procedures was performing your 'legal duties' so to speak. These are positive obligations intricately tied to living a good life. If you did/do not live a good life, the consequences were/are known. These positive obligations have never changed. They apply equally to all. If we live/d according to our holdings and responsibilities, we live/d reciprocally and did/do not break our laws. You carry a broken law with you for life. Our responsibility to the lands entrusted to us includes a lifelong responsibility that looks something like protection, but is respect. Our law is positively stated and lasts forever. The rationale for the same is to live as you are supposed to and the land will sustain you. In my understanding, Canadian law is quite different from this, particularly in the realm of sovereignty. Canadian law takes as a given the supremacy of man, one man, one race of man, at the time the assertion of alleged sovereignty over us occurred. This breaks our law related to equality. There is no requirement that that sovereign man treat his "owned" land in any way which acknowledges his obligation to it. This breaks our law of reciprocity. These natural laws as established by the Creator have been broken.

Has the Canadian law/understanding/case/policy changed over time and/or how has the historic meaning of the same become entrenched, embraced, or eliminated? In terms of the Canadian law respecting sovereignty, the premise for the same ostensibly is the Law of Nations. While we have not been conquered and have not become Canadian subjects, the understanding about Indigenous capacities in this context has become a more oppressive one over time. In our initial interaction with settler peoples we knew and understood that we would continue to live as we had prior to their settlement in our territories. Our understanding as nations that our way of life would not be altered or intruded upon was to a degree reconciled with settler law in the *Royal Proclamation*. Early American case law addressed our standing as nations. Over time, however, the mystical balloon of British sovereignty was retroactively interpreted to have arisen ('crystallized') and this tenet became applied to Indigenous nations externally, without consent

and in ignorance of our laws. Over time, starting in the 1970s with the *Calder* decision the exactitude and universality of this western understanding became examined in law. In the 1980s and 1990s the universality and appropriateness was questioned, and while there was no legal doubt about crystallization, when it occurred became questioned in Canadian law. When “existing” Aboriginal rights were recognized and affirmed in the Canadian Constitution, crystallization required a greater degree of investigation and rationalization. Canadian jurisprudence began to reveal a crack in the armour (as evidenced by the split in the *Calder* decision), and while the judiciary took tenuous steps towards acknowledging Indigenous understandings related to our responsibilities and reciprocity, they stopped short of the same, limiting the vision to terms and understandings readily acknowledgeable in a Canadian context (internal authority and limited autonomies). After the Supreme Court of Canada’s decisions in *Sparrow* and *Delgamuukw* there appears to be a united judicial front which has taken the limitation and hesitation regarding Indigenous sovereign holdings to mean that the door for discussion related to “sovereignty” is now closed. We see in several Canadian cases a judicial shorthand and intellectual diminishment related to claims of sovereign nationhood by Indigenous claimants and defendants. The rationale for assertions of Canadian sovereignty (absolutist propositions related to Canadian authorities) is no longer evident in the decisions, and a shorthand for Canadian *absolute sovereignty* (absent any allusions to the oppressive history, rationale and need for perpetuation of the same) arises.

What differentials (authority, power, ownership, control, dominance) exist in the exercise of the definition, practice and theory of the Indigenous understanding and the Canadian understanding? In the context of the ability to live by our legal principles, as Indigenous people we interact with oppressive systems representing Canadian legal interests and values everyday. The ability to openly live in accordance with our Original instructions is sometimes impeded; many of us choose separation (geographically, socially, culturally, economically, spiritually, etc.) in order to live lives as our laws require. There are oppressive impediments along the way and it is dangerous to discuss “interrupted” exercise of the same in times and places where oppression is covertly and overtly housed in Canadian laws and principles related to this. Our definition of reciprocal relationships with the land differs in kind with Canadian laws and principles related to sovereignty. Our responsibilities have not changed, are ever present and are legally binding on

every person to the same degree. The notion of power is difficult to define for the same reason that 'sovereignty' is hard to define as there is such a long and deep context for the same. Shorthand does not do our people justice. Power is not exercised, it is inherent and all beings possess gifts coming from that Original power. Balance is the foremost goal and dominance and power in an Indigenous context have been used in ways which disrupt that balance. As close as I can come in my understanding is that the Original power endowed us with responsibilities. Those responsibilities look like power in a western context, but are actually part of your conscientious existence. As people who face and faced oppressive Canadian laws, systematized oppression and oppressive day to day circumstances as a part of our colonial existence, foreign notions of authority, power, ownership, control, and dominance are cognizable in our every day. As possessors of presumed, assumed, and ostensible authority, power, ownership, control, and dominance the exercise and definition of Indigenous rights is one which has altered and contracted according to the item desired by the colonizer. The practice of Indigenous understandings undergoes intense legal scrutiny if it touches upon a 'right' (read: profit generating activity) claimed by the oppressor (to govern, to fish for lobster, to operate a casino). There is less intense scrutiny (power claimed) by the oppressor when the 'right' is not one predicated upon the generation of mass profit (hunting and fishing for sustenance, participating in gathering of flora and fauna for ceremonies, participation in areas deemed 'social service provision'). The practice of Indigenous understandings and the definition of what those are face Canadian legal limitation in order to accord with a Canadian understanding of what Canadian rights are. Indigenous 'rights' become defined in the context of what is left over once Canadian legal determinism and imperialism assert the powers, authorities and rights presumptively (and I would argue ostensibly) held by Canada. We find our Canadian legal rights relegated to a category and catalogue of "burdens" on the self-proclaimed list of Canadian rights.

The next question in developing a critical Indigenous legal framework is, are there potential areas of reconciliation? This is problematical given the demonstrated constraints on the Canadian legal imagination and the rigidity of the natural laws governing Indigenous nations. I am also reluctant to establish an area of shared terrain absent a broader and Indigenous contextual inclusive dialogue related to assertions of dominion and the oppression that stems from the same. It seems to me though that both Canada and Indigenous nations have a

demonstrated commitment to the notion of freedom of religion that is a shared principle (with differential practice, acknowledgement, and histories related to the same). There are also indicators of some common understandings in relationship to egalitarianism and equality that offer a springboard to invigorating shared understandings. There is widespread acknowledgement that there are rights inherent in Indigenous peoples by virtue of being Original peoples in our territories. The differentiation is usually in regard to degree and definition, not the actuality. In terms of the Canadian legal discussion related to sovereignty, there may be some parallels, ironically between the broader source of Canadian assertions of sovereignty (from a higher, if human, power) and that reciprocal relationship that Indigenous peoples have with the land (from a higher power) that may have more commonalities than we have imagined. The theory of “crystallization” has something fantastic about it and while I adamantly disagree with the Canadian legal findings with respect to the same, examining the source of that alleged mystical construction might be interesting and provide context for discussion. Indigenous laws related to the source of our inherent rights may also appear to some to be fantastic and there is context required here as well for an informed understanding of the basis of the assertions made. Protection and conservation of resources seems like an area where Indigenous values and laws may be reconciled with Canadian values and laws.

Finally, in developing a critical Indigenous legal theory, we need to examine what our (*Neheiywak*, Cree, Indigenous) principles, values and laws relating to critique, conflict and good relations require. We need to ask what does an Indigenous ethic of respect determine regarding the entrenchment and revitalization of the same? What challenges are likely to arise? How can this understanding be given contemporary weight and context? Developing a body of research and analysis related to critical Indigenous theory requires us to examine not only what we say but how we say it in a critical and responsible manner. Developing a reciprocal relationship, even with the words we say, requires us to be mindful of principles of respect, humility, kindness, honesty and fairness. This does not require that we separate our humanity from our assessment, but it requires we do so without meanness or dishonesty. Revitalizing our own language of measurement and consideration (as it is not for us to judge) requires that we ensure that balance is one of the goals we are consistently trying to achieve. The challenges that are likely to arise are ones related to our historical silencing and addressing the line between revelation of

accountability and shaming. Historically and contemporarily our voices, our real voices, have not been heard in the Canadian judicial system. Learning to re-voice and finding value in speaking to that system will be challenging. With such silencing and with a history resoundingly hostile to our understanding of our values, philosophies, laws and teachings it is quite easy to become vocal and critical. Finding places receptive to our understandings is one thing; finding people who not only listen, but can *hear* what we say is quite another.

c. Liberating Theory and Practice

Liberating ourselves from colonial bonds begins I think with the development / re-emergence of a critical Indigenous consciousness. Coming to this consciousness requires that we advance discussion, research and analysis in ways which accord due respect to the places we have come from with an eye to the places we want to remain in or re-invigorate. This is a journey. On the path there are stops at affirmation and recognition. There is also a prolonged stop at responsibility. While that is true, it is important to being to understand that we cannot rely on blame as a motivator for change. There is so much authorized and unauthorized imperialism, so much unclaimed responsibility; these become part of the Indigenous burden. We need to take time and responsibility for telling of our story of Canada's legalized and sanctioned oppression, while addressing conscientiously how to liberate ourselves from its weight. The immensity of its impact needs to be addressed in a way which consciously searches for solutions and does not just ascribe blame. The weight of it, if not done in a good way, one which sanctions and authenticates growth and liberation, would be too great for many to fathom. Fanon wrote of this: "Unable to stand up to all the demands, the white man sloughs off his responsibilities. I have a name for this procedure: the racial distribution of guilt."²¹³

While there is definitively a notion of responsibility, we are entrusted with our own means and goals for change. In the context of African American identity and emancipation in the United States, Cornel West wrote:

Mature black identity results from an acknowledgement of the specific black responses to white supremacist abuses and a moral assessment of these responses such that the humanity of black people does not rest on deifying or demonizing others.²¹⁴

²¹³ Fanon, *supra* note 8 at 103.

²¹⁴ Cornel West, *Race Matters* (New York: Vintage Books, 2001) at 43-44.

I am uncertain about Indigenous maturity. I think we are there, but I also think we need to address a critical Indigenous consciousness that allows us to take off blinders and examine the possibilities for meeting our responsibilities in the face of so much legalized (in a Canadian legal context) oppression. We need to construct, reconstruct, and renew Indigenous legal assessments of the perpetuated and fostered oppression not to label and punish, but to free ourselves from that history in our accurate and respectful telling of the same. From that we will find that we are able to move forward assured of our competence and our own humanity, into problem solving in a contemporary context. We may have few allies in this process of developing our own critical Indigenous consciousness. Expecting those who have succumbed to or taken power to participate in the liberation of those they have taken from is not an entirely realistic expectation. But there are many of us who have lost, have not achieved, who have not retained things of import to us, who have like interests and understandings. As Indigenous citizens from many different nations, we need to support each other and participate more broadly in the emancipation of those who have been restrained and constrained from spaces of respectful equality and fairness.²¹⁵ We cannot forget that many of our people are not only Indigenous, they are also poor, female and/or with little access to many of the services and essentials that meet basic human needs. These stories and our individual and collective response to our colonial pasts and present need to be told in our own voices. That is not the totality of our responsibility. We have a responsibility to make sure that our ways of living, understandings, teachings, worldviews and laws are told honestly. We must also assess the intricate nature of the illegality (in an Indigenous context) of the actions, inactions and breaches of our natural laws. This degree of complexity is important not only to reinvigorate our laws, but also to give context and effect to our experience and celebration of our continuing responsiveness and the inherent and continuing nature of those laws. It is difficult and it is in no way value neutral. That is a myth that we cannot afford to

²¹⁵One author has written of this, in the context of a movement of people of colour in the United States:

We need to be constantly moving beyond a short-range definition of needs, and not be deceived by scapegoating campaigns or driven into new fights over crumbs. Instead of pursuing a nationalist agenda, people of color must build a transnational movement for civil and human rights, a movement that will empower working-class people everywhere. Such a movement requires all of us to educate ourselves about our histories and our commonalities, including our experiences of working together, so as to break the mythology of inevitable division and domination.

Elizabeth Martinez, "It's A Terrorist War on Immigrants 1995-Present" in *De Colores Means All of Us: Latina Views for a Multi-Colored Century* (Cambridge: South End Press, 1998) at 80. For another discussion on colonizer power and the politic of decolonization, see Frantz Fanon, *The Wretched of the Earth* (New York: Grove Press, 1963).

invest ourselves in. We need to reinvigorate our laws for our own sake, but it can also be a part of our liberation to examine our Indigenous ‘legal truths’ in the face of Canadian ‘legal truths’.

Patricia Williams wrote of this:

That life is complicated is a fact of great analytical importance. Law too often seeks to avoid this truth by making up its own breed of narrower, simpler, but hypnotically powerful rhetorical truths...I think, though, that one of the most important results of reconceptualizing from “objective truth” to rhetorical event will be a more nuanced sense of legal and social responsibility. This will be so because much of what is spoken in so-called objective, unmediated voices in fact mired in hidden subjectivities and unexamined claims that make property of others beyond the self, all the while denying such connections.²¹⁶

Getting to those “objective truths” is an essential factor in the development and redevelopment of a critical Indigenous consciousness. A reassertion of our laws in concert with a critical analysis of the history of Canada’s law-making and law interpretation enables us critically to examine the oppressive conditions and their perpetuation by Canada’s legal regime. Liberation (of all life) requires this. Oren Lyons has written that:

It is necessary at this time to begin a process of critical analysis of the West’s historical processes, to seek out the actual nature of the roots of the exploitative and oppressive conditions that are forced upon humanity. At the same time, as we gain an understanding of these processes, we must reinterpret that history to the people of the world...The people who are living on this planet need to break with the narrow concept of human liberation and begin to see liberation as something that needs to be extended to the whole of the Natural World. What is needed is the liberation of all things that support life – the air, the waters, the trees – all the things that support the sacred Web of Life.²¹⁷

In motivating these completely relevant principles and understandings from thought to action, we need to ask: ‘How does critical legal theory become liberating theory and liberating practice?’ Again, to understand this with clarity, I have to look to *Neheiywak / Cree* principles to inform my understanding. We have a relationship with our lands that requires (and I hate to use that English legal concept) us to protect them. Protecting them in this instance means liberating them and emancipating them from the economic enslavement they are currently experiencing. We will, when we fulfill this requirement, find that reciprocity is in place and the land will be able to take care of us again. Fulfilling this requirement starts with telling the story of its enslavement and our seeming immobilization through the Canadian legal means. It also means ensuring that those

²¹⁶ Williams, *supra* note 7 at 10-11.

²¹⁷ Akwesasne Notes, ed., *Basic Call to Consciousness* (Summertown, TN: Native Voices, 2005) at 91.

protocols and ethics related to our natural laws are observed and protected. It means reinvigorating those laws, preserving them, translating them, creating spaces where they can be shared and addressing all beings' participation and responsibilities.

G. Conclusion

[We are from] totally different worlds, different *tapsinawin*.²¹⁸

Kihcitipecikew: Things that are put together in a sacred way. This part of the *wahkohtowin* language is high Cree and used in the discussion of relationships. The first part of it is sacred. Manitou does not mean God, it is the mystery. *Kichi* comes from the Creator. It is sacred.²¹⁹

Original and settler peoples have an opportunity to sit and speak with each other as relations and this allows us time for engagement. This can mean engagement in a “dialectical exchange”²²⁰ and opening the door for respectful conversations. I think that conceptualizing Indigenous emancipation has been grounded in theories of economic development and Canadian law without addressing what was avoided for so long: there may be no other way to do this than the way it was originally done. Few have, on a macro level, examined the possibilities for the renewal and rejuvenation of Indigenous paradigms in the renewal and restoration of Indigenous Nations based upon the dedicated renewal of Indigenous understandings and worldviews. This needs to be our commitment.

We need to address the truth of the matter, that we have “totally different worldviews, different *tapsinawin*.”²²¹ Addressing that truth means reinvigorating our worldviews through dedicated study. It also means critically engaging in examination, analysis and comparison of the nature of Original peoples' and settler peoples' worldviews to determine what colonialism is, where it is entrenched and how to participate in the disengagement of Indigenous worldviews from colonial influence and pressure. This will require a sharing of knowledge and a paradigmatic renewal. It

²¹⁸ Elder Campbell, *supra* note 51.

²¹⁹ *Ibid.*

²²⁰ bell hooks, “Critical Consciousness for Political Resistance” in South End Press Collective, ed. *Talking About a Revolution* (Boston: South End Press Collective, 1998) at 45.

²²¹ Elder Campbell, *supra* note 51.

will also require that we are able to identify, assess and analyze the impact and effect of colonization on Indigenous realities (if any). In a legal context, this requires us to identify non-Indigenous assumptions about Indigeneity that have become housed in systems, cases, laws and policy. It also requires us to critically assess and document their impact on both our ability to live in accordance with our own laws and on the impact that colonizing law has had on our actions, thoughts and particularities of man-made decision making. We have not lived in a vacuum. Just as our languages have addressed contemporary realities by including new words (hospital, government official, diabetes, metal) the way that we carry out our activities has been influenced by Canadian laws. We need to examine colonizing law to see where it has been successful and how that has impacted our lands and our peoples. It cannot change our laws, but it would be inaccurate to say there has been no impact on our ability to act as we like.

In terms of our obligation to our land/sovereignty, we are still living it. We have a relationship with our cousins that requires we respect each other. That is an accord that we entered with all seriousness and sanctity. Our interests are often contiguous as neighbors and cousins. The renewal of recognition of this actuality needs to be at the forefront of any Indigenous movement. Fear of the s-word can no longer inform our interaction in the boardroom, at the negotiating table or at our offices (band, settlement, umbrella organization, kitchen table). As a living breathing entity, we owe our relationship with our land (and with Creator) the reciprocity of asserting it, talking about it, living it.

Journal

Don't forget:

We own ourselves.

This is our land.

This land is us.

Cession is a myth.

We have voice and vision.

Assumptive power is not actual.

Creator put us here in our territory.

These are ours, they cannot be taken away.

We do not give them the right or let them take the right.

They have no right.

IV. DEFINED BY DEFICIENCY: INDIGENOUS WOMEN AND JUSTICE

A. Introduction

Canadian and Indigenous peoples are still divided by a chasm of dissimilar philosophies, worldviews, laws and experience. Our understanding of what constitutes in/justice is often quite divergent and in some instances may appear contradictory. However, the essential principles related to justice, those of fairness and truth, often resemble values tenaciously subscribed to in both Indigenous nations and Canada. There has been, through oppressive circumstances and responses, a perversion of the ideal, its achievability and the systems supporting them. In an Indigenous context Justice does not just mean a systematized programmatic approach to facilitating or nearing the ideal that is justice.²²² Justice does not refer to merely issues of crime and criminality, but also to notions of just relations, the foundation of which is based on core notions of reciprocity, egalitarianism, fairness, shared obligations and collective responsibility. Commitment to family, community, society and other nations as a function of just relations is a function of your humanity, as is addressing the requirement of performing the undertakings that form a part of your relationship with others. Just relations are imbued with positive

²²² Canadian justice is quite often consumed with the notion of procedural justice and is just as often unable to produce substantive results that would be understood to be just. For examples of this, see the *Calder* decision, *supra* note 121, in which one judge's procedural argument was used, thereby denying a substance based decision. In *Ominayak v. Norcen*, [1985] 3 W.W.R. 193 (Alta. C.A.) procedural fairness was replaced with procedural predetermination when the Cree citizens of the Lubicon Lake Nation attempted to file a caveat on their own land, in accordance with provincial legislation. One Indigenous publication wrote of this:

Early in their struggle, when construction of the road into their territory began, the Lubicon tried to file a caveat under the Alberta provincial Land Titles Act, putting people on notice that title to the land was contested. Although at the time provincial law required this be done, the Alberta provincial government refused to accept and file the caveat. The Lubicon then asked the Canadian courts to order the provincial government to obey its own laws. Alberta responded by postponing the case saying it wanted to wait for the outcome of the Paulette case, a similar case in Northwest Territories. The Paulette case went against the Native people, but the judgement read that had Northwest Territories law been similar to Alberta law, the court would have decided in favour of the Native people and ordered the government to file the caveat.

The Alberta government went back to the courts and asked for a second postponement. Then they REWROTE the legislation and made it retroactive to before the time the Lubicon had filed the caveat. The case was then dismissed by the courts because it had no basis in law. In other words, the Alberta Government CHANGED THE LAW to achieve its own ends.

From Ed Bianchi, "Under Attack From The Multinationals: The Lubicon Defend Their Land" *BEEDAUDJIMOWIN: A Voice for First Nations* (Summer, 1991), online: Nisto website <<http://www.nisto.com/cree/lubicon/1991/19910823.html>>.

conscientiousness in accord with the Original instructions received from Creator as societal obligations.

I have come to wonder lately what differentiates Canadian justice from violence. When I write it, it feels like hyperbole. Part of the struggle in writing this is making sure that I am true to myself and that I represent only my understanding and interpretation. So, my experience informs my understanding and I have come to think that the Canadian justice system is premised upon neutralization of Indigenous peoples, and that this neutralization takes forms that are often violent. Perhaps the ideal of justice is quite magnificent. The construction and systemization of Canadian justice, however is quite appalling. There is stratified misunderstanding, racialization, and almost unfathomable dehumanization in the bedrock of Canadian justice.

Perhaps our experiences as purported owner and dispossessed, oppressor and oppressed, allow us such divergent histories that we can never understand the actuality of achievement of an ideal. Perhaps even an idyllic principle is not achievable when the foundation of the relationship which would allow shared sites of experience is so polluted. As people whose experience of colonized violence and continued legalized disempowerment, indeed who have often seen our Indigenous identity legally rendered invisible, it may be impossible to reconcile the notion of meta-justice with any conceptualization of fairness. Our presence in the Canadian justice formula has been erased, our relationship as cousins deteriorated; we are a painful reminder that there is no justice here. How we assert ourselves while extricating our truths from the colonial bonds which presumptively dismiss or subjugate our understanding, experience and philosophy of just relations is one matter. How we tell our truth, our understanding of the nature of just relations in spaces occupied by individuals, collectives and systems misinformed about (at best) or destructive towards (at worst) Indigenous humanity is another.

Canadian in/justice in its ideal form extends to all peoples the promise of fairness in treatment, decision-making and process. Functionally, in its exercise and application, it has been a tool of oppression which has been instrumental in the legal decimation of Indigenous peoples, the legalized appropriation of Indigenous homelands, the legalized destruction and dismantling of families, and the legal devaluation of women.

Journal

I have been mulling over thoughts of fairness (unfairness), justice (injustice) and legality (illegality) for a while now. In order to understand this, I have looked to my own experience to explain my understanding.

It started a few years ago when I had a very heated conversation, following a great deal of silence, with a fellow who runs a justice education program. The program used to house a mandatory course on Aboriginal law and government. I say used to house, as this fellow made the decision to make the course an elective within the credential. His reasons are his own and he has the right to make the decision. It never sat well with me that "administrative problems" were the root cause of the decision not to use the course. The course as constructed examines Aboriginal people not as victims, but as peoples who possess laws, decision-making capacity, authority and concerns about the Canadian justice system. Students responded very positively to the course in the five years it was taught in the classroom and, while challenged, rose to the intellectual challenge in every instance. It was hard work as the students were predominantly Canadian justice officials and those who wanted to be the same. That hard work, I came to understand, came about on both ends. Students were studying materials and understandings that were philosophically different than anything many had learned before. They came to the course with a host of understandings about ethics and hierarchy that I had to learn about. I found the work hard and they found the work hard, but it was also immensely gratifying.

My heated conversation was about the necessity for the same in a program which teaches future and current Canadian justice officials educational courses. I tell this story not be unkind or make an example of this decision making style, but to address the notions of rightful decision making, authority and the requirement for inclusion which mirror my understanding of the fissure that exists between Canadian justice and Indigenous notions of rightfulness. However, in writing and in person, the educator posited a number of arguments as to why this course (written by an Aboriginal person, from an Aboriginal perspective of Canadian justice, and taught by an Aboriginal professor) was not mandatory for students in the program any longer. Those arguments and my responses to them were on such different pages that they sit with me every day.

I wanted to tell him that his deletion from the curriculum amounted to silencing and that construction of a Canadian "justice" credential without a required course in Aboriginal justice was morally reprehensible and socially irresponsible. I did.

I wanted to tell him that we could not construct our response to interaction with the criminal justice system into manageable and palatable bites for rumination. It is too late for that. I did.

So while he argued that "other interest groups" had interests that had to be represented in the curriculum and that he believed that the number of Aboriginal peoples incarcerated was overstated and statistically quite low, I quaked with anger.

One man. One decision. Classrooms of current and future justice officials represented.

One man. With authority. Erasing us from a generation's understanding of Indigeneity.

At the end of a moderated settlement (with an impartial party involved) I agreed to write a new course, one which we agreed he could review for content and for inclusion in the course curriculum. My questions today are as intense and forward as they were on that day - why does the responsibility to teach his acceptable definition of Aboriginal justice fall to Aboriginal peoples? The answer is simple - I don't trust him (as a representative of non-Indigenous authority) to do it. And why should I?

What I have taken from this personally, is that this discussion and the attempt to inform the system about the actualities of Indigeneity, will never be successful if it continues on the premise that it began: Indigenous peoples are inessential, incapable, and inhuman and must be controlled by Canadian law.

Besides a rage that I cannot seem to calm (at being an institutional reminder, at being the voice of Indian reason, at being erased, for being marginalized in my work place because I insist that Indigenous voices are heard, for being the painful and constant reminder that there are obligations at work here) I also carry with me the knowledge that institutions are people, people are groups of individuals, and that individuals make the decisions that impact institutions, which reverberate and hit our nations. This experience and others have made me aware of a number of factors that I take into account (spilling over, like tears on brown cheeks) whenever I am in discussion about Canadian justice.

1. *We are grim reminders of a racialized past. Those reminders are painful and disavowed in the present. Collective ownership of the oppression of Indigenous peoples is often strategically or unwittingly relegated to an individual or institutional past so that complicity and present acceptance are not addressed.*
2. *Very few people want to perceive themselves as possessing racialized thoughts and many cannot comprehend when we tell them that their actions are motivated by the same, in our understanding. We are a guilty reminder, best to be avoided so that guilt free psyches can pursue "value neutral" agendas.*
3. *If individuals cannot comprehend the nature and extent of integrated racialized and colonized thought and action it is difficult for individuals to take responsibility for personal notions of racialized and colonized thought and action.*
4. *Blame is not accountability and no one will respond to blame in a manner which promotes change and growth.*
5. *Without an informed understanding of in/justice written, interpreted, understood and transmitted by Indigenous peoples, understanding of the same is limited to the vision and interpretation of individuals who do not have a history of responding to and living through the attempted / colonization of Indigenous peoples.*
6. *The obligation for anti-colonization in the context of Canadian in/justice must be assumed by an informed and collective body which pools experience, ideas, capacity*

and courage in order to address the specificity of the impact and underpinnings of racialized justice on Indigenous peoples.

7. *Institutional problems require institutional responses.*
8. *Individuals are institutions.*
9. *Indigenous individuals who critique institutions offer a gift of agitation; it is emotionally and spiritually costly. We are not the problem, we are the problematic reminder of the colonized and racialized Canadian past and present in the context of justice.*
10. *In a real sense, we are not your problem. YOU are your problem.*

B. Defining Justice

It is an interesting term, "justice".

1. The quality of being just; fairness.
2.
 - a. The principle of moral rightness; equity.
 - b. Conformity to moral rightness in action or attitude; righteousness.
3.
 - a. The upholding of what is just, especially fair treatment and due reward in accordance with honor, standards or law.
 - b. Law. The administration and procedure of law.
4. Conformity to truth, fact, or sound reason...²²³

Canadian justice, seemingly, is not a right but a goal. Wrapping into a bundle notions of fairness, moral understandings, truth and equality, it is not just a substantive goal, it is a

²²³ Christine Ammer, *The American Heritage Dictionary* (Boston: Houghton Mifflin Company, 2000), online: Online Dictionary < www.dictionary.com >.

procedural requirement. In this context, we know that justice must be about a society's dedication to fairness and equality. In a procedural context, justice must be about procedures that are fairly and equally applied in trying to achieve that goal.

Justice, then, is a philosophy and a course of action that must be in accord with that philosophy. I do not think there is anyone who could argue that justice is not a laudable goal. As an ideal, the attainment of justice is a powerful philosophy.

Of concern is that the philosophy is built upon a foundation which is constructed with materials that can bear the weight of the many different people who want to inhabit a house of justice. If justice is doing what positive law demands, and positive law is premised on one particular society's understanding or morality and fairness, then some societies/peoples will not see their values reflected in the philosophy of justice. When action and attitude are imbued with a monolithic understanding of moral absolutism, then of course many values and standards will not be reflected in either the justice ideal or the processes that hopefully address achievement of the same.

At its core, justice and the achievement of justice have a finite set of principles which serve to determine assigned rights, rewards and punishments,²²⁴ the foundation of which stems from a shared perception of what is fair. Who shares that perception and the degree to which it is informed by and interpreted by who wields power (and how the values of power wielders inform definition and process) are important factors in the justice equation. For Indigenous people, it is often difficult to reconcile Canadian notions and understandings of justice with honour, truth, fairness and equality. That same system that idealizes a systematized approach to the meting of justice has entrenched bias and a collective understanding of Indigenous humanity. This collective understanding of the bundle and who may hold it impacts our ability to see what about Canadian justice is fair and honourable. It would seem in many instances that the assigned rights and commitment to fairness shift and alter, depending on to whom they are applied and what resources they have to protect themselves using a shield of affluence and belonging from which many of us receive little protection. I am not arguing that justice is not a laudable goal, but I am

²²⁴ Wordnet 2.0, 2003 Princeton University, online: Online Dictionary <www.dictionary.com>.

stating that for justice to have any meaning at all, for justice to shield us from unfairness, we need to include in the notion of justice some understanding that justice is a shared understanding which acknowledges that its current definition owes its inception to a colonial history and present which makes it a completely foreign concept and a largely unachievable and often unachieved goal.

Canadian justice finds its beginning launched in an era when the taking (fraudulent appropriation, theft) of Indigenous peoples' lands was cloaked in the notion of a relationship existing between the Crown and First Nations.²²⁵ There is some inkling of fairness in this, with the Crown asserting that a special relationship between the Queen and First Nations means that no one person can take Indigenous lands from us. I am thankful for that in small ways, because without those notions of Indigenous inhumanity entrenched in the minds of many settler peoples, who knows what of the meager lands we have now would be left to us without that Proclaimed intervention. However, those notions of Indigenous inhumanity were not limited to individuals. A collective notion of Indigenous inhumanity meant that another type of seizure, the "justifiable" taking for the collective interest represented by the Crown became part of "just relations" in the colonial context. Those individualized notions of Indigenous inhumanity which we were protected from in the advancement of alleged justice paled in comparison to the effect that the "justifiable collective" understanding of Indigenous inhumanity had on our territories, peoples and systems. The infusion of Indigenous inhumanity into Crown interpretations of moral rightness and what constitute/d fair treatment results in a definition and activation of justice which not only excluded/s Indigenous understandings of fairness, but which also entrenched inaccurate understandings of Indigeneity and the requirements of settler fairness in light of Indigenous inhumanity. The Manitoba Justice Inquiry addressed the role of the Canadian justice system in perpetuating discriminatory understandings of the past:

Historically, the justice system has discriminated against Aboriginal people by providing legal sanction for their oppression. This oppression of previous generations forced

²²⁵*Royal Proclamation, supra* note 107. Some historic Canadian case law addressing this relationship includes *Commissioner of Indian Lands v. Jannel* (1865), 18 R.J.R.Q. 187 (also reported: 1 L.C.L.J. 111) (L. Can. Sup. Ct. in Rev.), online: Canadian Native Law Cases <<http://library2.usask.ca/native/cnlc/vol01/065.html>> in which application to the Commissioner of Indian lands for purchase of Indian lands is mentioned, and *Commissioner of Indian Lands For Lower Canada v. Payant Dit St. Onge, Payant Dit St. Onge* (1856), 8 R.J.R.Q. 29 (Low. Can. Sup. Ct.), online: Canadian Native Law Cases <<http://library2.usask.ca/native/cnlc/vol01/066.html>> in which the Crown argues it holds Indian lands in trust for Indians.

Aboriginal people into their current state of social and economic distress. Now, a seemingly neutral justice system discriminates against current generations of Aboriginal people by applying laws that have an adverse impact on people of lower social-economic status. This is no less racial discrimination; it is merely 'laundered' racial discrimination. It is untenable to say that discrimination which builds upon the effects of racial discrimination is not racial discrimination itself. Past injustices cannot be ignored or built upon.²²⁶

All in all, I think it would be largely accurate to say that we are defined in Canadian law according to who Canadians are and who Indigenous people are not, and with that infusion and celebration of Canadianness integral to Canadian law, we become defined by what we lack (in terms of Canadian morals, values, and understandings). That Canadian lawful behaviour results in Indigenous unlawfulness (to apply a narrow term to what is a larger category of behaviour in Indigenous terms) is an often overlooked understanding. It is of import as well that we do not segregate "justice" from "colonization". In my experience and understanding Canadian justice is rife with colonial infusion; Canadian justice values, representatives, decision-making and systems owe a large debt to language, principles and understandings of subjugation, oppression and colonization. With the intricate tapestry of Canadian justice made up of fibers of idealism, culturally constructed meaning, and the devaluation of differential understandings, it is no wonder that we cannot find shelter in the blanket.²²⁷ Essentialist understandings of behavioural norms, woven with threads of exclusivity, affluence and culturally and racially defined norms and normalcy provide no protection in the guise of systematized justice. Instead, a Canadian hegemonic understanding of justice becomes normative, even though it is full with and predicated on a history which has legally categorized Indigenous stories and concerns since we first met as obsolete.

²²⁶ Manitoba. Public Inquiry Into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba / Public Inquiry into the Administration of Justice and Aboriginal People*; A. C. Hamilton, commissioner, C. M. Sinclair, commissioner (Winnipeg: The Inquiry, 1991), online: Aboriginal Justice Implementation Commission <http://www.ajic.mb.ca/volume1.html> [MAJI].

²²⁷ Examples of the inadequate and inappropriate blanket application of Canadian notions of justice to Indigenous peoples include cases in which violence against Indigenous women is treated as a gender based crime, without reference to the institutionalized and individualized racism implicit in that violence (most notably the Saskatchewan Court of Appeal decision in *R. v. Kummerfield* (1998), 163 Sask. R. 257 and discussed later in this paper) [*Kummerfield*, CA]. Additionally, Canadian notions of gender roles were entrenched in successive *Indian Acts*, notably in regard to identification of "Indians", representative government, and estates and succession (also discussed below).

Far from offering protection, Canadian justice assails us in our homelands (and assaults our land as well) and requires that we defend our Canadian shortcoming with a Canadian explanation.²²⁸ That our offense may be our defense of self, family and home causes, at least, indignation. How dare we say we are above the law? The truth is that we may be in many instances outside of that law. More correctly, Canadian law is not inside us. It is hard to assert the same with fervor when the malevolence of our colonial existence requires colonized response (inertia, action, violence) which may be quite outside of all of our laws due to the ills that colonization constructs and perpetuates. Colonization is not an excuse; it is an actuality which is authentically and certainly a part of our truth, Her Majesty's honour, and Canada's justice. Judge Murray Sinclair wrote of truth in an Indigenous world view:

According to the Aboriginal world view, truth is relative and always incomplete. When taken literally, therefore, the standard courtroom oath – to tell the truth, the whole truth and nothing but the truth – is illogical and meaningless, not only to Aboriginal persons but, from the Aboriginal perspective, all people. The Aboriginal viewpoint would require the individual to speak the truth “as you know it” and not dispute the validity of another viewpoint of the same event or issue. No-one can claim to know the whole truth of any

²²⁸ Examples from Canadian case law that exemplify this are cases requiring Indigenous peoples to legally identify their children as illegitimate in order to make applications for Indian status [see the Quebec Superior Court decision in *Two-Axe v. Iroquois Of Caughnawaga Band Council* (1977), 9 C.N.L.C. 786 (Que. S.C.), online: Canadian Native Law Cases <<http://library2.usask.ca/native/cnlc/vol09/786.html>> and *Re Vandenberg v. Guimond* (1968), 1 D.L.R. (3d) 573 (Man. C.A.), online: Canadian Native Law Cases <<http://library2.usask.ca/native/cnlc/vol09/786.html>> in which Mary Nellie Evelyn Guimond had to argue that she was the mother of illegitimate children in order to gain custody]. Legitimacy and illegitimacy are not Indigenous legal concepts. The Canadian legal concept of “ordinarily resident” has also required Indigenous peoples to identify as reserve residents, when in fact many Indigenous peoples maintain multiple and seasonal residences. For case law on this, see *Attorney-General of Canada et al. v. Canard et al.*, (1975), 52 D.L.R. (3d) 548 (S.C.C.), in which the administration of the estate of Alexander Canard was found to legally be dependent upon his being “ordinarily resident” on reserve, when he took seasonal work on a farm (including the year that he died, off-reserve). The Canadian legal fiction of ordinary residence does not examine the multi-residential, seasonal, and occupational realities of many Indigenous peoples. Further, it does not take into account the impact of colonial force on Indigenous economies and the resultant temporary or permanent diaspora many Indigenous peoples face. In this case, Martland, Ritchie, Pigeon and Beetz, JJ., Judson, J., concurring found that the deceased did “ordinarily reside” on the reserve, yet the fiction is not eliminated, only subverted for the purposes of this case. The duty to consult and accommodate addressed in the Supreme Court of Canada decision in *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 [*Haida*] and a number of post-1982 cases of the court create new Canadian legal fictions, rather than a reliance on the inadequacy of interpreting legislated legal fiction. In the *Haida* case the legal fictionalization of diminished Canadian governmental responsibility arose from the duty of the Crown in “asserted but unproven” Aboriginal rights. Legally requiring meaningful process as a good faith responsibility has embedded within in all sorts of possibility for the legal reductionism of Crown obligations. In terms of ignoring the colonized construction of gendered power bases in Indigenous nations and societies (and the establishment of the Canadian legal fictionalization of gender equality in those nations and societies), see the decision of the Supreme Court of Canada in *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627.

situation; every witness or believer will have perceived an event or understood a situation differently.²²⁹

How we locate truth and define truth is one example of the cultural divide separating theoretical justice from actual justice. How can imperial notions of equity and fairness, grounded as they are in a history of trespass, wrongful imposition and legalized racism, be asserted with any credence in those rooms built on taken lands? How we measure the impact of colonization on definitions of justice and applications of that justice to unjust circumstance is another. Justice surely must be about ensuring that the philosophical underpinnings of those peoples impacted are included in our application and definition of the principles of justice. In this way, justice can look something like this for many Indigenous peoples:

Justice = Truth + Fairness + Indigenous Philosophies – Colonization

How do we get to that place where we are able to disengage from colonization and attach meaning to our relationship as First and settler peoples? How do we reconcile our truth with a system (and the predicating understanding) of justice which we understand to be an integral part of the colonizing and racializing system which perpetuates *in*justice towards Indigenous peoples? How do we strip the construct (philosophy + system) of justice to arrive at a shared understanding of the nature of just relations between Original and settler peoples? Is there some way to move beyond oppressive relations and establish a reciprocal relationship authenticating and acknowledging the movement beyond an iniquitous and autocratic regime cloaked in the guise of fair relations?

With some trepidation, I approach the renewal of the relationship between Indigenous peoples and the ancestors of settlers. We are on entirely different pages in entirely different books and the truth of it is that we do not understand each other's truths. That which is unlike, without understanding, is unlikely to be reconciled. Our relationship has been forged without much understanding of the action and values, principles and laws of the other. This can cause

²²⁹Murray Sinclair, "Aboriginal Peoples, Justice and the Law" in *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice*, Richard Gosse, James Youngblood Henderson, and Roger Carter, eds. (Saskatoon: Purich Publishing, 1994) 173 at 180.

legitimate concerns about the intent, veracity, and integrity of decision making. Rightfully, when a nation is defined, oppressed, marginalized and in some ways disempowered by another there are obligations related to rebuilding a reciprocal relationship commensurate with the degree of alienation from self and community caused by the action of the oppressor.

True justice encompasses the concerns and beliefs of those most in need of protection.

True justice embraces the understandings, worldviews and morals of the whole, not just the privileged.

True justice eclipses nationalism, speaks to responsibility, and inherently houses respect.

As peoples who have faced (and some continue to face) displacement from our land, it is difficult to see the insult added to injury when our people are thrown in foreign prisons while breaking laws determined by foreign government on lands that have been taken from us. It is difficult to reconcile our idea of what would be fair with Canada's because there is not only a requirement that we assert our complex understandings of just thought and action, but also that we strip the colonial impact on our notion of the same (to say nothing of latent and festering anger).

Journal

The Relevance of Anger

Sometimes I cry when I talk about in(justice issues. I know, because I live Scott Momaday's understanding of "memories in (our) blood". Often, there is a roiling pain in my stomach when I think of the Canadian in(justice system. I think that part of it is the irony of the nomenclature. Another part is the recognition of the futility of hoping for justice when the colonial deck is quite loaded. It is hard to subtract yourself from the colonized and

institutionalized in justice when you and your relations are impacted by it. My responses are often, I imagine, dismissed as emotional and not intellectual responses. I have come to understand that this pain that I feel in my belly, my chest, my head - which beckons tears of rage and pain, is a completely rational response to the colonial reality. My body quite naturally rejects the implantation of colonial thought. My tears are indicators of the depth of the fissure existing between my mind/body space and those of others differentially situated in the colonial experience. I am no mere observer. I cry for those who are in such turmoil that they cannot afford to insulate themselves from jail. I cry for those whose anger is less diluted than my own and who act rather than feel.

The relevance of anger is that you know it is yours; this you can own. It has life that flourishes when your senses and capabilities feel deadened. I spend entire days defending the encampment from intellectual and colonial predators. I suppose that makes me difficult to some; to others it makes me an impediment to overcome. In that regard, I am the institutional roadblock that slows down the process so that Indigenous understandings and conscientiousness are addressed on at least some level. If I as an Indigenous person who is privileged, on the outskirts of this battle, am moved to cry then imagine the self-preservation required by peoples who do not have the luxury of computer-bow or word arrow. We need to thank those who are suffering for us so we do not have to, I can tell you that.

I do not participate in or perpetuate an understanding of Indigenous peoples as victims, while I do understand that we have been impacted by intended and unintended victimization which can immobilize, agitate and completely antagonize that anger. We have a responsibility for our actions and words. They are self-preservation (whatever that means

when you know that police are driving us to the edge of cities over frozen terrain in the middle of the night, shooting us in the back when we refuse to respond to them, or publicly responding to them when their interest in the disappearance of Indigenous women seems not to be present) and I have come to understand that I have a grey area for word and action.

What cauldron of boiling rage is created when we see the macro intolerance of Canada exhibited in the microcosm of the Canadian in/justice system? It cannot be hidden here, here where most of the faces in many prisons are brown ones. It cannot be hidden here, where intolerance often has a seat right next to racism on the benches.

Why is no one aghast at the number of Indigenous people in jail, who disappear without institutional notice, who suffer at the hands of in/justice officials? Why are we/you/all of us not rioting in the streets when we hear another Indian man has been taken on a "starlight cruise" in Saskatoon, Edmonton, and Winnipeg? Our colonial reality is this: we cannot expect justice in places where we are deemed inhuman. We cannot expect justice in places where decision making is made without a cognizance and live discussion about the impact of colonization on our un/just reactions.

To confinement.

To poverty.

To our understanding of what endangers us.

To our understanding of who is a danger to us.

To lateral, colonial, every imaginable violence.

C. Indigenous Women and Notions of Equality, Fairness and Shared Obligation

Journal

Memories in my blood:

I remember living on moose meat, moshom sending moose meat for the winter when we were broke. I remember a kaleidoscope of hair colours and aunts just a bit older than me. I remember the aunts braiding my hair and two of my mom's sisters whispering they were my mom, but not to tell the other auntie. I remember a room full of big bellied women, smoking and laughing in Cree double meaning (slightly ribald if you wanted it to be, family friendly if you didn't). I remember dipping dried meat in butter. I remember eating Indian popcorn. I remember men yelling "cousin" at my aunts on the street. I remember getting moccasins, custom made, every year and thinking every kid did. I remember becoming aware of alcohol, aggression and sadness (dialysis, failing liver, "the diabetes, she got me"), funerals (which we were invited to) and weddings (which we weren't). I remember my moshom calling me "my girl". Lying in bed with my auntie and being called by my mom's nickname (followed by the noun "bebe"). I remember the first time I realized that other kids did not eat moose or deer, go berry picking, or point with their lips. I remember a teacher talking about alcoholism, and although I didn't know the name, I knew it had a seat at the family table. I remember my White relatives joking, my whole life, that I was found in a berry bush, that some 'real' squaw had left me (making my mom White by inference and me outsider by incident). I remember eating berries as fast as we could pick them, running through the bush and being admonished when we injured a plant. I remember feeling responsible, feeling like I could make adult decisions as a child. I remember random boys on bikes yelling 'squaw' at my

mom, being called a wagon burner, and watching as all of the girls in my classroom sang "Injun, Injun, number 9" to/at/near/around me. I remember being in history class, dreading being asked the "Indian" question. Being subjected to lateral violence by my cousins and fellow Indigenous peer group (not Indian enough) and yelled at in an English class because I was adamant that the principles being taught were racist understandings of Indians (too Indian). I remember hot days in the sun, my mom braiding my hair, turning berry brown in summer, loving my skin, wondering why my brother was blonde, and drinking juice from mason jars. Don Williams, Patsy Oline and the Carter family as a soundtrack to my youth. Being told my uncle had been killed by a logging truck on a northern road. Then another. Orange shag carpet, one calendar on the wall ("take it, take it") in my moshom's last home before he died. Singing at his funeral. Brown coffee coloured beige and ivory women crying and laughing at the funeral (Auntie Blanche saying, "Why do we always die?"). Aunties and uncles coming to live with us when they got in trouble at home. Warm kitchens with bellied women sitting and talking. Grade school teacher teaching about skin pigmentation, looking at each of us for freckles and pronouncing to me in front of my classmates, "You're too dark". Seeing a poor Indian girl wearing a poncho, biking by me on a ratty bike, looking down and realizing I am wearing the same outfit and riding the same bike. Being told "You are not like them (I suppose, them being my family and relations). Looking through new readers for a brown face, finding none, colouring them myself. Classmates expressing surprise when I score off the charts in aptitude tests. Being told I lapse into a Cree accent when I am tired. Only going to school when I wanted to (55 absentee days one year).

I don't remember being thrown by my grandma to my auntie when she refused her last beating.

Women in our nations have equal worth, equal respect and equal responsibility when a family (or a community) is living in balance.²³⁰ The economic contribution of women to our nations is well known, but it should be understood that work could not be separated from family, family from language, language from ceremony. The interrelatedness of person to task is directly tied to the notion of responsibility for people who perform the task. One author has written of this:

Let me say that in my culture the work of women was generally respected and honoured, for the men knew very well that they could not live without them. The people of the past thought it a great honour that the women should bear and rear the children, ensuring that there would be people in the future. Equally honourable was the women's work of creating the lodges that made the homes, taking them up and down when camp moved, heating them, and providing the bedding and clothing for the household members. In the social life of my grandmothers, a household was judged not only by the bravery and generosity of the man, but also by the kindness and work habits of the woman.²³¹

Our oral histories include rich tales of women's participation in all aspects of Indigenous success and challenges. This did not change overnight upon the coming of settlers to our territories. Men and women participated in economic and relationship unions, sometimes beneficial and sometimes detrimental. We were not just wives and cooks, while those aspects of our existences are the ones which are well documented. We facilitated economic unions and exchange. We

²³⁰ The effect of colonizers on this balance is well documented. For additional sources on the impact of colonization on Indigenous women, see: Larissa Behrendt, "Law Stories and Life Stories: Aboriginal Women, the Law and Australian Society" (2005) 20:47 Aust. Fem. Stud. 245; Janice Acoose, *Iskwewak Kah'KiYaw Ni Wahkomakanak: Neither Indian Princesses nor Easy Squaws* (Toronto: Women's Press, 1995); Paula Gunn Allen, *The Scared Hoop: Recovering the Feminine in American Indian Tradition* (Boston: Beacon Press, 1983); Sarah Carter, *Capturing Women: The Manipulation of Cultural Imagery in Canada's Prairie West* (Montreal: McGill-Queen's University Press, 1997); Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998); and Mary Ellen Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L., 174-192.

²³¹ Beverly Hungry Wolf, *The Ways of My Grandmothers* (New York: Quill, 1982) at 110. For additional sources on women's rights and obligations in an Indigenous context, see: K. Ohmagari and F. Berkes, "Transmission of Indigenous Knowledge and Bush Skills Among the Western James Bay Cree Women of Subarctic Canada" (1997) 25:2 J. Hum. Eco. 197, online: Springer Link Homepage <<http://www.springerlink.com/content/h548kv50g2813574/?p=458d4b9f2d2d497cab07003bdd21dd95&pi=1>>; R.A. Hernández Castillo, "National Law and Indigenous Customary Law: The struggle for justice of indigenous women in Chiapas, Mexico" in M. Molyneux and S. Razavi, eds., *Gender, Justice Development and Rights* (Oxford: Oxford University Press, 2002) 384, online: Google Scholar <<http://scholar.google.com/scholar?num=100&hl=en&lr=&q=cache:KxbYUc9LZTgJ:www.utexas.edu/law/academics/centers/humanrights/adjudicating/papers/NationalLawandIndigenousCustomary.doc+indigenous+women+traditions>>.

hunted, fished, trapped and traded furs for money or goods.²³² With more frequency, we provided essential economic services in the provisioning of clothing, preparation of winter stores and foods,²³³ housing,²³⁴ and tasks as diverse as digging for roots with our men²³⁵ and chopping fence posts.²³⁶

It is important to note that all of our work was part of a functional and highly specialized interdependency with our men, our families and our nations. Our nations work when we take responsibility for our obligations and contribute meaningfully to the whole. Our interdependence insures our survival; our survival is threatened when we operate alone or are unable to take responsibility for our obligation (fulfill our duties). This sharing of responsibility and obligation ensured that all people's task were equally valued. One author has written of this: "Male and females equally shared domestic as well as economic duties."²³⁷

The work that women did/do was inseparable from who they were/are as the work was a contribution to the community as a whole. Women's contribution was closely related to the obligation to insure the good health of women. You could not separate who you were from the responsibilities you had. Indigenous women are a fundamental part of the strength of Indigenous nations. With one portion of the circle of life so particularly vulnerable to damage and devastation right now, the obligation to care for the rejuvenation of women's roles is not one

²³² Glecia Bear in Freda Ahenakew and H.C. Wolfart, *KOHKOMINAWAK OTACIMOWINIWAWA Our Grandmothers' Lives as Told in Their Own Words* (Saskatoon: Fifth House Publishers, 1992) at 207 [KOHKOMINAWAK]. For additional readings related to Indigenous women's participation in hunting, fishing and gathering, see: Carolyn F. Butler and Charles R. Menzies, "Out of the Woods: Tsimshian Women and Forestry Work" (2000) XXI: 2 *Anthropology of Work Rev.* 12-17, online: Ecoknow Homepage <http://www.ecoknow.ca/articles/awr_01.pdf>. At page 2, the authors write:

Tsimshian women have perhaps been less prevalent participants in the forest industry than their husbands, fathers and brothers; however, they have been involved in forestry in various ways since contact.

See also B.D. Cummins, F. Berkes, P.J. George, R.J. Preston, A. Hughes, and J. Turner, "Wildlife Harvesting and Sustainable Regional Native Economy in the Hudson and James Bay Lowland, Ontario" (1994) 47:4 *Arctic* at 350-360. The authors note in this article at 353 that there is "possible under-reporting" of Indigenous women's and children's work.

²³³ Janet Feitz in *KOHKOMINAWAK*, *supra* note 232 at 93. See additionally, for a discussion of Indigenous women's roles in the fur trade, Sylvia Van Kirk, *Many Tender Ties: Women in Fur-Trade Society, 1670-1870* (Winnipeg: Watson and Dwyer, 1980).

²³⁴ Glecia Bear, *KOHKOMINAWAK*, *ibid.* at 69.

²³⁵ *Ibid.* at 219.

²³⁶ Rosa Longneck, *ibid.* at 255.

²³⁷ Irina Bulmer, *Native Women and Equality Before the Courts* (Ottawa: National Association of Women and the Law, 1993) 2.

belonging solely to women. Like the rings of a tree²³⁸ disease in one ring will infect all of the others.²³⁹ This responsibility for healthy nations extends to all Indigenous citizens. Elder Rose Auger said of this:

Indian people must wake up! They are asleep! . . . Part of waking up means replacing women to their rightful place in society. It's been less than one hundred years that men lost touch with reality. There's no power or medicine that has all the force unless it is balanced. When we still had our culture, we had balance. The women made ceremonies, and she was recognized as being united with the moon, the earth, and all the forces on it. Men have taken her over. Most feel threatened by holy women.²⁴⁰

The obligation to restore health to the nations and the responsibility for the maintenance of healthy nations is dependent upon the balance between life and supernatural, plant and animal, man and woman. Women's roles and contributions, once disrupted, disrupt the entire balance and health and healthy communities cannot be achieved or maintained.

Women's responsibilities were not often individualized and had large impact on family and community life as a whole. A set of societal obligations and responsibilities informed individual women about their participation in the collective. These categories were often delineated (but not always) on gender lines.²⁴¹ Osennotion and Skonaganleh:rá wrote of these roles:

S. In our community, the woman was defined as nourisher, and the man, protector, and as protector, he had the role of helper. He only reacted: she acted. She was responsible for the establishment of all the norms — whether they were political, economic, social or spiritual....

O. She did not have to compete with her partner in the running of the home and the caring of the family. She had her specific responsibilities to creation which were

²³⁸ Interview with Maria Campbell, Métis Elder and Storyteller, Athabasca University (20 September 2006).

²³⁹ There is a quote often attributed to the Cheyenne nation that says no nation is conquered until the hearts of its women are on the ground. It is those postcard sayings that are frustrating in their representation, but which often have a grain of truth in their stereotype. While I will not comment on the notion of conquering, as it is a fallacy in North America, there is some validity in the centrality of women's roles in the strength and resilience of our nations.

²⁴⁰ Elder Rose Auger in Dianne Meili, *Those Who Know: Profiles of Alberta Native Elders* (Edmonton: NeWest Press, 1991) at 25.

²⁴¹ This should not be confused with gender assigned roles. Women and men are understood to often possess different gifts. Individuals may be more gifted in one area than another, but women's ways of listening, teaching, understanding are known to be different and in some ways more acute than men's in some Indigenous cultures. However, there is also significant gender "border crossing", too. Sarah Carter, in *Aboriginal People and Colonizers of Western Canada to 1900* (Toronto: University of Toronto Press, 2003), wrote of this at 90:

"Among the Blackfoot there was a unique role for some women called the *ninauposkitzipxpe*, or 'manly hearted women.' This was a small group of mature, married women, who possessed traits that were considered masculine – aggression, independence, ambition, confident sexuality, and property ownership."

different, but certainly no less important, than his. In fact, if anything, with the gifts given her, woman was perhaps more important....

S. Woman has had a traditional role as Centre, maintaining the fire — the fire which is at the centre of our beliefs. She is the Keeper of the Culture. She has been able to play that role even in a home divided....She has maintained her role despite intermarriage which caused her to be cut off from her roots, both legislatively and sometimes physically....Her home is divided as a result of....I don't know how many more ways you can divide her house and she'll continue to maintain that fire — but she will!

O. In addition to all the responsibilities already talked about, perhaps the most daunting for woman, is her responsibility for the men — how they conduct themselves, how they behave, how they treat her. She has to remind them of their responsibilities and she has to know when and how to correct them when they stray from those. At the beginning, when the 'others' first came here, we held our rightful positions in our societies, and held the respect due us by the men, because that's the way things were then, when we were following our ways. At that time, the European woman was considered an appendage to her husband, his possession. Contact with that...and the imposition of his ways on our people, resulted in our being assimilated into those ways. We forgot our women's responsibilities and the men forgot theirs.²⁴²

Those responsibilities are weighty ones. Many of the obligations and responsibilities that Indigenous women have are ones which have no translation or comparably situated role in western society; perhaps this is why the roles are noticeably absent in many historical and legal texts. The roles related to government and governance seem particularly difficult for western thinkers to interpret and understand; there is little western written historical record²⁴³ describing the nature and importance of Indigenous women's roles in Indigenous government. We have been fortunate to have those stories recorded in our oral traditions. Rene Jacobs has written of women's role in the Iroquois tradition:

The powerful status of women pervaded Iroquois society. According to the Great Law, Clan Mothers selected and confirmed the Iroquois Sachems and war chiefs. Clan mothers held the hereditary lines of title to the chieftanships...they monitored the Sachem's conduct closely and would warn a Sachem to abide by the Great Law if it appeared he was not proceeding with the welfare of the people in mind. After three warnings by the Clan Mothers who nominated him, a Sachem would be

²⁴² Osennontion and Skonaganleh:rá, "Our World" (1989) 10:2 Can. W. Stud. at 12-14.

²⁴³ One exception appears in the work of Anthropologist Max Gluckman [*Politics, Law and Ritual in Tribal Society* (Aldine Publishing Company: Chicago, 1965)]. Another exception appears in the work of Robert D. Cooter and Wolfgang Fikentscher in "Indian Common Law: The Role of Custom in American Indian Tribal Courts Part II" (1998) 46 Am. J. of Comp. L. at 509, online: University of California, Berkeley <http://works.bepress.com/robert_cooter/2>.

removed...Women had their own separate council and would deliberate an issue first. Upon determination of an issue, a Women's Council would notify the Sachems who would then convene the General Council...Clan Mothers decided whether captives would be adopted or killed....²⁴⁴

Indigenous women's roles are/were central to the Indigenous communities and governments. The line between private and public work, community and home lives was not drawn (and in many cases is still not drawn) in the way that it has been drawn in a western context. Simply stated, government and community could not function without the fulfillment of women's roles and obligations.

The crisis is better understood when you examine what is missing when the women are missing. Women are a central force in the preservation, renewal and passing on of culture. Language, laws and natural understandings about Indigenous life that are not learned on the land are learned, taught and renewed in the home. Women have a responsibility for the recognition, recitation and renewal of relationships. Women have been endowed with the ability to recognize and promote those persons with leadership qualities.²⁴⁵ Women are able to be aware of and sense the nature of a condition, room, gathering, space, character. These keen skills of contemplation and consideration, when properly matured and honed, are a central aspect of Indigenous government and governance. Women identify those who are skilled to lead and provide them with teachings requisite to serving Indigenous citizens. So central are women to relationships, relationship building and the development of good relations between family members, between families, between citizens and nations that Indigenous women are often quite

²⁴⁴ Renee Jacobs "Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers" (1991) 16 Am. Ind. L. Rev. 497 at 502-503.

²⁴⁵ For additional readings on this topic, see: Diane Michelle Prindeville, "Women's Evolving Role in Tribal Politics: Native Women Leaders in 21 Southwestern Indian Nations" (New Brunswick, New Jersey: Centre for American Women and Politics at Rutgers University, 2002), online: Centre for American Women and Politics Homepage <<http://www.cawp.rutgers.edu/Research/Reports/Prindeville2004.pdf>>; Thomas F. Thornton, "From Clan to Kwáanto Corporation: The Continuing Complex Evolution of Tlingit Political Organization" (2002) 17:2 Wicazo Sa Rev. 167, online: Project Muse Homepage <http://0-muse.jhu.edu.aupac.lib.athabascau.ca/journals/wicazo_sa_review/v017/17.2thornton.htmlch>. In this paper, the author wrote (referring to the work of Frederika de Laguna):

Women had a special status in Tlingit politics and were a dynamic force in sociopolitical life. While they typically (excepting the absence of a suitable male heir) did not assume formal offices or titles beyond that of matrilineal "clan mother," women exerted enormous influence in economic, political, and social spheres, and could also become powerful shamans within the spiritual realm (de Laguna 1983, 81-82). They regulated and managed household production and finances and also intra- and interethnic trade.

aptly called the backbones of our nations. Women are elemental and integral to our nations; Elder Campbell has told me there is a female element in the moon, in fire and in water. Women's spiritual roles ensure that we occupy one half of our lodges, one half of our ceremonies, and one half of the revered positions in Indigenous societies. So central is our being to the balance in Indigenous nations that our existence and survival as peoples are tied to the preservation and celebration of Indigenous nationhood. We serve as protectors: of fire, of life, of children and of our men. Our strength is celebrated in many of our sacred places and the nature of our existence is exemplified in the places we worship and celebrate.²⁴⁶

As Indigenous women we have our own stories, ceremonies, societies and medicines.²⁴⁷ We have our own meaningful and contributory/guiding economies, traditions and histories. Our traditions and customs are an integral part of the Indigenous ethos; our societies do not function without our presence, our contribution, our half of the circle contributing to the maintenance of societal equilibrium and balance.

We live and embody the strength housed in the feminine; sublime and enduring we house the durability of willows in our selves and in our teachings. Strong Indigenous women are an extraordinarily vital part of the natural ordering and laws. Our abilities and capacities are limitless, our exercise of the same determined by the natural laws governing our conduct. We have particular obligations, particular laws, that we must respect and abide to in order to keep ourselves, our families and our nations in balance. When the women are unable to maintain balance, families and nations are similarly off balance (traumatized, unstable, insecure, volatile, inequitable, unfair).

²⁴⁶ My understanding related to women's teachings, understandings, roles and responsibilities comes from discussion with women, reading women's writings and listening to women's stories. Misinterpretation of those teachings is entirely my responsibility.

²⁴⁷ Alpha Lafond refers to grandmother's medicine and her grandmother telling her sacred stories in *KOHKOMINAWAK*, *supra* note 232 at 241.

These are the truths:

Without us, there are no nations.

Without us, there can be no justice.

When women are not in balance, then our nations falter.

Canada's injustice has been a key factor in deliberately and indiscriminately disrupting the balance that exists between Indigenous women and men.

When women are devalued, there is little value in Indigenous citizenship; when we are killed, the nation facing amputation cannot live without its women.

Our women are dying in astounding numbers. We are the female face of Canadian justicide.

Our histories are not told. The number of Indigenous women who have died in this colonial experiment is incalculable. To say it is femicide may be difficult to quantify. That we understand this as our particular truth is relevant to the understanding. We were half of our nations, equal. Settlers came. We started dying. We continue to die violent deaths. We disappear at alarming rates. Now we die at the hands of non-Indigenous men, Indigenous men and Indigenous women. Quick learners, I guess.

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When we were babies we were wrapped in moss; soft and absorbent, children found protection in the fertile green moss. When girls became women, we were to be surrounded in moss, the lush earthy texture/essence holding our fundamental nature. When we were women we cleaned windows, washed floors with moss pulled from the earth. The smell of fresh life, cleanliness, permeating the air like a memory. When we were ill, medicine women would wrap some wounds in moss, life taking sickness restoring health. We need moss now more than ever.

All of this, this hate, this pain, this degradation, this disavowal, this disregard, this decimation, defies logic. There is a sense of disposability in many of these cases: we are disposable (garbage, trash, scrap, waste) perceived as trash (dispensable, expendable, unnecessary). Worse than that, there is a readily apparent notion that we are consumable. As an inhumane other. As a flesh commodity. As a sexual product. In every way we can imagine and in ways, I think, that we have not yet been able to imagine,²⁴⁸ our roles have been devalued and our obligations ignored. What effect this has on the rights dialogue has yet to be seen (and heard).

This is so diametrically opposed to our traditional roles in Indigenous nations that it is *stunning* (make unconscious, overwhelming, rendering speechless). When I wonder why it is that no one is taking action,²⁴⁹ why there is such an indolence with regard to the vast number of Indigenous women who are murdered, missing and assaulted in Canada, I try to remember that for many of us who are most impacted by the violence, the impact *stuns* and silences us. The ripple effect begins with the women who are murdered, abducted, assaulted and flows to the families and nations. Those of us who see our reflection in their experience and pain feel the swell. All of us are stunned by the strength of the current.

It is stunning in a way which may surprise. With the flow of pain comes the ebb of understanding: this could be any one of us. No bad choice or one bad choice and we are in a situation which could have the same result. The ebb of understanding, once it reaches a trickle is this: this is not just one woman, 500 women,²⁵⁰ all of our women, it is an epidemic. An

²⁴⁸ I think the degree of colonial damage to our nations and peoples cannot be assessed in any post-traumatic stress analysis as many of us are still living traumatized existences. What capacity exists to examine personal response to colonial violence is limited by all peoples' ability to understand the ways by which colonization traumatizes individuals while the trauma persists. What capacity exists to examine national and community response to colonial violence is even more limited as we are still living it; it is replicating and has a multiplier effect in the every day. Colonial violence has been renamed, subsumed in the aggregate that is continuing intrusion into Indigenous (physical and personal) territories.

²⁴⁹ I respectfully acknowledge the efforts of Indigenous women's organizations, including the Native Women's Association of Canada's Sisters in Spirit activism, the Institute for the Advancement of Aboriginal Women's Rights Path, The National Aboriginal Health Organization's Aboriginal Women's Health and Healing Research Group, among others.

²⁵⁰ The Native Women's Association of Canada reported the number in Beverly Jacobs, *Submission to the Special Rapporteur Investigating the Violations of Indigenous Human Rights* (Ottawa: Native Women's Association of Canada, 2002). The figure has been repeated in the media, attributed largely to Aboriginal women's groups. However, that number is a difficult one to accept, given the implication that "murdered and missing" has a specific interpretative context which does not generally include the deaths and anonymous disappearances of Indigenous women related to colonized poverty and violence and other responses to colonization.

epidemic of hatred and disregard for Indigenous women because we are Indigenous and because we are women. It is endemic. It is prevalent. It has become common / sense. Our common sense as constructed by our experience and understanding of rational and reasonable responses to the violence and racehatred that is thickly layered in our experience of Indigenous womanhood in Canada is such that it is reasonable to feel fear, dread, and anger.

D. Canadian Justice and Indigenous Peoples

Both the fact that Aboriginal governments have been interfered with and the specific manner that this interference was gender-based is important to understanding the justice obstacles Aboriginal people now face. Logically then, it can be easily surmised that as women were and *are* central to the structure of Aboriginal governments, women also played a specific role and possessed authority in matters of (criminal) justice. I have heard from Aboriginal people all over the continent: “Grandmother made the rules and Grandfather enforced them.” If this is the case, then Aboriginal women had (and still have) a fundamental responsibility with and to justice relations in our communities.²⁵¹

At one time, men would walk away from a game having forfeited their horses and valuables, perhaps all of their possessions. No doubt some would have bet their homes as well, but the tipis traditionally, and perhaps wisely, belonged to the women.²⁵²

Our common sense is constructed from an historic and present understanding of Canadian disregard and disrespect of Indigenous womanhood. I would like to be able to assert that this is a construct of shared societal indifference, but there is something more vicious in this construction and understanding of Indigenous womanhood and the violence (increasingly more commensurate and associative with this) perpetuated on Indigenous women. There is contempt and disdain, not mere indifference, in the way we are perceived, interpreted and constructed. This is true as perceived by Canadian law, Canadians, and it must be said – increasingly by our own people.²⁵³ This disregard and lack of respect has its origin in a male-dominated agenda of colonization, a Europhallo-centric construction of legislation pertaining to Indigenous citizenship and

²⁵¹ Patricia Monture-Angus, “Women and Risk, Aboriginal Women, Colonialism” (1999) 19:1-2 *Can. Wom. Stud.* 25.

²⁵² William Goulding, *Just Another Indian: A Serial Killer and Canada's Indifference* (Calgary: Fifth House, 2001) at 127.

²⁵³ Violence begets violence and I would note without discussion that Indigenous peoples are harming our own citizens in increasing numbers in crimes of violence related to interpersonal disputes. The seeds of colonized discontent often watered by context and frustration.

womanhood, and in a European notion of the capacity and rightfulness of conquering/subjugation. Like a stain, its origin may be in one place, but this stain has spread. To those who benefit from colonization. White government. White men. White women. Affluent amongst other groups. Dr. Larissa Behrendt, Kamilaroi / Eualeyai, writes that there is an assumption of conquest related to Indigenous women:

It is the legacy of colonialism, and the result of any war, that the women of the conquered are assumed to become the property of the conquering. Just as the invading colonists saw Aboriginal land as theirs for the taking, so too they assumed they could do as they wished with Aboriginal women without fear of interference from British law. As a result of this colonizing, conquering mentality, and given the gender imbalance in the colonies, the sexual abuse of Aboriginal women on the frontier and in the colony was prevalent.²⁵⁴

1) Cause

Subjectivity is the constitution of the self by the other. The idealized image or subject is the subject of law. Socialization into the dominant ideology is explained by unconscious processes in the subject. The rational, autonomous, choosing self is supposed by law to be decentred and split. For Aboriginal people in daily life, as victims of violence or as its instigators, as subjects of law, extremes of otherness profoundly condition subjectivity.²⁵⁵

Much has been written about the historic devaluation and diminishment of Indigenous women's contribution to and participation in Indigenous societies.²⁵⁶ As a whole, I understand that

²⁵⁴ Larissa Behrendt, "Consent in a (Neo) Colonial Society: Aboriginal Women as Sexual and Legal 'Other'" in (2000) 15:33 *Aust. Fem. Stud.* at 353.

²⁵⁵ Anne McGillivray and Brenda Comaskey, *Black Eyes All of The Time: Intimate Violence, Aboriginal Women, and the Justice System* (Toronto: University of Toronto Press, 1999) at 25.

²⁵⁶ Fran Sugar, "Entrenched Social Catastrophe and Native Women" (1989) 10:2-3 *Can. W. Stud.* 87; Kathleen Jamieson, *Indian Women and the Law: Citizens Minus* (Ottawa: Supply and Services, 1978); Martha Montour, "Iroquois Women's Rights with Respect to Matrimonial Property on Indian Reserves" (1987) 4 *C.N.L.R.* 1; Robert A. Williams, "Gendered Checks and Balances: Understanding the Legacy of White Patriarchy in an American Indian Cultural Context" (1990) 4 *Georgia L. Rev.* 1019; Mary Ellen Turpel "Home/Land" in (1991) 18 *Can. J. Fam. L.* 17; Fran Sugar and Lana Fox, "Nistum Peyako Seht'wawin Iskwewak: Breaking Chains" (1991) 3 *C.J.W.L.* 346; Douglas Sanders, "Indian Women: A Brief History of Their Roles and Rights" (1975) 21 *McGill L. J.* 656; Jo-anne Fiske, "Political Status of Native Indian Women: Contradictory Implications of Canadian State Policy" (1995) 19:2 *Am. Ind. Culture and Res. J.* 1; Jo-anne Fiske, Melanie and Evelyn George, "First Nations Women and Governance: A Study of Custom and Innovation Among Lake Babine Nations Women" in *Status of Women Canada*, ed., *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 2001) 55; Martha Harroun Foster, "Of Baggage and Bondage: Gender and Status among Hidatsa and Crow Women" (1993) 17:2 *Am. Ind. Culture and Res. J.* 121; Barbara M. Freeman, "Same/Difference: The Media, Equal Rights, and Aboriginal Women in Canada, 1968" (1998) 18:1 *Can. J. of Nat. Stud.* 87; John Gartrell, *The Social Impact of Band Membership: Bill C-31 in Alberta* (Edmonton, Alberta: Native Council of Canada, 1993); L. Gehl, "The Queen and I: Discrimination Against Women in the Indian Act Continues" (1998) 20:2 *Can. W. Stud.* 64; Christine M. Goodwin, "Human Rights, Women's Rights, Aboriginal Rights: Indivisible and Guaranteed?" (2002) 8:2 *Centerpiece*, online: [Centerpiece Homepage](#) <

Indigenous citizenship and autonomy and control over the same are philosophically, legally, intellectually, empirically and culturally different than Canada's understanding of Indian membership. While the meanings and understandings are completely different, the impact of legislatively providing for a Canada-defined population of Indigenous people has been consistent with the Canadian legislative intent – to entrench male dominated European understandings of Indigeneity in a legislative regime. The impact has been remarkably damaging and the resultant legal diminishment of Indigenous women's autonomy and Canadian legal stature has, to some degree had a commensurate impact on some Indigenous understandings related to Indigenous women's cultural and societal roles, and social, economic and political worth within Indigenous nations.

Phallo-locating Indigenous membership and status has had an incalculable detrimental impact on Indigenous women. Quantifying the same is next to impossible, but it can be compared to pulling the soft and resilient tissue from a willow branch. It might survive in fact might even thrive in certain contexts. However without it, there is no way in which it could have the self-sufficiency, strength or integrity that it was meant to have in accordance with natural law.

The construction of the notion of Indigenous dependency, and the correlate dependency of women upon men for existence, is part of the failing colonial experiment which we are all experiencing. It has been a hard fought battle with no winner. With a colonial experience that includes roles as formidable business women, romantic partners, sexual partners and wives, we have been defined externally according to the worth we were perceived to have in the new colonial world. Not enough has been written about our continuing roles as economic, political and cultural preservationists and innovators.²⁵⁷ Detailing our success as negotiators, chiefs,

<http://www.aclrc.com/Newsletter/centrepiece8no2.html>>; Evelyn J. Peters, "Subversive Spaces: First Nations Women and the City" (1998) 16 *Env. and Plan. D: Soc. and Space* 665; Lesley Erickson, "Constructed and Contested Truths: Aboriginal Suicide, Law, and Colonialism in the Canadian West(s), 1823–1927" (2005) 86:4 *Can. Hist. Rev.* 595-618, online: Muse Homepage <http://0-muse.jhu.edu.aupac.lib.athabascau.ca/journals/canadian_historical_review/v086/86.4erickson.html>; and Dawn Marie Ralstin-Lewis, "The Continuing Struggle against Genocide: Indigenous Women's Reproductive Rights" (2005) 20:1 *Wicazo Sa Rev.* 71, online: Muse Homepage <http://0-muse.jhu.edu.aupac.lib.athabascau.ca/journals/wicazo_sa_review/v020/20.1ralstin-lewis.html>.

²⁵⁷ Some writings in this area of interest are: Nancy Janovicek, "'Assisting our own': Urban Migration, Self-Governance, and Native Women's Organizing in Thunder Bay, Ontario, 1972-1989" (2003) 27:3 *The Am. Ind.*

advisors and communications specialists in the area of culture and language would enable us to re-configure the construction of Indigenous women's community contribution and national identities. Our roles in our histories and Canada's histories have yet to be shared with a wider audience and we need to address the barriers constructed by the lack of information and misinformation about Indigenous women since contact. We also have a wealth of narratives that can aid us in this effort.²⁵⁸ The written story of colonization is clearly established for easy viewing through a patriarchal lens with Indigenous women principally being viewed as facilitators of convenience (in trade, the development of relationships, as sexualized objects). With such a marginalized interpretation of Indigenous womanhood, it is difficult to discern how we were immediately perceived as ancillary actors, inferior on three levels: to White men, the White women and to Indigenous men. As prescribed inferiors, we found our role as centre to some circles similarly marginalized. In a Canadian context, we were legislatively ascribed legal insignificance. While this may not have impacted our vital roles in our nations, over time the diminishment had to send a message to Canadians about Indigenous women's insignificance. To examine the construction of this message, one has only to look to legislation and policy related to

Quart. 548; Lisa J. Udel, "Revision and Resistance: The Politics of Native Women's Motherwork" (2001) 22:2 *Frontiers: Am. J. of Wom. Stud.* 43; Tina Minor, "Political Participation of Inuit Women in the Government of Nunavut" (2002) 17:1 *Wicazo Sa Rev.* 65; Lucy E. Murphy, "Public Mothers: Native American and Metis Women as Creole Mediators in the Nineteenth-Century Midwest" (2003) 14:4 *J. Wom. Hist.* 142; Heather Howard-Bobiwash, "Women's Class Strategies as Activism in Native Community Building in Toronto, 1950-1975" (2003) 27:3-4 *The Am. Ind. Quart.* 566; S. Paddle, "Private Lives and Public Performances: Aboriginal Women in a Settler Society, Ontario, Canada, 1920s-1960s" (2003) 4:3 *J. of Colonialism and Colonial Hist.*, online: [Muse Homepage <http://muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v004/4.3morgan.html>](http://muse.jhu.edu/journals/journal_of_colonialism_and_colonial_history/v004/4.3morgan.html); Jessica Ball and Maureen Simpkins, "The Community within the Child: Integration of Indigenous Knowledge into First Nations Childcare Process and Practice" (2004) 28:3-4 *The Am. Ind. Quart.* 480; M. Annette Jaimes Guerrero, "'Patriarchal Colonialism' and Indigenism: Implications for Native Feminist Spirituality and Native Womanism" (2003) 18:2 *Hypatia* 58; and Wanda Wuttunee, *Living Rhythms: Lessons in Aboriginal Resilience and Vision* (Montreal and Kingston: McGill-Queen's University Press, 2004).

²⁵⁸ Some narratives include: Agnes Jack, *Behind Closed Doors: Stories from the Kamloops Indian Residential School* (Toronto: University of Toronto Press, 2002); Maria Campbell, *Halfbreed* (Toronto: McClelland & Stewart, 1973); Connie Fife, ed., *The Colour of Resistance: A Contemporary Collection of Writing by Aboriginal Women* (Toronto: Sister Vision, 1993); Agnes Grant, - *Our Bit of Truth: An Anthology of Canadian Native Literature* (Winnipeg: Pemmican Publications, 1990); Rayna Green, ed., *That's What She Said: Contemporary Poetry and Fiction by Native American Women* (Bloomington: Indiana University Press, 1984); Heather Hodgson, ed. *Seventh Generation: Contemporary Native Writing* (Penticton, B.C.: Theytus Books, 1989); Linda Jaine and Drew Taylor, *Voices: Being Native in Canada* (Saskatoon: University of Saskatchewan, Extension Division, 1992); Thomas King, *All My Relations: An Anthology of Contemporary Canadian Native Fiction* (Norman: University of Oklahoma Press, 1992); Daniel David Moses and Terry Goldie, eds., *An Anthology of Canadian Native Literature in English* (Toronto: Oxford University Press, 1992); Jeanne Perreault and Sylvia Vance, eds., *Writing the Circle: Native Women of Western Canada, An Anthology* (Norman: University of Oklahoma Press, 1993); Penny Petrone, ed., *First People, First Voices* (Toronto: University of Toronto Press, 1983); and Beth Brant, ed., *A Gathering of Spirit: A Collection of Native American Indian Women* (Toronto: Women's Press, 1988).

identification of legally acknowledged racial categorization, the disruption of relationships and the codification of rights related to Indianness.

If legislation reveals the mores of a society, then Canada has a detailed history of its diminishment of Indigenous women through legalized disenfranchisement.

a. Constructing the Indian: The Facilitation of Indigenous Women's Legalized Disappearance Using Canadian Law

The perpetuation of the divisive nature of naming / owning the Indian can be seen in the intellectualization of the Indian as owned object in the Canadian legal and historical terrains. The legal entrenchment and sanctification of these false ideas of Indian identity²⁵⁹ contributes to the devaluation of Indigenous humanity.

The construction of a legal Indian identity within the Canadian law-making regime (and its concurrent application by successive Canadian governmental regimes) has had several deleterious effects on Indigenous peoples and nations. The colonial regime which has enabled successive Canadian governments to define, assess and make determinations related to the legal status of Indians has not only effected policy and legislation which purports to define who is Indian, but has also served as a legitimization of the legal and social stigmatization of those who correspond with, resist and come outside of the identificational regime. In this sense, the historic and contemporary *Indian Acts* and the colonial administration which attempts to give effect to it are truly tools of the oppressor.²⁶⁰ The regime trivializes a fundamental right of all nations to

²⁵⁹ Writings and articles examining the construction of Canadian legal "Indian" identity include: Joyce Green, "Sex Equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act" (1985) 1:2 Nat. St. Rev. 2; Joyce Green, "Constitutionalizing the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4:4 Const. For. 110; Inuit Women's Association of Canada, *Arnait: The Views of Inuit Women on Contemporary Issues* (Ottawa: Pauktuutit, 1991); Bonita Lawrence, "Gender, Race, and the Regulation of Native Identity in Canada and the United States: An Overview" (2003) 18:2 Hypatia 3; Robin Brownlie, "'A better citizen than lots of white men': First Nations Enfranchisement - An Ontario Case Study, 1918-1940" (2006) 87:1 The Can. Hist. Rev. 29; Mark Francis, "The 'Civilizing' of Indigenous People in Nineteenth-Century Canada" (1998) 9:1 J. of World Hist. 51; Bonita Lawrence, *Real Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004).

²⁶⁰ Legally enacting and validating oppression serves to both sanctify and exonerate legislative oppression. It also serves to entrench oppression as natural and not just to exonerate the government of Canada for its enactments, but allows it to set a standard of "acceptable" oppression.

determine the nature, content and criteria for citizenship by turning “Indians” into legal objects. It also has created a political, legal and emotional fissure: the division of propertied (by endowed legal status) membership from disentitled (from status) membership places pressure on citizens to accord with, respond to, and define self by accordance with a false set of imposed legal principles which can devalue the worth of actual citizenship and national identification.

The stratification of power to name and own was and is entrenched in the legislative history related to the *Indian Act*. For example, the 1876 *Indian Act*²⁶¹ defined and objectified Indians:

3. The term “Indian” means

First. Any male person of Indian blood reputed to belong to a particular band;

Secondly. Any child of such person;

Thirdly. Any woman who is or was lawfully married to such person---

Later, the requirement of Indian blood was replaced by a notion of a male line of descent as criteria for registration as an Indian.²⁶² The impact of this legislation was almost immediate.

One author wrote of this impact:

Traditional lineage systems, many which followed the female line, were unilaterally replaced by patriarchal lineage and Indian women were penalized for marrying outside their tribes....The result was a major disruption of traditional kinship systems, matrilineal descent patterns, and matrilocal post-marital residency patterns. Furthermore, it embodied and imposed the principle that Indian women and their children, like European women and their children, would be subject to their fathers and husbands.²⁶³

European (and now Canadian) men, as namers/owners by Canadian law delegated that power to those whom they had named (Indian men). That power to name subsumed the power to own; Indian men were legally able to name and identify “Indian” women and the property of Canadian Indian legal identity was initially bestowed upon those that Indian men identified as women who were owned (and therefore became “Indian” women). In this sense, the Canadian legal categorization of Indian status became a power and the property of men. Women became the legal property of Indian men by virtue of the legislation.²⁶⁴

²⁶¹ *An Act to amend and consolidate the laws respecting Indians*, S.C. 1876, c. 18, s. 3 [1876 *Indian Act*].

²⁶² *The Indian Act*, S.C. 1951, c. 29, ss. 11(c)-(e) [1951 *Indian Act*].

²⁶³ Ann McGrath and Winona Stevenson, “Gender, Race and Policy: Aboriginal Women and the State in Canada and Australia” (1996) 38 *Labour/Le Travail* 37 at 41.

²⁶⁴ 1951 *Indian Act*, *supra* note 262 at s. 109(1).

Naming enabled intellectual (ostensible) ownership; that which was wild was verbally and legally tamed. Once owned according to European intellectual superiority and notions of ownership, the Indian was more easily identifiable and controllable as an administrative category (not unlike a tag and release program for wildlife). Once we were perceived as owned, then humanity or categorization of the sub-genus of human enabled a separation of Indian from Human. While Indigenous women were not included in this regime, except as appendages to the potential humanity of Indian men, we became a selective subset of Indian (human determined by White men, Indian determined by Indian men). With our humanity in question, it was easier to rationalize our oppression and status as owned beings. Verbal signifiers enabled colonizers to claim epistemological ownership of the notion of the Indian. Codifying who was subject of the laws served as a verbal signifier of who colonizers presumed were subject to the laws. The codification of Indianness was originally conceptualized as an indicator of who could easily be civilized and who could not.²⁶⁵ Notions of supremacy are clearly evident on the historical records which indicate that colonizers believed that eventually every Indian could be civilized; those who could not be, went the logic, would not survive. The reification of the Indian into that which is recognizable and controllable allowed and allows colonizers to legally entrench a false etymology in the legal construction of the Indian. Rather than owning the racialized component of the etymology, the term is reinvented as a necessary construct, one which is required to address the multiple Indigenous nations, the complexity of Indigenous politics, and the requirement that an outside body take responsibility for the same given the infighting and disruption in Indian communities. What the terminological use does not examine is the construction and use of the term in the furtherance of the division and infighting in Indigenous nations.

As well, the legal construction of Indian status as property and the impact that this has on people who have been made or interpreted as propertyless²⁶⁶ peoples is important to identify and

²⁶⁵ Francis, *supra* note 259 at 81 addresses Deputy Superintendent General of Indian Affairs Hayter Reed's belief that civilized (educated) Indians would be better prepared for participation in Euro-Canadian civilization. The lack of knowledge about Indigenous civilizations quite often led to a disregard or devaluation of the same.

²⁶⁶ Indeed, the construction of Indigenous citizens and nations as propertyless peoples is doubly confounding. Application of limited or finite terminology such as title, self-government, and members (rather than ownership, sovereignty, and citizens) constructs a limited category of qualified rights which are not the same as *true* citizenship

understand. The construction of a category of Indian status was aimed at both encapsulating (capturing) the Indian and at controlling Indian property. As property ourselves, Indians could not easily hold property. It was, in essence, domination through definition. If Indian status could be perceived as beneficial to the Indians, then Indian status became a sort of property. In theory, the externalization of Indian status placed wealth external to Indigenous nations. As external, for Indians to acquire the wealth (by application and/or connection with the act), the value of Indian status (a discretionary value, over time) became entrenched in the Canadian consciousness. Applying for status became an indicator of importance; not just anyone can have this. Certainly, the diminishment of women as legally constructed was fully informed by the legislation. As well, having to apply for status intrinsically decreases the import of status as a Government of Canada's obligation to provide and re-defines it as a discretionary category of Canada's to award. Indian status as externally defined, understood and interpreted means that Indian status attains standing as an indicator of acquired and not intrinsic wealth.

As Indigenous peoples whose propertylessness is legally constructed and whose land rights were often impacted if not defined by the same statute which defines us as Indians, it is a particularly questionable tactic to require us to apply to be defined, when being defined includes benefits such as health care, legal protection, tax exemption (among others) - which were already ours through treaty making processes and Aboriginal rights. The *Indian Act* acknowledges that which we know to be true - we are not the same as Canadians and we have rights which reflect our standing as Indigenous peoples. Requiring us to correspond with a false notion of identity and tying a slipknot between that identity and those rights which are mentioned in the legislation perpetuates a false understanding of the rights themselves. By subscribing to the *Act*, we are not agreeing that these rights are an act of benevolence or of charity; it may well be the economic reality that subscribing to the *Act* was reaching out to ensure that our rights were acknowledged,

rights and which I propose is predicated on notions of Indigenous non-humanity. In this sense, citizenship is imbued with notions of property – in land, in the rights of citizenship, in control over destiny. The English language is encoded with western notions of dominance and control over that which is perceived as inanimate (lands). It also presumes supremacy of interest of some peoples over others. The legal disempowerment presumes Indigenous non-property status, loosely interpreting Indigenous principles of shared obligation and responsibility as an incapacity to own predicated on falsely understood Indigenous laws and principles (i.e. egalitarianism in relationship, communalism in property). Inaccurately interpreted notions of Indigenous laws and principles result in a construction of Indigenous propertylessness as a rationale for the additional refusal to acknowledge rights to land, the construction of a category of near-citizens (members), and additionally assures that propertylessness as a western standard is entrenched in legal regimes and principles.

that we had access to necessities, or that we wanted - at least - the protection which the *Act* offers and which Canada makes us fight for otherwise. There is property and benefit in that, and grabbing for it may not at all mean accordance with the *Act*. There is duress in place here that few speak of. Status provides acknowledgment, access and benefit. In that, it is property.

In the context of critical construction of gendered and legal benefits, male-dominated Western beliefs and attitudes related to the status of women were legislatively applied to Indigenous women. The perception of women as property (and propertyless) was legally forced upon Indigenous nations and citizens through an exhaustive proscribed legislative regime which entrenched notions of women as owned, women as inferior, and women as unequal. To be certain, Indigenous women did not identify with the intent or impact of these Canadian laws. Paper and proscription did not impact our understanding of our central roles in our nations. We are half of the circle of life and a foreign prohibitive regime which ostensibly attempted to effect male based gender supremacy was of little internal intellectual or philosophical effect. However, as the legislative pressure and the correlated western male perception of women's inferiority were not only entrenched and advocated but presumed to be true, there has been continual tension on the relations impacted by the Canadian legislation. Notions of women's autonomy and centrality to our nations, long held and understood in Indigenous nations, were in direct conflict with the legislation.

Indian Act provisions related to Canadian legal identification of who was and was not Indian amount to a legal sanctification of false identificational standards.²⁶⁷ The legal sanctification of false identificational standards has had a ripple effect of absurd proportions in Indigenous nations. Falsely assuming the power to name and identify "The Indian" has been administratively and legally beneficial for the Canadian governmental/legal regimes. In terms of racializing Indigenous peoples, incorporating individualistic notions of Indianness has had a number of contagion effect within the Canadian governmental superstructure. Administratively, identifying Indians based upon a quantifiable and measurable understanding of Indianness allowed Canadians to define, encapsulate, categorize and intellectually own Indian people. That which was before nebulous, foreign, and intellectually difficult to understand (being defined

²⁶⁷ 1876 *Indian Act*, *supra* note 261.

by Indigenous laws, philosophies and understandings) was more easily understandable once named and quantified in terminology and entrenched in legal understandings held by the colonizer. Further, naming and according status to those named according to colonizer principles, tamed and claimed the before untamed and unclaimed Indians.

Confusing status with identification and nationhood, the Canadian legislative regime begins to construct the character of the individual legal Indian, and leaves the notion of the Indigenous citizen untouched. However, even given that the actual identity and character of Indigenous citizenship is not addressed does not diminish the fact that Canada has focused the legal status definition in such a way as to distinguish between 'rightful' and other Indians (Métis peoples, non-treaty Indians and non-status Indians). In doing so, besides ignoring the impact of actualities of Indigenous existence, Canada has constructed Indian status as property and has created an economic fissure between those identified as status holders (on-reserve, until 1985 male, since 1985 male descendents) and those who are not identified as status holders. In 1985 Canada altered the legislation to acknowledge the capacity of Indian bands to determine their own membership. This section provides:

10. (1) A band may assume control of its own membership if it establishes membership rules for itself in writing in accordance with this section and if, after the band has given appropriate notice of its intention to assume control of its own membership, a majority of the electors of the band gives its consent to the band's control of its own membership.²⁶⁸

According to this section of the *Act*, Indian bands can determine who will have membership on their Band List. It is important to note that this seeming autonomy is the tarmac on a road paved over the exclusion of Indigenous women and children, and the wrongful disenfranchisement of entire families. It would be difficult to argue that Indian bands should not have this control, but we should always remind ourselves that these determinations about membership are made after

²⁶⁸ The Report of the Royal Commission on Aboriginal Peoples addressed the provision in this way: "A band may now take control of its own membership from the department of Indian affairs by following the procedures set out in Bill C-31. Once a band has taken control of its membership, persons may be added to or deleted from the list of members according to the rules established by the band in a membership code. In short, the department of Indian affairs will no longer maintain the membership list for that particular band and will no longer have a say in how band membership decisions are made." Royal Commission on Aboriginal Peoples, "Aboriginal Women and Indian Policy: Evolution and Impact Indian Act" *Report of the Royal Commission on Aboriginal Peoples* vol. 4, ch. 2, s.3 (Ottawa: Minister of Supply and Services Canada, 1996), online: Indian and Northern Affairs Homepage <www.ainc-inac.gc.ca/ch/rcap/sg/sj3_e.html> [RCAP Report].

over one hundred and thirty years of legal tutorial in the inferiority of women's rights, division and conquering, entrenchment of the supremacy of men, and the objectification of Indigenous peoples. Additionally, we are asking (in many instances) male dominated European-style governmental bureaucracies to extend scarce resources to individuals and families who may have been legally ostracized and banished from the community for years. With that knowledge of Indianness as property and an understanding of the impact that sharing limited resources will have on (in a number of instances) an already struggling band, what are the results likely to be?

In this reconstruction of the *Indian Act*, the ability to provide legal status remained with the government of Canada. Control of band membership resides in the bands. It is useful to remember that status and membership may be entirely unrelated to the citizenship and nationhood of Indigenous nations. Only Indigenous nations can make determinations as to citizenship and the rights of citizens. As foreign standards of legal Indianness and membership have been entrenched in many Indigenous communities, addressing citizenship and legalization of that actuality as an inherent right can have profound implications for Indigenous nations. In the anti-colonial context, I am arguing that status is just this: Canadian legal status. Citizenship and the rights associated with Indigenous citizenship are standards and legal understandings developed and celebrated in many nations. Asserting, celebrating and rejuvenating those standards could have profound implication in the rights discussion in Indigenous communities and in Canada. Indigenous citizenship has not been determined any place but within Indigenous nations.

- b. Constructing Community Standards of Inclusiveness and Exclusion: The *Indian Act* and the Disenfranchisement of Indigenous Women

Belonging, relations and nationhood are wealth. Indian status mimics this in an absurdly misogynistic legal parody but individualizes the wealth. It confuses well-being and rights with status and privileges. Indian status is proprioceptive - we must be a part of the organism within which it is produced to be impacted by it. For this reason it requires co-optation. This is a dangerous proposition for two reasons. Firstly, many of us have been co-opted and have our

identity reinforced by the organism that is Indian Affairs. Secondly, there is no current construction/organism in place to take the place of the existing organism and having no organism at all is perceived by many people who participate in the legal administration of Indian people as being more dangerous than having a bad one.²⁶⁹

The *Gradual Civilization Act* of 1857 addressed the external quantification of Indianness and entrenched it in law.²⁷⁰ At section 4 the quantification of Indianhood was legally established: a person of one quarter Indian blood recognized by chief and council had the right to treaty annuity monies, interest money or rent.²⁷¹

The Act went on to address under what circumstance a woman legally identified as Indian (or belonging to an Indian father or husband) would cease to be an Indian person. At section 6, this Act stated:

Provided always that any Indian woman marrying any other than an Indian, shall cease to be an Indian within the meaning of this Act, nor shall the children issue of such marriage be considered as Indians within the meaning of this Act; Provided also, that any Indian woman marrying an Indian of any other tribe, band or body shall cease to be a member of the tribe, band or body to which she formerly belonged, and become a member of the tribe, band or body of which her husband is a member, and the children, issue of this marriage, shall belong to their father's tribe only.

As mentioned previously, the *Indian Act* of 1876 addressed enfranchisement within section 3, providing that *any* woman who married a “male person of Indian blood reputed to belong to a particular band” was an Indian. Indian women who married non-Indian ceased to be Indians under this section.²⁷² That section went on to provide that:

²⁶⁹ This may be true for some Indigenous or settler peoples. Harold Cardinal wrote about the *Indian Act* in *The Unjust Society*, *supra* note 210 at 140):

We do not want the *Indian Act* retained because it is a good piece of legislation. It isn't. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable Indian Act than surrender our sacred rights. Any time the government wants to honour its obligations to us we are more than ready to help devise new Indian legislation.

²⁷⁰ *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S.C. 1857, c. 26 [*Gradual Civilization Act*].

²⁷¹ *Ibid.* at s. 4.

²⁷² 1876 *Indian Act*, *supra* note 261.

3(c) "...except that she shall be entitled to share equally with the members of the band to which she formerly belonged, in the annual or semi-annual distribution of their annuities, interest moneys and rents; but this income may be commuted to her at any time at ten years' purchase with the consent of the band...".²⁷³

The construction of Canadian legal Indian womanhood was based upon European understandings and notions of the roles of women. Being able to "pay out" those constructed as former Indian women is one example of that misunderstanding. Indigenous women's significant roles in Indigenous nations, particularly as family leaders and governance experts/decision makers were not addressed in Canadian legislation and were in fact unrecognizable when painted with the legal brush of male dominance and female subservience.²⁷⁴ Domestic dependency, a notion applied to Indigenous peoples as a whole by settler peoples, was a feature in the microcosm of Euro-Canadian homes, too. The notion of owner and owned on gender lines was addressed by Sarah Carter:

A significant feature of the colonial legislation, later incorporated in the 1876 Indian Act, was the effort to impose Euro-Canadian social organization and cultural values, and English common law, in which the wife was virtually the property of her husband. The act assumed that women were subordinate to males, and derived rights from their husbands or fathers. Women were excluded from voting in band elections and from partaking in band business.²⁷⁵

Canada expanded its power to enfranchise in a 1919-1920 amendment to the *Indian Act*.²⁷⁶ In section 2, the power to determine whether an Indian woman who married out was eligible to receive treaty annuity payments and band money distributions (interest monies and rents) was

²⁷³ *Ibid.* at s. 3(c).

²⁷⁴ The Manitoba Aboriginal Justice Inquiry, regarding the attack on traditional Indigenous roles and the legal entrenchment of male dominance, found that:

The Canadian government also undermined equality between Aboriginal men and women with the legalization of sexist and racist discrimination in successive pieces of legislation. In 1869 it introduced the concept of enfranchisement, whereby Indian people would lose their status as Indians and be treated the same as other Canadians. For Aboriginal women, this process of enfranchisement had particularly devastating consequences, because the role assigned to Canadian women was one of inferiority and subjugation to the male.

MAJI, *supra* note 226, at v.1, ch. 13.

²⁷⁵ Carter, *supra* note 241 at 116-117.

²⁷⁶ *An Act to amend the Indian Act*, S.C. 1919-1920, c. 50.

provided to the Superintendent General.²⁷⁷ The effects of this in Indigenous communities are still being felt. In section 3, compulsory enfranchisement was legalized once again.²⁷⁸

²⁷⁷ *Ibid.*, s. 2.

²⁷⁸ *Ibid.*, s. 3.

Paragraph (h) of section two, and sections one hundred and seven to one hundred and twenty-three, both inclusive, of the said Act are repealed and the following are substituted therefor:-

A107. (1) The Superintendent General may appoint a Board to consist of two officers of the Department of Indian Affairs and a member of the Band to which the Indian or Indians under investigation belongs, to make enquiry and report as to the fitness of any Indian or Indians to be enfranchised. The Indian member of the Board shall be nominated by the council of the Band, within thirty days after the date of notice having been given to the council, and in default of such nomination, the appointment shall be made by the Superintendent General. In the course of such enquiry it shall be the duty of the Board to take into consideration and report upon the attitude of any such Indian towards his enfranchisement, which attitude shall be a factor in determining the question of fitness. Such report shall contain a description of the land occupied by each Indian, the amount thereof and the improvements thereon, the names, ages and sex of every Indian whose interests it is anticipated will be affected, and such other information as the Superintendent General may direct such Board to obtain.

A(2) On the report of the Superintendent General that any Indian, male or female, over the age of twenty-one years is fit for enfranchisement, the Governor in Council may by order direct that such Indians shall be and become enfranchised at the expiration of two years from the date of such order or earlier if requested by such Indian, and from the date of such enfranchisement the provisions of the Indian Act and of any other Act or law making any distinction between the legal rights, privileges, disabilities and liabilities of Indians and those of His Majesty's other subjects, shall cease to apply to such Indian or to his or her minor unmarried children, or, in the case of a married male Indian, to the wife of such Indian, and every such Indian and child and wife shall thereafter have, possess and enjoy all the legal powers, rights and privileges of His Majesty's other subjects, and shall no longer be deemed to be Indians within the meaning of any laws relating to Indians.

A(3) An Indian over the age of twenty-one years shall have the right to choose the christian name and surname by which he or she wishes to be enfranchised and thereafter known, and from the date of the order of enfranchisement such Indian shall thereafter be known by such names, and if no such choice is made such Indian shall be enfranchised by and bear the names by which he or she has been theretofore commonly known.

A(4) Upon the issue of an order of enfranchisement the Superintendent General shall, if any Indian enfranchised holds any land on a reserve, cause letters patent to be issued to such Indian for such land: Provided that such Indians shall pay to the funds of the band such amount per acre for the land he holds as the Superintendent General considers to be the value of the common interest of the band in such land, and such payment shall be a charge against the share of such Indian in the funds of the band. The Superintendent General shall also pay to each Indian upon enfranchisement his or her share of the funds to the credit of the band, including such amount as the Superintendent General determines to be his or her share of the value of the common interest of the band in the lands of the reserve or reserves, or share of the principal of the annuities of the band capitalized at five per centum, out of such moneys as are provided by Parliament for the purpose or which may be otherwise available for such purpose. The land and money of any minor, unmarried children may be held for the benefit of such minor or may be granted or paid in whole or in part to the father, or, if the father is dead, to the mother, or in either case to such person as the Superintendent General may select for such purpose for the maintenance of such minor, and the land and money of the wife shall be granted and paid to the husband, unless in any case the Superintendent General shall direct that the whole or any part thereof be granted or paid to the wife herself, in which case the same shall be granted or paid to the wife.

A(5) If such Indian holds no land in a reserve he or she shall be paid from the funds of the band such amount as the Superintendent General determines to be his or her share of the value of the common interest of the band in the lands of the reserve or reserves, and shall also be paid his or her share of the funds or annuities of the band capitalized as aforesaid.

A(6) Every Indian who is not a member of the band and every non-treaty Indian who, with the acquiescence of the band and approval (of the) Superintendent General, has been permitted to reside on the reserve or to obtain a holding or location thereon, may be enfranchised and given letters patent for such land as a member of the band, provided

In 1951, in a further revision to the Act, Canada gave itself even more power to effect enfranchisement. At section 10, the Act provided:

10. Where the name of a male person is included in, omitted from, added to or deleted from a Band List or a General List, the names of his wife and his minor children shall also be included, omitted, added or deleted, as the case may be.²⁷⁹

That broad expansion of powers included a loss of status for Indian women and disenfranchisement when she married a non-Indian man [section 12(1)(b)]. Additionally, a woman with membership in her band lost that membership if she married a non-member; if her husband belonged to another band she automatically became a member.²⁸⁰ If she did not become a member of another band (in which instance her per capita share of money due to the new band remained),²⁸¹ then she would receive a per capita share of the money entitled to members of the band from Her Majesty plus the amount the Minister estimated a member would receive under treaty for the 20 years after removal from the band list.²⁸² The loss of nationhood, membership, and citizenship suffered by these women were losses particular to women and demonstrate that the cost of mandatory enfranchisement was borne most heavily by Indigenous women and children.

Implicit in the presumed capacity to determine who is Indian is the presumed ability to assess, quantify and determine the standards related to Indigenous identity. This presumed ability is premised upon an internalized understanding that Indians are incapable of doing this, that Indigenous people have no standards related to identification and community which are to be valued and considered, and that Canadian determination (and presumably intellectual capacity to examine the same) operates with supremacy over Indigenous nations' regimes. The intrinsic construction of diminished capacity to make determinations about issues fundamental to national

that such Indian or non-treaty Indian shall pay to the credit of the band the value of the common interest of the band in the land for which he receives a patent.

A(7) On the issue of the letters patent to any enfranchised Indian for any land he may be entitled to, or the payment from the capital funds or annuities of the band, as above provided, such Indian and his or her minor unmarried children and, in the case of a male married Indian, the wife of such Indian shall cease to have any further claims whatsoever against any common property or funds of the band.

²⁷⁹ 1951 *Indian Act*, *supra* note 262 at s. 10.

²⁸⁰ *Ibid.*, s. 14.

²⁸¹ *Ibid.*, s. 16(3).

²⁸² *Ibid.*, s. 15(1)(a) and (b).

existence also serves as a rationale for the construction of non-Indigenous legal, policy and administrative regimes (truthful, responsible, accountable). It also serves as a justification for the unstated premise: Indians are unable to do this. It also serves as an ongoing rationale for the “management” of affairs which are central to Indigenous governmental operation.²⁸³

The end result, and it is a fundamentally damaging result, is that there exists a self-perpetuating regime of untruth which bundles colonial ideologies of Indigenous inferiority and the impact of the colonial regime on Indigenous nations as a response to a falsely constructed model based upon Indian incompetence and falsely assumed Indigenous dependency on the Canadian model of determining Indian identity. The model self-perpetuates on the basis of that presumed inferiority and it rationalizes its existence on the same. In this way, the regime of untruth becomes the filter through which colonized peoples observe, assess and understand Indigenous capacity to make determinations related to identity and determination of status within Indigenous nations.

Assigning legal value to some Indigenous men and disbursing funds, lands and rights to those men fortunate enough to have been defined by a foreign power as “Indian enough” is just one aspect of the gender supremacy entrenched in the *Indian Act*. While Indians were in no way thought to be equal to non-Indigenous men, they were legally defined close approximations of humanity, possessing capacity to become human, if the right choices (legally) are made. Disenfranchisement became entrenched in the *Indian Act*, a measuring stick for Indigenous men’s progressions towards humanity. The Indian men who could become “real” men (settler) under the *Act* were those who approximated European standards of “civilized” (including priests, lawyers, doctors) humans and those who could vote in Canadian elections.²⁸⁴ By this logic, women were considered less Indian as their Canadian legal identity as Indians was tied to the decision of Indian men as to who was Indian enough. Women were considered less human as they could not elect to become more human (civilized) unless that decision was made for them

²⁸³ *Indian Act* provisions which apply to this include the “taking” of Indigenous lands for public purposes (s. 35, 1951 *Indian Act*, *ibid.*), the descent of property (ss. 42-44 of the 1951 *Indian Act* and *Indian Act*, R.S., 1985, c. I-5 [1985 *Indian Act*]), the management of Indian moneys (s. 61 of the 1951 *Indian Act*, sections 61-69 of the 1985 *Indian Act*), regulation related to health and health care (s. 72(f)(g)(h) of the 1951 *Indian Act* and 73 (f)(g)(h) of the 1985 *Indian Act*), and election and powers of chiefs and councils (ss. 73-79, 80-85 of the 1951 *Indian Act* and sections 74-80 and 81-86 of the 1985 *Indian Act*).

²⁸⁴ 1876 *Indian Act*, *supra* note 261 at s. 86(1).

by Indian men who chose to enfranchise. Even in that regard, former Indian women were located in a legal vacuum once enfranchised. They were no longer Indians. They did not have capacity as Canadian citizens. The silence regarding the capacity of Indian women to vote in Canadian elections in the *Act* is a further testament to the invisibility / disappearance of Indian women perpetuated by the legislation. In fact, additional Canadian legislation similarly disregarded Indigenous women. Indian women were not able to vote in all provinces until 1969.²⁸⁵ Indian women were not legally allowed to vote in federal elections until 1960.²⁸⁶

Verna Kirkness wrote of this odd superimposition of Euro-Canadian values on Indigenous values:

Native women had the vote long before European women were accorded that privilege. Native women had a voice in national affairs and could rise to chieftanship. In many nations, the high chief was a woman. The imposition of the *Indian Act* in Canada actively destroyed traditional government, imposing instead elected band councils. Native people are now actively reestablishing our own style of government and democracy. This is only one way in which Native women are emerging and reclaiming our traditional positions.²⁸⁷

It is well known that many Indigenous people do not vote in provincial or federal elections in accordance with principled decision making and in accordance with their belief in Indigenous nationhood. Many believe that Indigenous nationhood informs our political participation and that as non-citizens of Canada or as First citizens in our nations we do not vote in foreign jurisdictions. So it may well have been that legally providing electoral participation to

²⁸⁵ Indians under the *Indian Act* were extended the provincial vote in all Canadian provinces as of 1969. *RCAP Report, supra* note 268, vol. 1, ch. 9, s. 12. It should be noted that all provinces but Newfoundland and Nova Scotia explicitly discriminated against Indians in their voting legislation. For examples, see *An Act to Further Amend the Laws Affecting the Elections of Members of the Legislative Assembly and the Trial of Such Elections*, S.O. 1874, c. 3, s. 15, *An Act to Make Better Provision for the Qualification and Registration of Voters*, S.B.C. 1875, c. 2, *The Election Act*, 1886, S.M. 1886, c. 29, s. 130, *The New Brunswick Elections Act* of 1889, S.N.B. 1889, c. 3, s. 24, *The Saskatchewan Elections Act*, S.S. 1908, c. 2, s. 11, *The Alberta Election Act*, S.A. 1909, c. 3, s. 10, *An Act to Amend the Quebec Election Act*, S.Q. 1915, c.17, s. 5, and Prince Edward Island's *The Election Act, 1922*, S.P.E.I., 1922, c. 5, s. 32. Some provinces distinguished enfranchised Indian voters from unenfranchised Indian people. Ontario, notably, later discriminated against on-reserve and unenfranchised Indians in *An Act to Further Amend the Law Respecting Elections of Members of the Legislative Assembly, and Respecting the Trial of Such Elections*, S.O. 1875-6, c. 10, s. 4.

²⁸⁶ Indian women were able to vote in band council elections in 1951 (as a result of the amendments to the *Indian Act*) and federal elections in 1960 (in accordance with the federal *Elections Act*). M. Caron, *A Study Of The Political Expressions of First Nations Women* (M.A. Thesis, University of Windsor 1998) [unpublished] at 33, online: Collections Canada webpage <http://www.collectionscanada.ca/obj/s4/f2/dsk1/tape11/PODD_0011/MQ52523.pdf> referring to *An Act to Amend the Canada Elections Act*, S.C. 1960, c. 7 and the 1951 *Indian Act*.

²⁸⁷ Verna Kirkness, referring to the vote and egalitarian participation in Indigenous societies, in "Emerging Native Woman" (1987-88) 2 C.J.W.L. 408 at 411.

Indigenous peoples historically would have made little difference to Indigenous peoples or Canadian elections. However the principle that Indigenous peoples, and in particular Indigenous women, had no entitlement to vote in Canadian federal and provincial elections sends a very clear message about legislators' perceptions of Indigenous humanity. As non-voters, non-citizens, we were deemed to be non-human. Men could vote. Indian men could not vote. Indian men were therefore not male humans. Women could not vote, but non-Indigenous women could vote before Indian women in Canadian and provincial elections. Therefore, not just patriarchy informed settler understanding of humanity. An odd blend of racialized patriarchy left Indian women outside of the circle of perceived humanity. As the last legal participants in Canada's electoral process, we were conceptually the least human and the least able to understand the nature of politics and laws.

Indigenous women who married Indian men also found their roles in Indigenous governance structure subject to foreign legislative erasure. In addition to providing that Indian women who married non-Indian men ceased to be Indian peoples, the *Gradual Enfranchisement Act* also impacted the ability of Indigenous women to participate in band style governments. Section 10 of the Act required bands to construct governments in accordance with non-Indigenous principles and understandings.²⁸⁸ A governmental structure requiring Indian bands to elect leadership every three years to address a finite set of subjects was legislatively required by Canada. As band-style governments became the place where new Indian government and old Indigenous governance met in many nations, women found their traditional roles in governance being (at least) infringed upon by the intrusive Canadian legislation. In some communities this amounted to a silencing of women entirely and in others it had little impact. However, with the imposition of a foreign means of governing, it became more and more difficult for Indigenous women to have their voices heard in the political arena.

This silencing often verged on erasure in other contexts for Indigenous women. In many Indigenous communities, women traditionally could indicate the end of a relationship by placing

²⁸⁸ *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42, S.C. 1869, chapter 6, ss. 10 and 12 [Enfranchisement Act].*

her partner's belongings outside of the home. This was not uncommon.²⁸⁹ As women worked most frequently in establishing and maintaining home, "Women owned the family home and all of its contents..."²⁹⁰ For these reasons, Canadian legislation providing for the absconding of home property from Indigenous women was doubly threatening. Our women were deprived of what they bought, paid for, built and owned and had to leave it if they were to observe Canadian laws. The understanding that home was male was not accompanied by an understanding of what place was a woman's place. In the case of the *Indian Act*, it was simply expected that Indian women go away. "Away", however, could not include any notion of traditionally marrying or leaving with another man. McGrath and Stevenson wrote of this:

The sexual autonomy of indigenous women and their right to divorce were violated by the 1876 Indian Act. Again, annuity and revenue monies were withheld from any woman with "no children, who deserts her husband and lives immorally (ie common law) with another man." This provision was a major blow to indigenous women who had always had the right to divorce and marry.²⁹¹

Legally requiring Indigenous women's dependency on Indian men and requiring that marriages be those legally condoned by Canada in order to gain what was rightfully theirs in the first place required women to choose to be some sort of legal Indian woman constructed for them with patriarchal and imperialist tools. Largely silenced and with secondary rights and no autonomy, the choices must have been difficult ones.

The erasure of Indigenous women has also been entrenched in case law related to the division of matrimonial property. In terms of matrimonial property, Indian women have been invisible as well. A 1986 decision of the Supreme Court of Canada ruled that provincial legislation dealing with an interim order related to the occupancy of matrimonial homes was not applicable on

²⁸⁹ For a discussion of Cree family and daily life, see J.F. Dion, *My Tribe the Crees* (Calgary: Glenbow Museum, 1979) at 1-28.

²⁹⁰ Bulmer, *supra* note 237.

²⁹¹ McGrath and Stevenson, *supra* note 263 at 46, referring to s. 72 of the 1876 *Indian Act*. Section 72 provides:
72. The Superintendent-General shall have power to stop the payment of the annuity and interest money of any Indian who may be proved, to the satisfaction of the Superintendent-General, to have been guilty of deserting his or her family, and the said Superintendent-General may apply the same towards the support of any family, woman or child so deserted; also to stop the payment of the annuity and interest money of any woman having no children, who deserts her husband and lives immorally with another man.

reserve.²⁹² Another decision released on the same day decided that provincial legislation related to the division of family assets/property was not applicable on reserve.²⁹³

“Secondary rights” also aptly describes Indian women’s rights with respect to wills and estates. Indian women whose Indian husbands passed away while intestate were entitled to one third of the deceased’s goods and chattels and land holdings on reserve only if “she be a woman of good moral character and that she was living with her husband at the date of his death, and the remainder upon his children (provided that they are Indians...).”²⁹⁴

The legislative erasure of Indigenous women was also promoted by the 1876 *Indian Act*. In section 26(1) of that Act women were specifically excluded from taking part in land surrender.²⁹⁵ Decisions related to the surrender of land made without women’s legal consent may have had a very different outcome had Indian women had a legal voice in that Canadian forum.

Additionally, Indian women were impacted by the imposition of the pass system. Women’s societies, kinship roles, participation in trading and traditional economies would have been impacted by a male dominated policy which required those wishing to leave the reserves to ask the permission of the Indian Agent to travel. Coming from a male dominated government where male domination was routinely entrenched in law, the impact on Indian women was likely to be at least as great as the impact of the pass system policy on Indian men. Sarah Carter writes that:

The most notorious of the post-1885 measures was the pass system, first initiated on a large scale during the crisis of 1885. Those who wished to leave their reserves were required to obtain passes from the agent or farm instructor declaring the purpose of their absence, the length of absence and whether or not they had permission to carry arms....just as in other colonial settings, such as South Africa and Kenya, the pass system operated to separate white people from indigenous people, and to carefully monitor how, where and when contact would be permitted to take place.²⁹⁶

²⁹² *Paul v. Paul*, [1986] S.C.J. No. 19 (S.C.C.) (QL).

²⁹³ *Derrickson*, *supra* note 3. The Native Women’s Association, the Assembly of First Nations and the Government of Canada have committed to a review of matrimonial property on reserve. For additional information on this, see: “Matrimonial Real Property Solutions: Reclaiming our Way of Being,” online: Native Women’s Association Homepage <<http://www.nwac-hq.org/mrp.php>> and “Addressing Matrimonial Property Rights On Reserves: Canada, AFN And NWAC Move Forward With Consultations,” online: Indian and Northern Affairs Canada webpage, online:< http://www.ainc-inac.gc.ca/nr/prs/s-d2006/2-02787_e.html>.

²⁹⁴ *An Act to further amend "The Indian Act, 1880"*, S.C. 1884, c. 27, s. 5 amending and replacing s. 20(2) [1884, *An Act to further amend "The Indian Act, 1880"*].

²⁹⁵ 1876 *Indian Act*, *supra* note 261 at s. 26(1).

²⁹⁶ Carter, *supra* note 241 at 162-163.

The *Indian Act* constructed, perpetuated, and perpetuates the erasure and invisibility of Indigenous women.

c. Through White Eyes: Building Disposable Indigenous Women

Our invisibility, the disposability of our participation and the negligible contribution we were perceived to be capable of making to society inform Canada's perception of our nature as Indigenous women. Our silence went virtually unnoticed. Our capacity to politically agitate and bring our issues into a meaningful field of view was perceived as negligible. As obscured as our actuality was by Canadian legislative presumptive invisibility, the construction of negative sexualized stereotypes of Indigenous womanhood through legislation and case law is equally destructive. The historic *Indian Acts* captured a false history constructed via non-Indigenous people's sexualization of Indigenous women. In 1880 *An act to amend and consolidate the laws respecting Indians*²⁹⁷ included a provision prohibiting the prostitution of Indian women. The 1880 *Indian Act* was amended in 1884 to include a provision that bawdy houses included "tents and wigwams".²⁹⁸ An 1886 amendment to the *Act* included provisions respecting the prosecution of anyone who, "being the keeper of any house, tent or wigwam allows or suffers any Indian woman to be or remain in such house, tent or wigwam, knowing, or having probably cause for believing, that such Indian woman is in or remains in such house, tent or wigwam, with the intention of prostituting herself".²⁹⁹ *Indian Act* provisions addressing the commodification of

²⁹⁷ *An Act to Amend and Consolidate the laws respecting Indians*, S.C. 1880, c. 28 (43 Vict.), s. 95 [1880 *Indian Act*] s. 95. Section 95 provides that "If any person, being the keeper of any house, allows or suffers any Indian woman to be or remain in such house, knowing, or having probable cause for believing, that such Indian woman is in or remains in such a house with the intention of prostituting herself therein, such a person shall be deemed guilty of an offense against this Act, and shall on conviction thereof, in a summary way, before any Stipendiary Magistrate, police magistrate or Justice of the Peace, be liable to a fine or not less than ten dollars, or more than one hundred dollars, or to imprisonment in any gaol or place of confinement other than a penitentiary, for a term not exceeding six months."

²⁹⁸ 1884, *An Act to further amend "The Indian Act, 1880"*, *supra* note 294 at s. 14 (amending s. 95).

²⁹⁹ *An Act to amend "The Indian Act"* S.C. 1887, c. 33, s. 11 repealing and replacing 106 with 106.

Indigenous women's sexuality were inserted into the *Criminal Code* in 1892.³⁰⁰ Indian prostitution was included in the criminal authority of Indian agents in 1894.³⁰¹

Indigenous women as constructed and understood sexual partners have been described by Dr. Larissa Behrendt as:

Being portrayed in the frontier as cheap or free sexual partners, and being known to accept small rewards for sexual favours, saw Aboriginal women labeled as "low-class" prostitutes. This construction of easy sexual access meant that Aboriginal women had little protection from the colonial law when they suffered sexual abuse and exploitation with allegations against white men usually dismissed.³⁰²

The interesting historical legacy that exists to this very day is not that colonizers economically and sexually exploited Indigenous women, but that Indigenous women required legislative regulation of our sexuality. That requirement, embedded in the western consciousness does not deal with Indigenous women as impoverished peoples or as business people, but as sexualized and licentious women requiring control over their nature. That there were many colonizing men who created a sex industry and who participated in the ownership, domination or use of Indigenous women's bodies is not embedded into our understanding of the falsely labeled "founding fathers". That there was such a vigorous industry that legislation was passed/constructed to address the potential exploitation of peoples whose economies and industries suffered at the hands of the same perpetrators is not a commonly held understanding in the Canadian legal lexicon. The legislation dealing with prostitution was unfortunately constructed in terms which addressed Indian women's participation in the sex trade rather than the construction of that new economy by settler men.³⁰³ That the indignity, shame and stereotype linger and cling to us to this day is offense enough; that no responsibility for their

³⁰⁰ *The Criminal Code*, S.C. 1892, c. 29, s. 190 [*Criminal Code*, 1892].

³⁰¹ Section 8, repealing and adding section 117, *Indian Act*, S.C. 1894, c. 32.

³⁰² Behrendt, *supra* note 254 at 354, addressing the construction of Indigenous women's historical identity in Australia.

³⁰³ For additional reading on this topic, see: Anthony McCalla and Vic Satzewich, "Settler Capitalism and the Construction of Immigrants and 'Indians' as Racialized Others" in Wendy Chan and Kiran Mirchandani, eds., *Crimes of Colour: Racialization and the Criminal Justice System in Canada* (Peterborough: Broadview Press, 2002) 25. Additional readings related to this topic include: Lisa Gibson, *Innocence and Purity vs. Deprivation and Immortality: The Spaces of Prostitution in Nepal and Canada* (MA Thesis, University of Sussex 2003) [unpublished], online: Network of Sex Work Projects <<http://www.nswp.org/pdf/GIBSON-INNOCENCE.PDF>>; Joan Sangster, " 'She is Hostile to Our Ways': First Nations Girls Sentenced to the Ontario Training Schools for Girls, 1933-1960" (2002) 20:1 J. of L. and Hist. at 59; and Joan Sangster, *Regulating Girls and Women: Sexuality, Family and Law in Ontario, 1920-1960* (Toronto: Oxford University Press, 2001).

position in the sex trade attaches readily to colonizing men is doubly offensive. Offensiveness is of little use in the de-construction of false ideologies of Indigenous womanhood; over time the sexualization and devaluation of Indigenous women which was in large part constructed by patriarchal and racialized attitudes entrenched in Canadian law.

d. Legislating Hatred

In real terms, addressing the entrenchment of notional equality in the *Indian Act* has given us an understanding of Paulo Freire's discussion of the oppressor and sub-oppressor.³⁰⁴ The *Indian Act* amendments requiring legal recognition of reinstated Indian women has resulted in "increased tension between Indian women and their communities regarding the rights of the reinstated women to live in their own communities as opposed to the rights of the community to decide who is, and who is not, a "member"."³⁰⁵

Situating the construction and perpetuation of racialized Indian identity in the past enables Canada to disavow (legally and politically) the modern-day racism built into the legislation and political decision-making and the responsibility for perpetuation of the same. In this sense, both the responsibility for the illegality (to say nothing of immorality) of the legislative regime and its application gives the appearance of being an historical construct with no contemporary responsibility (and, Canada would argue, no contemporary obligations resulting from the same). Historicizing racism enables those who currently perpetuate racism to act through political agnosticism - it is not their construct or belief, so there is no liability or accountability to eradicate the racism.

Situating the racism of categorizing Indians (categorization referent to the ostensible authority and actual dominance which enables naming, defining and owning) in some antiquated and

³⁰⁴ See Paulo Freire, *Pedagogy of the Oppressed* (New York: Continuum Publishing Group, 2003) at 43-46. It is my contention that the revisions in the 1985 *Indian Act*, *supra* note 283 have served to construct a false ideology of equality that allows facial compliance with a foreign standard but which continues to entrench inequality in its application.

³⁰⁵ Thomas Isaac, "Case Commentary: Self-Government, Indian Women and their Rights of Reinstatement under the *Indian Act*: A Comment on *Sawridge Band v. Canada*" (1995) 4 Nat. L. Rep. 1.

historic understanding of Indian identity de-contextualizes and de-emphasizes the responsibility to address the same legally, rightfully and appropriately in a contemporary context. It also legitimizes illegal, abhorrent and disrespectful categorization and understandings of Indigeneity as they are defined, interpreted and applied contemporarily.

The power to name, identify and classify citizens lies with the government which represents citizens. In this instance, that authority to name has been assumed by the namer - this does not mean that the authority is rightful, lawful or moral. It also does not mean that any notion of Indigenous citizenship determination resides in any place but in Indigenous nations.

Much has been written about Canadian Indian status and its gendered inequity.³⁰⁶ What has been fundamentally missing from this dialogue is both the notion of layers of racialization³⁰⁷ and patriarchy and a critical discussion related to the construction of Indianness as a constructive means of femicide and decimation of Indigenous laws and societies related to the perpetuation of the feminine side of the circle. How the legalization of the subjugation of Indigenous women has been instigated and perpetuated by Canada's legislative regime has been addressed, but the impact on our standing in our own nations, communities, families and kitchens is addressed to a lesser degree.

When we became understood by non-Indigenous peoples to be property under the *Indian Act*, several things happened that impacted our ability to fulfill our obligations as Indigenous women. In a Canadian legal context, subjugating the role and identity of Indian women to either a correlate of Indian men's roles and identity or to that of "non-people" – neither possessing Indian status nor being legally defined as women - would have several long-term impacts on Indigenous

³⁰⁶ Some examples include: Thomas Isaac and Mary S. Maloughney, "Dually Disadvantaged and Historically Forgotten? Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21:3 Man. L.J. 453; Sharon D. McIvor, "The Indian Act as Patriarchal Control of Women" (1994) 1 Ab. Wom. L.J. 41; Winona Stevenson, "Post-colonial Reflections on the Past and Future Paths of Canadian Aboriginal Women (or, Out From Under the Skirts of Her Majesty)" (1995) 11 London J. of Can. St. 1; and Winona Stevenson, "Colonialism and First Nations Women in Canada" in Anne Decter, ed., *Scratching the Surface: Canadian, Anti-Racist, Feminist Thought* (Toronto: Women's Press, 1999) 49.

³⁰⁷ By "layers of racialization" I mean Indian men as externally racialized men who can be legally constructed by settler legislators. Indian women could be legally defined by marriage to a non-Indian man, edict by a non-Indian official, or marriage to an Indian man. In this way, Indian men are racialized by non-Indian men, but Indigenous women are subject to racializations by Indian men and non-Indian men – facing more than one layer of race construction.

women. As sub-categories of the species Indian and as non-women, we found the immediate disregard for our legal identity had other ripple effects on the understanding of our standing. When legally regarded as non-people or as property of Indian men, we found that our central roles in work that was women's (advising government, selecting leaders, maintaining culture in the home) became legally devalued and our position/place continuously questioned and relegated to an intellectual and legal void. This is not to say that the roles and obligations were not undertaken and fulfilled; it means only that Canadian legal recognition of the same had what amounts to erosion – perhaps of rights and of authorities, but certainly of place. Our rightful places in our nations, communities and families began to face significant legal pressure. Our durability and enduring nature was and is challenged; our strength in the face of this legalized adversity is unquestionable. We have had our backbones steeled by the example of some formidable Indigenous women. Jeannette Vivian Corbiere Lavell is one of them.³⁰⁸ Yvonne Bedard is another.³⁰⁹ It is important to note that we were not overlooked or merely misunderstood - our invisibility was legally mandated. We were not quite Indian, were not quite men, and were not quite women.

As women warriors, any attempt to claim personhood or womanhood in accordance with women's traditions has been found to be politically, socially or legally threatening. We are particularly indebted to Indigenous women who refused to acquiesce to colonial ignorance, intolerance, misogyny and aggression. Sandra Lovelace addressed her concerns about male privilege by writing to the United Nations.³¹⁰ Its response³¹¹ resulted in a shift in the laws applied to people defined as Indian under the *Indian Act*. Sandra Lovelace is, as often is the

³⁰⁸ *A.-G. Canada v. Lavell* (1973), 38 D.L.R. (3d) 481 (S.C.C.). Jeanette Corbiere Lavell, a citizen of the Wikwemikong Band of Indians, married a non-Indian man and was deleted from the Indian Register (pursuant to former section 12(1)(b) of the *Indian Act*). She appealed a decision of the Registrar and at the Supreme Court of Canada it was decided that the *Bill of Rights* did not apply to the *Indian Act* – the abrogation of the right of equality for women was legally permitted when Indian women were treated unequally.

³⁰⁹ *Bedard v. Isaac* (1971), 25 D.L.R. (3d) 551 (Ont. H.C.) and *ibid*. Yvonne Bédard also married a non-Indian man, lost her Indian status, and returned to the reserve upon dissolution of the marriage and moved into a house for which her mother had a Certificate of Possession. Ms. Bédard faced expulsion and dispossession from her home in Six Nations by the Six Nations by Council. Her case was heard with the Corbiere-Lavell case and the same racio-gendered inequality entrenched and perpetuated by Canadian law.

³¹⁰ Letter from Sandra Lovelace et al to United Nations Human Rights Committee (29 December 1977), online: Native Law Centre <<http://www.usask.ca/nativelaw/unhrfn/lovelace/doc>>.

³¹¹ *Sandra Lovelace v. Canada*, Communication No. R.6/24, Report of the Human Rights Committee, UN GOAR, 36th Sess. Supp. No. 40, UN Doc. A/36/40 Annex 18 (Adopted 30 July 1981), online: Native Law Centre <<http://www.usask.ca/nativelaw/unhrfn/lovelace/doc>>.

case, the representative voice of many peoples. The women from the Tobique First Nation in New Brunswick fought sexual discrimination as a group.³¹² The assertion of strength and substance by the politically disempowered often results in political backlash and aggression from the politically empowered. It comes at some cost as it has been difficult to effectively assert our strength and substance into mainstream Canadian law. Defined as less than – non-Indigenous men, Indian men, and non-Indigenous women – in Canadian law, we have found that fundamental disregard and discounting has had an enduring impact. They have impacted our formulation of community, our wealth and poverty, our access to language, our access to homes in our territories, our access to health care, our identification by those who participate and have a vested interest in the construction of band identities, our ability to participate in our governments, our access to cultural resources, our ability to practice our religion, and our mobility. As a staunch advocate for Indigenous rights who acknowledges their origin in our relationship with our Creator and as Original peoples, I can quite clearly enunciate a philosophy in which I assert vigorously that our nationhood is based upon an entirely different set of principles and laws, and that we have access to culture and language – all of which operates regardless of the *Indian Act*. However, with community housing tied to *Indian Act* recognized lands, access to Elders and spiritual leaders on reserve often tied to that land, and the rights to health care and education administered to *Indian Act* Indians, I can also readily acknowledge that many of us have been unable to access many things which are our birthright because of the Canadian legislative and administrative regime.

In this legislative construction of Indigenous women, it is painful to acknowledge our perceived disposability (a perception which I argue continues to this day). We were and are often still perceived as sexualized entities incapable of possessing humanity. Aside from our absent humanity, we are notable for the degraded circumstance of our sexuality which can be owned, and cheaply. There is also a particular notion and violence that arises when we dare to speak out and back about this. Enduring in this construction as well is a particular invisibility and absence of our occupation of self. Canadian legislation has created a perception of Indian women as devalued and devoid. Of humanity. Decency. Morals.

³¹² Janet Silman, *Enough is Enough: Aboriginal Women Speak Out* (Toronto: Women's Press, 1987).

That our legal existence has been contingent upon both Indigenous men and non-Indigenous men has placed sustained economic, social, and cultural pressure on Indigenous women. It has also put substantial pressure on our role in the politics of Indigenous Nations. The impact of European colonizers on the make up of Indian political organization is evident in many First Nations in Canada. With colonizers unwilling / unable to acknowledge the fundamentally important role of Indigenous women in Indigenous governments, the *Indian Act* provisions relating to Chief and Council revealed and entrenched the patriarchy clearly evident in European communities and nations. The historic legislative provision entrenching the legal requirement of male leadership in Indian country provided:

10. The Governor may order that the Chiefs of any tribe, band or body of Indians shall be elected by the male members of each Indian Settlement of the full age of twenty-one years at such time and place, and in such manner, as the Superintendent General of Indian Affairs may direct, and they shall in such case be elected for a period of three years, unless deposed by the Governor for dishonesty, intemperance, or immortality, and they shall be in the proportion of one Chief and two Second Chiefs for every two hundred people; but any such band composed of thirty people may have one Chief; Provided always that all like Chiefs now living shall continue as such unit death or resignation, or until their removal by the Governor for dishonesty, intemperance or immortality.³¹³

With the technical leadership legally enforced, traditional leadership in Indigenous nations came under pressure (legally, politically and economically) to conform with the patriarchal understanding of the capacity of men and the incapacity of women to choose, form and run government. The erosive economic, legal and political pressure took varying forms and had variable effects on the traditional governments of Indigenous nations. Traditional kinship and hereditary leadership roles were and often still are profoundly informed and influenced by women. The traditional systems of governance and government in Indigenous nations were directed and influenced by women in the nations who stored vast repositories of knowledge related to the qualities of leaders, the importance of balance in government and the maintenance of good family relations in governed territories and nations. Legally prohibiting women from holding chief or councilor positions placed administrative burdens on processes governing the implementation of ancient traditions and laws. While the substance of those laws and principles may have been unaltered, the means to give effect to them and practice them with the same fluency as previously may have been impacted. Like the religious traditions and laws that went

³¹³ *Enfranchisement Act*, *supra* note 288 at ss. 10 and 12.

underground or which were hidden from colonizers, women's roles in governance and governments were/are often practiced subversively or quietly.

2) Effect

Registered Indian women are much more likely to die due to violence than are Canadian women as a whole. This statement is most applicable to the 25 to 44 age cohort where Registered Indian women of this age are 5 times as likely to experience a violent death than are Canadian women. Overall, the age-standardized mortality rate resulting from violence for Registered Indian woman was 84 per 100,000 from 1989 to 1993. This rate was nearly 3 times the rate experienced by all Canadian women (30.0 per 100,000).³¹⁴

The effect and impact of the disenfranchisement of Indigenous women from our nations, communities and territories is largely immeasurable.³¹⁵ However, there are several key indicators that point to the impact of the attempted and legalized diminishment of Indigenous women's roles in our nations. As women whose rights were legally contingent on those of Indigenous men defined under Canadian law as Indians, we have been conditional Indians for a period of 120 years. After the increasing political pressure Canada took from the international community because of the *Lovelace* case,³¹⁶ changes were made to the legislation to address the issue of gender equity. However, amendments to the *Indian Act* in 1985³¹⁷ to bring it in line with Canada's *Constitution Act* have not addressed the issue with consistency or to a degree commensurate with the enfranchisement of women. In order to bring the *Indian Act* in line with the gender equality provisions in the *Charter of Rights and Freedoms* Indian women who had been unable to be members and who had their Indian status taken from them (by virtue of marrying non-Indian men or non-status Indian men, or being married to status Indian men who

³¹⁴ Department of Indian Affairs and Northern Development, *Aboriginal Women: A Demographic, Social and Economic Profile* (Ottawa: Department of Indian Affairs and Northern Development, 1996).

³¹⁵ In what may be an ironic coincidence, most Canadians' understanding of the impact of disenfranchisement on Indian women comes from personal stories told in the first person to them or in the third person via a judicial translator. While many authors have addressed the individual or anticipated population impact of disenfranchisement on women and communities, few studies have addressed the nature and extent of the impact of this femfranchisement on actual and defined women or communities' governance, economies, spirituality, language retention or social structures. The theory of Bill C-31 impact has been well documented, the actuality has not.

³¹⁶ One news source reported that following the case, Minister of Indian Affairs John Munro permitted suspension of section 12 by band request. Deanna Wuttunee, "Discriminatory Laws Lifted" *Saskatchewan Indian* 10:9-10 (September/October, 1980) at 16.

³¹⁷ 1985 *Indian Act*, *supra* note 283 at ss. 6 and 10.

gave up or lost their status) became able to apply to be Indians again. One level of legal subversion of woman's rights is that we have to apply for that which was legally taken away; the onus is on us to both apply and prove heritage which ties us to what was historically legally defined as male Indian status.

The second level of subversion is that that lineage is tied to the historically gender biased recognition for a current gender biased recognition. The status rules in the 1985 *Act* do little to ameliorate the impact of the historic portions of the *Indian Act* that disenfranchised women and postpones the effects of the same rule in a contemporary context for three generations. Certainly, it is important that people who were disenfranchised are able to apply to have status re-instated. However, the *Act* is still serving an assimilationist agenda, postponing the effects for later generations. The difficulty arises because there are two legal categories of Indians entitled to be re-instated under section 6 of the 1985 *Indian Act*.³¹⁸ Section 6(1) addresses status of Indians for whom two parents were or are entitled to Indian status.³¹⁹ Section 6(2) addresses status for Indians of whom only one parent was/is a status Indian or was entitled to status at death.³²⁰ How the current generation of reinstated Indians gained their status [through section 6(1) or 6(2)] will determine whether their children and grandchildren will have Indian status.

Indians who re-gain status under section 6(1) (in which two parents are entitled to or are status Indians) who have a child together, see their child who applies for status gain s.6(1) status.³²¹ If that s. 6(1) status child eventually has a child with a non-status or non-Indian person, their child (a grandchild) is eligible for s. 6(2) status. If that s. 6(2) status person has a child with a fellow s. 6(2) Indian, their child will be a 6(1) status entitled child.³²²

However, if an Indian entitled to or possessing 6(1) status has a child with an Indian entitled to or possessing 6(2) status, their child will be a s. 6(1) Indian.³²³ If that s. 6(1) status Indian child

³¹⁸ *Ibid.*, s. 6.

³¹⁹ *Ibid.*, s. 6(1).

³²⁰ *Ibid.*, s. 6(2).

³²¹ *Ibid.*

³²² For a detailed discussion of the legal distinction between status Indians under sections 6(1) and 6(2), see *RCAP Report*, *supra* note 268 at v.4, ch. 2, s.3.3.

³²³ *Ibid.*

has a child with a non-status or non-Indian person, their s. 6(2) status Indian child, upon having a baby with a non-status or non-Indian person, will find that their child has no Indian status.³²⁴

In short, with regard to the second generation cut-off, Indians who regain their status through section 6(1) (in which both parents are or were entitled to be status Indians) who marry a non-status or non-Indian and whose child of that marriage [who is a 6(2) status Indian] marries a non-Indian, will see that their grandchildren are legally defined as non-Indians.³²⁵

Journal

When my mom put her application in to be an Indian ten years ago, I don't think she imagined that figuring out who we were, where we legally belonged would take so long. Thank goodness for the inefficiency of bureaucracy because the decision to apply has never sat very comfortably with me. My grandfather, in an English context, has questionable paternity. In a Cree context, he has two dads and was lucky enough to have an abundance of relations. However, who the dad is (Canadian laws) and who his dad was (Cree laws) differs. He had a Cree dad and a Métis dad who raised him. Who we are in Canadian law has become dependent upon a Canadian determination that I have come to call, "Who's your daddy?" The answer, shame infused and reeking of Catholicized condemnation and Canadian particularization, is a lie.

How we came to be "Other" on the checklist/box is now the secret. In truth, it is no one's business. But, I cannot help but wonder, what if your choice to honour your family meant that you could not get dialysis, could not get treatment? I wonder why honour and respect

³²⁴ *Ibid.*

³²⁵ For a community based model, see also Mother of Red Nations Women's Council of Manitoba, "What Is Bill C-31" online: Mothers of Red Nations <http://morn.cimnet.ca/cim/dbf/Bill_C_31.pdf?im_id=4956&si_id=92>.

has nothing to do with the mooniaw truth. It also makes me wonder why our truth, our way, is not the criteria upon which citizenship is based.

Somewhere along the ideological way, it became normalized for Indigenous people in this country (Canada, not to be confused with Indian country) regardless of paternity, to be divided from relations and nations on the basis of arbitrary Canadian legal standards. I can have no angst over this division as the ridiculousness of the capricious legal categorization is meaningless to me. My own sense of self and identity tells me that regardless of the suspect legal regime which encapsulates and blanches our Canadian legal identity - we are still a nation, still a people, still relations as long as we perceive ourselves and are received as citizens of our nations.

And yet, we apply.

In our family, being the legal Indian would require us to ignore our own ethics and truths and succumb to those 'truths' required by the Canadian legal system. In Canada's systematization of Indigenous identification, I am required to tell the Canadian legal truth in a way which it can comprehend and in a way which identifies me as Indian. If I tell who my grandfather's parent is, I am legally entitled to be Indian. If I honour my grandfather's life and the tradition which he followed, I am no less a Cree citizen, but am also a Métis citizen. In honouring his wish my Cree citizenship is not impacted. My Canadian legal standing, however, is. In honouring our fathers, mothers and grandmothers, many become legally subrogated in the Canadian system - which disregards our own ethics of inclusion and standards for citizenship. The resultant and often complex substantiation of identity in a

Canadian legal context is often authentication through deception. In requiring this, there can be and has been an implicit and enduring devaluation of authentic Indigenous identity.

As people who face the colonisation of our identity daily, it is difficult to see our way clear of the system which entraps us. Forced declaration of false identity to gain the necessities of life is duress. We live in a state of duress.

On paper, this reinstatement provision makes sense if you suspend disbelief and have trust in linguistic (and not moral, historic or future) equality.³²⁶ However, when you remember that the bulk of the reinstated status Indians who see their legal status lineage stopped at the second generation are principally women who lost status by marrying out, there is a differential impact on the children of women reinstated. There are women who cannot pass on status to their children if they marry non-Indian men (men who retained status under the same clause can pass on Indian s.6 (1) status to their children even if they married a non-status Indian woman or non-Indian).³²⁷

Those who are reinstated as Indians, those who are able to find proof in systems rife with errors and patriarchal based decision making, find that Indian status is finite for the children of women who are reinstated. Furi and Whelan also address two other situations of potential inequity in their paper. The first occurs when Indian and non-Indian parents have children out of wedlock pre-1985. Children born to Indian fathers and non-Indian mothers were permitted to carry on their father's lineage via section 6(1). Indian women who had female children with non-Indian

³²⁶ The ghosts of discrimination past echo in the hallways of Canadian courtrooms. One Indian newspaper reported that with respect to the pre-1985 *Indian Act* "...Prime Minister Pierre Trudeau told the Commons he considered the section discriminatory but refused to make any changes, however socially progressive, over the heads of the Indian community. But, Trudeau said, the government **will consider** unilateral imposition of the change if approval was not forthcoming from the National Indian Brotherhood in a year or two." Wuttunee, *supra* note 316. The reinstatement provision provides facial equality so that the rights of Indian women appear to be the same of those as Indian men. However, facial equality belies the embedded inequality; the amended section is still discriminatory in its effect. Believing in the equality of section 12 of the 1985 *Indian Act* requires a suspension of knowledge of the discriminatory history that faced women and the discriminatory future that faces our children. The arguments used to support this section are precisely those that were used to ignore the issue for generations all of which are predicated on a presumed historic equality, which is the logical and legal fallacy.

³²⁷ Megan Furi and Jill Wherrett, "Indian Status And Band Membership Issues" (1996), online: Library of Parliament <<http://www.parl.gc.ca/information/library/PRBpubs/bp410-e.htm>>.

men between 1951-1985 had to apply to have their female children reinstated – finding that those children only had section 6(2) status.³²⁸ The other situation could occur in these circumstances:

The application of the amendments has also led to a situation in which members of the same family may be registered in different categories. One example could occur in a family that enfranchised, and in which the mother is a non-Indian. Under Bill C-31, a child born prior to the family's enfranchisement is eligible for registration under section 6(1), while a child born after enfranchisement is eligible only under section 6(2), since one parent is not an Indian. This affects the ability to pass on status, because the latter child will be able to pass on status to his or her children only if their other parent is a status Indian.³²⁹

With many First Nations attempting to limit membership generally³³⁰ and the rights according to those who are found to be members specifically (i.e. voting,³³¹ proceeds of agreements,³³²

³²⁸ *Ibid.*

³²⁹ *Ibid.*

³³⁰ There are a myriad of reasons for limiting membership. Some Indigenous nations may have self-determining standards in place that they wish to see applied to all Indigenous peoples wanting to participate in the community. Others may have personal reasons for not including particular members. It is difficult to know the precise effect that scarce resources and the internalization of colonial standards of Indian membership may have on these membership decisions. See, for example, *Samson Indian Band v. Canada (Min Of Indian Affairs & Northern Dev.)*; *Omeasoo v. Canada (Min. of Indian Affairs & Northern Dev)*, [1989] 1 C.N.L.R. 110 in which the Federal Court Trial Division reviewed the membership rules passed by the band in accordance with section 10(7) of the *Indian Act*. These membership rules did not address the automatic inclusion of “membership to certain categories” (referring only instead to the population on the Band list prior to April 17, 1985 and 6(1)(c) status holders). Post-1985 reinstated status holders were not addressed in the Membership code. The Samson Band Membership Rules were found to be invalid. In *McArthur v. Saskatchewan*, [1992] S.J. No. 189 (Q.B.) (QL), the Saskatchewan Court of Queen's Bench reviewed the appeal of a Registrar's decision to add reinstated Indians to the Band List of the Pheasant Rump Nakota Band No. 68. This Band was formed from principally reinstated members in 1990 on application to the Registrar. While the appellants protested the inclusion of almost every name on the list initially, they eventually challenged the group's capacity to form an Interim Band Council. The court found that the Registrar was “quite correct in concluding that the appellants had not satisfied the onus of establishing the Interim Band Council was not the “council of the admitting band”(at 17). A decision of the Ontario Court of Appeal, *Barry v. Garden River Band of Ojibways*, [1997] O.J. No. 2109 (Ont. C.A.) (QL) reviewed the situation where reinstated female appellants and their children (who regained status and membership) were seeking an equal per capita share of land claim settlement moneys. In this instance, the court found that, at para 48: “The appellants and all those they represent are entitled to a declaration that they are each entitled to the payment of an equal distributive share of the \$1,000,000 fund from the Settlement Agreement without deduction of any kind.” In this case, women who were previously enfranchised received a payment and the band sought to deduct that from their land claim distribution. The band also argued that their children (with their mother as the lone Indian status parent) received no distribution. See also the decision of the Federal Court of Appeal in *Sawridge Band v. Canada*, [2004] F.C.J. No. 77 (F.C.A.) (QL). In this case the appellant Band appealed an order to include 11 people on its Band List. In a related case [*Sawridge Band v. Canada*, [2005] F.C.J. No. 1860 (T.D.) (QL)], the Sawridge Band has launched an action based on the argument that the Bill c-31 provisions are not consistent with section 35 of the *Constitution Act*. See also *Gros-Louis v. Huron-Wendat Nation*, [1990] 1 C.N.L.R. 46 (F.C. T.D.) in which the Federal Court of Canada – Trial Division heard an application by some band members to annul a vote held in which s.6(1) and s.6(2) children with one Indian parent were not allowed to be registered. In *Yellowbird v. Samson Cree Nation 444*, [2003] A.J. No. 780 (Alta. Q.B.) (QL), the Alberta Court of Queen's Bench dismissed an appeal by the First Nation of the court's refusal to strike a claim by Shinnéz-Lee Yellowbird (whose mother has been a First Nation member since 1987 and who sought a declaration of Cree Nation membership).

housing³³³) it seems unlikely that the provisions in intent or effect will open the door to welcome Indians home. One author as written this about the differential impact:

The problem with transmitting status and the different subsections of article 6 do not affect Indian men to the same extent as native women. As a result of section 12(1) (b) under the old Indian Act, a Native man conferred his status to his non-Indian wife. For the children of the Indian woman, the situation is not the same. Having lost her status and then being reinstated, her children are registered under section 6(2) and therefore cannot transmit status to their children unless they marry a status Indian registered under section 6(1). As a result, the discrimination against native women was not completely eliminated by postponed for two generations.³³⁴

That subversion and the quiet practice of women's obligations led many to believe that our roles were subservient, secondary and/or disappearing. This perception of our roles in the Canadian legal consciousness was temporally associated with the false perception that we as inhuman beings were also subservient, secondary and disappearing. Our worth was defined and muted through the legal definition of who were not. We were not able to be human without attachment to a male status Indian. We had no independent identity and were therefore perceived as inferior and dependent. We had no role in government so were perceived as passive and submissive. We were seen as subject of, subject to legislation and therefore subject of and subject to male dominance.

³³¹ *Corbiere, supra* note 6. In this case, the Supreme Court of Canada determined that a provision of the *Indian Act* providing that voters in band elections be ordinarily resident on reserve was inconsistent with section 15 of the *Charter*. See also *Scrimbitt v. Sakimay Indian Band Council* a 1999 Federal Court Trial Division decision in which the applicant, an Indian person who was reinstated by virtue of Bill c-31, contested her band's decision not to allow her to vote in the band elections. The band had developed its own membership code in 1987. The applicant argued that not allowing her to vote violated section 15. The remedies granted were a declaration that her right to vote was infringed and a return to the Band List (which the band had removed her from). Reported at: [1999] F.C.J. No. 1606 (F.C. T.D.) (QL).

³³² *Medeiros v. Ginoogaming First Nation*, [2001] F.C.J. No. 1812 (F.C. T.D.) (QL) was an application by off-reserve members of the First Nation who were seeking judicial review of the Council and Band decisions (housed in Band Council Resolutions) related to Settlement Agreements providing for proceeds for on-reserve members of the First Nation. In this case, the Chief and Council argued that the off-reserve members were no longer members of the First Nation. The application for judicial review was granted and the decisions sent back to the Chief and Council for re-determination without discrimination.

³³³ In *Laslo v. Gordon Band (Council)*, [2000] F.C.J. No. 1175 (F.C.A.) (QL), the Federal Court of Appeal reviewed the decision of the Canadian Human Rights Tribunal in granting a remedy to Sara Laslo [a reinstated Indian woman looked for housing on reserve – her Chief told her that her status as a reinstatee was as a “third place priority” (para 8)]. Clause 67 of the *Canadian Human Rights Act* (R.S., 1985, c. H-6) provides that the Act does not affect the *Indian Act* or provisions made pursuant to it. The court said of this (at para 30): “...that the housing allotment decision itself is one that Parliament has, under section 20 of the *Indian Act*, expressly entrusted to the Gordon Band Council.”

³³⁴ Bulmer, *supra* note 237 at 28. Single mothers face a similar discrimination for their children. ‘Illegitimate’ children are assumed to be non-Indian children under the *Indian Act*, according to Bulmer, at 29.

Relatively disempowered,³³⁵ women look to the legislation to force the hand of the nations we come from. What is missing from this Canadian legal discussion is the understanding that as women we had our membership taken from us by law and our citizenship followed by practice. Citizenship that only our nations could provide and deny. Some stayed connected through strong relationships but staying connected is not the same as understanding and living the entitlement. Being forced to live off of reserves meant being forced to live away from our relatives, our families, and our fellow citizens. Without community or country many lost language, land and connection. When we were legally invited back in to the *Indian Act* definition, many did not find that an invitation from their nations to become citizens again. Others found that the invitations were provisional or limited.³³⁶ More than that, we find that some of our nations, from which Canada forced estrangement, do not want to remember our names, our connection, and our relationship. We are telling communities with scarce resources that we want to come home. Home, with a land crunch, an assigned and internalized notion of propriety, and ravaged economies, can neither make room nor provide enough for every person who was pushed out. And as understanding as we can be about the nature of colonization, we wonder how we can be considered outsiders when it was the colonial government that forced us from our nations? How can we not be relatives because a foreign presence told you we were not? Now that we have voice and are able to come home, to understand what we have lost, being told that we do not belong/are opportunistic/do not have a home by people we had hoped would re-embrace us as family is more than demoralizing - it is true disenfranchisement.

In the Supreme Court of Canada's *Corbiere*³³⁷ decision there is Canadian judicial recognition of the disempowerment that "residence" of Indians has on *some* Indian people. This discussion occurs without a real analysis or review of the historical and legalized racial and other factors that constructed factions consisting of those who live on reserve and possess electoral rights and those who live off reserve and whom the band stated did not possess electoral rights. Addressing the effect but not cause of this constructed legal fissure, McLachlin and Bastarache JJ found:

³³⁵ We differ in our understanding of power and I have used the phrase to mean "legally constructed as powerless" although the actuality might be quite the opposite.

³³⁶ In *Corbiere*, *supra* note 6, the Batchewana First Nation sought to limit the rights of off-reserve Indians (predominantly reinstated members) to vote in elections for chief and councilors.

³³⁷ *Ibid.*

Two brief comments on this new analogous ground are warranted. First, reserve status should not be confused with residence. The ordinary "residence" decisions faced by the average Canadians should not be confused with the profound decisions Aboriginal band members make to live on or off their reserves, assuming choice is possible. The reality of their situation is unique and complex. Thus no new water is charted, in the sense of finding residence, in the generalized abstract, to be an analogous ground. Second, we note that the analogous ground of off-reserve status or Aboriginality-residence is limited to a subset of the Canadian population, while s. 15 is directed to everyone. In our view, this is no impediment to its inclusion as an analogous ground under s. 15. Its demographic limitation is no different, for example, from pregnancy, which is a distinct, but fundamentally interrelated form of discrimination from gender. "Embedded" analogous grounds may be necessary to permit meaningful consideration of intra-group discrimination.

Having concluded that the distinction made by the impugned law is made on an analogous ground, we come to the final step of the s. 15(1) analysis: whether the distinction at issue in this case in fact constitutes discrimination. In plain words, does the distinction undermine the presumption upon which the guarantee of equality is based -- that each individual is deemed to be of equal worth regardless of the group to which he or she belongs?

Applying the applicable Law factors to this case -- pre-existing disadvantage, correspondence and importance of the affected interest -- we conclude that the answer to this question is yes. The impugned distinction perpetuates the historic disadvantage experienced by off-reserve band members by denying them the right to vote and participate in their band's governance. Off-reserve band members have important interests in band governance which the distinction denies. They are co-owners of the band's assets. The reserve, whether they live on or off it, is their and their children's land. The band council represents them as band members to the community at large, in negotiations with the government, and within Aboriginal organizations. Although there are some matters of purely local interest, which do not as directly affect the interests of off-reserve band members, the complete denial to off-reserve members of the right to vote and participate in band governance treats them as less worthy and entitled, not on the merits of their situation, but simply because they live off-reserve.³³⁸

In the absence of understanding of the why (this was constructed) and who (constructed this and is most impacted) it is hard to make an assessment about the importance of case law in this realm. Certainly inclusion and representative capacity is addressed. Addressing legal rights without addressing the circumstance (legal wrongs) that constructed the situation seems to be a stop gap measure. It must also be said that the power to decide who is included is a colonial victory. There is no victory for Indigenous peoples here. The enforced exclusion by Indigenous

³³⁸ *Ibid.* at paras 15-17.

citizens via the *Indian Act* and acted upon by band councils or the enforced inclusion by White judiciary means that decisions related to the fundamental rights of Indigenous citizens are still being made by non-Indigenous bodies. In the short term, the Canadian judiciary has addressed notional parity for a small group of people, in the long term (as is the case with much systemic imperialism) the decisions about Indigenous autonomies are being made by non-Indigenous people. The wresting of authority and the imposition of voicelessness have mandated Indigenous silence and marginalization from our own decision making even further. Implicit in this marginalization from governmental decision making is a devaluation of our decision making power as individuals, the ramifications of which continue to visit us in our homes, on-reserve or off-reserve.

a. Devaluation of Humanity: Hunting Indigenous Women

Ada Elaine Brown • Brittany Manitopyes • Naomi Leigh Desjarlais • Jaime Wheeler • Donna Marie Kasyon • Maxine Wapass • Pamela Jean George • Janet Sylvestre • Victoria Nashacappo • Monique Pitre • Joanne Ghostkeeper • Ginger Lee Bellerose • Cara King • Jessica Cardinal • Lorraine Wray • Sherry Ann Upright • Edna Bernard • Barbara Eyapaise • Rhonda Running Bird • Georgette Flint • Bernadette Ahenakew • Mavis Mason • Gail Cardinal • Ramona Wilson • Lana Derrick • Delphine Nikal • Roxanne Thiara • Alishia Germaine • Cherissa-Lynn Mercer • Charlene Kerr • Colleen Shook • Ann Ruby Threlfell • Brenda Logan • Verna Littlechief • Wendy Poole • Cherish Billy Oppenheim • Crystal Peggy Baker • Lee-Ann Parker • Lisa Marie Graveline Aka Lisa Bear³³⁹ • Alberta Williams • Sherry Irving • Sarah Jean Devries • Lisa Marie Young • Michelle Gurney • Janet Henry • Stephanie Lane • Elsie Sebastien • Jacqueline Marie Murdock • Tanya Marlo Holyk • Heather Chinnock • Olivia Gayle Williams • Dorothy Anne Spence • Teressa Williams • Dawn Crey • Georgina Papin • Brenda Wolfe • Jennifer Furminger • Rebecca Guno • Maria Lorna Laliberte • Ruby Anne Hardy • Michelle Remi(mi?) • Mona Wilson • Cheryl Ann Joe • Nancy Jane Bob • Yvonne Abigosis • Sereena Abbotsway • Cassandra Lailoni Antone • Kari Ann Gordon • Tammy Lee Pipe • Rachel Turley • Rose Minnie Peters • Mary Lidguerre • Patricia Pendleton • Crysta Lynn David • Phoebe Mack • Velma Marie Duncan • Roberta Marie Ferguson • Jocelyn 'Chippy' McDonald • Chantal Marie Venne • Donna Rose Kiss • Donna Charlie • Carol Ruby Davis • Lisa Marie Gavin • Catherine Mary Daignault • Glenda Morrissette • Christina Littlejohn • Constance Lynne Cameron • Jackaleen Patricia Dyck • (Velicia?) Felicia Solomon³⁴⁰ • Noreen Taylor • Cheryl Duck • Therena Silva • Jane Louise Sutherland • Susan Asslin • Sonya Nadine Mae Cywink • Elena Assam-Thunderbird • Rebecca Jean King • Bernadette Leclair • Donna Tebbenham • Minnie Sutherland • Sandra Kaye Johnson

³³⁹ One website reports that Lisa Graveline's unnamed mother was found dead behind a strip club. Online: Missing/Murdered Native Women In Canada <<http://www.missingnativewomen.org/>> [Missing/Murdered Native Women].

³⁴⁰ Helen Betty Osborne's cousin. "Stolen Sisters Discrimination and Violence Against Native Women in Canada", online: Amnesty International <http://www.amnesty.ca/campaigns/sisters_overview.php> [Stolen Sisters].

• Charlene Catholique • Heather Tuckatuck • Cheryl Ann Johnson • Anna Mae Aquash • Laura Lee Cross • Jennifer Naglingniq • Donna Joe • Carol Ann Deiter • Marlene Buffalo-Hudson • Laura Ann Ahenakew • Elaine Keewatin Flowers • Dawn Keewatin • Rose Desjarlais • Mrs. Wayne Stonechild • Madeleine Lavalee • Jane Doe • Joyce Cardinal • Annette Bruce • Julie Gambler • Roberta Saddleback • Tracy Lyn Hope • Cherlene Kerr • Debbie Kennedy • Gloria Duneult • Brenda George • Dawn Ritchie • Laverna Avigan • Debbie Neeclose • Loran Carpenter • Jennieft Pete • Verna Lyons • Sandra Flamond • Bobbie Lincoln • Donna Chartrand • Shirley Nix • Lisa Leo • Martha Garvin • Gertrude Anderson • Christine Billy • Shelia Hunt • Jerry Ferguson • Ruby Williams • Barbara Laroque • Holly Cochrane • Cindy Williams • Lorna George • Veronica Harry • Monika Lillmeier • Elsie Tomma • Patricia Andrew • Nya Robailard • Mary Johns • Rose Merasty • Lorna Jones • Lois Mackie • Carol Davie • Lorraine Arrance • Nancy Jane Bob • Peggy Snow • Janice Saul • Margaret Vedan • Janet Basil • Leanne Scholtz • Donna Stony • Laurie Scholtz • Karen Baker • Jenny Waters • Belinda Ritchie • Sharon Arrance • Julie Smith • Pauline Johnson • Maxine Paull • Chantel Ferguson • Annie Cedar • Patricia Wadhams • Amanda Flett • Maureen Riding-At- The-Door • Bernadine Standingready • Luanne Stolarchuk • Marjorie Pironen • Dora Patrick • Sally Jackson • Tanya Wallace • Laura Frank • Pamela George • Shirley Lone Thunder • Dierdre Lavalley³⁴¹ • Amber Tara-Lynn Redman³⁴² • Melanie Geddes • Wynona Umpherville • Florence Frenchman • Leona Sanderson • Farro Bird • Tamra Jewel Keepness • Dahleen Kay Bosse • Donna Marie Kayson • Shirley Lonethunder • Sheila Kahnpace • Elizabeth Bertha Halkett • Mary Johnson • Barbara Paul • Patricia Thomas • Wannita Leanne Wolf • Samantha Evelyn Belcourt • Mary Ida Periard • Maggie Lee Burke • Lisa Marie Willier • Kelly Dawn Reilly • Diana Marie Bellerose³⁴³ • Debbie Lake • Roberta Okeymow • Rebecca Boutilier • Hazel Ann Combs • Vivian Rose Paddy • Jennifer Janz • April Lambert • Shawna Lee Bird • Rachel Quinney • Lynn Minia Jackson • Cheryl Lynn Black • Francesca Laboucan • Brenda Moreside • Carmen L'Hirondelle • Madeline Noskey • Shirley Lyne Laboucan • Geraldine Letendre • Jessica Leah Noskey • Arlene Thunder • Virginia Johansen • Dorcas Gail Shorson • Rene Gunning • Lorna Ulmer-Billy • Tawnya Megan Lisk • Sarah Strachan • Christina Wallace • Diane Mary Stewart • Mary Jane Jimmie • Jennifer Cusworth • Norma Cecilia Tashoots • Norma (Lorna) George • Chasidy Whitford (toddler) • Fabian (Faye) Manley Paquette • Danielle Larue • Vanessa Buckner • Christina Lorraine Christison • Tami Dean Tracey • Richard "Kellie" Little • Gale Annetta Morrison • Mary Anne Medwayosh • Vickie Black • Adriane Cecile Rose Wadhams • Roberta Jean Elders • Melissa Maureen Nicholson • Kimberley Gallup • Lorraine Sue Awasis³⁴⁴ • Christina Marie George • Violet Delores Herman • Brenda Hazel Larose • Martina May Johnnie • Kristal Eileen Martin •

³⁴¹ The previous names are Indigenous women recorded by the Native Women's Association as being missing or dead as of October, 2005. The numbers are vastly underreported and estimates by the Sisters in Spirit Campaign number the missing or dead Indigenous women at approximately 500 women in 20 years. Native Women's Association of Canada, "Sisters in Spirit" (21 October 2005), online: Native Women's Association of Canada <<http://sistersinspirit.ca/engmissing.htm>> [Sisters in Spirit].

³⁴² Additional names appearing in this list come from a number of sources, including case law, newspaper reports, and a number of missing women websites on the internet. See Appendix A for pinpoint references and information on each woman.

³⁴³ Missing/Murdered Native Women website, *supra* note 339. Sister of Ginger, who was murdered. Deanna is a mother of four and missing.

³⁴⁴ Shot and killed by RCMP while investigating a domestic dispute. N.A. "Turtle Island Native News network Briefs" *Turtle Island Native Network Discussion* (06 April 2003), online: Turtle Island webpage <<http://www.turtleisland.org/discussion/viewtopic.php?p=723&sid=ec9d4add4ebc0a95a10f592aea8a990a>>.

Kayla Nichole Shieann John • Kayla McKay • Eva Mitchell • Doreen Jack³⁴⁵ • Kim Casimer • Mary May Dick • Monica McKay • Ruby Anne Kirkpatrick • Helena Tomat • Rachel Adams • Diane May Joseph • Sandy Korba • Sherry Charlie • Stephanie Thomas • Thelma Janice Pete • Sharon Abraham • Mary Florence Lands • Amanda Cook • Honey Joy Mckay • Eileen Bradburn • Doreen Leclair • Beatrice Sinclair • Cassandra Coralee Thomas (infant) • Sylvia Ann Guiboche • Isobel Lathan • Ruby Verna Genaille • Elaine Moar and Hailey Moar (infant) • Nadine Beaulieu (infant) • Jamie McGuire • Precious Pascal • Sunshine April Hilda Wood • Susan “Brenda” Levasseur • Candace Henderson • Dianna Marie Hamm • Dorothy Martin • Sherry Paul • Moira Erb • Tania Marsden • Nicolle Hands • Jacqueline Stanicia • Marie Edith Banks • Geraldine Settee • Evelyn Stewart • Glynnis Lee Hall • Vivian Cada • Cheryl Moonias • Deanna Daw • Meloni Sutton • Samantha Johnings (infant) • Stacey Diabo • Diane Dobson • Deborah Toulouse • Jane Jack • Maxine Suzanne Peters • Pamela Holopainen • Tara and Vickie Thornley (adopted out) • Elizabeth Kamookak and Jeremy Jacob • Donna Kusugak • Inusiq Sarah Akavak • Oolayou Eyesiak and Pootoogoo (son) • Mary Ann Birmingham • Betsy Kalaserk-Kirby • Leanne Irkotee • Rhoda Maksagak • Deborah Holmes • Chrystal Dawn Bearisto • Gladys Simon • Sandra Gaudet • Elaine Flowers • Corrie Ottenbreit • Delores Dawn Brower •

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There are no words that can address the horror of this.

As noted, women between the ages of 25 and 44 and legally defined as Indian under the *Indian Act* have been found to be five times more likely than other women in that age category to die a violent death, according to a government of Canada report.³⁴⁶

Helen Betty Osborne was 19 years old when she was abducted, sexually assaulted and murdered on November 12, 1971. Fifteen years and one provincial inquiry³⁴⁷ later, the link between the racialized administration of Canadian justice and community complicity in silence was made public. In 2003, Helen Betty Osborne’s cousin Felicia was found murdered. No killer was found. The lack of police vigilance and attention to Indigenous women was cited as related factor by Felicia Solomon’s family.³⁴⁸

³⁴⁵ Doreen Jack, her husband Ronald and sons Russell and Ryan all disappeared. Missing/Murdered Native Women website, *supra* note 339.

³⁴⁶ *Aboriginal Women: A Demographic, Social and Economic Profile*, *supra* note 314 at 13.

³⁴⁷ *MAJI*, *supra* note 226.

³⁴⁸ *Stolen Sisters*, *supra* note 340 at 1.

Highway 16 in British Columbia, dubbed the Highway of Tears has seen 6 young girls killed or abducted since 1990.³⁴⁹ Most of the women were Indigenous.

Robert Pickton has been charged with twenty six counts of murder, some of them Indigenous women from Downtown Eastside Vancouver.³⁵⁰

The Saskatchewan Court of Appeal heard a Crown appeal on sentencing for a man who was convicted of sexually assaulting a 12 year old Cree girl. Dean Edmondson's sentence, two years to be served at home, was upheld.³⁵¹ Two other men were originally acquitted of the assault and the Crown has appealed the same.³⁵² The girl who was assaulted, her uncle says, has started abusing alcohol and has attempted suicide.³⁵³

Judge David William Ramsay faced 10 charges of sexual assault, breach of trust, and obtaining the sexual services of a person under the age of 18.³⁵⁴ He was a Provincial Court judge when the crimes took place. One charge of sexual assault was for the assault of a 16 year old Métis girl. He negotiated a price but did not pay her for sex and slammed her head into his dashboard, slapped her across the face and sexually assaulted her. The judge assailant had presided over a case conference regarding custody of her child.³⁵⁵

The judge paid a 14 year old Aboriginal girl to perform oral sex on him. He repeatedly (4-6 times) paid her for sex on different occasions.³⁵⁶ The Aboriginal girl in this instance appeared before the judge several times during the same period when was paying her to perform oral sex

³⁴⁹ P. Edgar and M. Hume, "A sixth family feels the pain" *National Post* (July 19, 2002), online: Missing People webpage <http://www.missingpeople.net/highway_16_disappearances-july_19_2002.htm>.

³⁵⁰ "Trying Pickton on 26 counts unfair to jury: judge" (21 October 2005), online: CTV Homepage <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060809/pickton_060809/20060809?hub=CTVNewsAt11>. He will originally be tried on 6 of them.

³⁵¹ CBC News, "Top court dismisses Sask. Sex case" (20 October 2005), online: CBC News <http://www.cbc.ca/story/canada/national/2005/10/20/scoc_sask051020.html>. While not murdered or missing, attacks on Indigenous women and girls are pervasive and often include elements of sexualization and racialization.

³⁵² "2nd Trial Starts for Sexual Assault of Girl" (20 March 2007), online: CBC News <<http://www.cbc.ca/canada/saskatchewan/story/2007/03/20/kindrat.html>>.

³⁵³ T. Cook, "Natives angry over decision on man who assaulted girl" (21 October 2005), online: Globe and Mail webpage <<http://www.theglobeandmail.com/servlet/story/LAC.20051021.ASSAULT21/>>.

³⁵⁴ *R. v. Ramsay*, [2004] B.C.J. No. 1165 at para 2 (B.C. S.C.) (QL).

³⁵⁵ *Ibid.* at para 4.

³⁵⁶ *Ibid.*

on him. The judge also told the girl that in return for her secrecy, he would “let her off sentences”.³⁵⁷

The judge paid a 15 year old Aboriginal girl who had appeared before him to perform oral sex on him. He attempted to overpower her, pulled her hair and threatened to kill her if she told anyone.³⁵⁸

In its decision, the British Columbia Supreme Court, Dohm A.C.J.S.C. presiding stated:

The wrongdoing of one individual in the system, of a most serious nature, has not been allowed to compromise and destroy the system itself. Indeed, this case shows that the administration of justice has the capacity to be sensitive and responsive, as well as being effective.³⁵⁹

One of the aggravating factors in this case was found to be the judge’s position³⁶⁰ and the court’s decision was intended to denunciate the reprehensible actions³⁶¹ and an unprecedented aberration.³⁶² The accused was sentenced to seven years.

Gilbert Paul Jordan got Indigenous women he had searched out in “the skid row” area of Vancouver drunk with toxic quantities of alcohol in hopes of achieving sexual satisfaction.³⁶³ Six of those women died and four more were rescued by police officers before their blood alcohol level resulted in death.³⁶⁴ Jordan was charged with and found guilty of manslaughter in 1988. He received a sentence of fifteen years, which was reduced to nine years on appeal. Jordan served six years and was ordered not to drink with any women or attend licensed establishments.³⁶⁵ When he was released, Jordan invited an Indigenous woman to his room and attempted to procure alcohol (the woman left when he went to get the liquor).³⁶⁶ This occurred within two weeks of his release. He appealed the terms of his probation. The terms were upheld. However, in 2004 Mr. Jordan appealed again another finding related to his breach of

³⁵⁷ *Ibid.*

³⁵⁸ *Ibid.*

³⁵⁹ *Ibid.* at para 8.

³⁶⁰ *Ibid.* at para 16.

³⁶¹ *Ibid.* at para 15.

³⁶² *Ibid.* at para 17.

³⁶³ *R. v. Jordan*, [1988] B.C.J. No. 3011 at 2 of 5 (B.C. S.C.) (QL) [*Jordan BCSC*].

³⁶⁴ *Ibid.*

³⁶⁵ *R. v. Jordan*, [2003] B.C.J. No. 237 at 2 of 6 (B.C. C.A.) (QL) [*Jordan BCCA*].

³⁶⁶ *Ibid.*

probation based upon the same breach as occurred in the previous breach.³⁶⁷ His sentence to an additional year and to probation for three years was upheld.

Addressing the violence against and disregard for Indigenous women requires that we do not do so in the absence of an understanding and discussion of the multiple layers of oppression and violence that Indigenous women face. Addressing the violence against Indigenous women as an individualized crime diminishes the impact that Canadian legal/colonial strategies have had in the development and perpetuation of this violence. One author has written of this:

To understand violence against Aboriginal women, the situation must be situated within the surrounding legacy of the colonization of Aboriginal women. Aboriginal women have endured countless legislative intrusions directing at assimilating and controlling the four spheres of everyday tribal life; political, social/kinship, spiritual and land.³⁶⁸

As noted, there seems to be a constructed perception of Indigenous women as disposable (trash, garbage, scrap, waste) and sexualized entities. There is a layering of violence, indifference and invisibility which creates an incredibly empowering situation for brutalizers, murders, and rapists of Indigenous women. There is a palpable underlying hatred, even worse an entitlement, when you read the cases involving Indigenous women who have been assaulted and murdered. There is some degree of knowledge shared in many of these instances that the life that has been taken *does not matter, will likely not warrant an investigation and/or that the perpetrator's action is somehow acceptable, if not rightful.*

There is an errant awareness that Indigenous women can be brutally sexually used and then disposed of. Disdain and disregard do not fully encompass this; if you read carefully you will notice that there is a sense of disposing of some *thing* distasteful, with little value. There is a peculiar heightened violence, to our heads, our hearts, our women's places of strength. I do note that when we are in the dark, secret urban spaces and country roads we become even more disposable; our lives seemingly less meaningful and absences less noticeable.³⁶⁹ Somehow, we are perceived as abundant, less than human and not worthy of respect. What is justice and how

³⁶⁷ *Ibid.* at 1 of 6.

³⁶⁸ Anna Hunter, "The Violence that Indigenous Women Face" 39:2 (March/April 2005), online: Canadian Dimension webpage <<http://canadiandimension.com/articles.2005/03/01/35/5>>.

³⁶⁹ Sherene A. Razack, "Gendered Racial Violence and Spacialized Justice The Murder of Pamela George" in Sherene A. Razack, ed., *Race, Space and the Law: Unmapping a White Settler Society* (Toronto: Between the Lines, 2002) 121.

does it relate to the systematized and systematic devaluation and eradication of Indigenous women from our traditional roles, traditional spaces and earth? The *Indian Act* has constructed many Indigenous women as women without property, without space. These spaces where we are murdered and disappeared from are perceived as owned by men/whitemen/brownmen. Somehow we are perceived as intruders in that owned space, and because we were left with nothing after the colonial husking, our bodies, our sexuality and our children are owned by others. Indigenous women are absolutely commodified. Entirely devalued, legislatively owned and subjugated, our deaths often barely of note.

There is abnormal silence about our Indigeneity in the Canadian courtroom;³⁷⁰ it is not difficult to reconcile the perpetuation of the colonial silencing of Indigenous women (through legislation, policy and historic case law) with the contemporary silencing of our voices when we are victimized, raped and murdered. There is a silence in the court about our culture, from which many of us are violently wrenched. There is a silence about the impact of our absences on our nations and communities, let alone on our families. Taking that backbone of the nation by force has left a void in many of our families, communities and nations. How can you avoid that discussion? In a Canadian context, at least, there is a layering of race based hate crimes that is almost never mentioned.³⁷¹ It is my understanding that the enforced legislative invisibility of

³⁷⁰ It is a difficult balance to include actuality of Indigeneity in spaces where we have been silenced or where our images have appeared to us as funhouse mirror reflections. As identifying authentic Indigenous experience and detailing Indigenous histories in a non-objectifying or stereotyping manner is very difficult to do (from within a system or an experience within which Whiteness is the entrenched standard of normalcy and reasonableness), many justice officials opt for silence in order not to make a mistake or generalization. As a result, there are three categories which can address the treatment of Indigenous peoples in Canadian law:

1. Cases in which Indigenous peoples and cultures are treated as historical or racialized objects; 2. Cases in which Indigenous peoples and cultures are largely ignored (for example, notably absent in the Saskatchewan Court of Appeal decision in *Kummerfield* is an informed discussion of the devaluation of Indigenous women as a racialized action and as a colonial effect); and 3. Cases where Indigenous identity and culture is re-constructed and predicated on stereotypical interpretations of Indigenous peoples or cultures (which I would argue, is a concern related to the application and interpretation of section 718.2 of the *Criminal Code*, *infra* note 646). This discussion is dealt with at length later in this paper.

³⁷¹ I note the relative silence surrounding the disappearance of many women (poor, some Indigenous) from Vancouver's east side, the young girls (most Indigenous) who have disappeared from the Highway of Tears in northern British Columbia, and the murders of women from the Edmonton area (many Indigenous) and the lack of community outcry, media coverage and public inquiry into conditions that allow the murder and kidnapping of Indigenous women with such frequency. For a discussion of, and media reports on the disappearances and the largely absent Canadian community response to the same, see: Dennis Culhane, "Their Spirits Live within Us: Aboriginal Women in Downtown Eastside Vancouver Emerging into Visibility" 27:3 (2003) *Am. Ind. Quart.* 593 and C. Buehler, "Search begins for Edmonton serial killer" (Summer 2006), online: First Nations Drum webpage <<http://www.firstnationsdrum.com/Summer2006/MssgWomenserial.htm>>.

Indigenous women, the history of racialized and sexualized brutality against Indigenous women, and the overwhelming nature of the ongoing colonization of Indigenous peoples are so deeply entrenched and immense that often no one even sees them. It truly is the elephant in the living room that no one can identify, let alone quantify. There is no naming of the circumstance of our existences, no reiteration of the nature of our actualities because they are not understood and they are a link in the chain that is joined with the existence and operation of the Canadian justice system itself. Interestingly, while there is a discomfort with the interpretation of Indigeneity generally, when it is layered with gender there is almost no capacity or capability to interpret the nature or racialized and gender specific hatred and violence in a Canadian context. I understand it, I think. They cannot extract their role in colonization from the continued violence.

The justice system is a part of the violence and creates a climate and perpetuates a circumstance where the violence against and silencing of Indigenous women is accepted and acceptable. And so, violence and brutality thrive in a places where they are given it room to grow. Silence and disinterest fertilize spaces within which violence flourishes. John Martin Crawford killed Indigenous women, usually after raping them. He was able to do so undetected (unobserved) for years. While one judge stated that a very disturbing aspect of the case was the “callous disregard”³⁷² that Martin demonstrated for the women he killed, it is not just the violence that is troubling but the seeming disinterest that Crawford had for the Indigenous women that he killed. That disinterest was not limited to Crawford, Goulding writes:

But Crawford has been the beneficiary of a disinterested media and an equally impassive public. More important, his victims have suffered even further because of this indifference.³⁷³

In 1981 Mary Jane Serloin was murdered by Crawford and he was sentenced to 10 years for manslaughter.³⁷⁴ She had bite marks on her chest, breasts and face; Crawford went to a bar after he killed her.³⁷⁵ In 1992 he killed Shelly Napope.³⁷⁶ She was stabbed in the stomach, chest and

³⁷² Goulding, *supra* note 252 at 74, referring to a statement by Justice Mclean.

³⁷³ *Ibid.* at xiii.

³⁷⁴ *Ibid.* at 70 and 73.

³⁷⁵ *Ibid.* at 72 and 74.

³⁷⁶ *Ibid.* at 5.

side after being sexually assaulted.³⁷⁷ Calinda Waterhen was killed by Crawford in the period between 1992-94.³⁷⁸

John Martin Crawford was found guilty of one count of first degree murder in the death of Shelly Napope and two counts of second degree murder with no eligibility of parole for twenty-five years for the murders of Eva Taysup and Calinda Waterhen.³⁷⁹

Crawford also victimized other Indigenous women. One evening when a police surveillance team stopped watching Crawford, it has been alleged that he went downtown in his mother's car and raped and killed Janet Sylvestre.³⁸⁰ There was not enough evidence to support a conviction related to the sexual assault and murder of Janet.

Theresa Kematch was another woman brutalized by Crawford. She was picked up by Crawford in October of 1994. Goulding writes of this:

Theresa claims that he beat her, raped her, and left her on the street. What made this attack different from the others Crawford may have committed is that members of the RCMP had Crawford under surveillance at the time, which raises the issue of the extent to which the police actually witnessed what happened to Theresa.³⁸¹

Theresa's sexual assault was discussed by police officers and the story passed from one to another after she was assaulted. One of the police officers was very close to the scene of the crime as it took place (ten feet).³⁸² Goulding asks of this:

Why the RCMP did not move in to prevent the assault is a question that has yet to be answered satisfactorily. John Crawford had killed before. The RCMP knew it, and they had reason to believe that he might be responsible for at least one other killing. Theresa was in a car with a suspected sexual predator and a known killer.³⁸³

Theresa was left on the ground, stumbling through the weeds and streets until she made contact with two other police officers.³⁸⁴ Why the police officers on the scene did nothing to intervene

³⁷⁷ *Ibid.* at 7.

³⁷⁸ *Ibid.* at 111-112.

³⁷⁹ *Ibid.* at 185 and 189.

³⁸⁰ *Ibid.* at 136-137.

³⁸¹ *Ibid.* at 116.

³⁸² *Ibid.* at 119.

³⁸³ *Ibid.*

³⁸⁴ *Ibid.* at 123.

and why they did not assist a sexual assault victim is unknown. The silence that surrounds the official response of the Canadian justice system to the attack and the seeming invisibility of Theresa Kematch is indicative of an immense disregard of the humanity of Indigenous women. That disregard for Indigenous women's humanity is not limited to officials in the justice system. We are assumed by many to be, if not less than human, then incapable of being understood, different. Incomprehensible. As different, we are accorded space that may be entirely respectful but which can be categorized as outside of the person adjudicating's realm of understanding and therefore comfort. Relegated to a space of differential understanding (and in some cases indifference) our concerns, safety and shared experiences are perceived as too different to overlap with Canadians'. In this way, the violence that we experience can be marginalized, trivialized or distinguished from the threat facing the Canadian community. Dangers which may impact us are not threatening to those who place distance between Indigenous women's "nature" and experiences and other peoples. In this way, what threatens us is not a community threat but an insignificant threat or danger not impacting *the community as a whole*. The Crown prosecutor in the Crawford case discussed the lack of public concern in terms of "risk assessment" and Goulding writes of this that "most people living in Saskatoon did not perceive any threat to their own lives."³⁸⁵

Perhaps that distancing, facilitated by a legislative regime which constructed Indians as "other" and Indigenous women as even less than other, is partial explanation for why the decimation of Indigenous women in Canada has gone largely unnoticed until lately. With Indigenous men constructed as "other" and Indigenous women constructed as a subset of "otherness", the brutal murders and invisible disappearances of Indigenous women are able to occur often with only families, communities and Indigenous nations noticing the absence. The numbers are astounding.³⁸⁶ There are many women who disappear and whose disappearances are reported decades later. Goulding spoke to police officials about the breadth of this vaporization of and violence against Indigenous women. "In the end, the search turned up nearly five hundred

³⁸⁵ *Ibid.* at 31.

³⁸⁶ Modest estimates place them at 500. I found over 350 names readily available in the writing of this paper. It is likely that the names of Indigenous women who are missing and murdered without documentation would have a multiplier effect on this number. All Indigenous women identified by the media, case law and various websites that I could find are included in Appendix A.

women, reported missing in the previous three years, who matched the general criteria of age and background of the Saskatoon victims.”³⁸⁷

Pootoogoo Egetsiak was killed on his twenty fourth birthday. His killer also killed Pootoogoo’s mother Oolayou Atsiqtaq by multiple stab wounds to the belly, throat and rectum. Jopie Atsiqtaq woke up with an “urge to kill”³⁸⁸ and did so. The trial judge Marshall, J. examined both Atsiqtaq’s birth in a Hamilton tuberculosis sanatorium, his visit to a sanatorium for tuberculosis in his childhood, and a life informed by violence and criminal activity. Atsiqtaq was sentenced to life imprisonment without eligibility for parole for 15 years.³⁸⁹ There is no mention of the deceased’s Indigenous heritage.

Betsy Kirby died by hanging herself with a shower curtain. Ian Adam Kirby was present during her death and did nothing to stop it. Her husband was charged with criminal negligence causing death and failing to provide the necessaries of life.³⁹⁰ Ian Adam Kirby was convicted of criminal negligence causing death. The trial judge found that “It is also clear that the deceased tended to become volatile when drinking. She had also tried to commit suicide in the past.”³⁹¹ The deceased’s seven year old son testified at this trial. Ian Adam Kirby was sentenced to three years imprisonment, reduced for remand time to 20 months.³⁹² There is no mention of the Indigenous heritage of the deceased.

Deborah Holmes was murdered by James Barry Bradley. She had ended her relationship with him. He broke into her apartment. He drove around her home. He called her. Deborah called 911 seven times between 1999-2001 to complain about Holmes.³⁹³ On the day of her death, the RCMP attended her residence and then left. At that time, Holmes broke in with an axe and hatchet and murdered Deborah. In the months before he killed Deborah, Holmes had repeatedly uttered threats and referred to the axe as something he was going to use to murder Deborah.³⁹⁴

³⁸⁷ Goulding, *supra* note 252 at 33.

³⁸⁸ *R. v. Atsiqtaq*, [1988] N.W.T.J. No. 57 at 2 of 5 (N.W.T. S.C.) (QL).

³⁸⁹ *Ibid.* at 5 of 5.

³⁹⁰ *R. v. Kirby*, [2004] N.W.T.J. No. 57 at para 7 (N.W.T. S.C.) (QL).

³⁹¹ *Ibid.* at para 21.

³⁹² *R. v. Kirby*, [2004] N.W.T.J. No. 71 at para 13 (N.W.T. S.C.) (QL).

³⁹³ *R. v. Bradley*, [2003] P.E.I.J. No. 41 at para 5 (P.E.I. S.C.T.D.) (QL).

³⁹⁴ *Ibid.* at para 36.

He also stated that he owned her and Deborah belonged to him.³⁹⁵ Holmes was found guilty of first degree murder, life with no chance of parole for 25 years. There is no mention of the Indigenous heritage of the deceased.

Fourteen year old Sandra Gaudet was killed during the night of March 9-10 1990. She was found strangled and with marks on her breasts and vulva consistent with bite marks.³⁹⁶ She was walking home from a friend's when she was dragged into Taillefer's home. Taillefer admitted in a statement that he strangled her. Both Taillefer and Duguay provided incriminating statements to the police and were found guilty at trial and appealed. Initially, the Quebec Court of Appeal dismissed Taillefer's appeal and allowed Duguay's appeal.³⁹⁷ The Court of Appeal ordered a new trial (on a second degree murder charge).³⁹⁸ With new evidence in hand, both Taillefer and Duguay appealed their case to the Court of Appeal again, which dismissed the appeals.³⁹⁹ They appealed to the Supreme Court of Canada, who found that the Court of Appeal did not deal with the fresh evidence properly. As a result of the Supreme Court of Canada's decision, Taillefer got a new trial for first degree murder. Duguay's manslaughter conviction was quashed and a stay of proceedings was ordered.⁴⁰⁰ There is no mention of the Indigenous heritage of the deceased.

Elaine Flowers was murdered on October 31, 1985.⁴⁰¹ The deceased met with her former common law husband on October 30 with a social worker and an R.C.M.P. constable. They discussed custody of their daughter. Elaine was willing to grant access but not custody to her former common law husband Allen. There is no mention of the Indigenous heritage of the deceased. The appellant after a day of drinking shot his way into Elaine's home and shot her twice.⁴⁰² The accused appealed his conviction for first degree murder. The appeal was dismissed.⁴⁰³ There is no mention of the Indigenous heritage of the deceased.

³⁹⁵ *Ibid.* at para 43.

³⁹⁶ *R. v. Taillefer, Taillefer v. The Queen, Duguay v. The Queen* (2003), 233 D.L.R. (4th) 227 at para 5 (S.C.C.) (QL) [*Taillefer* at S.C.C.].

³⁹⁷ *R. v. Taillefer and Duguay* (1995), 100 C.C.C. (3d) 1 (Qc. C.A.) (QL).

³⁹⁸ *Taillefer* at S.C.C., *supra* note 396 at para 23.

³⁹⁹ *Ibid.* at para 112.

⁴⁰⁰ *Supra* note 397 at 43.

⁴⁰¹ *R. v. Allen*, [1994] N.J. No. 203 at para 3 (Nfld. C.A.) (QL).

⁴⁰² *Ibid.* at para 27.

⁴⁰³ *Ibid.* at para 96.

Donna Doris Tebbenham was 17 years old when she was murdered. The murderer Runholm's semen was found in her vagina. There is no mention of the Indigenous heritage of the deceased.⁴⁰⁴

Bernadette Leclair was 16 years old when Runholm killed her. His semen was found in her vagina. There is no mention of the Indigenous heritage of the deceased. Runholm's parole eligibility was fixed at 20 years, after reviewing the circumstances of the murders and noting that over 60 community and family letters of support were received as part of his parole eligibility application.⁴⁰⁵

Samantha Johnnings was 19 months old when found murdered in her crib. There was evidence of violence, including semen on the baby's private parts.⁴⁰⁶ The accused Brooks appealed on evidentiary and procedural issues. The Court of Appeal found that the absence of a Vetrovec warning (regarding credibility of in custody witnesses) with regard to incriminating statements Brooks made to two other in custody inmates did result in an unfair trial.⁴⁰⁷ The mother's stability, temperament and emotional nature were addressed by the Court of Appeal,⁴⁰⁸ which determined the appellant Brooks did not receive a fair trial. The Crown appealed the decision to the Supreme Court of Canada.⁴⁰⁹ The Supreme Court of Canada majority determined that the warning is discretionary, that the trial judge used his discretion in making the determination as to whether to give the same, and that the appeal should be allowed and conviction should be restored.⁴¹⁰ There is no mention of the Indigenous heritage of the deceased.

Stacy Diabo was found dead in Alexis Delisle's home on Kahnawake on September 23, 2003. Delisle stated that she received a death threat, that her windows on her home were broken thereafter and that she phoned the Peacekeepers when she heard the windows break.⁴¹¹ Delisle testified that Stacy Diabo had struck her with something (she sustained and received treatment

⁴⁰⁴ *R. v. Runholm*, [2003] O.J. No. 875 at para 13 (Ont. Sup. Ct.) (QL).

⁴⁰⁵ *Ibid.* at para 34.

⁴⁰⁶ *R. v. Brooks*, [1988] O.J. No 3913 at 1 of 34 (Ont. C.A.) (QL).

⁴⁰⁷ *Ibid.* at 33 of 34.

⁴⁰⁸ *Ibid.* at 17 of 34.

⁴⁰⁹ *R. v. Brooks*, [2000] S.C.J. No. 12 (S.C.C.) (QL).

⁴¹⁰ *Ibid.* at paras 1, 4, 20 and 22.

⁴¹¹ *R. c. Delisle*, [2005] Q.J. No. 11298 at paras 18-19 [C.Q. (Crim. & Pen. Div.)] (QL).

for wounds) and that she had grabbed a knife to defend herself and then noticed the deceased on the floor bleeding.⁴¹² Stacey had made statements that evening and before that she would kill Alexis.⁴¹³ Delisle was charged with and acquitted of second degree murder. There is no mention of the Indigenous heritage of the deceased.

Jane Jack was murdered by multiple stab wounds at the residence of the accused by the accused Strong on April 27, 1995.⁴¹⁴ Kinsman, J. of the Ontario Court of Justice found that the deceased struck Strong in the head. Justice Kinsman also found that as a “result of this provocation”⁴¹⁵ Strong stated he had no memory of the events that followed, but that he obtained a knife and inflicted twenty two abrasions and punctures - some of which resulted in Jane’s death. The judge found that the accused was guilty of manslaughter and sentenced him to 30 months custody.⁴¹⁶ There is no mention of the Indigenous heritage of the deceased.

On February 10, 2000, Inusik Sarah Akavak was strangled by Kootoo Korgak while her five year old daughter was home.⁴¹⁷ Korgak was awaiting trial on a five month old charge of assaulting Akavak.⁴¹⁸ Korgak was sentenced to Life in prison without parole eligibility for 12 years.⁴¹⁹ There is no mention of the Indigenous heritage of the deceased.

Precious Pascal died of blood loss due to trauma on January 21, 2004.⁴²⁰ A fifteen year old boy has been charged with second degree murder. Precious was 14 years old. There is no mention of the Indigenous heritage of the deceased.

⁴¹² *Ibid.* at para 20.

⁴¹³ *Ibid.* at paras 46 and 53.

⁴¹⁴ *R. v. Strong*, [1996] O.J. No. 3558 [Ont. Ct. Just. (Gen. Div.)] (QL).

⁴¹⁵ *Ibid.* at para 4.

⁴¹⁶ *Ibid.* at paras 5 and 14.

⁴¹⁷ “Iqaluit residents honour Inusiq Akavark” *Nunatsiaq News* (7 April 2000), online: Nunatsiaq Homepage <http://www.nunatsiaq.com/archives/30815/news/nunavut00430/nvt20407_10.html>. See also “Family member opposes wife-killer’s appeal” (15 August 2003), online: Nunatsiaq Homepage <http://www.nunatsiaq.com/archives/30815/news/nunavut/30815_03.html>.

⁴¹⁸ “Accused in Iqaluit homicide was free on release order,” online: Nunatsiaq Homepage <http://www.nunatsiaq.com/archives/nunavut000230/nvt20218_01.html>.

⁴¹⁹ *R. v. Korgak*, [2003] Nu. J. No.3 (N. C.A.) (QL).

⁴²⁰ “Teen charged with second-degree murder” (11 February 2004), online: CBC Manitoba <http://winnipeg.cbc.ca/regional/servlet/View?filename=mb_arrest20040211>.

Mark Allen Bell bludgeoned Diana Marie Hamm to death on October 18, 1991.⁴²¹ Upon conviction, he initially received 5 ½ years, but upon appeal by the Attorney General, the sentence was increased to 12 years.⁴²² There is no mention of the Indigenous heritage of the deceased.

In some cases, Indigenous citizenship is acknowledged, but usually not in terms of the relevancy of the impact, intent or effect of the crime.

Dorothy Martin was killed during a struggle with Gerald Robert Wilson on April 26, 1999 by a gunshot to her mouth.⁴²³ A 1999 Manitoba Court of Appeal decision ordered a new trial after Wilson won his appeal contesting his sentence of 7 years for manslaughter. The case does refer to the deceased's traditional upbringing in the context of hunting and fishing.⁴²⁴

Jocelyn "Chippy" McDonald was killed by James Kakegamic who was sentenced to life and found guilty of first degree murder.⁴²⁵ Jimmy Jared Kakegamic had been found guilty of sexual assault of his wife in 2004.⁴²⁶ Jocelyn was a Whitedog First Nation member.⁴²⁷

The Ontario Court of Appeal decision in *R. v. Worth*⁴²⁸ upheld the decision of the trial judge who found that the appellant was guilty of second degree murder with parole ineligibility for 23 years.⁴²⁹ The head of a 12 year old girl was found in Worth's car. The appellant, at trial, refused to see the Crown's psychiatrist.⁴³⁰ A Corrections Canada worker provided that:

He hated females: he said, "I fantasize; I have sexual fantasies which are bizarre; I raped already twice and I don't want to do it again...."⁴³¹

⁴²¹ *R. v. Bell*, [1993] M.J. No. 226 at 1 of 5 (Man. C.A.) (QL).

⁴²² *Ibid.* at 4 of 5.

⁴²³ *R. v. Wilson*, [1999] M.J. No. 239 at paras 3 and 5 (Man. C.A.) (QL).

⁴²⁴ *Ibid.* at para 21.

⁴²⁵ "Kakegamic Guilty" (18 October 2005), online: CKDR News Homepage <<http://news.ckdr.nrt/>>.

⁴²⁶ *R. v. Kakegamic*, [2004] O.J. No. 3744 (O.C.J.) (QL).

⁴²⁷ J. Thoom, "City Man Appeals Murder Conviction," online: Wataway Homepage <<http://www.wawatay.on.ca/index.php?module=pagesetter&func=viewpub&tid=1&pid=1314>>.

⁴²⁸ *R. v. Worth*, [1995] O.J. No. 1063 (Ont. C.A.) (QL).

⁴²⁹ *Ibid.* at para 30.

⁴³⁰ *Ibid.* at para 3.

⁴³¹ *Ibid.* at para 5.

Further, when the Crown referred to the appellant's "propensity to kill Indian girls"⁴³² in cross-examination of the psychiatrist for the defence, the trial judge held that:

It seems to me that looked at in a very general way, this type of cross-examination is inappropriate. It will tend to do no more than inflame the jury. It avoids the central question, being whether or not Dr. Hill [the defense psychiatrist] has relied upon the fact of the previous behaviour in forming his opinion.⁴³³

The Court of Appeal agreed with the trial judge that this "hypothetical" was inappropriate as it addressed the appellant's past criminal conduct.⁴³⁴ That the discussion of Indigeneity was even broached and that there exists a propensity to kill Indian girls is of relevance to Indigenous girls and Indigenous citizens. It should be of interest to everyone. The deceased was of Métis ancestry.

⁴³² *Ibid.* at para 7.

⁴³³ *Ibid.* at para 7.

⁴³⁴ *Ibid.* at para 8.

Journal Entry

There are very few words to describe the enormity of this. I don't even have the words to name it. It is not just violence, it is not just racism, it is not just brutality, it is not just devaluation and it is not just erasure. The horror of it, the absolute voiding of humans because they are Indigenous and because they are women has no name. It's small and uncertain, but I feel if I could name it that maybe I could begin to comprehend it.

The barbarity and cruelty, is unknowable but is an amplification of something somehow familiar. It is unknown but somehow recognizable.

We do not have a word to describe the immensity of our loss. We have been deprived of some of the strongest part of one half of our circle. What happens when the circle is unfilled?

It. Inhumanity + degradation + misogyny + racism + colonialism + hatred + brutality + savagery + almost casual disregard for our lives +

It. Genocide.

It. Femicide.

It. Abofemicide.

If IT is deliberate and systematic (in this case, devaluation entrenched and perpetuated in systems), what differentiates it from genocide?

And. Who will mourn the women who are missing, who are murdered by strangers and loved ones? How do we mourn if our ceremonies are desecrated from years of oppression and colonization? How do we honour those who were taken by the honourless?

All we can do at times is commit to making sure it is not an erasure. Give it voice and honour the women.

How can you deconstruct destruction?

Indigenous women disappear with alarming frequency. With worried, grieving and rightfully quiet voices raising the alarm, many Canadians might not see the problem as local enough, important enough or serious enough to warrant amplification of the voices of the missing.⁴³⁵ As a result, in many places missing Indigenous women are presumed to be gone, silenced and erased.

Christina Littlejohn went missing in 1968 from her First Nation. 72 year old Eddie Smith was charged with second degree murder in conjunction with her disappearance.⁴³⁶

Fourteen year old Amanda Cook was murdered on July 13, 1996. Clayton George Mentuck was arrested and charged three months later with second degree murder; he was acquitted on

⁴³⁵ In Indigenous communities I have lived in and visited there is a silent recognition of our factual knowledge: this can happen to any one of us, our daughters, and our nieces. The understanding is horrific, shared, and is sometimes spoken of in the same quiet tones that disease is spoken of. In this way, I feel that the disappearance and murder of Indigenous women has, in the same way disease has, been perceived as having animus.

⁴³⁶ "Hearing begins in 36-year-old case of missing woman" (29 July 2004), online: Carillion Homepage < http://www.thecarillion.com/newsjul29_04.html >.

September 29, 2000.⁴³⁷ Chain-like pieces of metal similar to that worn by the accused as a necklace were found at the crime scene.⁴³⁸ It was determined that they were not from his necklace. Questioning was undertaken on and reference was made to the Qaywayseecappo Reserve in the decision.⁴³⁹ Crown assertions, including a confession with an undercover officer, included those that the accused had admitted to the crime on five occasions.⁴⁴⁰ It should be noted that Amanda Cook's attention and playful flirting were described by the trial judge as supporting the inference that a stranger to whom Amanda was attracted could have murdered her. "At least one of (people who attended the fair where Amanda was murdered) them, who was not the accused, attracted the attention of the deceased."⁴⁴¹

Honey Joy McKay, 21 years old and the mother of one was killed by her common law husband on November 15, 2003. He plead guilty to manslaughter and received a five year sentence.⁴⁴² Honey Joy was an Indigenous woman from Berens River, Manitoba.⁴⁴³

Eileen Bradburn was kicked to death by Jeffrey Crane on February 14, 2002.⁴⁴⁴ The accused's Aboriginal ancestry was addressed in sentencing.⁴⁴⁵ Eileen had five children.⁴⁴⁶ In addition to kicking Eileen in the head, Jeffrey Crane assaulted her in an inhumane and degrading manner.⁴⁴⁷ He was sentenced to eight years incarceration.⁴⁴⁸

⁴³⁷ *R. v. Mentuck*, [2000] M.J. No. 447 at para 2 (Man. Q.B.) (QL). Mentuck's first trial started in January of 2000 and in February 2000 the jury was discharged, having been unable to reach a verdict.

⁴³⁸ *Ibid.* at para 35.

⁴³⁹ *Ibid.* at para 43.

⁴⁴⁰ *Ibid.* at para 57.

⁴⁴¹ *Ibid.* at para 55.

⁴⁴² M. McIntyre, "Man gets two more years for killing wife" (12 July 2005), online: Mike McIntyre on Crime <http://mikeoncrime.com/News/NPView>.

⁴⁴³ Online Obituary of Honey Joy McKay, online: Obituaries Today Website <http://www.obituariestoday.com/Obituaries/PrintObitVersion.cfm?Obituary_ID=30838>.

⁴⁴⁴ *R. v. Crane*, [2003] M.J. No. 80 at para 7 (Man. Prov. Ct.) (QL).

⁴⁴⁵ *Ibid.* at paras 13 and 14. The court refers to section 718 of the *Criminal Code*, *infra* note 646, and identifies Crane as a member of the Oxford House First Nation.

⁴⁴⁶ *Ibid.* at para 16.

⁴⁴⁷ *Ibid.* at para 25.

⁴⁴⁸ While the case does not identify the deceased as Aboriginal, Aboriginal women's sites have identified her as an Aboriginal woman. See Appendix A for more information.

Sisters Corrine McKeown and Doreen Leclair were murdered by William Dunlop on February 16, 2005 in Winnipeg.⁴⁴⁹ Dunlop was violating two restraining orders. The sisters called 911 on five occasions and were told by the operator, among other things, to call the police directly, to resolve the issue themselves and that they were partially to blame (even Dorren had just told the operator that Corrine had been stabbed).⁴⁵⁰ He stabbed both women up to two hours after their first call to 911.⁴⁵¹ Manitoba's chief medical examiner called an inquest which resulted in a 164 page report. Both of the murder victims were Métis.⁴⁵²

Kristal Eileen Martin was killed by James Robert Labbe between June 17-18, 1999.⁴⁵³ Labbe originally confessed and made voluntary statements that he had hit Kristal ten times in the head with a "brick thing"⁴⁵⁴ out of love and that she wanted to die. At the British Columbia Court of Appeal, Labbe appealed his conviction for second degree murder. The appeal was allowed and a new trial ordered on the manslaughter charge.⁴⁵⁵ While there is no mention of Kristal Martin's Indigenous ancestry in the case, she is identified as an Aboriginal woman on one online website.⁴⁵⁶

Kim Casimer was killed by Voyne Mathias Baptiste by blows inflicted to her head following a sexual assault on December 22, 1989.⁴⁵⁷ At trial, Baptiste was convicted of first degree murder, while committing/attempting to commit a sexual assault. On appeal, the conviction was upheld.⁴⁵⁸ The British Columbia Supreme Court decision notes that both the accused and Kim were 'native Indians'.⁴⁵⁹

⁴⁴⁹ "The Winnipeg 911 murders" (2 July 2004), online: CBC News <<http://cbc.ca/news/background/aboriginals/winnipeg911.html>>.

⁴⁵⁰ *Ibid.*

⁴⁵¹ S. Edmonds, "Dispatcher followed rules in not sending cops to stabbed women – 911 inquest," online: Coalition for Gun Control website <http://coalitionforguncontrol.org/911_4.htm>.

⁴⁵² "Manitoba coroner orders inquest in 911 murders" (10 May 2001), online: CBC Homepage <http://www.cbc.ca/story/news/national/2001/05/10/inquest_1k_010510.html>.

⁴⁵³ *R. v. Labbe*, [2000] B.C.J. No. 2882 (B.C. S.C.) (QL).

⁴⁵⁴ *Ibid.* at para 14.

⁴⁵⁵ *R. v. Labbe*, [2001] B.C.J. No. 2305 at para 38 (B.C. C.A.) (QL).

⁴⁵⁶ Missing/Murdered Native Women website, *supra* note 339.

<www.aktionsgruppe.de/abteilung4/5398559763100b201/53985597631011905/index.html> [Aktionsgruppe].

⁴⁵⁷ *R. v. Baptiste*, [1998] B.C.J. No. 1246 at page 2 of 13 (B.C. C.A.) (QL).

⁴⁵⁸ *Ibid.* at 13 of 13.

⁴⁵⁹ *R. v. Baptiste*, [1991] B.C.J. No. 3945 at page 2 of 19 (B.C. S.C.) (QL).

Twenty two year old Sandy Ann Rose Korba was murdered by Marik Ellsworth, her common law spouse, by several blows to the head with an axe following an argument.⁴⁶⁰ Of six blows, the first was likely from behind.⁴⁶¹ He was convicted of manslaughter and is to serve 10 years imprisonment.⁴⁶² While not identified as Indigenous in the case, an online website identifies Sandy Korba as an Indigenous woman.⁴⁶³

Gale Annetta Morisson is described by the British Columbia Court of Appeal as “a 29 year old severely mentally handicapped native woman”.⁴⁶⁴ At trial, her accused murderer Dwain Elliot Taylor testified that he hit Gale over the head a number of times with a stick.⁴⁶⁵ The trial jury rendered a verdict of guilty of second degree murder (para 10), on appeal the conviction for second degree murder was set aside and a new trial ordered.⁴⁶⁶

The disposability of Indigenous women is also evident in the evidence from the trial decision of *R. v. Beaulac*.⁴⁶⁷ In this case, Beaulac and an acquaintance John Eldon Norris drank with assaulted and killed Mary Anne Medwayosh. They then threw her body into water near the Second Narrows Bridge in Vancouver.⁴⁶⁸ Mary Anne was forced into the trunk of a car and transported to the place where she was killed and disposed of.⁴⁶⁹ Jean Victor Beaulac was found guilty at trial of first degree murder (in the third of three trials marred by interpretative problems).⁴⁷⁰ Evidence was entered that Beaulac beat her severely with a rock and threw her in a river.⁴⁷¹ A fourth trial was ordered by the Supreme Court of Canada in 1999.⁴⁷² The court held that the new trial should be held before a judge and jury who speak both official languages.⁴⁷³

⁴⁶⁰ *R. v. Ellsworth*, [2003] B.C.J. No. 2031 (B.C. S.C.) (QL).

⁴⁶¹ *Ibid.* at para 10.

⁴⁶² *Ibid.* at para 89.

⁴⁶³ Missing/Murdered Native Women website, *supra* note 339.

⁴⁶⁴ *R. v. Taylor*, [1995] B.C.J. No. 1620 at para 6 (B.C. C.A.) (QL).

⁴⁶⁵ *Ibid.* at para 7.

⁴⁶⁶ *Ibid.* at para 42.

⁴⁶⁷ *R. v. Beaulac*, [1997] B.C.J. No. 2379 (B.C. C.A.) (QL) [*Beaulac CA*]. Retrial ordered by the Supreme Court of Canada related to French language rights of the accused. *R. v. Beaulac*, [1999] 1 S.C.R. 768 (S.C.C.) (QL) [*Beaulac SCC*].

⁴⁶⁸ *Beaulac CA*, *ibid.* at paras 7 and 10.

⁴⁶⁹ *Ibid.* at para 9.

⁴⁷⁰ *Ibid.* at para 2.

⁴⁷¹ *Ibid.* at para 10.

⁴⁷² *Beaulac SCC*, *supra* note 467 at para 57.

⁴⁷³ *Ibid.*

Cherish Oppenheim, aged 16, was murdered by Robert Raymond Dezwaan on October 13, 2001 in Merrit, British Columbia.⁴⁷⁴ Dezwaan had previously been charged with assault and sexual assault of two women in 1993 and 1997.⁴⁷⁵ He had also been arrested on two counts of uttering threats against a former girlfriend and sexual assault with a weapon in two incidents in 2001.⁴⁷⁶ On the evening he killed Cherish, Dezwaan is stopped for drunk driving and even though he is carrying a weapon and is breaching a bail condition, he is allowed to leave the scene.⁴⁷⁷ Cherish was a First Nation girl from Merritt.⁴⁷⁸

Fabian Paquette⁴⁷⁹ was killed by Dale Eliason. Eliason stated that he learned of Fabian's partial gender reassignment while participating in a sex trade transaction and that violence followed.⁴⁸⁰ Fabian's profession, gender and Indigenous ancestry were addressed in this case. Eliason was found guilty of manslaughter and given 7 years imprisonment.⁴⁸¹ Fabian was identified by the court as a person of "native heritage".⁴⁸²

Cheryl Joe was murdered by Brian William Frederick Allender in Vancouver on January 20, 1992; her body was mutilated, her skull crushed and both breasts and much of the vaginal tissue was removed.⁴⁸³ Hair found on the driver's window was identified as "pubic hair of the Mongolian race which includes Native Indians; that the deceased was a Native Indian."⁴⁸⁴ The British Columbia Court of Appeal decision⁴⁸⁵ dismissed the appeal in which the appellant argued that a first degree murder charge was unreasonable. The Supreme Court of Canada dismissed a further appeal.⁴⁸⁶

⁴⁷⁴ "R. v. Robert Raymond Dezwaan – Chronology of Case" (23 August 2002), online: Justice for Girls Homepage <http://www.justiceforgirls.org/onthewatch/cc_Dezwaan.html>.

⁴⁷⁵ *Ibid.*

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Ibid.*

⁴⁷⁸ "News Briefs From February 2003" Turtle Island Native Network News Briefs (7 March 2003), online: <<http://www.turtleisland.org/discussion/viewtopic.php?t=477&sid=c3670485468de37d8561b88dece3e622>>. She is also identified on the Sisters in Spirit Campaign list of Indigenous women who are missing or murdered. Sisters in Spirit, *supra* note 341.

⁴⁷⁹ I respectfully include Fabian Paquette in this category as she self-defined as female.

⁴⁸⁰ *R. v. Eliason*, [2003] B.C.J. No. 2476 at paras 7 and 14 (B.C. S.C.) (QL).

⁴⁸¹ *R. v. Eliason*, [2003] B.C.J. No. 2780 at para 21 (B.C. S.C.) (QL).

⁴⁸² *Ibid.* at para 3.

⁴⁸³ *R. v. Allender*, [1993] B.C.J. No. 2127 at para 4 (B.C. S.C.) (QL).

⁴⁸⁴ *Ibid.* at para 31.

⁴⁸⁵ *R. v. Allender*, [1996] B.C.J. No. 224 (B.C. C.A.) (QL).

⁴⁸⁶ *R. v. Allender*, [1996] S.C.C.A. No. 107 (S.C.C.) (QL).

April Lambert was 12 years old when she was run over by Robert Chris McKenzie in August of 1998 near High Level, Alberta.⁴⁸⁷ She was identified as “native” at sentencing.⁴⁸⁸ McKenzie had a criminal record that demonstrated he had previously victimized women.⁴⁸⁹ He was sentenced to 14 years on the manslaughter charge and four and a half years on the remains charge.⁴⁹⁰

Brenda Moreside was 44 years old when she was shot to death by Stanley Willier. Mr. Willier has a violent criminal past (including second degree murder). This fact evidently was not in the minds of the 911 operator and an RCMP constable who were called for assistance. No police were dispatched or arrived.⁴⁹¹ One of the recommendations related to the internal review of this case was one day of training devoted to Aboriginal concerns for training of justice officials.⁴⁹²

The Saskatchewan Court of Queen’s bench and Court of Appeal had opportunity to address the violence and aggression facing Indigenous women in its *R. v. Kummerfield*⁴⁹³ decision of 1997. In the sentencing of Stephen Tyler Kummerfield and Dennis Ternowetsky, the court addressed what sentence suited the circumstance, that being “The tragedy of this case is that a human being lost her life at the hands of two other human beings”.⁴⁹⁴ The tragedy was a violent and man-made tragedy.

Pamela George, a Saulteaux citizen of the Sakimay First Nation, was killed on April 17th, 1995 on the outskirts of Regina, Saskatchewan.⁴⁹⁵ Stephen Tyler Kummerfield and Dennis Ternowetsky beat her, and the court held that her death was “caused by injuries she sustained in

⁴⁸⁷ *R. v. McKenzie*, [2000] A.J. No. 455 at para 18 (Alta. Q.B.) (QL).

⁴⁸⁸ *Ibid.* at para 23.

⁴⁸⁹ *Ibid.* at para 36.

⁴⁹⁰ *Ibid.* at para 40.

⁴⁹¹ “911 call murder suspect had violent history” (July 28, 2005), online: CBC News Homepage <<http://www.cbc.ca/story/national/2005/07/28/moreside050728.html>>.

⁴⁹² “RCMP Admit Failure in not Returning 911 Call” (30 December 2005), online: CBC News Homepage <<http://www.cbc.ca/story/canada/national/2005/12/29/Moreside051229.html>>.

⁴⁹³ *R. v. Kummerfield*, [1997] S.J. No. 149 (Sask. Q.B.) (QL) [*Kummerfield*, QB].

⁴⁹⁴ *Ibid.* at para 4.

⁴⁹⁵ Razack, *supra* note 369 at 123.

a beating”.⁴⁹⁶ The two admitted they picked up Pamela George with one of them in the trunk of a car.⁴⁹⁷ There was evidence they were heavily intoxicated. They admitted they beat her and they abandoned her.⁴⁹⁸ They argued that someone else/some other (an Aboriginal) man killed her.⁴⁹⁹ In their actions towards Pamela George, the Court of Queen’s Bench found that Kummerfield and Ternowetsky were “cruel and cowardly”.⁵⁰⁰

The two university students were celebrating the end of the school term with a night of drinking. They spent time cruising downtown Regina, drinking and driving around the city. Kummerfield was said to describe the events of that evening quite clearly, saying that “...we drove around, got drunk, we killed this chick...oh, we just beat the shit out of her.”⁵⁰¹

It was alleged that Alex Ternowetsky also telephoned a friend (Stuart) and told him that he picked up (Pamela), beat her and raped her.⁵⁰² In this telling of the story, Ternowetsky called Tyler Stuart, and Stuart said that Ternowetsky told him “she deserved it, she was an Indian.”⁵⁰³ Ternowetsky denied making this statement. Stuart stated that Ternowetsky also said that “he had done it before and it’s a rush.”⁵⁰⁴ Ternowetsky denied making the remarks.⁵⁰⁵

This decision was appealed to the Saskatchewan Court of Appeal and heard in January of 1998. The Crown appealed the manslaughter convictions, arguing that the trial court judge had “usurped the function of the jury” by directing them to convict on manslaughter.⁵⁰⁶ The appeal was dismissed.⁵⁰⁷

⁴⁹⁶ *Kummerfield, CA supra* note 227 at para 8.

⁴⁹⁷ *Ibid.* at para 30.

⁴⁹⁸ *Ibid.* at para 13.

⁴⁹⁹ Razack, *supra* note 369 at 124.

⁵⁰⁰ *Kummerfield, QB supra* note 493 at para 8.

⁵⁰¹ *Kummerfield CA, supra* note 227 at para 37. Stephen Kummerfield to Tyler Stuart.

⁵⁰² *Ibid.* at para 37. When asked about his evening the night before, Ternowetsky’s friend Tyler Stuart said Ternowetsky responded, “not much, got drunk, killed a chick”.

⁵⁰³ *Ibid.* at para 41.

⁵⁰⁴ *Ibid.* at para 37. Ternowetsky to Jason Hodel at paras 37 and 41.

⁵⁰⁵ *Ibid.* at para 41.

⁵⁰⁶ *Ibid.* at para 3.

⁵⁰⁷ *Ibid.* at paras 61 and 65.

The two men were convicted of manslaughter, not murder. Evidence was brought forward that this was not the first time the men had participated in other nights of “slumming”.⁵⁰⁸ Argument was brought forward that Kummerfield and Ternowetsky had demonstrated intent in hiding in the trunk of a car⁵⁰⁹ and covering their license plate.⁵¹⁰ The only mitigating circumstance in their sentencing at the Court of Queen’s Bench was held to be the ages of Kummerfield and Ternowetsky.⁵¹¹ Their drunkenness directly contributed to a finding of manslaughter rather than murder.⁵¹² Both were sentenced to six and a half years (nearly 10 including time served), with both being eligible for full parole upon serving one half of the sentence.⁵¹³ Malone, J. stated this was due to the degree of violence involved:

In my opinion the actions of the accused that I’ve referred to are of unusual violence, brutality or degradation and require me to strongly express society’s denunciation of the circumstances giving rise to this offence.⁵¹⁴

Other than the suggestion that the hairs found in Pamela’s hand were from a ‘native person’,⁵¹⁵ and the mention that as an Indian she deserved “it” there is no mention of Indigeneity in the cases. There was, however, consideration given to Pamela George’s occupation:

There is one final matter that merits comment. During the evidentiary stage of this trial, Crown counsel found it necessary to adduce evidence of the victim’s occupation. Although this aspect of the evidence was not explored in great detail, it is clear that counsel for the parties did not belittle or denigrate her on that account. This evidence was led by the Crown only in the context of legal and factual issues that arise in that case. Accordingly, the examination and cross-examination should be construed in that light.⁵¹⁶

The Appeal was dismissed.⁵¹⁷

An additional Saskatchewan Court of Queen’s Bench decision (Ball, J.) related to criminal negligence causing death also provides insight into judicial decision making related to Indigenous women. Sheila Kahnapace had the foresight to call a taxi after leaving a bar on November 1, 2000. Upon reaching a destination (Sheila did not identify her home), the cab

⁵⁰⁸ *Ibid.* at para 37.

⁵⁰⁹ *Ibid.* at para 12.

⁵¹⁰ *Ibid.* at para 41.

⁵¹¹ *Kummerfield, QB supra* note 493 at para 10.

⁵¹² *Ibid.* at para 11.

⁵¹³ *Ibid.* at paras 18 and 21.

⁵¹⁴ *Ibid.* at para 21.

⁵¹⁵ *Kummerfield, CA supra* note 227 at para 41.

⁵¹⁶ *Ibid.* at para 64.

⁵¹⁷ *Ibid.* at para 65.

driver spent a half hour with Sheila and placed a coat over her shoulders, inquired of a neighbor and asked the dispatcher three times whether police had been called to check on Sheila. He left her there. She died from hypothermia. The cab driver was acquitted.

Sheila was born on March 24, 1970.⁵¹⁸ Sheila and her cousin were drinking at a bar when the wait staff called a cab and walked Sheila to it. Her cousin handed Sheila a jacket, and testified that Sheila had one jacket with her.⁵¹⁹ The cab driver provided a statement which provided that Sheila had two jackets with her when she entered the cab.⁵²⁰ The cab driver took her coat when Sheila indicated that she did not have cab fare.⁵²¹ He also called his dispatcher and asked him to call the police. The dispatcher did not do so.⁵²² The accused's actions were held not to be criminally negligent, and the court found that, "In hindsight, Mr. Johnson's decision to retain the jacket, even if there is no proof that it caused the tragic death of Mrs. Kahnapace, was undoubtedly a decision he would like to change. Nevertheless, on either an objective or subjective standard, his conduct in all of the circumstances did not demonstrate the degree of willful and wanton disregard for her life or safety as to justify criminal sanction."⁵²³

Jerry Baker was arrested as he left a correctional centre.

On that date an information was sworn before The Honourable Judge Kay, of the Provincial Court of British Columbia, and a warrant was issued. The appellant was arrested pursuant to this warrant as he was leaving the William Head Institution where he had served a seven year sentence with respect to a conviction on September 19, 1990, on eight counts which included sexual assault with a weapon, attempted sexual assault, assault with a weapon, forcible confinement, and three other offences involving the possession, pointing, or careless use of a gun.⁵²⁴

That information was laid by an RCMP Constable who feared that Baker would commit serious injury. During the trial, the court reviewed a memo drawn by a forensic psychologist who provided that:

⁵¹⁸ *R. v. Johnson*, [2002] S.J. No. 603 at para 3 (Sk. Q.B.) (QL) [*Johnson*].

⁵¹⁹ *Ibid.* at para 14.

⁵²⁰ *Ibid.* at para 15.

⁵²¹ *Ibid.* at para 18.

⁵²² *Ibid.* at para 20.

⁵²³ *Ibid.* at para 46. Kahnapace is a family name from the Pasqua First Nation in Saskatchewan and the Lebret Métis community in Saskatchewan.

⁵²⁴ *R. v. Baker*, [1999] B.C.J. No. 681 at para 2 (B.C. S.C.) (QL).

I find that the evidence indicates that Mr. Baker has a very serious criminal record of sexual assaults against young native women, especially, that he has refused or at least there is no evidence before the court that he has ever received any of the intensive treatment for sexual offenders which he requires.⁵²⁵

Baker was appealing the imposition of a 12 month recognizance to take place once he was released from prison. The RCMP constable laid his information on the basis that Baker was likely to perpetrate serious injury. In this case, Cohen, J., for the British Columbia Supreme Court found that there were reasonable grounds that the appellant would commit a personal injury offense and supported the decision of the hearing judge.⁵²⁶ In 2003, Baker applied to the court to determine the admissibility of his criminal record in his trial for first degree murder (committed in the course of a sexual assault).⁵²⁷

Gilbert Paul Jordan got Vanessa Buckner drunk. She died from alcohol poisoning.⁵²⁸ He was convicted of manslaughter.⁵²⁹ He received a 15 year sentence.⁵³⁰ This sentence is all the more incredible as he also got 6 other women drunk who died as a result of alcohol poisoning.⁵³¹ All of these women died between November 20, 1980 and October 12, 1987.⁵³² He offered the women money if they would drink. The police intervened on four additional occasions when four more women were drinking with Jordan.⁵³³ The judge wrote in this decision, "But the overwhelming weight of the admissible evidence, including that of the accused himself reveals a man who preyed upon native Indian women for his sexual gratification. He got some sort of perverted satisfaction in watching these women drink themselves into insensibility."⁵³⁴ His purpose was also to "have sex".⁵³⁵ There was an 'indifference' to his victim(s) noted by Bouck, J.⁵³⁶ The trial judge also noted that Vanessa was in an emotionally vulnerable state as she had her baby taken away by social services prior to her death.⁵³⁷

⁵²⁵ *Ibid.* at para 9.

⁵²⁶ *Ibid.* at para 44.

⁵²⁷ *R. v. Baker*, [2003] B.C.J. No. 570 (B.C. S.C.) (QL).

⁵²⁸ *Jordan BCSC*, *supra* note 363.

⁵²⁹ *Ibid.* at page 5 of 5.

⁵³⁰ *R. v. Jordan*, [1988] B.C.J. No. 2317 at page 2 of 2 (B.C. S.C.) (QL).

⁵³¹ *Jordan BCSC*, *supra* note 363 at page 2 of 5.

⁵³² *Ibid.* at page 2 of 5.

⁵³³ *Ibid.* at page 3 of 5.

⁵³⁴ *Ibid.* at page 5 of 5.

⁵³⁵ *Ibid.* at page 1 of 5.

⁵³⁶ *Ibid.* at page 5 of 5.

⁵³⁷ *Ibid.*

Connie and Ty Jacobs were fatally shot on March 22, 1998.⁵³⁸ R.C.M.P. Constable Dave Voller fired the fatal shots.⁵³⁹ Constable Voller was called to assist in an apprehension of Connie Jacobs' children. Connie and Ty's family members were critical of the police for leaving the mother and child lying in a pool of blood for hours.⁵⁴⁰ A fatality inquiry into the deaths was held in the Tsuu T'ina Nation.⁵⁴¹ During that inquiry, a social worker testified that Connie Jacobs had stated, "You're not going to take my kids away, not this time."⁵⁴² The inquiry also heard testimony that Connie may have feared the children would be abused in foster care, and that may have informed her decision to shoot at the R.C.M.P.⁵⁴³ The Report to the Attorney General regarding the inquiry findings, provided that when social workers came to the Jacobs household, they could not initially find Ty, who was later found hiding under a pile of blankets in a closet.⁵⁴⁴ After the social workers left and a tribal police officer called for back up, Constable Voller arrived. The Inquiry found that Connie Jacobs discharged her rifle at him.⁵⁴⁵ This "...despite the subsequent discovery by investigators that the (Connie's) rifle contained no live ammunition."⁵⁴⁶ Constable Voller fired once and his gun pellets passed through Connie and Ty.⁵⁴⁷ The recommendations were varied, dealing with the administration of justice, health care, social services and emergency services. Three recommendations of note were made:

- C, 1: The Inquiry recommends that more be done to assist women, in particular, mothers, to be able to feel some power and control over their lives and feel a sense of independence.

⁵³⁸ Nova Pierson, "Mounties used bullhorn" (12 March 1999), online: Newspaper Articles on the Inquest webpage < <http://members.fortunecity.com/brutalitycanada/Jacobs1.html> >.

⁵³⁹ Nova Pierson, "Shooting action backed" in (17 March 1999), online: Newspaper Articles on the Inquest webpage < <http://members.fortunecity.com/brutalitycanada/Jacobs1.html> >.

⁵⁴⁰ Carol Harrington, "Band marks shooting anniversary" (22 March 1999), online: Newspaper Articles on the Inquest webpage < <http://members.fortunecity.com/brutalitycanada/Jacobs1.html> >.

⁵⁴¹ Government of Alberta, *Fatality Inquiry into the Deaths of Connie and Ty Jacobs*" (1 February 1999), online: Government of Alberta webpage < http://justice.gov.ab.ca/downloads/jacobs_inquiry/ctj-inquiry >.

⁵⁴² Nova Pierson, "Inquiry hears Jacobs defiant 'You're not going to take my kids away, not this time' " (20 April 1999), online: Newspaper Articles on the Inquest webpage < <http://members.fortunecity.com/brutalitycanada/Jacobs1.html> >.

⁵⁴³ Nova Pierson, "Jacobs feared foster care. Family says child-abuse worries prompted shots at RCMP" (28 September 1999), online: Newspaper Articles on the Inquest webpage < <http://members.fortunecity.com/brutalitycanada/Jacobs1.html> >.

⁵⁴⁴ Government of Alberta, *Report to the Attorney General – Public Inquiry – The Fatality Inquiries Act* (15 May 2000) at para 26, online: Alberta Justice Homepage < <http://justice.gove.ab.ca/downloads/documentlaoder> >.

⁵⁴⁵ *Ibid.* at para 39.

⁵⁴⁶ *Ibid.* at para 57.

⁵⁴⁷ *Ibid.* at para 40.

- C, 2: Aboriginal children need to be seen as not just children belonging to a particular family or First Nation, but as Canada's children, and women need to be seen as an investment in the well-being of those children.
- C, 3: The Inquiry recommends that other ideas for the protection of children and the empowerment of women be studied, and considered.⁵⁴⁸

⁵⁴⁸ *Ibid.* at para 26.

*Journal**Memorial Song**Come home now**Come back again**Come home to freedom**Sisters and friends**Thanks for your children**Thanks for your families**Thank you for living**Thank you for giving**We pray for your memory**We pray for your life**We pray for your spirit**We offer you peace**Come home now**Come back again**Come home to freedom**Sisters and friends*

Perhaps there is no lexicon that can encompass the erasure, eradication, devaluation and destruction of Indigenous women. There is no language that is strong enough to hold this hatred, contempt and horror. Perhaps the horror of an epidemic of violence against Indigenous women cannot be contained in any language. Perhaps the language of colonization cannot house the horror of its impact on those who face colonial violence. Perhaps notions of humanity cannot be stuffed into colonial wordboxes like “investment”, “empowerment”, and “independence” when colonizers devalued, disempowered and attempted the enforced dependency of Indigenous peoples through violence. Canada’s inability to linguistically, legally and personally distinguish accountability and responsibility from guilt perpetuates the silencing, erasure and eradication of Indigenous women.

E. Indigenous Analysis

Aboriginal women were vulnerable to colonial force and violence. As sexual objects, Aboriginal women were seen as fair and easy game for white men; as members of a colonised people, they were also subjected to a range of racist indignities. These colonial prejudices were not just historical, colonial stereotypes. They have contemporary forms and contemporary legacies.⁵⁴⁹

Journal

Pinegrove Correctional Centre for Women, 1993

All but one of the women I saw today identified as Aboriginal. I saw almost 100 women. What. The. Hell. Is. Going. On? One woman was there for what I would consider White collar crime (and she was White), but her economic circumstance could not protect her from those walls.

One woman had just been processed, spoke only Dene, and wanted to know who her kids were with. Hers was a response to violence, and she acted out of survivor's strength. And there ?

⁵⁴⁹ Behrendt, *supra* note 254 at 360.

am, ineffectually trying to translate her experience to paper, trying to understand her well enough to contact her kids, find them, and get word to them. When she finds out I work for the Native Women's Association, she assumes that this is part of my mandate and I am woefully inadequate as her only sister removed. When she finds out the Royal Commission is funding my work, she blanches and nearly runs out, thinking I am a Canadian government employee. I offer her the paper, the story I think can change the world, and she takes it, knowing it will be taken from her, an admission of her guilt.

Another woman burned down a building in her community. The judge asked her if she was guilty, and she responded that of course she was. She told me she meant that she felt guilt. I think that the judge confused remorse with guilt and there she sat, having burned down the place where she was sexually abused, in jail, freed and incarcerated at the same time.

My heart and head hurt from the gifts they gave me, stories too awful and too painful to tell a stranger. I am too young and too naive to get what all of this means, I know that. I would say that of the women I saw, those who answered awkwardly worded questionnaires, almost all were there for incidents related to violence or to poverty. Some were related to both. Most came from rural lives and were transplanted to this urban justice factory, far from home, far from families. Most do not want their kids to visit, don't want to plant this image of mother in their children's memory. Staff told me about one Christmas when three generations of women were incarcerated. I am sick. I am crying a lot. If my disempowerment feels like this, what does theirs feel like?

There is no sense of boiling rage here, with a huge feeling of defeat and acceptance of some sort of pre-determined fate; I sense (and this is the luxury of being outside the walls) that for some of these women that many of them feel that this is just a part of the Indian life. It does not seem just, it is not fair, but there is a broader cognizance that this is the way things are.

So, tied to money or a lack of it, tied to violence and a feeling of helplessness and no longer a victim, or just sheer folly - this is the way things are. Not acceptance, exactly, but an acknowledgement of the near-fated current existence. Maybe, when your mom and daughter are in the prison on Christmas day with you, when this is what you live, it is most of what you know.

Where to start re-building? Where does the deconstruction of the terrible begin and how does change occur? Emancipation begins with acknowledgement and with us telling our stories. We have no readily available comparative and Indigenous based history for, about and by Indigenous women which details the evidence of our erasure. We did not know that it required anything other than common sense to see that we are being murdered and eradicated. We did not know that our colonial devaluation meant that we could not be seen or heard. We need to write those stories, make them readily available and infuse the classrooms, courtrooms and kitchens with our own stories in our own voices. I am cynical about the role that Canadian law can play in this. The fissures between haves and have nots, Indians and non-status Indians, Métis and Inuit people have been roughly and effectively forged, law the crowbar that forced open rifts with limited acknowledgement, limited benefits and limited definitions.

Canada needs to acknowledge the devastating impact that its legislative regime has had on relationships in our families, communities and nations. There is actual responsibility here, and an acknowledgement of the role of Canada in devaluation of Indigeneity and womanhood is important to our own understanding and capacity to reverse the colonial tide. Important, but not essential.

The race politics of Indian status have resulted in ridiculous categorizations premised upon colonizer acknowledgement of some nebulous and not at all determined set of patriarchal principles that on the surface look like categorization by historic relationship. In truth and effect, the historic relationships that are entrenched in the *Indian Act* look nothing like those in our nations; they are by design, underwritten with a patriarchal pen. You cannot by design and by requiring people legally enfranchised to apply for recognition, using only the acceptable patriarchal linkages as proof of Indianness, expect any just result. The gender discrimination is entrenched too thoroughly and attached too closely to a time when we as Indigenous women were owned. Requiring proof of Indianness requires us to look to that historic past, immersed in gender hatred and the disregard of women. It requires us to acknowledge the validity of a regime that labeled us Indian if we married an Indian to prove our Indianness now. We must validate the regime in order to receive what is rightfully ours in the first place. Validating the system asks too much of us; we cannot continue to authenticate inauthentic standards of race and gender based distinctions.

Given all of this, I suppose it would be best to articulate a new arrangement for determination of membership and the related benefits. However, I think there are at least two things that stop us from doing this. The first is the degree of community splintering and the impact of colonization on our nations. Managing an Indian Affairs stratagem which continues to erode women's positions in our nations, divide families on arbitrary and historically male biased factors, and which continues to find citizens accepted by our nations as ineligible for status, would only place us in the position of gatekeeper to a deeply divisive and flawed process. The end result of this process is false categorical miscegenation.⁵⁵⁰ We cannot perpetuate that error. Legislatively enabling us to develop membership lists, in theory, rests that power within our hands. However, what it truly amounts to is a derivative authority to close the door. With limited resources available, there is almost no incentive to welcome those pushed out back in. As well, with patriarchy and familial relationships deeply entrenched in the authority, those who have been pushed farthest away are seldom welcomed back in to the fold.

⁵⁵⁰ In this instance, I use the term to address categorizing Indigenous peoples as different races through the Canadian legislative regime. Indians are one race. Non-status Indians are another race. Métis people are another race. In this way, children are legally perceived as being children of mixed race (and therefore no legal entitlement for Indianness transfers to those children).

The second is the nature of membership itself and the inability of gradations of legal belonging to re-invigorate and replace the damaged citizenship / community recognition which is required in our nations. Many of those relations who have been kept off the land reserved to their families have suffered a breakdown in relations with those who were permitted to stay. Finite resources promote a survival instinct and those cases of nations denying membership, citizenship, residency and voting rights to their relations are not necessarily about exclusionary politics. In many instances, not welcoming Indigenous women and their descendants home is learned behaviour of resource preservation and demonstrated concern for those who are already members of the community and receiving resources.⁵⁵¹ Women and children of women as non-citizens and non-members face economic and cultural hardship and deprivation. One author has written of this:

Despite the hegemony of the dominant system, “traditional” values and procedures may continue to operate in some Aboriginal communities in an informal way. An examination of such values and procedures also underlines the dissonance of the dominant justice system for Aboriginal peoples.⁵⁵²

Canadian legislation has frozen in time the stereotypes and shared legislator perception of Indigenous womanhood. In order to redress this situation, that history needs to be addressed. Accountability must be taken. Redress must be undertaken. Redress itself includes recognition of the impact of the legislative regime on women and on relationships within families and nations. The sharing of our histories is important, but the renewal of those values, principles and laws which inform notions of respect, equality, relationships and kinship need to be revived and take their rightful place in both the Indigenous and the Canadian consciousness. It is easy to disregard that which you do not know exists. It is more difficult to ignore that which you know about. McGillivray and Comaskey have written about the impact of foreign perceptions of Indigenous womanhood on Indigenous women and communities:

Colonialism and Indian policy eroded shared value systems and the spirituality and myth systems that create social, spatial and familial cohesion.⁵⁵³

⁵⁵¹ See the cases at *supra* note 330 for examples of this conflict.

⁵⁵² Jennifer Koshan, “Aboriginal Women, Justice and the Charter: Bridging the Divide?” (1998) 32:1 U.B.C. Law Rev. 23 at 29.

⁵⁵³ McGillivray and Comaskey, *supra* note 255 at 50.

Spirit murder may occur in connection with broader cultural devaluation, as a tactic of humiliation by an abusive partner or parent, or through the abuse of trust and position of authority by one holding a position of spiritual power....⁵⁵⁴

With evidence of police “starlight cruises” impacting both Indigenous women⁵⁵⁵ and Indigenous men⁵⁵⁶ it is hard to refute that devaluation of Indigenous people is quite entrenched in many portions of the justice system. One Court of Queen’s Bench judge in Saskatchewan has acknowledged this and went as far as concluding in a case related to jury selection for an Indigenous accused:

Widespread anti-aboriginal racism is a grim reality in Canada and in Saskatchewan. It exists openly and blatantly in attitudes and actions of individuals. It exists privately in the fears, in the prejudices and stereotypes held by many people and it exists in our institutions. Furthermore, examination of racism as it impacts specifically on aboriginal people suggests they are prime victims of racial prejudice. This evidence of widespread racism has traveled into systemic discrimination of aboriginals in the criminal justice system. I am therefore satisfied that in all cases involving aboriginal accused in Saskatchewan, there is a realistic possibility that one or more jurors will discriminate against the accused because of his race.⁵⁵⁷

As a result, a two pronged question was established that the accused could ask while exercising the court-sanctioned right to challenge each juror for cause. The first question was whether juror impartiality would be affected because the accused is Métis. The second was, if the first question was answered in the affirmative, if they could set aside their bias, prejudice or partiality to give an honest verdict according to the evidence.⁵⁵⁸

The *Indian Act* is an historic exemplification of oppression of Indigenous peoples. Housing notions of patriarchy and embedded with racialized notions of Indigenous capacities, capabilities and authority, the Canadian government has imposed gendered and racialized standards of Indigeneity on Indigenous peoples. This has resulted in not only the historicization and replication of racism through systemized means, but has also constructed Indian status, in fact

⁵⁵⁴ *Ibid.* at 51.

⁵⁵⁵ Wulustuk Grand Council, *Wulustuk Grand Council Homepage Newsletter* (July 2003) at 9 of 14, online: Wulustuk Grand Council Homepage

< http://www.gatheringplacefirstnationscanews.ca/OtherNations/Wulustuk/070703_04.htm>. Referring to and quoting the Toronto Police Service’s admission that they had abandoned an Indigenous woman decades prior.

⁵⁵⁶ See *R. v. Munson*, [2003] S.J. No. 161 (Sask. C.A.) (QL), a case in which two police officers appealed their conviction for forcible confinement. The trial jury acquitted them of assault. The appeal was dismissed.

⁵⁵⁷ *R. v. Fleury*, [1998] S.J. No. 538 at 10 of 12 (Sask. Q.B.) (QL). Barclay, J.

⁵⁵⁸ *Ibid.* 11-12 of 12.

perhaps Indian maleness as valued property (albeit, of a limited nature). This has an enduring impact on those peoples (generally women and their descendants) who have no status/property. As a result, Canadian contemporary laws result in continued disenfranchisement of Indigenous citizens. This disenfranchisement has in many instances resulted in the devaluation of Indigenous citizens, notably women, through the legalization and stigmatization of Indigenous women. The assertion of the power to name and label has resulted in a population of Indigenous community members who remain nameless and invisible within the Canadian mind. This invisibility has created a shared consciousness in some that without name, without value and without country, Indigenous women will not be protected, will not be noticed, and will not be missed. Legal erasure of Indigenous women has been legally sanctioned. Actual erasure has in some instances followed. Indigenous women who have been relocated to cities, who have been alienated by colonization, or who have found their spirit challenged have found their relationships with both their brothers and sisters, and their White cousins, diminished. The politic of relations from which so many have been estranged, sees us not meeting our obligations to the most vulnerable of our societies.

Journal

Uncommon Sense

I have been having difficulty piecing this chapter together. It is not because it is difficult for me. In fact, I think it is the opposite of that. It is so evident to me how Canada's legislative regime has resulted in a continuum of erasure of Indigenous women that directly relates to the disappearance and murder of Indigenous women that I don't think I have been able to effectively record the causal nature of it. When I think of it, that is the true strength of colonization - you don't know how to connect A to B because there are so many As and so many Bs. There is also the question of proof. And I am not Canada's reasonable man. I am not a man. I am not reasonable. I am not Canada's.

While sitting with girlfriends a few years ago talking about the violence that impacts us as Indigenous women, one of us said, "We should just write down all of the women who are killed, all of them who disappeared and say, "There. What else do you need to see to know we are being hunted"?" In this section of the paper I have tried to construct that discussion as powerful and telling as it is. It does stand alone.

Standing alone though does not get the doctoral dissertation done, so I will add these thoughts.

The violence that we face as Indigenous women is now a part of our common sense, and that is terrifying to me. Don't swim after a meal, don't take rides from strangers, and you are being hunted so never open yourself to the possibility of violence.

Hunted sounds hyperbolic but there is no other word to describe this ongoing, unlabelled and continuous physical attack that is a part of our common sense. Our men and children are hunted too. There is something about the disdain for and disregard of Indigenous women embedded in colonial legislation that is precisely reflected in the kidnapping and murder of Indigenous women that continues to thin out our strength, our women.

Do you know that there are several layers of protection (children, nations, knowledge) that surround what we hold dear as Indigenous peoples? Women share that circle of protection and are the frontline in our preservation and defense. Kidnapping and killing women also serve to weaken our nations in ways that are painful to speak of and which are almost unfathomable to most. My problem is that I fathom this.

There is a link between the eradication of Indigenous women through law and the eradication of Indigenous women through violence. We cannot be lulled into thinking that legislative acts leave no blood on the walls. It is harsh and it is true. We cannot ignore the fact of unrelenting violence against Indigenous women having its roots in colonizer settlement, colonizer government and colonizing laws. Those roots of settler society are thick and strong.

The answer is not an easy one. Intellectually we know that Indigenous women were legally subsumed into the category “Indian”. This is not entirely accurate as there were certain clauses in the legislation to ensure that Indian women were not as easily identifiable or recognizable when constructed by the *Indian Act*. In quite simple terms, we were made a subset of male Indian property. Our existence as “Indians” was as owned or acknowledged by males defined as Indian under the *Indian Act*. This ownership would not, I suspect, have impacted all owned women immediately. It would impact many familial relations immediately. Those who raised extended families and who had relationships with more than one spouse would find themselves without home, community and connection. Like a stone thrown in a lake, the ripples would extend outward, impacting a larger and larger group of people over time. Matriarchy was not housed or acknowledged in the *Indian Act*. Nor was egalitarianism.

So we arrive at a place where the disappearance and murder of Indigenous women must force us to tell: That legislation, housing the notion of devaluation of Indian women, contributes to the construction of Indigenous women as without value. Invisible. Disposable.

To make this link, we often arrive at the problem of proof. How do we prove that this resulted in that? It is so tempting to lob probability back when defending our lives. We don’t have the written/re-written version of our history as relations to exhume and make pronouncements. Logically, if we were equal partners when colonization started and now we are under siege, then colonization plays a part in this. There is such a deafening silence that it is difficult to know where to look for proof. It seldom shows up on White paper, it rarely shows up in White courts and it does not show up in White classrooms. This is difficult to navigate because the cause is

not our story and not even the circumstance of violence and hatred can be described with accuracy in those places.

F. Conclusion: The Re-Assertion of Indigenous Understandings of Wellness and Reciprocal Relationships

Justice, in a Canadian context, is a goal to be achieved. It is a principle which is commendable. It may not be achievable, but it is certainly a principal goal.

Justice, in a First Nations context, is more than commendable, it is an underlying tenet; it may be a law in and of itself. If the fundamental principle is honesty and fairness / *kwayaskatsiwin*,⁵⁵⁹ then justice is a natural requirement to achieve fairness.

What justice requires of the system and of the people involved in the system may be difficult to determine because the notion of justice may not be similarly situated in First Nation and Canadian legal systems. It may be doctrinal, or it may be a principle. If the value and the achievability of the same differ in Indigenous and Canadian systems, then the context for discussing the same may be quite different.

If we approach the discussion with a micro-examination of Justice as a concept or goal, rather than as a natural requirement of *kwayaskatsiwin* (honesty and fairness), we do not address justice as mutuality and justice as a commitment to peace.⁵⁶⁰ Similarly, if we do not address shared understandings of just relations / justice as a goal, then we do not fully address the nature of the treaty relationship (or renewed First Peoples and settler relationship) as envisioned.

The failure to fulfill the terms of the treaties is not just an adjective (unjust); it is also a noun (injustice). It does not merely describe a thing; it describes a state of being. When all things are as they should be, justice not only prevails it is a given. When there is injustice, it is an indicator

⁵⁵⁹ Cardinal and Hildebrandt, *supra* note 18 at 32.

⁵⁶⁰ *Ibid.*

of the disruption of the relationship envisioned by the treaty process. It is an indicator that the fundamental principle of fairness is not being achieved.

Justice, in a Canadian context, *occurs* when the law's substance and process are fair.

Justice, in a First Nation context, cannot *exist* when there is no reciprocity, when the principle of honesty and fairness is not adhered to, and when relationships are not honoured.

In a treaty context, justice is a responsibility and an obligation anticipated by and committed to by First Nations and Her Majesty in Right of Canada.

In this understanding, justice is viewed as a positive obligation in order to reciprocally honour the mutual obligations existing and build the relationship between Indigenous Treaty Nations and Her Majesty in Right of Canada.

One of the main issues that stems from this is the ability of existing systems to effect the changes required to ensure that the mutual promises made in the treaties and the relationships anticipated by the signatories are respected and addressed in ways and venues which can give effect to the reciprocal relationship.

Colonialism creates extreme dynamics of domination and subjectivity, which readily translate into the more intimate relations of abuser and abused. Colonialism has shaped the nature, severity and rate of intimate violence in indigenous communities. It has influenced internal and external evaluation of the violence and created an environment in which it thrives as learned behaviour, transmitted across generations, silenced by culture. The reduction of women's roles in tribal economies and politics, the 'decentring' of motherhood in mission schooling, and the patriarchy embedded in the Indian Act, in its regulation of band membership and electoral privileges, are entwined with the targeting of childhood for 'civilization'.⁵⁶¹

⁵⁶¹ McGillivray and Comaskey, *supra* note 255 at 22.

V. BUILDING THE PERFECT INDIAN: CONSTRUCTING AND DECONSTRUCTING RACE AND THE INDIAN RENOVATION PROJECT

A. Introduction

I have been trying to review the proposed suite of “Indian” governance legislation Canada attempted to pass in 2003-2005 since the day it came out.⁵⁶² Having reviewed the material clause by clause for a number of presentations, you would think that I would be able to retain the information quite easily. It came to my attention quite early in the research that these materials were not new to me. I recognized the framework within which they were housed. The implicit understandings built in to the language were familiar to me. You see, I have developed a methodology (shorthand) for dealing with racism. My paradigm allows me to see the gross inequality embedded in the construction of Canadian law to allow me to look at the end result as constructed by and related to understandings of Indigenous insufficiency. The shorthand allows me to read it, *see* it, understand it and possess a cognizance of its presence while still allowing me to look to the resultant inequity. The end result is that I almost ignore the context of racism in legislation and other systems to arrive at the net impact of Canadian law. My review of the impact and effect of inequality and racism has allowed me to make convincing arguments against the construction of such law. I do this over and over in response to a context-free construction or renovation project which requires some response. However, the builders keep on building and the construction projects keep on being constructed. Reviewing the construct at the end (once plans are set or when the legislation is enacted) keeps Indigenous people in the position of having to respond. When we are not actors but reactors our too precious resources are applied to constructs which cannot possibly have meaning, weight or resonance, developed as they are without an eye to our history, relations or laws. There is worth in examining the potential cumulative effect of racially informed legislative schemes as a whole to determine what approach to take before more are constructed.

⁵⁶² I note the passage of the *First Nations Oil and Gas and Moneys Management Act*, S.C. 2005, c. 48 since I began writing this paper. The legislation addresses one portion of the accountability anticipated in the proposed legislation addressed here. While there is some crossover between this *Act* and the proposed legislation discussed at *infra* note 781, the commentary related to authority, autonomy and perceptions of accountability are relevant to both.

Perhaps compressing supremacist policy and laws into manageable shorthand and examining the effects is just one way of measuring impact. More and more, I become aware that it is just one means of dealing with the weight and reality of living in an oppressive imperial regime. Discussions of Indigenous irresponsibility (and/or a lack of accountability) litter the historical legislative record and have started to appear in proposed contemporary legislation. As I grow cynical and older I come to believe that culpability and accountability are important and that the government of Canada is completely right on this point: each nation must be accountable for their participation in the subjugation of citizens on the basis of economies, governance, laws, family, culture, language and race (among other categories). However, to advance the position that Indigenous people must do so in the absence of recognition of settler participation in the ongoing subjugation and colonization of Indigenous nations and citizens is an unconscionable act of finger pointing on Canada's behalf to avoid being held accountable for the construction of circumstances which created and perpetuates the subjugation.

So, I write this piece because it is too easy to economize and accommodate subjugation through my shorthand. Also, I do so as I see that there is another shorthand developing. It involves looking at Indigenous Nations through "value neutral" glasses, assessing our perceived shortcomings and then prescribing curative legislation. By analogy, we are required to subscribe to the medication recommended by a physician, devaluing the curative powers in our own traditions and medical personnel, and ignoring the fact that the physician actually made us ill by misdiagnosing us and performing malpractice in the first place. In this metaphor of wellness and illness, Dr. Canada comes to us and tells us our traditional doctors will have limited authority and penultimate responsibility – acknowledging our right to administer vitamins with the expectation we will cure the virus they injected into our bodies.

In this way, if we automatically accept the intellectual shorthand that there is a moral, fiscal or economic malady in First Nations, we often do not examine the historical and racialized reasons for the development of those issues. If we do not complete that examination, then the overrepresentation of Indigenous people in the Canadian criminal justice system and the fiscal or economic issues facing First Nations seem to be issues arising because of some sort of deficiency. We can review the proposed governance legislation and deem its means and ends

analysis as laudable and achievable. However, if we continue to overlook the fundamental shortcomings in the legislation (the lack of acknowledgment of Indigenous self-determination and Indigenous participation in Indigenous construction projects, presupposed First Nation inferiority) we perpetuate and pass on the malady.

The notion that we have no political institutions has been replaced with the notion that we have no functioning political institutions. We are perceived as not having the skill to govern and it is therefore determined that we require additional rules to ensure that we as lawless peoples can adhere to the laws, if not understand them. By this telling, our lack of correctness of judgment must be supplemented by adherence to rules which will curb our lack of virtue (in areas such as finance, accountability and economics and business).

Preferring to examine this as a joint deconstruction/construction/rejuvenation project, this chapter serves to examine the context and the myth of 'value neutral' law making as it has applied to Indigenous people in our nations in Canada. It will, further, review the systemic racism in this construction and renovation project, defining and examining the stereotypes involved in the construction of the legal Indian in Canada. The evaluation of stereotypes will continue with an analysis of the construction of 'Whiteness' in Canadian law, concluding with a review of the current state of the construction and renovation process and the deconstruction projects which must occur.

By writing this, I hope to shift the tide of discussion from the images of incompetence and inadequacy created by Her Majesty and applied to Indigenous peoples from first contact with each other to a discussion about the racialized underpinnings of Canada's legislative schemes which objectify Indigenous peoples. By developing a critical dialogue related to the images created in this construction project (including those constructions of Whiteness), the emerging dialogue should compel further examination, with a critical eye, of continued colonization and racism as they impact Indigenous peoples. Rather than developing dueling stereotypes and dualisms, this work attempts to evoke some measure of critical capacity for questioning long-held beliefs with respect to colonization, privilege and subjectivity. Simply put, the work seeks to eradicate the shorthand with respect to categorization as it has become far too familiar. My

hope is that we do not look this ugly familiar in the face for another generation; my dream is that we do not live with the expectation of racism. Our children should not be allowed the 'gift' of non-racialized preferences and understandings; they should understand that they enter each new interaction and situation with the expectation and promise of fair personal representation.

B. Context and The Myth of Value Neutral

Bartoleme de las Casas, summarizing the viewpoint of Spanish royal historian Bishop de Sepulveda at the debate at Valladolid, wrote that the royal historian believed Indigenous people were not blessed with the gifts of governance, law or reason. Paraphrasing de Sepulveda, de las Casas wrote:

The Philosopher discusses these barbarians and calls them slaves by nature since they have no natural government, no political institutions (for there is no order among them), and they are not subject to anyone, nor do they have a ruler. Certainly, no one among such men has the skill needed for government, nor is there among them quickness of mind or correctness of judgment. As a result, they do not want to choose a ruler for themselves who would bind them to virtue under political rule. They have no laws which they fear or by which all their affairs are regulated. There is no one to evaluate good deeds, promote virtue, or restrain vice by penalties. Finally, caring nothing for life in a society, they lead a life very much like brute animals.⁵⁶³

It is thought that the Spanish manuscript of this text was written somewhere around 1550. In it, Bishop de Sepulveda debated Bishop de las Casas with respect to the morality and intelligence of the Indigenous peoples impacted by Spanish exploration and colonization. Many of the arguments and logic utilized by both men resonate within colonized understandings with respect to Indigenous people. De Sepulveda, in the debate at Valladolid, argued that Indians were:

barbaric, uninstructed in letters and the art of government, and completely ignorant, unreasoning, and totally incapable of learning anything but the mechanical arts; that they are sunk in vice, are cruel, and are of such character that, as nature teaches, they are able to be governed by the will of others.⁵⁶⁴

While it may or may not be true that we were uninstructed in the art of Western government, it is equally true that settler peoples were uninstructed in Indigenous languages and the art of

⁵⁶³ Bartholome de las Casas, *In Defense of the Indians* (DeKalb, Illinois: Northern Illinois University Press, 1974), at 33.

⁵⁶⁴ *Ibid.* at 11-12.

Indigenous governments. Many Indigenous nations had fully functioning, well administered, and accountable governments based upon our own values and laws. The arguments used by Bishop Sepulveda are informed by supremacist thinking and were clearly written as justification for the Spanish colonial regime. How this differs from the legislative and legal attempts to colonize Indigenous peoples in Canada remains to be seen. Continuing to prescribe “best practices” in the area of government is a completely reasonable and defensible goal. To do so in the absence of a recognition of the existing governmental regimes, citizenship desires, the historic role of Canada in the oppression of Indigenous historic and traditional government and laws, and without acknowledging the right of self-determination of Indigenous peoples perpetuates the colonial regime anticipated by Bishop de Sepulveda. Denying our historic context and applying “standards of governance and accountability” in the absence of that context couches the legislation in value neutrality which is, at least, uninformed. A more pessimistic interpretation is that the legislative regime enacted by and anticipated by Canada to deal with the ‘administration of Indians’ is a link in a chain of colonialism and that those values internal to the judgments of the lawmakers are predicated upon racially biased notions of inferiority and superiority of laws and governance.⁵⁶⁵

There is something that no one talks about, as we (may) seem to have internalized the colonial mindset and the Western regimentation and standardization as an impartial recitation of the requirements of ‘civilized’ societies. By implication, Indigenous nations and citizens are abnormal, not up to standard and require guidance and rules to control our uncontrollable behaviour.⁵⁶⁶ The stereotype is predicated on the ‘fact’ that our values and standards, whether or not we have met them, have been neutralized.⁵⁶⁷ To require that one nation subscribe to the laws

⁵⁶⁵ *Ibid.* at 30. de las Casas also examined categorizations of Indigenous peoples and examined what he perceived to be the values of some Indigenous peoples. This link in the chain of colonialism is remarkably similar to many which appear later in the chain. de las Casas wrote that:

The second kind of barbarian includes those who do not have a written language that corresponds to the spoken one...and therefore they do not know how to express in it what they mean. For this reason they are considered to be uncultured and ignorant of letters and learning.

⁵⁶⁶ *Ibid.* at 13-14. de las Casas states that the conclusion of Sepulveda’s position is that:

the Indians are obliged by the natural law to obey those who are outstanding in virtue and character in the same way that matter yields to form, body to soul, sense to reason, animals to human beings, women to men, children to adults, and, finally, the imperfect to the more perfect, the worse to the better, the cheaper to the more precious and excellent, to the advantage of both.” This is the natural order....

⁵⁶⁷ Looking to the discussion in the *Sparrow* case (*supra* note 147 of “existing” Aboriginal rights, it is easy to see that the potential for verbal vaporization of Aboriginal rights could be quite easily interpreted in a Canadian context.

and rules of another is domination; to refuse to acknowledge the self-determining role of Indigenous governments and citizenship involves subjugation. To utilize law and legislation to achieve these goals is less violent in the immediate than military subjugation. It is, however, no less based upon notions of supremacy and inferiority and has enduring violence and damage, the half life of which is often as poisonous as the initial pronouncement.

The notion that subject (settler) defines object (Indian) is clearly evident in the historic materials. What is not necessarily so clearly observable is that in objectifying and labeling Indigenous peoples, settler people were able to comment on themselves as well. What they were in the first person (singular or plural) was able to define and be defined by how they labeled the third person (singular or plural). In defining, distance is created. In objectifying, neutralizing is desired. It is difficult, in objectifying, to address the requirements and elements of objectification. Subject observing object necessarily distorts and increases the potential of inaccuracy. Proximity is achieved by labeling (“I am not, but I can see”) and credibility is enhanced when subject describes object. If first person can watch (I, we) describe and define, third person (s/he, *it*, they) become/s (if only in first person discussion) captured (if only in the imagination). If captured repeatedly in words and on paper, neutralization (taming) *it* may be effected.

The image of the Indian was developed as a rationale. If the Indian was bad, then expansion, intervention and legislation developed to control Indigenous people were favoured. If the image of the Indian was good, then Christianization, servitude and civilization were warranted. The polemic that historically has emerged is based upon where the image of the Indian is best situated to serve the needs of settler peoples. The image of the Indian as bad could be used to rationalize policies, legislation and case law. The image of the Indian as good could be used to enforce settler behaviour. While there are variations on the polemic (a whole myriad) the objectification of the image of the Indian in furtherance of settler laws and legislation has a long history. That this long history has been recorded in legislation and Her Majesty’s legislative history with all of its bias intact allows us to see an indication of the lack of neutrality in the

As well, the determinations related to the “fact” (fact being a White jurist’s fact) of integrality of practices, customs or traditions to Aboriginal culture also allows verbal vaporization of Aboriginal rights in a Canadian context. The most compelling fact, in my understanding, is that non-Indigenous jurists determine what “a defining feature of the culture in question” is with little or no knowledge of Indigenous culture. For an example of this, in the context of the right to govern our nations, see *Pamajewon*, *supra* note 43 at para 25. Presumed neutrality is entrenched in section 35(1) of the *Charter*, neutrality which clearly does not exist.

understanding of settlers with respect to Indigenous people. It also tells us a great deal more about the motivations, mores and values of settler people than it does about Indigenous peoples.

C. Namer and Named: Settler Construction and the Legal Myth of Indianness

1) History Lessons

The history that we share is recorded in two places – in our oral traditions and in settlers’ written records. The written texts have provided a largely one-sided view of Indigenous and settler people’s interaction. Within those writings, Indigenous people have appeared as monochromatic images of personified fear and incompetence. The “Indian” was a metaphor for the fear settlers harboured about settling in our territories. The image of the Indian became a tool used to justify colonial expansion. Indians were good and needed settlers. Alternatively, Indians were bad and needed (colonial) law and government. All of which has very little to do with how we understood and understand ourselves (or settler peoples). Robert Berkhofer has written of Indigenous perceptions of Indigeneity:

Since the original inhabitants of the Western Hemisphere neither called themselves by a single term nor understood themselves as a collectivity, the idea and the image of the Indian must be a White conception. Native Americans were and are real, but the *Indian* was a White invention and still remains largely a White image, if not stereotype. According to a modern view of the matter, the idea of the *Indian* or *Indians in general* is a White image or stereotype because it does not square with the present-day conceptions of how those peoples called Indians lived and saw themselves. The first residents of the Americas were by modern estimates divided into at least two thousand cultures and more societies, practiced a multiplicity of customs and lifestyles, held an enormous variety of values and beliefs, spoke numerous languages mutually unintelligible to many speakers, and did not conceive of themselves as a single people – if they knew about each other at all. By classifying all these many peoples as *Indians*, Whites categorized the variety of cultures and societies as a single entity for the purposes of description and analysis, thereby neglecting or playing down the social and cultural diversity of Native Americans then – and now – for the convenience of simplified understanding. To the extent that this conception denies or misrepresents the social, linguistic, cultural and other differences among the people so labeled, it lapses into stereotype. Whether as conception or as stereotype, however, the idea of the Indian has created a reality in its own image as a result of the power of the Whites and the response of Native Americans.⁵⁶⁸

⁵⁶⁸ Robert Berkhofer, *The White Man’s Indian: Images of the American Indian from Columbus to the Present* (New York: Vintage Books, 1978) at 3.

The taxonomy of Indigenous peoples inevitably found us wanting as settler mores and linguistic and cultural differences were infused with notions of Indigenous inferiority. Critical thinkers have examined categorization and its role in the rationalization of subjugation.⁵⁶⁹ Commodification and generalization based upon conceptualizations of “otherness” and the ways in which Indigenous peoples did not conform to settler norms contributed to the development of a generic understanding of our multinational, multicultural, multilingual and politically distinct characters. Consequently, a generic interpretation of our identity was developed, a subjective shorthand by which settler peoples could identify all Indigenous peoples. Linguistic identifiers began to be attached to the image and characteristics applied to Indigenous peoples. As Berkhofer aptly states of the *pro tanto* application of the term “Indian” to Indigenous peoples:

The use of the general term demanded a definition, and this definition was provided by moral qualities as well as by description of customs. In short, character and culture were united into one summary judgment.⁵⁷⁰

The end result is that the written historical record is predominantly occupied by external examination of Indianness utilizing internalized values of Whiteness. Subjectivity is unacknowledged and subsumed in the discussion of Indigenous peoples and our perceived characteristics in settler constructions. As a result of the socio-linguistic evaluative assumptions, the homogeneous and monochromatic image of the Indian becomes the linguistic indicator for all that is Indigenous. The uniformity ensures that as we are measured against settler values, as a whole: the many Indigenous nations and citizens are transposed into the monolithic Indian. Diversity is collapsed and collective terminology developed not only as an objectification of subject but also as a signifier which intrinsically houses differentiation. “Indian” becomes the identifier and qualifier. Through this linguistic indication, Indigenous people are associated with deficiency because the term itself houses settler presumed supremacy (to name, define and assess).

⁵⁶⁹ *Ibid.* at 24. Berkhofer wrote of this:

The general terms of heathen, barbarian, pagan, savage, and even Indian revealed these criteria of judgment at the same time that they validated the use of collective terms for the peoples of other continents. The European takeover of the New World proved to Europeans, at least, their own superiority and confirmed the reliability of the classification of peoples by continents.

⁵⁷⁰ *Ibid.* at 25.

Not only does the general term *Indian* continue from Columbus to the present day, but so also does the tendency to speak of one tribe as exemplary of all Indians and conversely to comprehend a specific tribe according to the characteristics ascribed to all Indians.⁵⁷¹

Objectification results in removal of the object from subject. In turn, as the settler subject views the Indian object, s/he must analyze and assess according to the values and understandings s/he possesses. In many instances, the basis of the analysis is differentiation of self from object. It requires that the subject view the object as distinguishable from her/himself. Berkhofer writes of this:

Since White views of Indians are inextricably bound up with the evaluation of their own society and culture, then ambivalence of Europeans and Americans over the worth of their own customs and civilization would show up in their appraisal of Indian life. Even with the image of the Indian as a reverse or negative model of White life, two different conclusions about the quality of Indian existence can be drawn. That Indians lacked certain or all aspects of White civilization could be viewed as bad or good depending upon the observer's feelings about his own society and the use to which he wanted to put the image.⁵⁷²

In short, Indigenous people become defined by (presumed) deficiencies. Of course, there were distinctions made. Unfortunately, many of the distinctions were made for the justification of imposition by settler societies.⁵⁷³

⁵⁷¹ *Ibid.* at 26.

⁵⁷² *Ibid.* at 27-28.

⁵⁷³ *Ibid.* at 28. Berkhofer has written of the development of this polemic:

...the good Indian appears friendly, courteous, and hospitable to the initial invaders of his lands and to all Whites as long as the latter honored the obligations presumed to be mutually entered into with the tribe. Along with handsomeness of physique and physiognomy went great stamina and endurance. Modest in attitude...the noble Indian exhibited great calm and dignity in bearing, conversation, and even under torture. Brave in combat, he was tender in love for family and children. Pride in himself and independence of other persons combined with a plain existence and wholesome enjoyment of nature's gifts. According to this version, the Indian, in short lived a life of liberty, simplicity and innocence.

On the other side, a list of almost contradictory traits emerged of the bad Indian in White eyes. Nakedness and lechery, passion and vanity led to lives of polygamy and sexual promiscuity among themselves and constant warfare and fiendish revenge against their enemies. When habits and customs were not brutal they appeared loathsome to Whites...Filthy surroundings, inadequate cooking, and certain items of diet repulsive to White taste tended to confirm the low opinion of Indian life. Indolence rather than industry, improvidence in the face of scarcity, thievery and treachery added to the traits on this side. Concluding the bad version of the Indian were the power of superstition represented by the "conjurers" and "medicine men," the hard slavery of women and the laziness of men...Thus this list substituted license for liberty, a harsh lot for simplicity, and dissimulation and deceit for innocence.

When encouraging settlement in the Americas, even Christopher Columbus waxed eloquently about the virtues of Indigenous peoples in our traditional territories:

The people of this island and of all the other islands which I have found and of which I have information, all go naked, men and women, as their mothers bore them, although some of the women cover a single place with the leaf of a plant or with a net of cotton which they make for the purpose....they are so guileless and so generous (sic) with all that they possess, that no one would believe it who has not seen it. They refuse nothing that they possess if it be asked of them; on the contrary, they invite any one to share it and display as much love as if they would give their hearts. They are content with whatever trifle of whatever kind that may be given to them, whether it be of value or valueless...They do not hold any creed nor are they idolaters; but they all believe that power and good are in the heavens and were very firmly convinced that I, with these ships and men, came from the heavens, and in this belief they everywhere received me after they had mastered their fear. This belief is not of ignorance, for they are, on the contrary, of a very acute intelligence and they are men who navigate all those seas, so that it is amazing how good an account they give of everything....⁵⁷⁴

After this, the savagery versus nobility debate began in earnest as Spanish colonizers sought to enslave the Indigenous people whose territories they were usurping. The debate at Valladolid had taken root in the imagination of settler peoples and others seeking to justify colonization. Indigenous people were good (as de las Casas argued) and/or evil (according to Juan Gines de Sepulveda)⁵⁷⁵ as the need arose. The enduring stereotype which emerged was one of illiterate peoples who are unable to reason, and living in lawless states with political disorganization and no understanding of economic principles or functioning and beneficial economies. de las Casas provides a taxonomy of “barbarians” which includes “those who do not have a written language that corresponds to the spoken”⁵⁷⁶ and those who “are not governed by law or right, do not cultivate friendships, and have no state or politically organized community. Rather, they are without ruler, laws and institutions.”⁵⁷⁷

⁵⁷⁴ Christopher Columbus, *The Journal of Christopher Columbus*, trans. C. Jane (London: Hakluyt Society, 1960) at 194-200.

⁵⁷⁵ de las Casas, *supra* note 563 at 13. de las Casas wrote of this:

...Sepulveda proves that the Indians, even though unwilling, must accept the Spanish yoke so that they may be corrected and be punished for the sins and crimes against the divine and natural laws by which they have been contaminated, especially their idolatry....

Sepulveda, a jurist, was a proponent of Aristotle's theory of natural slavery and argued that the characteristics of Indians made for perfect servitude.

⁵⁷⁶ *Ibid.* at 33. He goes on to state that “For this reason they are considered to be uncultured and ignorant of letters and learning.”

⁵⁷⁷ *Ibid.* at 32.

de Sepulveda's image of the "bad Indian" houses traces of what seems to be a lingering theme in the settler imagination about Indians.⁵⁷⁸ The enduring nature of this characterization and these stereotypes: lawless, unable to govern ourselves, an absence of productive economies, and non-existent moral standards have been at the root of every piece of legislation drafted with Indigenous people in mind from first contact to the present in Canada. These characterizations become particularly relevant when analyzing the legislative scheme which Her Majesty has established to deal with the "incompetent Indian".

D. Legislating Criminals and Criminal Law

The obligation to obey laws which are premised on the superiority of non-Indigenous legislators over presumed inferior Indigenous citizens is not an historic relic. A review of contemporary legislation reveals that not only has Canada played (and that it continues to play) a role in the ongoing colonization of Indigenous people, but also that Canada has utilized its institutions to aid in the ongoing colonization of Indigenous people.⁵⁷⁹

The problem that arises is identifying what elements of institutions are based on institutionalized colonization and racism. The difficulty with determining the same is that some understandings have become so entrenched in institutions that their colonial origin is not necessarily easily discernible. The imperceptibility of the colonial origin can make identifying the impacts of colonization that much more difficult. If the structures are immersed in colonized and racialized

⁵⁷⁸ *Ibid.* at 33. de las Casas wrote of de Sepulveda's position that "Since they fall so short of other men in intellectual capacity and behavior, they are inclined to harm others. They are quick to fight, quarrelsome, eager for war, and inclined to every kind of savagery."

⁵⁷⁹ In a Canadian legal context, it is important to note that the Department of Indian Affairs agent (Indian Agent) had remarkable colonial authority to police, arrest, and try Indians under successive *Indian Acts*. That colonizer role extended from outlawing spiritual and cultural activities to restricting mobility, see section 3 of 1884, *An Act to further amend "The Indian Act, 1880"*, supra note 294 at s. 3. In section 23, Agents were legislatively empowered to expand their jurisdiction. As well, in *An Act to Amend the Indian Act, 1880*, S.C. 1881, c. 17 (44 Vict.) s. 12, it was legislated that "Every Indian Commissioner, Assistant Indian Commissioner, Indian Superintendent, Indian Inspector or Indian Agent shall be ex officio a Justice of the Peace for the purposes of this Act." In 1882, *An Act to further amend "The Indian Act, 1880"*, S.C. 1882, c. 30. (45 Vict.), s. 3 [1882 *An Act to further amend "The Indian Act, 1880"*], section 3 legislatively empowered the Indian Agent to act as a stipendiary or police magistrate. There are a litany of examples of the degree and types of control that Indian Agents ostensibly had over Indian peoples – whether they used it or not, they were legally empowered to control Indian economies, gatherings, identification and many other matters. This exertion of colonial control was at a macro level and a micro level and we are still not free from this portion of the colonial legislation or its effects.

understandings, the resultant application of their understandings and judgments to racialized and colonized peoples and to Indigenous peoples is difficult to de-construct. If the law is racially motivated and created by an institution premised upon racial superiority and applied by a person who harbours racialized thinking, it may be difficult to assess where policy and practice merge or diverge.

If the law itself is premised on illegal and inaccurate notions of Indigenous inferiority,⁵⁸⁰ then determining the nature of the racialized construction and the impact of the legislation can be difficult. This is compounded by linguistic differences which couch dissimilar concepts in umbrella terminology, no matter who is telling the story. In fact, during the negotiation of Treaty Number 6 there were exchanges relating to the continuing role of Indigenous people in their own enforcement of law in their territories. It was clearly established in the understanding of parties at the negotiation of Treaty No. 6 that there was a jurisdictional gray area with respect to what was known to settlers as criminal law and what was known to Indigenous people as teachings and understandings. For example, the Treaty No. 6 Adhesions correspondence file contains this letter:

⁵⁸⁰ Canadian legal history is rife with evidence related to the inferiority of Indigenous peoples as groups and individuals. Modern legislation and case law is built upon presumptions of the inferiority of Indigenous interests (in sovereignty, the extent of autonomy, and related to resources). While cases related to the requirement of consultation with Indigenous nations have the potential to shift the presumption of inferiority to one of superior or equal interests, that has not yet been established in the Canadian legal or socio-political mindset. For a detailed discussion written prior to the *Haida* decision see Thomas Isaac and A. Knox, "The Crown's Duty to Consult Aboriginal People" (2003), 41 Alta. L. Rev. 49. In terms of relevant case law see, for example, the decision of Lamer C.J. and Cory, McLachlin and Major JJ. in *Delgamuukw*, *supra* note 48 at para 168, in which they find "there is always a duty of consultation." See also the majority decision in the *Haida* case, *supra* note 228 at para 10 where the majority held:

I conclude that the government has a legal duty to consult with the Haida people about the harvest of timber from Block 6, including decisions to transfer or replace Tree Farm Licences. Good faith consultation may in turn lead to an obligation to accommodate Haida concerns in the harvesting of timber, although what accommodation if any may be required cannot at this time be ascertained. Consultation must be meaningful. There is no duty to reach agreement. The duty to consult and, if appropriate, accommodate cannot be discharged by delegation to Weyerhaeuser. Nor does Weyerhaeuser owe any independent duty to consult with or accommodate the Haida people's concerns, although the possibility remains that it could become liable for assumed obligations.

The concern that must be addressed is one which many Indigenous citizens share: what is a duty to consult in the absence of a duty to honour, acknowledge, and meaningfully accommodate? At worst, it could be interpreted to be the recognition of a right as an empty box. Interpreted this way, the above decision addressed the Aboriginal rights of Indigenous peoples as required by section 35(1), but creates a legal void with regard to the interpretation of what those rights are.

This chief [Big Bear] came to Fort Pitt in 1876 and saw the Commissioners, but he was not accompanied by his people. He demanded from Governor Morris, that no Indian should be hanged...

I hear that Big Bear is trying to get all the non-treaty and some of the treaty plain Indians to assemble and demand a new treaty or at least to ask for better terms. He shall, I am informed, (*also support*) . . . the idea that Indians should be exempted from hanging. It is said also that he thinks Indians should not be imprisoned for any crime, and though he asked Lieut. Gov. Morris in 1876 that the buffalo should be protected it appears he did not intend that any law of the kind should apply to Indians.⁵⁸¹ (*Italics mine*).

The stereotype of lawless Indians and how it informed Canadian police practice with respect to undisciplined Indians are largely a product of settler imagination and have benefited Her Majesty's institutions in Canada.⁵⁸² The ripple effect that this stereotype has had on the application of this "knowledge" in the development of policies and practices related to the policing of Indigenous people is likely as damaging as the application of the knowledge in every day policing activities.

There is a great deal of written evidence which illustrates that the presence of the Northwest Mounted Police in areas west of Ontario was, in part, to ensure that the lawlessness of settler peoples was contained.⁵⁸³ Just who the criminals were at the time of settlement of the west was seemingly a settled issue. A Government of Canada official wrote to his superior that:

⁵⁸¹ Letter, Correspondence Regarding Adhesions to Treaty 6 - Battleford, Northwest Territories (9 May 1878), Ottawa, National Archives of Canada, (RG 10, Volume 3655, Reel C-10114, File: 9000, 1877—1878).

⁵⁸² Canada has benefited greatly, I would argue (in the departmental development, employment and expansion of ostensible authorities in the construction and expansion of the North West Mounted Police, Royal Canadian Mounted Police, correctional systems, Indian Affairs, and institutions related to Indian Affairs), from the perpetuation of images of Indigenous inferiority, lawlessness and inability. For additional reading on this topic, see *Berkhofer, supra* note 568; Daniel Francis, *The Imaginary Indian: The Image of the Indian in Canadian Culture* (Vancouver: Arsenal Pulp Press, 1992); and Robert Stedman, *Shadows of the Indian: Stereotypes in American Culture* (Norman: University of Oklahoma Press, 1982).

⁵⁸³ The Treaty No. 6 Report on Negotiations at Treaty 6 provides:

Three years ago, a party of Assiniboines were shot by American traders —men, women and children were killed. We reported the affair to Ottawa; we said, the time has come when you must send the red-coated servants of the Queen to the North west to protect the Indians from Fire-water, from being shot down by men who know no law, to preserve peace between the Indians, to punish all who break the law, to prevent whites from doing wrong to Indians, and they are here today to do honour to the office which I hold. Our Indian chiefs wear read (sic) coats, and wherever they meet the police they will know they meet friends.

Report on Negotiations, "Correspondence and Extensive Reports Regarding the Signing of Treaty 6 at Fort Carlton, Saskatchewan", Ottawa, National Archives of Canada (RG 10, Reel C-10111, Volume 3636, File: 6694-1, 1876—1877).

...in some parts of the country the Indians have been greatly harassed by white settlers allowing and even driving their cattle on Indian Reserves for pasturage, and the provisions of the Act relating thereto were in all probability made rather stringent on that account. The sub-section to which he refers has been in force since 1876, if not before, and up to the present time there does not appear to have been any agitation for its repeal. The section was probably enacted to prevent an accused person from escaping deserved punishment through the non-observance of some formality in the proceedings by an inexperienced Indian Agent or Justice of the Peace. I am not at the moment prepared to recommend that the said sub-section be repealed....⁵⁸⁴

Criminal law was effected, with respect to Indian people, by the *Indian Act* for years.⁵⁸⁵ The administration of criminal law was within the authority of the Department of Indian Affairs, which was established to address the administration related to Indians and lands reserved for Indians. The evolution of the legislation related to Indians, in relation to western categories of criminal behaviour, is indicative of a number of issues. To be able to examine those issues, it is useful to provide an overview of Canadian legislation which purported to address issues of concern related to Indigenous jurisdiction, authority and behavior in the area of criminal law. What becomes clear is that while the oppressive nature of the attempt to legislatively control is constant, the nature and direction of the oppression changes. There are, at least, four eras of settler attempts to assert legislative control over Indigenous people.

1) Invasion: Indigenous Authorities and Autonomies Acknowledged

From pre-Confederation until the 1880s, attempts to legislatively control Indian behaviour were minimal. Encroachment by settler peoples, rather, was the focus of the legislative regime. Criminalizing some settler behaviour in their interaction with Indigenous people became necessary as the behaviours involved invasion of Indigenous territories and potential impact on Indigenous land or other rights. For example, in 1864, it was established in law that anyone who wanted to cut wood on the Huron La Jeune Lorette Reserve had to get permission in writing

⁵⁸⁴ Letter from Deputy Superintendent General to Deputy Minister of Justice, A. F. Ewing, K. C.—Edmonton— Suggesting repeal of Ss. 2, Sec. 37 of the Indian Act (10 October 1921), Ottawa, National Archives of Canada (RG 13, Justice, Series A-2, Volume 262, File: 1921—1854, 1921/09—1921/10).

⁵⁸⁵ *Supra* note 579.

from Chief and Council. Failure to do so would result in a monetary penalty.⁵⁸⁶ The 1868 *An Act providing for the organization of the Department of the Secretary of State Canada, and for the management of Indian and Ordnance Lands*⁵⁸⁷ provided that anyone who provisioned liquor to Indian people was to be held responsible and liable to a fine (as did other legislation in 1869).⁵⁸⁸ The *Act* also provided that there was a fine for cutting timber or removing stone from Indian lands.⁵⁸⁹ 1874 legislation providing for the establishment of the Department of the Interior included a section which created penalties for those who supplied intoxicants to Indian people.⁵⁹⁰ While Indian people who were found to be intoxicated could also be arrested, it is certain that the provision of liquor to Indian people was initially the central focus of the legislative regime. Notably, certain sales and exchanges with Indian people without the written consent of the Indian Agent were deemed criminally liable transactions.⁵⁹¹

The legislation is both protective and somewhat defensive. In protecting Indian people from the invasion of their reserves by settlers, the *Act* also served to remind non-band Indians that the established boundaries were to be acknowledged under punishment of law. In a consolidation of previous legislation pertaining to Indian peoples, the 1876 *Indian Act* contained provisions related to fraudulent conveyances, unlawful occupation, and trespassing.⁵⁹² Notably, both “person(s) or Indians(s)”⁵⁹³ could be fined, jailed or removed in the event of the same. Those

⁵⁸⁶ *An Act to Enable the Huron Indians of La Jeune Lorette, to regulate the cutting of wood in their Reserve*, S.C. 1864, c. 69, s. 1 [*La Jeune Huron Act*].

⁵⁸⁷ *An Act providing for the organization of the Department of the Secretary of State Canada, and for the management of Indian and Ordnance Lands*, S.C. 1868, c. 42 (31 Vict.), s. 12 [*Management of Indian and Ordnance Lands*].

⁵⁸⁸ *Enfranchisement Act*, *supra* note 288, s.3.

⁵⁸⁹ *Management of Indian and Ordnance Lands*, *supra* note 587 at s. 22.

⁵⁹⁰ *An Act to provide for the establishment of “The Department of the Interior”* S.C. 1873, c.4. (36 Vict.), s. 3.1

⁵⁹¹ *Ibid.*, s. 6.2.

⁵⁹² 1876 *Indian Act*, *supra* note 261, ss. 11, 12, 16.

⁵⁹³ *Ibid.*, ss. 11, 13, 14, 16. Later, settler populations protested these sections as unwarranted and unfair:

Section 35 of the Indian Act gives to any Police Magistrate, Justice of the Peace or Indian Agent, power to commit a man to jail for thirty days for causing or permitting any cattle or other animals owned by him to return to the Indian lands. There is no alternative fine...In this country where the cattle of farmers run at large and where the Reserves are mostly unfenced it seems to the writer to be outrageous to put a respectable farmer in jail for thirty days merely because his cattle strays upon an Indian Reserve after he has been orally requested to remove them. The particular point which I think ought to be dealt with is Section 37, sub-section 2, which provides that such judgment shall not be appealed from or removed by certiorari or otherwise be final . . . [p.2] The case I have in mind at the present time is that of a respectable farmer living near the Indian Reserve at Hobbema, who is now in jail as a result of the conviction lodged by the Indian Agent at Hobbema. There is a dispute as to the facts. His cattle were on the range. He states that he was not notified to remove his cattle, although the Indian Agent claims that he was. While this man

attempting to interfere with the sale of Indian lands could be punished by a fine and imprisonment.⁵⁹⁴ Those selling intoxicants and those in possession of intoxicants were subject to penalties.⁵⁹⁵

Similarly, early judicial tribunals, in their interaction with Indigenous peoples, were concerned with the impact that settler peoples were having on Indigenous nations.⁵⁹⁶ Initially, the tribunals were sometimes understood to be more permissive in their understandings related to Indigenous people. Department of Indian Affairs Officials knew that despite their efforts to colonize through law, that their policies and systems would not always be supported by the judiciary.⁵⁹⁷

Concerns related to Indigenous people as a category in law were, initially, primarily actions against settler peoples who had encroached in some way on Indigenous territories. Trespass was

was busy harvesting his grain and while he had 100 acres to cut one of the appointees of the Indian Agent at Hobbema arrested him, took him to the Indian Agency at Hobbema, and he was convicted and sentenced to thirty days in jail at Fort Saskatchewan within a few hours. This matter is exciting considerable comment, and I do not hesitate to say that it is an outrage, and *it is difficult to understand how such a provision could have crept into Federal Statute* (Emphasis added).

Letter dated 16 September 1921 from Mr. Ewing to Deputy Supt. General asking that Ss. 2, 37 of the Indian Act be repealed, Ottawa, National Archives of Canada, (RG 13, Justice, Series A-2, Volume 262, File: 1921—1854, 1921/09—1921/10).

⁵⁹⁴ 1876 *Indian Act*, *ibid.*, s. 44.

⁵⁹⁵ *Ibid.*, s. 79.

⁵⁹⁶ See *Worcester and M'Intosh*, *supra* note 105 as they relate to settlement on Indigenous peoples' lands. See also *Rex v. Pickard* (1908), 14 C.C.C. 33 (A. D.C.) as it relates to the sale of alcohol to Indians. For a more recent case, see *Whitfield v. Canadian Macaroni Company* (1967), 68 D.L.R. (2d) 251 (Qc. Q.B.), in which a contractual clause prohibiting "fraternization" with Inuit villages and communities by company employees was held by the Quebec Queen's bench to not be an infringement of employee's liberty under the *Bill of Rights*. Casey, J. made it clear at 253 that "I do not see that it matters whether the purpose of this clause was to protect the native population or to preserve morale at the radar station or to realize some other objective or combination of objectives. The clause does not contravene Whitfield's right to liberty, whatever its source may be." However, the underlying rationales all have at root, the understanding that interaction with the Inuit peoples would disrupt society (Inuit or non-Inuit). This case was appealed to the Supreme Court of Canada and dismissed. *Whitfield v. Canadian Macaroni Co.* (1968), 68 D.L.R. (2d) 766 (S.C.C.).

⁵⁹⁷ A letter from Commissioner of Indian Affairs to the Indian Affairs Minister dated 12 February 1885 supports this:

...it has always been my opinion that an example should be made of some of the leading Indians who incite or stir up other Indians to act in a manner threatening the peace of the Territories but one of our main difficulties has been that when it was considered that a merited example could be made by the punishment of an Indian whose presence amongst others was always a source of disquietude as well as a great trouble to the Agent that the view so strongly held by me and my subordinates did not coincide with those (sustained ?) by the magistrate on the bench....

Commissioner of Indian Affairs to Indian Affairs Minister, Battleford—Treaty No. 6 –Troubles with Big Bear and Other Chiefs, Also Death of Big Bear (Indian Commissioner for Manitoba and Northwest Territories), (15 February 1885), Ottawa, National Archives of Canada (RG 10, Volume 2576, Reel C-10101, File 30 pt. A, 1883—1888).

common.⁵⁹⁸ Fraud and unlawful transactions⁵⁹⁹ related to land were also common. Settler peoples found themselves defending actions in which their government was bringing criminal charges against them. For an example of this, see *The Queen v. Hagar*,⁶⁰⁰ a case in which an Indian woman living on Indian land leased her land out to a non-Indigenous lessee (which was illegal). The defendant lessee was held guilty of a misdemeanor.

Review demonstrates that the legislation passed in this era was particularly pertinent to Indigenous lands and resources, the role of the Crown in protecting Indigenous lands, and the required legislative format or legal requirements to transfer them to non-Indigenous parties. In many of these legislative instances, Indians are legislated as though we are witless victims. Eventually, protectionism in this era also extended to the prohibition against providing alcohol to Indigenous peoples. In an 1875 decision of Manitoba's Court of Queen's Bench, the *Enfranchisement Act* was reviewed in determining the available penalties for selling intoxicants to Indian people.⁶⁰¹

This period of legislation, as it relates to the construction of the image of the Indian, seems to have had the principal goal of effecting ease of transfer of Indigenous land to settler people and acknowledging lands reserved to Indian people. The image of the ignoble nature of settler character was manifest in the legislation (as was the image of Indian requiring protection). The legislation in this era seems to attempt to control settler people's behaviour in unscrupulous business transactions and negotiations with Indigenous people. If the resultant image of the Indian is of people needful of protection because of corrupt speculation, the emerging image of settler people as those we need to be protected from is equally potent.

⁵⁹⁸ See, for example, *Little et al v. Keating* (1842), 1 C.N.L.C. 285 (U.C.Q.B.) and *Attorney General v. Price*, (1868) 1 C.N.L.C. 1 (U.C.C.).

⁵⁹⁹ See for example, *Regina v. Baby* (1854), 1 C.N.L.C. 350 (U.C.Q.B.) [*Baby*]. In this case, the defendant was charged with purchasing lands from Indigenous peoples without governmental consent.

⁶⁰⁰ *The Queen v. Hagar* (1857), 1 C.N.L.C. 393 (U.C.C.P.) [*Hagar*].

⁶⁰¹ *R. v. Dease* (1875), Carey's Man. R. 1. *Enfranchisement Act*, *supra* note 288, s. 2.

2) Subjugation of Indigenous Beliefs and Economies

In the context of criminalizing Indians, controlling Indigenous people seems to be the goal of Canadian legislation passed from the early 1880s until 1951. Wanting to legislatively provide themselves with control and correspondingly limit that of Indigenous peoples, the portions of settler legislation dealing with Indigenous authorities and practices attempt to define and limit Indigenous control over justice,⁶⁰² spirituality and other authorities.

An 1881 amendment to the *Indian Act* provided that the Indian Commissioner, Assistant Commissioner, Superintendents, Inspectors and Agents could serve as Justices of the Peace for the purposes of the *Indian Act*.⁶⁰³ The powers of the Indian Agent were substantially expanded by an amendment to the *Act* which provided that Indian Agents would in some circumstances have the power of a Stipendiary or Police Magistrate.⁶⁰⁴ By 1882, then, within the Canadian legal system the Department of Indian Affairs was serving as arresting officer and judge of Indian people. The legislation was upheld in 1885 in *Hunter v. Gilkison*⁶⁰⁵ a case from Ontario's Queen's Bench in which it was determined that a Visiting Superintendent and Commission of Indian Affairs possessed jurisdiction to act as a justice of the peace under the 1880 *Act*. In *R. v. McAuley*⁶⁰⁶ the court examined the jurisdiction provided to an Indian Agent to adjudicate proceedings where settler peoples sold intoxicants to Indigenous peoples. In this instance, it was determined that Indian Agents must have jurisdiction over the Indians to whom liquor was sold in order to have jurisdiction as a justice of the peace over the proceedings.⁶⁰⁷

The legislative regime also addressed settler concerns that Indigenous people, collectively, posed a potential political or military threat. An amendment to the *Indian Act* provided that whoever induced three or more Indians, non-treaty Indians or half-breeds to make a request (together, in a disorderly, riotous or threatening manner) calculated to cause a breach of the peace could be charged and potentially jailed. Similarly, if someone did an act calculated to cause a breach of

⁶⁰² It is important to note that Canadian principles of justice are very different from Indigenous notions of laws and principles required to live a good life.

⁶⁰³ *An Act to Amend the Indian Act, 1880*. S.C. 1881, c. 27 (44 Vict.) s. 12.

⁶⁰⁴ 1882 *An Act to further amend "The Indian Act, 1880"*, *supra* note 579, s. 3.

⁶⁰⁵ *Hunter v. Gilkison* (1885), 2 C.N.L.C. 226 at 236 (O.Q.B.).

⁶⁰⁶ *R. v. McAuley* (1887), 2 C.N.L.C. 345 (O.D.C.).

⁶⁰⁷ *Ibid.* at 34.

peace, s/he was liable to be imprisoned.⁶⁰⁸ Further amendments that year enabled the Superintendent General to prohibit the sale or gift of ammunition to Indians⁶⁰⁹ and prohibited the potlatch.⁶¹⁰ The Governor in Council was also empowered to set aside the election of chiefs in the case of “fraud or irregularity or connivance.”⁶¹¹ Control was a key factor emerging in this time of the developing legislation. On paper, Indigenous people were not to meet as a group for any purpose other than a social one. On paper it seemed we could not achieve wealth through hunting. On the books, we could not redistribute wealth and practice our spirituality in our traditional ways. Our leadership could be set aside by Indian Affairs. Any concern we had about these legislative controls and/or their illegal application could be taken to the justice of the peace, who was an employee of Indian Affairs.

Control extended to the day-to-day affairs of the Indigenous nations as well. The *Indian Advancement Act of 1884* professed to acknowledge certain limited powers of chief and councils on reserve, including “the repression of intemperance and profligacy”,⁶¹² removal and punishment of trespassers on reserve,⁶¹³ imposition of penalties and enforcement related to the enumerated categories of responsibility.⁶¹⁴

In the *Indian Act of 1886* Her Majesty attempted to extend the reach of her own enforcement mechanism to Indigenous people by providing that in the event of intoxication any “constable may, without due process of law arrest any Indian or non-treaty Indian who he finds in a state of intoxication.”⁶¹⁵

In 1886 *The Larceny Act* made it an offense for anyone to injure or remove or purchase anything from an Indian grave.⁶¹⁶ What this indicates is that curiosity and criminality amongst settlers were tied together in an attempt to own the image of the Indian. Settler criminality was also on

⁶⁰⁸ 1882 *An Act to further amend “The Indian Act, 1880”*, *supra* note 579, s.1.

⁶⁰⁹ *Ibid.*, s. 2.

⁶¹⁰ *Ibid.*, s. 3.

⁶¹¹ *Ibid.*, s. 9.2 (amending section 72).

⁶¹² *The Indian Advancement Act, 1884*, S.C. 1884, c. 28 (47 Vict.) s. 10(4).

⁶¹³ *Ibid.*

⁶¹⁴ *Ibid.*, s. 13.

⁶¹⁵ *The Indian Act*, S.C. 1886, c.43, s. 104 [1886 *Indian Act*].

⁶¹⁶ *Ibid.*, s. 98.

the minds of the framers of the Canadian *Criminal Code*.⁶¹⁷ Section 278 of the 1890 *Criminal Code* criminalized polygamy, which had an impact on Indigenous social and familial relations.⁶¹⁸ In 1892 any Indian woman who prostituted herself or the keeper of any residence for such a purpose was liable to be found guilty of an indictable offence.⁶¹⁹

As well in that year, the *Criminal Code* codified the provision relating to Indian graves and made it a criminal offence to induce or stir up three or more Indigenous people (Indians, non-treaty Indians or half-breeds) to make a request of “any agent or servant of the Government” or to “do any act calculated to cause a breach of the peace.”⁶²⁰ This protection was formidable. In 1906, anyone who incited an Indian to commit an indictable offense could be found guilty and liable to imprisonment of up to five years.⁶²¹

There was an indication in the legislative regimes established by Canada that the Indigenous peoples possessed rights by virtue of being the original occupants of the land and that the rights of Indigenous peoples were to be protected legislatively. The 1894 *Unorganized Territories’ Game Preservation Act*⁶²² contained a provision which exempted Indians from limitations on hunting, injuring, shooting, wounding or molesting listed game and birds.

From 1906 until the early 1950s, the legislative regime enacted by Canada to address concerns related to Indians and to criminal behavior in relation to and by Indian people also primarily dealt with the suppression of Indian spirituality and economies. For example, the *Indian Act of 1906* contained a provision prohibiting anyone from buying or acquiring produce from Indian

⁶¹⁷ How settler lawlessness is associated with discovery and freedom in the “wild west” and Indian existence contributed to the wildness of the west diverges from the polemic of ‘struggling settler’ and ‘savage Indians’ which are so pervasive in the written settler accounts of settlement. The legislative history reveals that settler struggles with Indigenous peoples were often of their own making in attempted usurpation of Indigenous territories, resources and properties.

⁶¹⁸ *Regina v. Bear’s Shin Bone* (1899), 3 C.N.L.C. 513 (N.W.T.S.C.) examined this in the context of a marriage between a Blood man and two Blood women. Blood marriage customs were found to contravene the *Criminal Code* section and the male defendant was convicted.

⁶¹⁹ *The Criminal Code*, 1892 *supra* note 300, s. 220. The role of Indigenous women in prostitution as a result of disruption of traditional economies, laws and governance has not been thoroughly examined in an historic context.

⁶²⁰ *Ibid.*, ss. 98 and 190.

⁶²¹ *The Criminal Code*, R.S.C. 1906, c. 146, s. 110.

⁶²² *The Unorganized Territories’ Game Preservation Act*, S.C. 1894, c. 31 [*The Unorganized Territories’ Game Preservation Act*].

reserves in Manitoba, Saskatchewan, Alberta or the Territories.⁶²³ The *Act* also included a section which allowed the Superintendent General to declare parts or the entirety of game laws to apply to Indians in those same areas.⁶²⁴ Of enduring importance is the fact that the settler government made it illegal for Indian people to participate in Sundances in the 1906 *Act*.⁶²⁵ The prohibitive nature of the legislative regime was expanded in 1914. In this year, Indian people dancing could, legislatively, only do so with the consent of the Superintendent General of Indian Affairs or his Agents or be incarcerated and/or fined.⁶²⁶ The intrinsic control of Indian spirituality likely only contributed to settler people's fascination with it. In fact, the legislative regime was altered to criminalize activities associated with settler people's collection of Indigenous people's spiritual belongings.⁶²⁷ The acquisition of totem poles or other carvings was prohibited by penalty of fine and possibly imprisonment in 1926-27.⁶²⁸ In this year as well, the legislative regime which impacted Indigenous people in the Canadian criminal arena became increasingly intrusive. The regime was expanded to effectively suppress protest by Indigenous peoples (in many instances, as a result of the oppression internal to the Canadian laws and externalized in its application). One section of the *Indian Act* provided that any person who assisted, who contributed, who donated, or who fundraised to enable Indian people to bring claims forward without written consent from the Superintendent General was guilty of an offense and liable to a fine or imprisonment.⁶²⁹ This enabled Indian Affairs to stop Indigenous nations and citizens from bringing actions against Indian Affairs without permission.

Economic regulation and insuring that Indian people's economies were developed within parameters acceptable to the Canadian government became the focus in this era. In fact, during this era, hunting and fishing rights as a whole begin to enter the consciousness of settler peoples, with general federal legislation⁶³⁰ or provincial legislation⁶³¹ being applied to Indian people.⁶³² Legislatively criminalizing Indigenous activities helped support this goal.

⁶²³ *The Indian Act, 1906*, R.S.C. 1906, c. 81, s. 39 [1906 *Indian Act*].

⁶²⁴ *Ibid.*, s. 66.

⁶²⁵ *Ibid.*, s. 149.

⁶²⁶ *Indian Act*, S.C. 1914, c. 35, s.8 [1914 *Indian Act*].

⁶²⁷ How this relates to owning the image of the Indian and yet regulating the actuality has its basis in racialized subjugation which is not the subject of this paper.

⁶²⁸ *An act to amend the Indian Act, 1906*, R.S.C. 1926-27, c. 32, s. 4.

⁶²⁹ *Ibid.*, s. 6.

⁶³⁰ *Dominion Fisheries Act, 1914*, 4 & 5 Geo. V, c.8.

⁶³¹ For example, the *Ontario Game and Fisheries Act, R.S.O. 1914*, c. 262.

In 1927, it was established that the Governor in Council could make regulations with respect to the transfer of produce by Indian people in Manitoba, Saskatchewan, Alberta or the Territories.⁶³³ Opening and running a tavern on-reserve was prohibited by virtue of the 1927 *Indian Act*.⁶³⁴ The 1940-41 version of the *Indian Act* addressed regulations to control the purchase of animal skins or parts from Indians.⁶³⁵

The ostensible control over the powers exercised by Indigenous nation leadership and over the activities of Indigenous citizens reflects the concern of the settler government that Indigenous people would govern our people, worship and give effect to our laws as we always had. If, by this telling, Indigenous people are perceived as uncontrollable, then the corresponding legal regimentation and restraint by settlers appears to be of an unethical and manipulative nature. If our image as Indigenous peoples is one of peoples whose behaviours are prescribed by our urges and who require external control, it is arguable that the image of settler people which arises is one of people who are compelled by domination, are unprincipled and exploitative. If, by this review, Indigenous people were perceived as pagan ritualists and requiring economic protectionism, then it would be safe to say that the supremacist nature of the settler peoples led them to presume superiority in religion and commerce. Presumed intellectual and spiritual inferiority has as a correlate assumed intellectual and spiritual superiority.

⁶³² *Sero v. Gault* (1921), 4 C.N.L.C. 468 at 474 (O.S.C.). In this case an Indian sued a fishery inspector for the recovery of a fishing net and it was determined that either the *Dominion Fisheries Act*, *supra* note 630 or the *Ontario Game and Fisheries Act*, *supra* note 631 applied to Indians.

⁶³³ *Indian Act*, R.S.C. 1927, c. 98, s. 40 [1927 *Indian Act*]. In 1930, this section was renumbered and the prohibition against sale or barter was extended to the acquisition of animals from reserves in the same provinces without the written consent of the Indian Agent. *Indian Act*, S.C. 1930, c. 25, s.5. Later, it was clarified that no consent was required to sell and barter amongst band members in the *Indian Act*, 1932-1933, c. 42, s.3.

⁶³⁴ 1927 *Indian Act*, *ibid.*, s. 126 (b).

⁶³⁵ *Indian Act*, S.C. 1940-41, c.19, s. 1 (becoming 42A).

3. Intrusion: Colonial Control

The 1951 *Indian Act* expanded the powers of the Chief and Council to include the regulation of traffic⁶³⁶ and the observance of law and order.⁶³⁷ It also provided that copies of by-laws made by Chief and Council had to be sent to the Minister.⁶³⁸ Individuals removing minerals, foliage, and anything else from the reserve without the consent of the Minister or his Agent could face fine and/or imprisonment.⁶³⁹ As well, the Governor in Council was able to appoint persons to act as justices of the peace with respect to *Indian Act* and *Criminal Code* offences related to riots, grave robbing, cruelty to animals, common assault and breaking and entering on reserve and related to an Indian person or property.⁶⁴⁰ It also included a provision which acknowledged the bands' ability to make trespass⁶⁴¹ by-laws relating the imposition of fines and imprisonment.⁶⁴²

The attempt to supervise and control the Indian in this era is pervasive. In the period from 1951 until the present day, the *Indian Act* has undergone little or no transformation in terms of its acknowledgement of Indigenous responsibilities. The 1970 version of the *Indian Act* chiefly housed the acknowledged band council authorities in section 81.⁶⁴³ These authorities include responsibility for weeds and trespass. Importantly, section 88 provided that "subject to the terms of any other Act of the Parliament of Canada, all laws of general application from time to time in force in any province are applicable to and in respect of Indians in the province, except to the extent that such laws are inconsistent with this Act or any order, rule, regulation or by-law made thereunder...".⁶⁴⁴ In this way, a blanket swipe at requiring Indigenous people to follow settler laws was undertaken.⁶⁴⁵

⁶³⁶ 1951 *Indian Act*, *supra* note 262 at s. 80(b).

⁶³⁷ *Ibid.*, at s. 80(c).

⁶³⁸ *Ibid.*, s. 81(1).

⁶³⁹ *Ibid.*, s. 92.

⁶⁴⁰ *Ibid.*, s. 105.

⁶⁴¹ *Ibid.*, s. 80(p).

⁶⁴² *Ibid.*, s. 80(r).

⁶⁴³ *Indian Act*, R.S.C. 1970, c. I-6, s. 81 [1970 *Indian Act*].

⁶⁴⁴ *Ibid.*, s. 88.

⁶⁴⁵ It should also be noted that in this time frame Indigenous customary law continued to be attacked and unacknowledged in Canadian courts, particularly in the area of Indigenous laws pertaining to governance. In *Logan v. Styres*, *supra* note 126 at 270, the Ontario Higher Court found that even though their decision interfered with the system of the hereditary chiefs, the *Indian Act* jurisdiction over surrenders had to be followed. As well, in *Point v. Dibblee Const. Co.* (1934), 5 C.N.L.C. 334 (Ont. S.C.), the issue of life chiefs was again discussed in the context of surrender and the Ontario Supreme Court determined, at page 338 that: "The department in no way recognizes a life chief who is selected by the oldest woman in his own particular clan."

If Indigenous peoples are legislated in this way because we are perceived as requiring management, guidance and control, the image that arises is Indian people as passive, anarchistic, amoral, and incompetent. In this rather artificial comparison, settler governments are perceived as aggressive, dogmatic, controlling, and oppressive. The image that arises is settler peoples wrongly asserting their values in a deliberate fashion and applying them by force of their law. In this sense, the image that arises is one of immoral peoples.

Journal

The merit of we/they.

I am trying not to see Indigenous peoples and non-Indigenous peoples as dichotomous peoples with opposite beliefs. If I did, I would be broken in half with a parent from each tradition. I have to believe that as long as these ideas can persist and exist within healthy people, that they can persist and exist within healthy nations.

There are spaces of shared ideologies, law and knowledge. We cross over and greet each other in the ways that colleagues do. But when we do not crossover and do not have shared space, it is truly more challenging and honourable to greet each other as relations who respect each other.

I suppose the divide is great, but the true challenge is not in finding our mutuality, but in agreeing to respect the differences.

4) Contemporary Legal Indians: Implicit Inadequacy and Incompetence

In a contemporary sense, the concern that I have about the application of these stereotypes is evident in a recent amendment to the Criminal Code. Section 718.2(e) of the Code provides:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.⁶⁴⁶

On its face, a mandatory requirement that the Canadian judiciary consider all options outside of imprisonment and that they pay attention to the circumstances of Indigenous people who have broken Canada's laws is quite progressive. However, given that objectivity is a myth and that there has been such a decadent history of settler misinterpretation of our values, religions, governments, economies, our *circumstances*, how progressive can this legislative provision be? Intrinsic to the application of section 718.2 is an understanding that there has been settler growth and development based upon historic lessons. Addressing overrepresentation legislatively as progress requires that the factors leading to overrepresentation for which Canada is responsible be addressed as well. It seems like incongruous logic for Indigenous overrepresentation in Canada's justice system to be addressed at the end of this chain of events. It should be noted that the chain of events was triggered and participated in by the oppressive organization using the oppressive tool which has served to enforce the colonization of Indigenous people through the Canadian justice system.

Section 718.2(e) requires that the judiciary examine circumstances which should be taken into consideration prior to sentencing. This requires two judgments (based upon the judge's values and understandings). The first is a judgment related to defining which circumstances are related to being Aboriginal. The second is judging whether these "Aboriginal" circumstances require consideration in sentencing. Both judgments presume capacity to determine what is and is not Aboriginal (and seemingly, the ability to subtract the impact of colonization on Aboriginal people from the equation). Implicitly, I believe know that 99 per cent of the judiciary in Canada is not schooled in the values, laws and principles that make us Indigenous people. What makes

⁶⁴⁶ *Criminal Code of Canada*, R.S., 1985, c. C-46, s. 718.2(e).

our circumstances special, in our terms, is that connection between people, laws, spirituality and governance. These relationships are essential to Indigenous people. What the Canadian law requires is that our circumstances *look* Aboriginal enough to grant us a sentencing reprieve.⁶⁴⁷ What is “Aboriginal enough” is dependent upon each particular judge’s experience with and understanding of Aboriginal peoples, cultures and traditions. This does not, in most instances, result in the most *special* circumstance being examined – that of settler people’s response to Indigenous people through legislation, policy-making and legal colonization. The gaze of the subject is fixedly upon the object. The subject does not examine itself. Her/his position in the colonial superstructure and her/his indebtedness to it will inform her/his decision-making.

The resultant impact is that not only is objectification utilized by the Canadian judiciary, but it is legislatively required when an Indigenous person is being sentenced.⁶⁴⁸ Who Indians are and what makes a person Indian are decided by each judge each time they are sentencing an Indigenous person. This leaves a great deal of personal discretion in the hands of the judge. Her/his experiences, understandings and values of Indigeneity will weigh heavily in this determination.

The foremost concern I have about this is not that it allows settler judges to pick apart Indigenous people; the concern I have is that settler judges are legislatively able to construct a new Indian. This new Indian (or image of the Indian, if you will) is developed regardless of the

⁶⁴⁷ Notably, *R. v. Gladue*, [1999] S.C.R. No. 19 (S.C.C.) (QL) at paras 89 and 90 and 93 and 94 that the circumstances of Aboriginality to be taken into account (per s. 718.2(e)(A) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts) include the circumstances that prompt an Aboriginal person to engage in criminal conduct. The court also found the lower court may have erred in limiting the application of the section to on-reserve and rural Indians. Importantly, “looking Indian” in this case, may be encompassed in the identified systemic factors. At para 67: “Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation.”

⁶⁴⁸ Importantly, see *R. v. Poucette*, [1999] A.J. No. 1226 (Alta. C.A.) (QL), in which the Alberta Court of Appeal addressed the Queen’s Bench judgment’s pan-Indianism approach to the systemic principles impacting Aboriginal peoples. The Court of Appeal determined at para 14 that:

“The sentencing judge did not order a pre-sentence report. He was familiar with the broad systemic and background factors affecting the aboriginal community at Morley, but failed to tie those factors to the particular offender. It is not clear how Poucette, a 19-year old, may have been affected by the historical policies of assimilation, colonialism, residential schools and religious persecution that were mentioned by the sentencing judge. While it may be argued that all aboriginal persons have been affected by systemic and background factors, Gladue requires that their influences be traced to the particular offender. Failure to link the two is an error in principle.”

response that we as Indigenous peoples have had to colonial systems, governments, laws and legislation. The new Indian is also built without addressing settlers' roles in the development and perpetuation of colonial systems, governments, laws and legislation. Without regard to our shared history and without addressing the historic and continuing attempts to colonize Indigenous people, the *Criminal Code* requires judges to forge ahead and address those individual specifics which should alter the time an Indigenous person spends in jail.

In some instances, the new Indian has been found: to live on reserve, not in an urban centre⁶⁴⁹ and to be non-violent.⁶⁵⁰

In other situations, alienation from culture and alcoholism are admitted as attributes that Indians possess but are not determined to be "special circumstances". The new Indian is also defined by her/his shortcomings, but those shortcomings do not mitigate sentencing. They are a part of being Indian (so the stereotype goes) but they are not a *special* part of being Indian. If the circumstances are not mitigating, but are recognized in the case law, then the shortcomings of individual Indians are not part of being the new legal Indian, they are understood by many to be just part of being Indian. The result is, that there are factors implicitly linked with being Indian in the case law, but they are not demonstrably tied to the terminology in the legislation that result in mitigating circumstances. They are factors, but are not *special enough* factors. If they are not factors which should be taken into account, then their relevancy is questionable. Perhaps it is settler tourism – visiting the Indian and providing a postcard of the Indian but not a personal photo of an Indigenous person.

There seems to be a notion of the individual Indian as drunken or drugged. Perhaps this image is easier to individualize and examine without, on the surface, addressing the racialized thinking involved in systematizing it. Also, if it is addressed as an individual problem, there can be ascribed individual responsibility (and consequences) for that. Unless there is a link made

⁶⁴⁹ *Gladue*, *supra* note 647. In this case, the trial judge did not consider the accused as living "within the aboriginal community as such" because she lived off-reserve in an urban area.

⁶⁵⁰ In *R. v. W.M.K.*, [2002] N.W.T.J. No. 103 at para 19 (N.W.T. T.D.) (QL), the judge determined that "it is also clear that where the Court is dealing with violent offences, violent offenders, in effect, have to be treated relatively equally; and the fact the Mr. W.M.K. is aboriginal does not in some way lessen either the harm that he has done or the need for a severe sentence in this case."

between that drunkenness and those systems, there will be no link in the application of the legislation. Making that link, between social ills in Indigenous societies and systemic bias and colonial regimes, requires judicial notice that the situation was constructed and perpetuated by settler systems.

Admittedly, it would be highly problematic to tie alcoholism to Indigeneity, however in some instances the judge seems to think it is a relevant fact for sentencing – just not relative to the Indigenous people’s race and culture.⁶⁵¹ While not connecting the principles of race and culture to sentencing, judges have mentioned alcoholism in their judgments, referring to the alcoholism of the accused, victim and their families. In these circumstances, courts are concerned with the individualization of Indigenous circumstance while discussing the notion of familial relations and wellness. In *R. v. Saunders*, a decision of the Ontario Superior Court of Justice, the court was asked to take judicial notice of the fact that Indigenous peoples have been mistreated by society. The judge seemed not to understand what the definition or ramification of societal bias may be and stated that “other than the general treatment by society of aboriginal people, I have not been told of anything that appears to be discriminatory against him [the defendant] with regard to employment. He has held responsible jobs. He has had, I believe, three relationships.”

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⁶⁵¹ *Gladue*, *supra* note 647. See also *R. v. Laliberte* (2000), 143 C.C.C. (3d) 503 (Sask. C.A.) (QL) at para 59, in which Vancise, JA elaborated on a three step inquiry to determine whether an Aboriginal individual should be incarcerated :

Within that framework the sentencing judge therefore must be provided with the following information on a sentencing hearing:

- 1) Whether the offender is aboriginal, that is, someone who comes within the scope of s. 25 of the Charter and s. 35 of the Constitution Act, 1982;
- 2) What band or community or reserve the offender comes from and whether the offender lives on or off the reserve or in an urban or rural setting. This information should also include particulars of the treatment facilities, the existence of a justice committee, and any alternative measures or community-based programs.
- 3) Whether the offender has been affected by:
 - a) substance abuse in the community;
 - b) alcohol abuse in the community;
 - c) poverty;
 - d) overt racism;
 - e) family or community breakdown.
- 4) Whether imprisonment would effectively deter or denounce crime in the subject community. Within this heading it would be useful for the Court to determine whether or not crime prevention can be better served by principles of restorative justice or by imprisonment.
- 5) What sentencing options exist in the community at large and in the offender's community. For example, does an alternative measures program exist in the offender's community if he lives on a reserve?

⁶⁵² *R. v. Saunders*, [2000] O.J. No. 5622 No. 508/99 at para 10 (Ont. Sup. Ct. Just.) (QL).

This is troubling on three fronts. The least offensive is that the judge seems only to understand and interpret the section of the legislation dealing with systems in a manner which is reflective of his own values. “Systems”, in this context, refers to the potential for discrimination in hiring. There is no mention of his role in one of the systems which perpetuate what he labels “the general treatment by society of aboriginal people”.

The second troubling portion of his decision is that there is no critical analysis, no discussion or evaluation of that “general treatment”. It is, in his estimation and assumptive shorthand, a given. Seemingly, the legislation was enacted to address that very factor. That the judiciary is often incapable even of identifying it leaves me quite concerned with their ability to define it. Correctly defining it would require, as an initial step, at least recognizing the complicity of the justice system within that “general treatment”.

Finally, disassociating social ills as they impact Indigenous people from the pressure and injury placed on them by settler society locates the illness and the cause in Indigenous societies. For example, in one case of an Aboriginal offender and in the context of section 718.2(e), the judge stated:

I recognize the lifestyle of Mr. Augustine and the background of his way of life on the reservation, the abuse, the drinking, the taking of drugs but, in my view, these are not mitigating factors that should be imposed for manslaughter.⁶⁵³

The assumptive shorthand that is developing, in part because section 718.2(e) facilitates it, allows judges to raise and dismiss those elements of what they believe to be aspects of Indigenous cultures in their search for what might be a “special circumstance”. This special circumstance is the means by which the judge can determine what a mitigating factor is. The enumeration of aspects of Indian culture in this way leads to a formula:

New Indian = drinking + drugs + abuse + reserve

⁶⁵³ *R. v. Augustine*, [1999] N.B.J. No. 541, No. 29/99 at para 32 (N.B. C.A.) (QL).

which finds Indigenous peoples as a whole *recognized* as the legal Indian (who may or may not have the judge's perception of Indianness applied to her/him give effect to mitigation of her/his sentence).

The Supreme Court of Canada decision in *Gladue* did hold that the court should look at the unique systemic or background factors which brought the Indigenous person before the courts.⁶⁵⁴ However, as a part of the system, it is compelling to see how the system would (and if it would) adjudicate its own role in the perpetuation of these circumstances. The court referred to *R. v. Williams*, a case in which the Supreme Court of Canada noted that there was widespread bias against Indigenous people and that “[t]here is evidence that this widespread racism has translated into systemic discrimination in the criminal justice system.”⁶⁵⁵

This application of the new legal Indian image denies the subjugation that is historically entrenched in settler – Indigenous relations and which continues today. A concern which stems from the dialogue is how settlers in positions of decision-making authority can acknowledge that which they cannot experience and that which they may not understand. How is it that settler peoples will be able to intimately understand that individual violence can sometimes be a response to institutional violence?

The questions remain as Indigenous people experience increasing frustration. How better would settler peoples fare in their adherence to and honouring of Indigenous laws? Judges who cannot understand that social ills are a response to destruction and invasion, the settler failure to honour treaties, economic deprivation, disenfranchisement, and legal and governmental subjugation have no business deciding what circumstances of Indigeneity are *special*.

If, in this discussion Indigenous people appear beaten, ill and despondent, it is important to remember that settlers administered the beating, have thrived on the virus which sickens us and are celebrating in institutions which have wealth which we have not seen since before they came to our territories.

⁶⁵⁴ *Gladue*, *supra* note 647.

⁶⁵⁵ *Ibid.* at para 61 quoting *R. v. Williams*, [1998] 1 S.C.R. 1128 at para 28.

In this context, settlers prescribing restorative justice as a means to heal from the wounds settlers inflicted are not likely to hold curative powers.⁶⁵⁶

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It seems that there is no new Indian, no new image of the Indian, no new understanding of Indigeneity. For settler clarity we are painted with the same red brush, there is no palette of beige, mocha, brown, pink or other colours of the Indigenous house. What we perceive in our every day to be a unique set of circumstances has a trail and spatters of paint that trails us for years.

I suspect that it is easier to conglomerate the Indian than to particularize the personhood, but that does not make it right and it does not convince me that justice can be achieved where these men and others like them have decided we are generic/mono/uni and that it does not bear individualization, informing themselves about the particularity of Indigenous experience, or in educating themselves about the role some of them play in colonization.

Our circumstances surely cannot be just the way we are perceived by colonizers who adjudicate our response to their ancestors' presence in our territories.

⁶⁵⁶ The majority in *Gladue* (*supra* note 647 at para 71) held that:

“The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence as different issues and different conceptions of sentencing are addressed in their appropriate context.”

Developing entire systems based upon settler perceptions of Indigenous values and understandings is equally as troubling as attempting to infuse the current Canadian justice system with aspects of Indigenous people’s “special circumstances.”

E. Legislating Indigenous Economies

Non-Indigenous invasion included the attempted occupation of spaces in use by Indigenous economies. Wealth provided by legislatively, politically and physically controlling Indigenous participation in Indigenous and western economies has been recorded in oral traditions and in writing by western and Indigenous academics.⁶⁵⁷ However, once Indigenous peoples were relocated to reserves and treaty and other promises made with respect to the maintenance of our traditional economies were being broken, the economic wealth in our nations became endangered. Her Majesty legislatively outlawed trading alliances and ceremonies which redistributed wealth. The acquisition of resources and wealth on reserve became controlled by Indian agents who, at first, acted in the guise of protectionism. Later, becoming emboldened and ostensibly empowered by legislation, Indian Agents began to use the promise of economic wealth and the threat of economic deprivation as colonial tools to control Indigenous people.⁶⁵⁸ Indigenous principles approximated by English terms such as egalitarianism and societal well-being were under legislative attack. Indigenous economies were undermined and attempts were made to replace them. Without the means of control of the environment, resources and means of production, Indigenous people became alienated from our own economies and were relegated to worker roles in a foreign economy.⁶⁵⁹ Settler legislation led to alienation and eventually economic subjugation as Indigenous peoples' enforced participation in western industrial schools and farming operations were legislatively required. In a demonstrable indication of Indigenous isolation from the fruits of our labour, Her Majesty legislatively alienated Indigenous people from both capital and revenue monies, which were to be spent, saved or invested, according to Her Majesty.⁶⁶⁰

It is most interesting to note that in the area of Indigenous economies, there has been little or no change in the policy, legislation and understanding of successive settler governments. The begrudging respect offered to Indigenous languages, spiritualities and cultures and the

⁶⁵⁷ Indigenous participation in Western economies was quite lucrative for many Indigenous peoples who controlled their participation in the economy.

⁶⁵⁸ For a detailed and profoundly informative discussion on this point, see Sarah Carter, *Lost Harvests: Prairie Indian Reserve Farmers and Government Policy* (Montreal: McGill-Queen's University Press, 1990).

⁶⁵⁹ *Ibid.*

⁶⁶⁰ 1906 *Indian Act*, *supra* note 623 at s. 89.

bureaucratization of notions of inherent rights and the right to Indigenous government by Her Majesty have not similarly been extended to the notion of Indigenous economies. The rights to livelihood have not been fully discussed in a contemporary context.⁶⁶¹ In fact, the modern dialogue seldom broaches the topic of the quantification of economic loss and Canada's obligation with respect to the devastation of Indigenous economies through legislative and policy means. It is almost as if in the midst of the onslaught of the traumas visited by colonization we are not demanding and the settler is not offering. The consequent result is that the re-telling of history becomes internalized by many people: to the victor go the spoils.⁶⁶² Instead, the current dialogue, much like the historic one, seems to be predicated on the notion that *the deserved victor has no accountability for the cost of his dominion*. Seemingly, the intrinsic acceptance of both the adjective deserved and the noun victor defeats the requirement that an accounting and audit of the costs of invasion be done. Accordingly, the myth of dominion becomes further embedded in the colonial imagination.

To examine the process of legislative economic alienation and to arrive at the corresponding stereotypes this creates of settler peoples, it is useful to examine the attempted economic subjugation of Indigenous peoples in the following four eras:

- 1) Invasion: "Protecting the Indian" and Acknowledging Difference and Obligations

Until Confederation, settler legislation with respect to Indigenous lands was primarily concerned with the settler obligation to protect Indigenous land, resources, and interests from settler encroachment. Whether this was due to protectionist inclination, notions of duty, or other reasons the end result is clear: the image of settler obligation in the face of settlement in

⁶⁶¹ I note two similarly fated cases, although in differing treaty areas: the decision of the Supreme Court of Canada in *R. v. Horseman*, [1990] S.C.J. No. 39 (S.C.C.) (QL) [*Horseman*], with a case of hunting a grizzly bear out of season and selling the same in the Treaty no. 8 territory. While Treaty no. 8 addressed hunting for commerce, the court found that right was limited to hunting for food by virtue of intervening legislation. See the *Marshall I*, and *Marshall II*, *supra* note 6 decisions in which the right to fish was limited to "necessaries".

⁶⁶² Renato Rosaldo, *Culture and Truth: The Remaking of Social Analysis* (Boston: Beacon Press, 1989) calls this fabled telling of history "imperialist nostalgia". Discussed in bell hooks, *Killing Rage* (New York: Henry Holt and Company, 1995) at 43.

Indigenous territories and the acknowledgement of differences between original and settler peoples were entrenched in legislative schemes.

For example, in *An Act for the Protection of Crown Lands in Upper Canada*⁶⁶³ the Indian Commissioner was authorized to seize timber on Indian land and sell it. Case law pursuant to this section of the *Act* dealt with the timeline within which the Commissioner had to sell it.⁶⁶⁴ As well, in *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*⁶⁶⁵ there was a provision “That the said Commissioner shall have full power to concede or lease or charge any such land or property as aforesaid, and to receive or recover the rents, issues and profits thereof as any lawful proprietor, possessor or occupant thereof might do...”.⁶⁶⁶ In 1850, the protection of Indian interests was entrenched in the aptly named *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury*⁶⁶⁷ within which it was enacted that “no purchase or contract for sale of land in Upper Canada, which may be made of or with the Indians or any of them, shall be valid unless made under the authority and with the consent of Her Majesty...”.⁶⁶⁸ Case law based upon this legislation determined that Her Majesty’s approval was required in the instance of bargaining with Indians for the sale of land⁶⁶⁹ and determined that criminal conviction would occur if a non-resident went into possession of Indian lands via an oral contract with an Indian person.⁶⁷⁰ In one case it was determined that timber cut on-reserve by Indians or by non-Indians with Indian consent could not be seized.⁶⁷¹ While there is certainly an unstated supremacist understanding (that settlers had the authority to make decisions about Indigenous peoples) what is more surprising is that there is an underlying acknowledgement of Indigenous priority with respect to their own territories. That the Indian was to be treated differentially because of circumstances indigenous to the Indian was clear. The rationale was likely not

⁶⁶³ *An Act for the Protection of Crown Lands in Upper Canada*, S.U.C. 1839, c. 15, s.5.

⁶⁶⁴ *Jones v. Bain* (1854), 1 C.N.L.C. 269 (U.C.Q.B.).

⁶⁶⁵ *An Act for the better protection of the Lands and Property of the Indians in Lower Canada*, S.C. 1850, c. 42 (13 & 14 Vict.).

⁶⁶⁶ See *The Queen v. Johnson* (1850), 1 C.N.L.C. 396 (U.C.C) and *The Queen v. Strong* (1850), 1 C.N.L.C. 419 (U.C.C.C.) for interpretation and application of this act in the relevant time frame.

⁶⁶⁷ *An Act for the protection of the Indians in Upper Canada from imposition, and the property occupied or enjoyed by them from trespass and injury* S.C. 1850, c.74 (13 & 14 Vict.) [*Protection of Indians Act, 1850*].

⁶⁶⁸ See the preamble of the *Protection of Indians Act, 1850*, *ibid*.

⁶⁶⁹ *Baby*, *supra* note 599.

⁶⁷⁰ *Hagar*, *supra* note 600.

⁶⁷¹ *Vanvleck et al v. Stewart et al* (1860), 1 C.N.L.C. 476 at 477 (U.C.Q.B.).

favourable. There is a presumption of incompetence of Indians that underlies the legislation. However, if you examine the legislative regime there is also something surprising rooted in the language: acknowledgement of Indigenous citizenship and corresponding rights associated therewith.

For example, taxation of Indigenous citizenship was legislatively forbidden. In 1853, *The Consolidated Assessment Act of Upper Canada, 1853*⁶⁷² addressed the absolute prohibition on Indian taxation thusly:

- VI. And be it enacted, That the following property shall be exempt from taxation:
Firstly. All estate and property belonging to or vested in Her Majesty, Her Heirs and Successors, or held by Her Majesty or any other person or body corporate in trust for or for the use of any tribe or body of Indians, or vested in any public body, officer, person or party in trust for Her Majesty, or for the public uses of the Province, save as hereinbefore provided as to any private occupant of such property.

Indians were exempt because of their status as Original peoples. Later rationalizations addressing the stated benevolence of Her Majesty do not address the inherent understanding that was legislatively entrenched. Indians could not be taxed because they were Indians. While it may be interpreted that Indians as Crown property, could not be taxed, Indians as Indians could not be taxed. The implications for nationhood and citizenship within this acknowledged inherent right are understandably substantial.

The 1857 *Act to encourage the gradual Civilization of the Indian Tribes in this province, and to amend the Laws respecting Indians* provided for enfranchisement of Indians and taxation for those who were enfranchised.⁶⁷³ The link between the understanding that Indians could not be taxed and Indian citizenship is one which has been addressed in all subsequent versions of the *Indian Act*. Treaty annuities were to be similarly respected. As a result, as early as 1859 there was a legislative provision which stated that no presents or property bought with annuities paid

⁶⁷² *The Consolidated Assessment Act of Upper Canada, 1853* S.C. 1853, c. 182, s. VI.

⁶⁷³ *Gradual Civilization Act*, *supra* note 270 at s. XIV.

to Indian tribes could be taken, seized or distrained for any matter or cause.⁶⁷⁴ Acknowledgement of the special status of Indians as Foreigners (in a settler context) reinforces and perpetuates the understanding of Indigenous peoples as nations.

Other provisions were clearly in place to facilitate settler relocation to Indigenous territories. In 1856, legislation was enacted validating conveyances and leases made by Indians in the Township of Durham to address settler concerns that they would not have actual title to Indian lands.⁶⁷⁵ As well, in 1859, legislation decreed that roads could be built through Indian reserves with the consent of the Superintendent General of Indian Affairs.⁶⁷⁶ Evidently the notion of Indian citizenship and nationhood were disregarded when the acquisition of land for settler peoples was an issue.

Recognition of Indian rights to Indian resources was acknowledged legislatively as well. In the 1860 legislation, *An Act respecting the Management of the Indian Lands and Property*⁶⁷⁷ the Governor in Council enacted legislation which would allow it to sell and manage timber on Indian lands and direct the monies arising from the sale of Indian lands.⁶⁷⁸ While demonstrating an adherence to the myth that Indians' understandings of economic management were inferior to settlers' understandings, the legislation also demonstrates that Indian people were to have their economic wealth stabilized in the face of settlement. As evidence of this, the cutting of the timber by anyone other than the Huron of La Jeune Lorette was legislatively prohibited in 1864. The Huron were able to make by-laws fixing the conditions of distribution, granting their citizens permission to cut and other areas related to giving effect to the *Act*.⁶⁷⁹

If, by this legislation, Indigenous peoples are perceived as requiring protection, settler people are perceived as imperialist and intrusive. As well, if Indigenous peoples are perceived as possessing inherent rights to their territories and resources upon them, settler appetite for the

⁶⁷⁴ *An Act respecting Civilization and Enfranchisement of certain Indians*. C.S.C. 1859, c. 9. (22 Vict.), s. 5.

⁶⁷⁵ *An Act to change the tenure of the Indian Lands in the Township of Durham*. S.C. 1856, c. 4 (19 Victoria), s. II.

⁶⁷⁶ *An act to authorize the making and maintenance of Roads through Indian Reserves in Lower Canada*, S.C. 1859, c. 60. (22 Vict.) s. 1.

⁶⁷⁷ In the 1860 *An Act respecting the Management of the Indian Lands and Property* S.C. 1860, c. 151. (23 Vict.).

⁶⁷⁸ *Ibid.*, ss. 6 and 7, respectively.

⁶⁷⁹ *La Jeune Huron Act*, *supra* note 586 at s. 5(1-3).

same and the need to control it is demonstrable by the terms and breadth of legislation to control settler behaviour (and at other times, to facilitate their appetite).

2) Settler as Manager

In this era, settlers begin to use legislative means to exert authority into the day to day activities of Indigenous peoples. Settler application of professed legislative authority extends from natural resource proceeds to the participation of Indigenous people in labour-related and professional occupations, and the ramifications that that has for Indigenous citizenship. The implications which this has for the creation of images of settlers are wide-ranging. What it says about settler understandings of Indigenous humanity and economies is startling.

Protectionism (at least and theft at most) continued to a degree, in this era. Securities and money “of any kind applicable to the support and benefit of the Indians” and proceeds from the sale of Indian land or timber were to be held in a trust, according to 1868 legislation.⁶⁸⁰ This legislation also contained provisions for the conditions of Indian land surrender, a section which provided that no presents or property of Indians could be seized or taken “for any debt, matter or cause whatsoever”.⁶⁸¹ It also contained penalties for those removing Indian timber or stone from Indian lands, and a requirement that proceeds from the sale of timber be paid to the Indian Fund.⁶⁸²

Legally required Indian labour on road projects was entrenched in the *Indian Act*. The *Indian Act* was the principal piece of legislation which, at least, de-stabilized Indigenous economies. In a section of the Act which was present in the 1876-1927 Acts, mandatory labour on road projects was prescribed:

23. Indians residing upon any reserve, and engaged in the pursuit of agriculture as their then principal means of support, shall be liable, if so directed by the Superintendent-General, or any officer or person by him thereunto authorized, to perform labor on the public roads laid out or used in or through, or abutting upon such reserve, such labor to

⁶⁸⁰ *Management of Indian and Ordnance Lands*, supra note 587 at s.7.

⁶⁸¹ *Ibid.*, s. 14.

⁶⁸² *Ibid.*, ss. 22 and 30.

be performed under the sole control of the said Superintendent-General, officer or person, who may direct when, where and how and in what manner the said labor shall be applied, and to what extent the same shall be imposed upon Indians who may be resident upon any of the said lands; and the said Superintendent-General, officer or person shall have the like power to enforce the performance of all such labor by imprisonment or otherwise, as may be done by any power or authority under any law, rule or regulation in force in the province or territory in which such reserve lies, for the non-performance of statute labor; but the labor to be so required of any such Indian shall not exceed in amount or extent what may be required of other inhabitants of the same province, territory, county, or other local division, under the laws requiring and regulating such labor and the performance thereof.⁶⁸³

Participation in settler economy (agriculture) evidently provided settlers with enough evidence of Indigenous servitude or settler citizenship to require Indigenous participation in “public projects” on Indian reserves. That Indigenous participation in agricultural activities may have been evidence of diversification of Indigenous economies or an extension of Indigenous participation in other agricultural and horticultural economies (i.e. gathering, root and berry picking) was seemingly beyond the understanding of settler legislators.

Legislatively enforcing labour and colonial expansion had a cost for Indigenous peoples. Developing roads in and of itself bore a price tag: it increased the potential for encroachment and exploitation. Additionally, time spent on developing roads in Indigenous territories was time not spent on Indigenous economic activities. The development of roads encouraged travel by settlers into sectors of Indigenous territories they previously had no access to and to the development of non-Indigenous economies in reserve settings. The movement from migrating or semi-sedentary peoples to sedentary peoples had a tremendous impact on Indigenous economies. The encroachment on Indigenous territories facilitated by road construction further impacted Indigenous economies. The alienation from the tools and resources of production resulted in further isolating Indigenous people from Indigenous economies and in economic stratification in the settler economies with Indigenous people participating in the lowest rungs of the production ladder.

⁶⁸³ 1876 *Indian Act*, *supra* note 261 at s. 23.

Improvements made by Indigenous peoples on their territories subsequently included in reserve territory were first legislatively acknowledged in 1876.⁶⁸⁴ In that year, the *Indian Act* required that Indians entering non-home reserves had to get a license in writing from the Superintendent General (or someone deputed by him) in instances where the Indian entering the reserve did so for the purposes of removing certain items (trees, saplings, shrubs, underwood, timber or hay thereon, or by removing any of the stone, soil, minerals, metals or other valuables).⁶⁸⁵ While the intent may have been “protective” and the result in some instances was beneficial, there were likely other negative impacts. One such likely impact was that the provision was intrusive and disruptive of traditional trading alliances within various Indigenous nations. The tenure and intent of this section changed minimally between 1876 and 1970. Notably, in 1906 the prohibition was extended to “Every person, or Indian.”⁶⁸⁶

The 1876 *Act* also included a section which stated that reserve land could not be sold, alienated or released until surrendered to the Crown.⁶⁸⁷ Further, it included a clause which provided:

58. All moneys or securities of any kind applicable to the support or benefit of Indians, and all moneys accrued or hereafter to accrue from the sale of any Indian lands or of any timber on any reserves or Indian lands shall, subject to the provisions of this Act, be applicable to the same purposes, and be dealt with in the same manner as they might have been applied to or dealt with before the passing of this Act.⁶⁸⁸

The tone and tenure – that the resources on Indian territories and the moneys from them were to be controlled by Canada - did not change significantly from 1876 to 1970.⁶⁸⁹ In addition to that presumed authority, legislation allowed Her Majesty to grant timber licenses on reserve lands at

⁶⁸⁴ *Ibid.*, s. 10.

⁶⁸⁵ *Ibid.*, s. 17.

⁶⁸⁶ 1906 *Indian Act*, *supra* note 623 at s. 127.

⁶⁸⁷ 1876 *Indian Act*, *supra* note 261 at s. 25. This section was virtually unchanged until 1927, when the tenure remained the same, but the Governor in Council was given additional powers to regulate the same. *Indian Act*, S.C. 1951, c. 29, s. 50.

⁶⁸⁸ 1876 *Indian Act*, *ibid.*, s. 58.

⁶⁸⁹ 1970 *Indian Act*, *supra* note 643 at s. 61(1)(2). This section provides:

(1) Indian moneys shall be expended only for the benefit of the Indians or bands for whose use and benefit in common the moneys are received or held, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which Indian moneys are used or are to be used is for the use and benefit of the band.

(2) Interest upon Indian moneys held in the Consolidated Revenue Fund shall be allowed at a rate to be fixed from time to time by the Governor in Council. R.S., c.149, s.61.

rates and subject to conditions She established.⁶⁹⁰ While all of these provisions discouraged settlers from attempting to usurp Indigenous territories, they also speak to the burgeoning image of settler as manager of Indigenous lands, resources and properties.

This image is further advanced by the fact that settler people began to demonstrate that the “managing” of the Indian bore a price tag and the cost of that would be borne by Indigenous peoples themselves. The paradoxical nature of this colonial requirement that Indigenous people bear the cost of colonialism is beyond absurdity. It is important to note that as early as 1876, it was anticipated that there would be costs associated with “administering” Indians. Proceeds from the sale of Indian lands or arising because of Indian property held in trust, sale of timber or any other source could be held, invested or spent (including the cost of time and management of the reserves) according to Her Majesty’s determination.⁶⁹¹ Section 59 of the 1876 *Act* included a provision with respect to the monies to be provided for “management”:

59. The Governor in Council may, subject to the provisions of this Act, direct how, and in what manner, and by whom the moneys arising from sales of Indian lands, and from the property held or to be held in trust for the Indians, or from any timber on Indian lands or reserves, or from any other source for the benefit of Indians (with the exception of any small sum not exceeding ten per cent. of the proceeds of any lands, timber or property, which may be agreed at the time of the surrender to be paid to the members of the band interested therein), shall be invested from time to time, and how the payments or assistance to which the Indians may be entitled shall be made or given, and may provide for the general management of such moneys, and direct what percentage or proportion thereof shall be set apart from time to time, to cover the cost of and attendant upon the management of reserves, lands, property and moneys under the provisions of this Act, and for the construction or repair of roads passing through such reserves or lands, and by way of contribution to schools frequented by such Indians.⁶⁹²

This image of settler as manager of the Indian was further entrenched in section 60 of the 1876 *Indian Act* (which remained quite the same from the period of 1876-1970). Within this section, the controlled and organized settler was legislatively enabled to manage and administer all money associated with Indigenous territories, resources and properties. Section 60 provided:

⁶⁹⁰ 1876 *Indian Act*, *supra* note 261 at s. 45. This section remained almost completely unchanged in the 1876-1927 versions of the Act. Subsequent enactments broadened this power.

⁶⁹¹ *Ibid.*, s. 59.

⁶⁹² *Ibid.*

The proceeds arising from the sale or lease of any Indian lands, or from the timber, hay, stone, minerals or other valuables thereon, or on a reserve, shall be paid to the Receiver General to the credit of the Indian fund.⁶⁹³

While “management” of Indigenous monies, lands, properties and resources was being controlled legislatively, Her Majesty perceived this as insufficient to direct the Indian and Indian Affairs. Participation in hunting and fishing, principal elements of Indian economies was ostensibly controlled as well. While protecting resources on-reserve it also required Indigenous people to participate in their economic activities within the false borders established under the *Indian Act*. Hunting was limited on-reserve to people from the reserve in 1876.⁶⁹⁴ This was expanded to fishing in 1886.⁶⁹⁵

In this era, the prohibition against taxation of Indian people was also entrenched in the *Indian Act*. Markedly, within this era as well the right began to be qualified. Taxation on real and personal property of Indians was prohibited in the 1876 *Indian Act*.⁶⁹⁶ The 1880 version of the *Act* enunciated the first of the coming limitations to be placed on this prohibition. In this *Act*, section 75 provided that real estate held in a lease or fee simple or personal property outside of the reserve could be taxed.⁶⁹⁷ The protection of monetary wealth was extended to transactions involving other security in 1876. Another section of that year’s *Indian Act* provided that no one could take any security, lien or mortgage upon real or personal property of any Indian.⁶⁹⁸ Case law dealing with this section established that mortgages on reserve lands were invalid.⁶⁹⁹ Section 67 of the 1876 legislation provided that Indians could sue for debts owed to them.⁷⁰⁰

Indian economies began to be addressed in earnest in the 1876 *Indian Act*. In it, section 69 (which appeared in a number of subsequent amendments to the *Act*) provided that no presents given to Indian people or property purchased via annuities could be taken to settle a debt.⁷⁰¹ The

⁶⁹³ *Ibid.*, s. 60.

⁶⁹⁴ *Ibid.*, s. 11.

⁶⁹⁵ 1886 *Indian Act*, *supra* note 615 at s. 22.

⁶⁹⁶ 1876 *Indian Act*, *supra* note 261 at s. 64.

⁶⁹⁷ 1880 *Indian Act*, *supra* note 294 at s. 75.

⁶⁹⁸ 1876 *Indian Act*, *supra* note 261 at s. 66.

⁶⁹⁹ *Black v. Kennedy* (1877), 2 C.N.L.C. 26 at 20 (M.Q.B.).

⁷⁰⁰ 1876 *Indian Act*, *supra* note 261 at s. 67.

⁷⁰¹ *Ibid.*, s. 69.

presumed authority to control Indigenous economies was given wider berth in 1886. In this year, this component was strengthened with a provision which enabled the Governor in Council to make regulations for prohibiting or regulating commerce (sale, barter, exchange or gift by a band) in grain, root crops or other produce.⁷⁰²

Economic control takes on new and oppressive tone in this era. Not content to regulate the Indian's participation in Indigenous economies or settler participation in Indigenous economies, the settlers' legislative regime expanded to regulate Indian participation in settler economies in 1876. A section of the *Indian Act* prohibited participation in settler economies by Indians. If you were a professional, you could not be an Indian. Section 86(1) of the 1876 Act provided that if you were a degree holder, doctor or a lawyer, or a minister, you would lose (or give up) your Indian status.⁷⁰³ To participate as a professional in the settler economy, you had to be a settler.

As well in this era, settler micromanagement went hand in hand with settler presumed supremacy. Likely in response to feared "Indian insurgence", an 1884 revision to the *Act*, still present in the 1927 *Indian Act*, provided that the Superintendent General, with notice, could prohibit the "sale, gift or any other disposal" of ammunition and cartridges to Indians.⁷⁰⁴ What this likely did (in addition to criminalizing the Indian, as discussed earlier in this paper) was further interrupt Indigenous participation in Indigenous economies. The underlying presumption of settler supremacy went hand in hand with settler misinterpretation of Indigenous economies. As mentioned, participation in potlatch, giveaways and ceremonies which were often essential to the redistribution of wealth and establishment of alliances and familiarity was outlawed in 1884.⁷⁰⁵ The impact that this had on familial and communal wellness is not well known in a Canadian legal context.

Her Majesty as micromanager was legislatively enabled in 1886. At this time, the *Indian Act* legislatively prohibited the harvesting of maple trees on-reserve for removal or acquisition from

⁷⁰² 1886 *Indian Act*, *supra* note 615 at s. 30.

⁷⁰³ 1876 *Indian Act*, *supra* note 261 at s. 86(1). This provision was in place until 1951.

⁷⁰⁴ 1884, *An Act to further amend "The Indian Act, 1880"*, *supra* note 294 at s. 2.

⁷⁰⁵ *Ibid.*, s. 3.

an Indian person.⁷⁰⁶ Her Majesty's motivation, however, was still suspect. In this year, it was also legislated that no official or employee of the Department, no missionary and no teachers on reserve could engage in commerce (trade with, sell supplies, cattle or other animals).⁷⁰⁷ The image that this creates is one of barbarian at the gates and with the Dominion as gate keeper.

That decisions about Indian participation in economic activities were legislatively entrenched by peoples who had to have legislation in place to control their own propensity to raid the larders they were protecting is clearly evident in the legislative history. Bartering was disallowed in the west in 1886 without a special license.⁷⁰⁸ An 1891 amendment to the *Indian Act* provided that only those granted shooting privileges by consent of the band could do so on reserve.⁷⁰⁹ The issue of settler control of Indian activity through administration extended to settler control of Indian resources through administration. A great deal of discretionary power was housed in the administrative decisions that Her Majesty made with respect to Indians.⁷¹⁰ Section 70 of the 1886 *Act* was almost precisely the same as section 59 of the 1876 *Act*, which attempted to empower Her Majesty's agent to reduce the purchase money due or to become due on sales of Indian lands (or reduce the interest, or rent on leased lands) if he considered it excessive.⁷¹¹

Later in the era, protectionism by settlers seems to be replaced with a stricter "managerial" style; that managerial style is one of enforcer. At this time, Her Majesty seems to have reached the conclusion that participation in Indigenous economies is no longer a viable economic alternative for Indians. Instead, in an overt attempt to replace Indian economies by forcing participation in agricultural and other labour-related occupations, Her Majesty enacted legislation which promoted agriculture and mandated relocation to and participation in boarding and industrial schools.

⁷⁰⁶ 1886 *Indian Act*, *supra* note 615 at s. 32.

⁷⁰⁷ *Ibid.*, s. 134.

⁷⁰⁸ *Ibid.*, s. 134(2).

⁷⁰⁹ *Indian Act*, S.C. 1891, c. 30, s.4 adding section 136. Also need to add to end notes.

⁷¹⁰ That the group which made the laws which empowered the group (and enforced the laws) contributes to the interpretation of the entity law-lawmaker-lawbreaker-law enforcer as a mass of Whiteness. With law as self-perpetuate and settler peoples as creators and perpetuators of settler law, in the face of the onslaught of colonial activity, motivation and justification it is difficult to separate intent from action, and those from actors and enactors.

⁷¹¹ 1886 *Indian Act*, *supra* note 615 at s. 70.

For example, in 1894 the Governor in Council required the consent of the band to authorize and direct the expenditure of capital moneys of the band in land, cattle, implement or other improvements,⁷¹² this approval could subsequently be overridden. Section 139 reads:

139. The Governor in Council may, with the consent of a band, authorize and direct the expenditure of any capital moneys standing at the credit of such band, in the purchase of land as a reserve for the band or as an addition to its reserve, or in the purchase of cattle for the band, or in the construction of permanent improvements upon the reserve of the band, or such works thereon or in connection therewith as, in his opinion, will be of permanent value to the band, or will, when completed, properly represent capital.⁷¹³

With respect to the above mentioned section, it is important to note that in 1914, a section was added to the *Indian Act* which provided that if a band refused to consent and the Superintendent General thought that refusal was detrimental to the progress of the band the Governor in Council may “without the consent of the band, authorize and direct the expenditure of such capital for such of the said purposes as may be considered reasonable and proper.”⁷¹⁴ This clause demonstrates the implicit supremacist understanding held by legislators of the day that their discretion and decision making with respect to Indian economies was superior to the understanding and decision making of Indigenous people with respect to Indigenous economies.

This presumed supremacy is evident in other enactments as well. Prior to that, in 1894, it was legislatively established that the Governor in Council could enforce compulsory attendance of Indian children at schools.⁷¹⁵ The next section of the *Act* provided for the establishment of industrial or boarding schools. Wide sweeping powers were legislatively provided which would allow for the committal of Indian youth to the schools until the age of 18.⁷¹⁶ The role of children in traditional Indigenous economies was forever altered as many lost the teachings, language and understandings related to conservation which had been a principal law in Indigenous cultures which had direct relevance to Indigenous economies. That those children became adults who were trained to participate in labour related activities in settler economies ensured that Indigenous principles of conservation and economic wealth were not likely to be practiced without legislative or other settler interference.

⁷¹² *Indian Act*, R.S.C. 1894, c. 32, s. 139 [1894 *Indian Act*].

⁷¹³ *Ibid.*, s.11, adding s. 139.

⁷¹⁴ 1914 *Indian Act*, *supra* note 626 at s. 4.

⁷¹⁵ 1894 *Indian Act*, *supra* note 712 at s. 137.

⁷¹⁶ *Ibid.*, s. 138.

If, in this era, Indigenous people are stereotyped as incapable (by virtue of our birth) of controlling and managing our nations, the legislative regime as established in that time points to settlers as power hungry and incapable by birth of living principled lives, requiring restrictions to control their voraciousness for ownership and control.

3) Controlling the Means of Production: Settlers as Possessor

The era from the late 1800s until the 1970s can be generally characterized by settler confidence in their 'deserved' control over land and resources. The degree to which the Indian became perceived as an object to be possessed in this era is greater than in previous eras, largely because the Indian became incidental to the expansion of settler authorities and expansion. In this time frame, the image of the settler is one of expansionist. The settler requires the image of the Indian at this time for little, so completely has the administration of the Indian exhausted and externalized the participation of Indigenous people in their own economies. The settler utilizes the image of the Indian in this time frame to advance other goals: territorial expansion, economic development, and the broadening of his/her sphere of control.

In terms of settler-Indigenous relations, the image of the Indian as without will or as child is perpetuated to enable further development and settler expansion without a requirement of justification. With respect to Indigenous economies and Indigenous trap lines, one settler wrote to Her Majesty regarding the image of Indian economies during this era:

...the Indian is a ward of the Gov't and as such has been treated as a child. We do not expect a child to comply with all the domestic or social rules and regulations of a household or well-organized society. We give him a playpen, rumpus room or allot to him a backyard and allow him and his playmates to do pretty much as they please therein and do not expect him to behave like an adult or to comply with all the social amenities and regulations demanded of the adult members of the home or other social institution. True he does break his toys and playthings but this is viewed with good-natured tolerance by any thoughtful or considerate parent who recognizes that it is not fair to expect the same standard of behaviour and conduct from the infant that is demanded of the adult.⁷¹⁷

⁷¹⁷ M. J. Edwards to Mr. D Allan, Superintendent of Reserves and Trusts, Indian Affairs, Fur Conservation – Alberta—Correspondence Regarding Game and Fur Conditions and Registered Trapping Areas and Trap Lines.

Settler determinations of this nature tell us more about settlers than they do about Indigenous people. Settler perceptions of their benevolence aside, the image created of settler arrogance, presumptive ownership and supremacy in this era is clearly evident.

During this time, Indigenous peoples' participation in Indigenous economies and within non-Indigenous economies was addressed on numerous occasions. That is not to say that protectionism was no longer an issue. In fact, enforceability by Indigenous peoples as against settlers and trespassers was still an issue and was one of the principal settler motivations behind legislatively controlling the Indian in this era. Encroachment and imperialist notions of settler right of territoriality are evident in the following excerpt of a letter and Canadian government report from this era:

[The Indians] have repeatedly expressed their complaints on the following points:

The want of proper authority and the absence of power to enforce it, causing a feeling of insecurity for life and property. It has been to my personal knowledge that the Indians have been the victims of many trespasses, on their property, committed by white men, without their being allowed any means of redress...The absence of game laws in the District of Keewatim resulting in a great destruction of game which will in a few years, leave them deprived of that important means of subsistence.⁷¹⁸

Encroachment by settlers and the corresponding strain on Indigenous economies and natural resources had been a concern for quite some time. In 1894, *The Unorganized Territories' Game Preservation Act*, which described animals and birds which were not to be hunted or taken, included a notwithstanding clause which exempted Indians from its application.⁷¹⁹ While seemingly addressing the concerns related to Indigenous economies, the legislation also included a provision prohibiting any person from entering into "any contract or agreement with or employ any Indian or other person".⁷²⁰ A 1906 consolidation of the legislation included a section which provided for a fine for anyone engaging an Indian person to hunt or take the enumerated game

Also Included is a List of Treaty Indians Trap Lines (Map) (11 January 1949), Ottawa, National Archives of Canada (RG 10, Indian Affairs, Volume 6734, Reel C-8096, File: 420-2-2-1, 1946—1950).

⁷¹⁸ Letter, pp. 3-4 of Reports and Inventories Regarding Stock and Implements, Etc. Provided to Various Bands in Treaties 4, 5 and 6 (26 November, 1944), Ottawa, National Archives of Canada (RG10, Indian Affairs, v. 3654).

⁷¹⁹ *The Unorganized Territories' Game Preservation Act*, *supra* note 622 at s. 8(a).

⁷²⁰ *Ibid.*, s. 12.

and fowl.⁷²¹ In 1914, an amendment to the *Indian Act* provided that without the written consent of the Indian Agent, no Indian could commerce in an animal, “the progeny thereof given to him or to the band under treaty stipulations...”.⁷²² Whether contemplated in the climate of resource conservation or not, the overall effect is an attempt to absolutely control Indian participation in Indigenous economies and commercial interaction between Indians and settlers. Given the long-detailed history of Indigenous laws related to conservation, it is difficult to assign culpability to Indigenous people for fish, game and fowl shortages. In fact, with legislation requiring that settlers do not engage Indians to hunt or fish for them, it would seem that the image of anti-conservationist could be applied to settler peoples in this era.

The provincial *Natural Resources Acts* (Natural Resource Transfer Agreements) were passed in the 1930s and provided that:

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867*, the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province and the interest of the Crown in the waters and water-powers within the Province under the *North-west Irrigation Act, 1898*, and the *Dominion Water Power Act*, and all sums due or payable for such lands, mines, minerals or royalties, or for interests or rights in or to the use of such waters or water-powers, shall, from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals and royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides....⁷²³

The implicit assumptive ownership of land and resources, the explicit legislation of the same, and the resultant pressures this placed on Indigenous nations are still evident today. In fact, Her Majesty’s legislation with respect to lands and resources and the applicability of those laws and authorities to Indigenous peoples continue to be the subject of litigation. One such piece of legislation is the *Whaling Convention Act* of 1951. This *Act* contained a section allowing the Governor in Council to make regulations permitting “Indians and Eskimos” to engage in whaling or some whaling-related activities.⁷²⁴ Some of the lines of settler authority continued to be blurred. In 1952 it was legislated that the Governor in Council could make regulations

⁷²¹ *Northwest Game Act*, R.S.C. 1906, c. 151, 25.

⁷²² 1914 *Indian Act*, *supra* note 626 at s. 7 amending 105.

⁷²³ *Alberta Natural Resources Act*, S.C. 1930, c. 3; S.A. 1930, c. 21 1930.

⁷²⁴ *The Whaling Convention Act*, S.C. 1951 (2nd sess.) c. 29, s.6(g).

authorizing “the Minister to enter into agreements with Eskimos or Indians, or persons with Eskimo or Indian blood living the life of an Eskimo or Indian, for the herding of reindeer that are the property of Her Majesty...”⁷²⁵ in the Northwest Territories.

The 1951 *Indian Act* legislatively entrenched Ministerial dictates regarding reserve economies by facilitating the Department’s participation in farms on reserve. While the section allows the Minister to purchase and distribute seed without charge,⁷²⁶ it also indicates Her Majesty’s willingness to develop economic activities, regardless of Indigenous intent or histories. Her Majesty’s ostensible control over Indian revenue moneys was solidified in 1951. In this year, section 68 of the *Act* (section 69 in the 1985 version) legislatively authorized the Minister to address a band’s ability to “control, manage and expend in whole or in part its revenue moneys”.⁷²⁷ The Governor in Council, in this same year, was ostensibly empowered to make regulations related to authorizing the Minister to grant licenses to cut timber, providing for the disposition of surrendered mines and minerals underlying lands in a reserve.⁷²⁸

Also in 1951, band councils were legislatively ‘permitted’ to make by-laws pertaining to beekeeping and poultry raising regulation,⁷²⁹ “control and prohibition of public games, sports, races, athletic contests and other amusements,”⁷³⁰ regulation of the conduct of people entering the reserve to sell or buy merchandise,⁷³¹ and the protection and management of animals (fur-bearing), fish and other game on reserve.⁷³² The domain of Indian authority anticipated by this legislation was quite a small one. The image of settler as owner-operator is quite pronounced. In reality, while some Indigenous people were ostensibly following these rules, many Indigenous people continued to participate in traditional or mixed economies, living by the laws intrinsic to Indigenous understandings and teachings. Understanding settler rules was one thing, voluntarily participating in the scheme or conceding to that authority were quite others.

⁷²⁵ *Northwest Territories Act*. R.S.C. 1952 (Supp.), c. 331, s. 41(a).

⁷²⁶ 1951 *Indian Act*, *supra* note 262 at s. 70(1). This section also appears in the 1970 and 1985 versions of the *Indian Act*.

⁷²⁷ *Ibid.*, s. 68(1). It appears in 1970 *Indian Act*, *supra* note 643 at s. 69(1) and the 1985 *Indian Act*, *supra* note 283.

⁷²⁸ 1951 *Indian Act*, *supra* note 262 at s. 57.

⁷²⁹ *Ibid.*, s. 80(k).

⁷³⁰ *Ibid.*, s. 80(m).

⁷³¹ *Ibid.*, s. 80(n).

⁷³² *Ibid.*, s. 80(o).

The sphere of command for settlers anticipated in the 1951 *Indian Act* is immersed in false understandings of settler supremacy and Indian inferiority. In this year as well, the Minister was legislatively enabled to spend Indian revenues for “any purpose that in his opinion will promote the general progress and welfare of the band or any member of the band.”⁷³³ There is a large degree of discretion in this *Act*, generally. The image of settler as making rules for the perpetuation of domination is quite a prominent one.⁷³⁴ With a lack of knowledge about Indigenous cultures and economies (or disregard for the same) clearly evident in the legislation, it is difficult to interpret “his opinion” as anything other than arbitrary and uninformed, at least.

Much of the remaining legislation dealt with regulation of Indigenous economies and expansion of settler economies. 1954 legislation provided that loans could be made to Indians to assist in the projects related to the construction of on-reserve housing.⁷³⁵ The 1957 *Pacific Fur Seals Convention Act*⁷³⁶ made dealing in fur seal skins illegal but made an exemption for skins officially marked and certified as skins which were taken by “Indians, Ainos, Aleuts or Eskimos”. A 1960 revision to the *Northwest Territories Act* provided that the Commissioner in Council could make “Ordinances for the government of the Territories in relation to the preservation of game in the Territories that are applicable to and in respect of Indians and Eskimos”.⁷³⁷ The provisions of the 1970 *Pacific Fur Seals Convention Act* made it an offense to engage in certain types of seal hunting; these terms were deemed not to apply to “an Indian or an Eskimo”.⁷³⁸ Finally, control in this era extended to Indian fishing through case law related to the *Fisheries Act*.⁷³⁹ The end results of the inclusion of Indigenous economies in generic settler

⁷³³ *Ibid.*, s. 66(1).

⁷³⁴ This is a pattern that is repeated throughout the history of attempted legislation of Indigenous peoples. Successive governments and governmental officials have entrenched a notion of pan-Indianism in their development and interpretation of policy and legislation related to Indigenous peoples.

⁷³⁵ *An act to amend the National Housing Act, 1954*. S.C. 1956, c. 9, s. 17. Notably, few if any of the contracts for housing on reserve at that time went to Indigenous firms, citizenship or bands. This legislation also signaled a coming change in Canadian policy from Her Majesty recognizing the obligation to house Indians to Her Majesty as a potential participant in Indian housing provision. The ramifications for Indian citizens and nations in terms of the impact on Indian economies has been stunning.

⁷³⁶ *Pacific Fur Seals Convention Act*, S.C. 1957, c. 31, s. 8(c) [*Fur Seals Act*].

⁷³⁷ *An Act to amend the Northwest Territories Act*, S.C. 1960, c. 20, s.1.

⁷³⁸ *Fur Seals Act*, *supra* note 736 at s. 7.

⁷³⁹ In 1958, *The Fisheries Act*, R.S.C. 1952, c.119 was held to be applicable to Indians in Saskatchewan by virtue of the 1930 Natural Resources Agreement, S.S. 1929-30 in *R. v. Watson* (1958), 5 C.N.L.C. 523 at 524 (S.M.C.).

legislation were two fold: in one schema Indian economies became regulated by settler legislation, in another they became criminalized by it.

By 1966, economic development was a stated concern as it related to Indian people. Within the *Government Organization Act*, Her Majesty ostensibly gave the Minister of Indian Affairs and Northern Development responsibility for:

18. (b) undertaking, promoting and recommending policies and programs for the further economic and political development of the Northwest Territories and the Yukon Territory....⁷⁴⁰

That the territory was largely populated by Indigenous people meant, by implication, that Indigenous nations' and citizens' economic participation became, at least in Canada's understanding, subject to Canada's policies and political goals.

Indigenous peoples were soon to feel the full effect of attempted settler economic subjugation. In 1966-67 "Indian Welfare" became defined and entrenched in the Canadian legislative domain. The *Canada Assistance Plan* contained a section authorizing the forging of agreements between Canada and the provinces for the provision of provincial welfare programming to Indian people.⁷⁴¹ The legislative entrenchment and definition of "Indian Welfare" constructed Indian as subject of settler kindness and did not examine the treaty and other commitments settlers made to Indigenous nations for the continuity of economies, cultures and lifestyles. Subverting obligation to asserted benevolence, the settler created a climate of hostility and poverty for Indigenous peoples which has had destructive and alarming impacts on Indigenous citizenship.

Continuing with the attempted creation of an image of benevolence (and the attempted eradication of settler as obligated to Indigenous peoples) Her Majesty enacted legislation which made even the former attempts to create false Indian economies seem like a kindness and not a

⁷⁴⁰ *Government Organization Act, 1966*, S.C. 1966-67, c. 25.

⁷⁴¹ *Canada Assistance Plan, S.C. 1966-1967 c. 45*, s. 11.

legal requirement as a result of settlement. In 1968-69 Indian farmers on reserve and Indian bands were able to apply for loans under the *Farm Credit Act*.⁷⁴²

If, in this examination of the legislation enacted in this era, Indigenous peoples are perceived as impoverished and existing due to the kindness of settlers, the image of settler people is one of people gaining wealth at others' cost and of a dishonourable party to ignored sacred agreements.

4) Contemporary Images: Indian as Indigent and Settlers as Owner-Operator

The stereotypes entrenched in the discussed legislation have taken root in the contemporary imagination of the Canadian judiciary. Regardless of whether the resultant terrain and discussion leads the judiciary to Aboriginal rights or Treaty rights, legislative "contravention" by Indigenous people leads us to the foreign territory which is most certainly occupied by settler people: Canadian jurisprudence.⁷⁴³

The image of the Indian economy is one which has changed little since colonization took root in the soil in this country. The image of our participation within our own economies is quite the same as well. How Indigenous people are perceived by the judiciary tells us a great deal about settler people themselves. How settlers speak of us quite clearly establishes an image of settler people.

In the Supreme Court of Canada decision in *R. v. Horseman*, a case in which a Cree person in the Treaty 8 area shot a bear in self-defense (and later sold it) in contravention of provincial game laws, Madame Justice Wilson in dissent stated that Indian treaties must be given the effect signatories obviously intended.⁷⁴⁴ The concern here is the same one that we should have when we examine Canadian legislation as a whole in its provisions with respect to Indigenous people –

⁷⁴² *Farm Credit Act*, S.C. 1968-69, c.6, s. 17(3).

⁷⁴³ I limit my discussion to post 1988 Canadian case law for two reasons. Firstly, this is often pointed to as a period of enlightenment in Canadian jurisprudence. Secondly, while the legislation contravened is most often provincial legislation, the status of Canada as Intervener in most of these actions demonstrates a continued contribution to the construction of images of Indians and of settlers.

⁷⁴⁴ *Horseman*, *supra* note 661 at paras 39 and 41.

there is an assumption of mutuality in the Canadian law which is not existent in our experience. To be able to speak of the effect intended by the signatories of the Treaties, there would need to be recognition of the validity of our process for storing that information and of the value of it. Commensurately, the effect intended by Her Majesty would have to be given some examination as well.

The presumption of mutuality and of equality is a myth. We cannot compare differences using similar comparative points. To be able to examine and understand the effect that the signatories understood themselves to be giving to the Treaty promises regarding Indigenous economies, there would need to be a much broader base of understanding and recognition and entrenchment of an Indigenous analytical framework. The application of the equality template to peoples who have, since we met settler peoples, been found unequal and have seen that understanding internalized in settler law making, is absurd.

Madame Justice Wilson examined the work of Arthur J. Ray and his statement that it is of little use to distinguish between domestic and commercial economic participation in an Indigenous context:

For these reasons, differentiating domestic hunting from commercial hunting is unrealistic and does not enable one to fully appreciate the complex nature of the native economy following contact.⁷⁴⁵

The implicit understandings which are not addressed and which are not thoroughly understood, are that the nature of familial, kinship and community relations means that provision for one's self means provision for one's family. It also means that Indigenous understandings of family are implicit in determinations related to consumption and the redistribution of wealth. Also unexamined is the translation of bartering and trading worth in the context of a buying and selling market and vice versa.

⁷⁴⁵ *Ibid.* at para 8. Dr. Ray, a noted scholar and historian, has studied Treaty 8 Indigenous peoples, rights, and Elders' statements extensively. The work that Madame Justice Wilson referred to in her decision was Ray's "Commentary on Economic History of Treaty 8 Area" an unpublished work dated June 13, 1985, at 8.

Speaking for the Majority, Justice Cory stated that:

An examination of the historical background leading to the negotiations for Treaty No. 8 and the other numbered treaties leads inevitably to the conclusion that the hunting rights reserved by the Treaty included hunting for commercial purposes.⁷⁴⁶

While this, on its own, appears to be a victory for Indigenous peoples, the misunderstanding with respect to the nature of Indigenous economies is not clarified nor engaged in a very convincing manner. The court goes on to state that the *Natural Resource Transfer Agreement* was meant to modify the division of powers as established in the *Constitution Act, 1867* and that there was a “quid pro quo” - while the NRTA did take away right to hunt commercially, the nature of the right to hunt for food was substantially enlarged.⁷⁴⁷

In 1990, general legislation limiting fishing catches was addressed in the context of Aboriginal rights in *R. v. Sparrow*.⁷⁴⁸ In this case, the Supreme Court of Canada was asked to decide if the net length used by Musqueam Indians (and permitted in their Musqueam Indian Band Indian Fishing License) was consistent with section 35(1) of the *Constitution Act, 1935*. The license was issued pursuant to British Columbia Fishery Regulations and the *Canadian Fisheries Act*.

In this case, it becomes quite clear that settler peoples perceive the Indian as a subsistence consumer, with a right to acquire no more than s/he requires. This Indian also does not engage in commercial economies. That there is no setter understanding or interpretation of commercialism in an Indigenous context is abundantly clear in the decision. What is also clear is that the Supreme Court of Canada is quite unsure how to address, measure, quantify or impute affluence and wealth in an Indigenous context. In this context, the determination made by the court was that there must be a test to determine whether there has been prima facie interference with Indigenous rights. The first question that is asked in this test is whether the legislation in question has the effect of interfering with an existing Aboriginal right?⁷⁴⁹ The difficulty with this question is the same difficulty with section 35(1) as a whole. Limiting Aboriginal rights to “existing rights” may be acceptable in situations where the parties discussing the rights agree on the impact and effect that colonization continues to have on Aboriginal rights, and on the

⁷⁴⁶ *Ibid.* at para 47.

⁷⁴⁷ *Ibid.* at para 60.

⁷⁴⁸ *Sparrow*, *supra* note 147.

⁷⁴⁹ *Ibid.* at para 68.

terminology to be used in the dialogue. However, when the uncertainty of the impact of colonization is entrenched in the term “existing” in section 35 and when the terminology is applied as a part of the infringement test, that uncertainty is buried and the result is likely to be less accurate than ever.

Initiating a discussion of (commercial) rights requires that we look to the characteristics or incidents of the right at stake.⁷⁵⁰ Characterization requires historic memory, records and an acknowledgment of the systems and civilizations which characterized the right in the first place. The exercise is two pronged, requiring Indigenous enumeration of the right and settler acceptance of responsibility for disruption of the right. The reality of the colonial experiment which Her Majesty engaged us in is that those who hold the knowledge may have been unwilling (as a result of the distrust inherent in colonial relationships) or unable (for reasons of sanctity, interpretation, or colonial suppression and / or invalidation of the right) to characterize the right. The further reality is that interpreting the right accurately requires an audit of settler oppression related to the specific right (which is difficult, given the layering of dishonesty, the benefits that accrue to those on the lucrative end of an imbalance of power, and the cultural and linguistic interpretation issues). To require authentication of the Aboriginal right in the absence of this discussion and in the presence of settler judicial councils only results in perpetuation of the oppression.

This is not such a radical concept. It is radical if you have situated yourself in the space which allows you comfort. It is radical if you think that settler experiences as oppressors have no impact on the determination of what a reasonable limitation on fishing is. It is radical if you think a settler judge completely understands what undue hardship is to an Indigenous person whose experience of colonization includes being confined to a territory, a fishing area, a fishing season and then a net length as a result of poor settler conservation practices. It is radical if you think that a settler person can accurately define what an Indigenous person’s “preference” or “preferred means” of exercising authority is in a *still* completely oppressive situation.

⁷⁵⁰ *Ibid.* at para 69.

Rights that are recognized and affirmed under section 35 of the *Constitution Act* become subject to a justificatory test which is set out in the *Sparrow* decision. This test requires that the Canadian judiciary ask a number of questions in order to justify a limitation on an Aboriginal right.

Is there a valid legislative objective?

The major difficulty with this arm of the Supreme Court of Canada's test is that there is no weighting of a comparative objective respecting the validity of Indigenous peoples' needs. The question validates, intrinsically and almost instantaneously, the right to limit Indigenous rights. A shorthand develops which enables judicial decision makers to rubberstamp and validate legislative schemes, regardless of the impact on Indigenous nations and authorities. No such examination – and who would want it in this forum – occurs with respect to Indigenous legislative authorities. The test presumes subjugation of Indigenous authorities to Canadian and provincial authorities. It also further assesses as unimportant Indigenous objectives.

Has the Crown acted honourably?

If we placed the same parameters on this test which settlers place on us - requiring the Crown to have a pattern of honourable behaviour as defined by Indigenous people in a chain of continuity from time immemorial until now – we could construct a very thorough understanding of traditions within the settler context. A wondrous possibility exists for this in the construction of the image of Whiteness. To require an examination of “honour” in a context-free environment is to deny colonization. If the test requires that Indigenous peoples have exercised the right since time immemorial, to ensure that we have the full contextual understanding of the right and its potential interruption, there should be an examination of the Crown's behaviour in that context and timeframe.

What honour requires, and indeed what honour is, is a culturally informed determination. To ask settlers to examine settler behaviours to determine if they have been in accordance with settler standards is a pretty low requirement with respect to accountability. What settlers require to accord with *wahkohtowin* is a much more rigorous and honourable standard.

A full determination, an anti-colonial determination, would require that we examine the notion of clean hands a bit further. Has Her Majesty operated with clean hands? Harold Cardinal has written, on the notion of “cleanliness” in a Cree context:

If one talks about a clean person, in a very broad sense one is talking in a philosophical way about a person who is honest with himself, with his family, with his neighbors, with all people; a person who is clean in the sense that purity is cleanliness. To the white man, some of these responsibilities are religious, and some are the responsibilities of citizenship. More simply they describe the way people *should* relate to one another, the way they should help one another.

When a person speaking from the traditional point of view says, in Cree, that he is a clean person, he relates himself to the clean land. This signifies recognition of the fact that this land belongs to, and was created by a clean being....⁷⁵¹

How clean have settlers been in their relationship with the land? In the application of the Cree law to settler peoples, how does the historical record detail the cleanliness of settler interaction with Indigenous territories?

Has there been as little infringement as is possible?

To be fair, many Indigenous peoples are equally as uninformed as settler people are with respect to the nature and impact of infringement as a whole. Being immersed in colonizing influences and understandings on an ongoing basis, it is difficult to see the ripple effect of the legislative drop in the colonial ocean. Many of us have become caught in the waves. Some struggle against the current of colonization. Others participate in the colonial experiment as sub-colonizers who have co-opted settler authority. How do you determine what has crossed over the line when the line is drawn in sand and the tide of colonization continues to crash over it?

“As little infringement as possible” requires us to be able to separate this colonial instant from the colonial history and currency. Accuracy requires settler peoples to be able to discern, acknowledge and account for the impact of colonial tools and that they be able to differentiate this colonial rule from the colonial regime. This also requires an examination of cleanliness and purity in a colonizer context. “As possible” requires trust, and if there is anything we have

⁷⁵¹ Harold Cardinal, *The Rebirth of Canada's Indians*, *supra* note 210 at 11.

learned well in this imperialist state it is that trust for settler peoples is one of the few things we cannot tie from our past to our present.

Finally, has the settler maintained the law of cleanliness or, living a good life? In the establishment of stereotypes related to settler peoples' breaking of Indigenous laws, this is by far the most pervasive area within which negative characterizations are constructed. "As little infringement" in an Indigenous context, can be said to be concordant with cleanliness.

Whether, in a situation of expropriation, fair compensation is available?

How is "fair" determined in this colonial context? What would be fair compensation for the devastation of Indigenous economies, the disruption of traditional Indigenous commercial activities and the decimation of resources?

Whether the impacted Aboriginal group has been consulted?

One of the difficulties in addressing this issue is assessing the participatory capacity and representative function of governments in nations reverberating from the shock of colonization. How do you determine which nations are impacted when boundary lines have been haphazardly drawn, dividing territories, nations and citizens artificially?

The end result in the *Sparrow* decision was that it was determined that legislation which "affects the exercise of Aboriginal rights will nonetheless be valid, if it meets the test for justifying an interference with a right recognized and affirmed under section 35(1)."⁷⁵²

There seems to be an assumed understanding of Indian as personal consumer. Canadian case law reveals that the Canadian judiciary can understand subsistence, ceremonial and social fishermen (and by extension, hunters).⁷⁵³ There is a demonstrated willingness to recognize the Indian as individual consumer, but not as producer for or provider of group consumption (outside of a familial context). In this context, old images of the stoic Indian conservationist reverberate in

⁷⁵² *Sparrow*, *supra* note 147 at para 61.

⁷⁵³ *Ibid.* at para 40.

modern conceptualizations of the Indian. The tacit understanding, misunderstood by the Supreme Court of Canada is that English terms like “egalitarianism”, which approximate Indigenous notions of community well-being, have replaced the analysis required to determine what, precisely, is meant by Indigenous economies, Indigenous provisioning, and Indigenous wealth. Nowhere in the decisions has anyone addressed Indigenous notions of community distribution, Indigenous notions of prosperity, or personal honour and its relationship to prosperity. The perception amongst the Canadian judiciary is a simplified interpretation of complex economies and economic relationships. Clearly, the stereotype of Indigenous people as simple is one which reflects back and upon settler peoples in this context.

Simplifying the multifaceted nature of Indigenous economies has been very useful for settlers. For example, the 1996 Supreme Court of Canada decision in *R. v. Gladstone*⁷⁵⁴ gives evidence of this reductionism. In this decision, complex Indigenous economic understandings were categorized and classified into ‘understandable’ terminology. What was ‘understandable’ was more likely that which was familiar to settlers. The terminology developed embedded simplistic understandings related to Indigenous economies (which are often false) and which belie the true nature of Indigenous economies, even while resulting in one of the few favourable decisions for Indigenous people in this area.

In *Gladstone*, the court looked to its recent decision in *R. v. Van der Peet*⁷⁵⁵ in enumerating a test to determine if an activity by Indigenous people was an Aboriginal right. The test in that instance was “in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.”⁷⁵⁶ With respect to this issue, the court determined that “The exchange of herring spawn on kelp for money or other goods was to an extent a central, significant and defining feature of the culture of the Heiltsuk prior to contact and best characterized as commercial. This exchange

⁷⁵⁴ *R. v. Gladstone*, [1996] 2 S.C.R. 723 (S.C.C.) (QL) [*Gladstone*]. In this case, the accused were selling herring spawn on kelp. They were charged under the *Fisheries Act* with selling the same without the “proper license.” When arrested, the accused presented an Indian food fish license. Under this license, he was allowed to catch 500 pounds of herring spawn on kelp. The Supreme Court of Canada went on to consider whether the requirement that the accused provide a license was a breach of his Aboriginal right and contrary to section 35(1) of the *Constitution Act, 1982*.

⁷⁵⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (S.C.C.) (QL).

⁷⁵⁶ *Ibid.* at para 46.

and trade was an integral part of the distinctive culture of the Heiltsuk prior to contact.”⁷⁵⁷ The court found that regulations which placed a limitation on the Aboriginal right to participate in the herring spawn trade were a *prima facie* infringement of their Aboriginal right.⁷⁵⁸

That an activity must be an element of a practice, custom or tradition integral to a culture claiming the right is one thing. To be able to meet the requirements of this first test there are evidentiary issues, capacity issues and trust issues which must be resolved. Assuming that an Indigenous nation does establish this (stuffing their livelihood into wordboxes which settlers can understand), there is a requirement that the Indigenous nation must also establish that there has been continuity from the period prior to contact until now.⁷⁵⁹ This can be likened to requiring Indigenous peoples to disprove colonization and then become complicit in the lie in order to live their lives as Indigenous people participating in Indigenous economies. The unacknowledged imperialism in this is striking. If the right has been interrupted (by colonization, choice or for any other reason), Indigenous peoples can no longer call it a right, it ceases to legally exist. For settlers to cease to call something an Aboriginal right because they took the ability to practice it away, is the height of oppression. To require us to be complicit and be silent about the fragmentation of our ability to practice the right is at least unprincipled and contrary to international law.

What if the activity which is claimed as a right is one which Indigenous peoples participated in during unpredictable and seemingly unsystematic time periods (based upon seasonal or spiritual timeframes)? What if one means of gathering economic wealth occurred only in times of famine, when relations met, every year that a certain animal was born, or when nations met for the first time? That we were legislatively prohibited from leaving reserves without passes, associating in groups, and participating in transactions without criminal repercussions, all of these factors should be included in the determination as to the integral nature of an activity. We do not share a history which allows us to trust Canada’s courts to make those decisions, to understand those conceptions. Additionally, continuity requires the uninterrupted practice from prior to contact to current day. That inventory should address not only the practice in Indigenous

⁷⁵⁷ Gladstone, *supra* note 754 at Headnote.

⁷⁵⁸ *Ibid.* at para 53.

⁷⁵⁹ *Ibid.* at para 28.

terms, but also the ability to practice it uninterrupted. If we do not require that in the assessment, we repeat the injustices by applying them again. To do otherwise holds Indigenous people responsible for colonization. This results in a writ large “blame the victim” approach to determinations by Canada’s courts.

In this instance, the court determined that the harvesting by the Heiltsuk was not an incidental activity (related to social or ceremonial activities) but was a “central and defining feature of Heiltsuk society.”⁷⁶⁰ This is a critical point of discussion, as the Canadian judiciary begins to establish the elements of Indigenous societies in their law (and to disestablish, legally, others).

This is evident in further case law as well. The 1998 decision of the Supreme Court of Canada in *Delgamuukw v. British Columbia*⁷⁶¹ addressed Aboriginal rights and title in the context of an Indigenous claim to 58,000 square kilometres in British Columbia. The decision stands for the proposition that Aboriginal rights are, in the Canadian judicial mindset, placed on a continuum. To be an Aboriginal right, an activity must be a practice, custom or tradition integral to a distinctive culture. Aboriginal title (more than a specific right to engage in a site specific activity) sits at the other end of the spectrum.⁷⁶²

This case is interesting as it sets out a test for infringement (in this case, with Aboriginal title). The test finds that infringement is acceptable if it is in furtherance of a legislative objective that is compelling and substantial and consistent with the special fiduciary relationship between Indigenous people and settlers.⁷⁶³ That the test for infringement of an Aboriginal right (in this case, title) is based upon whether the infringement was based on legislative objectives which are compelling and substantial is illusory. Putting us in jail for our religion was presumably, at one time, based upon compelling and substantial settler objectives. Forcing women out of the community and dividing families was (and is) likely, based upon compelling and substantial settler objectives. Requiring us to get passes to leave reserves, cease being Indian if we became professionals, get Her Majesty’s permission to bring an action against Her Majesty – all of these

⁷⁶⁰ *Ibid.* at para 29.

⁷⁶¹ *Delgamuukw*, *supra* note 48.

⁷⁶² *Ibid.* at para 183.

⁷⁶³ *Ibid.* at para 162.

were probably based upon compelling and substantial settler objectives. Imperialism and colonialism informs and informed that assessment.

The difficulty with the application of these standardized tests to Indigenous nations, institutions and organizations is that if the past wrongs were unacknowledged, the onus is on Indigenous people to disprove those wrongs to retain our rights. As a result, if the contemporary exercise of the rights can be taken away (in the Canadian legal context) because Canadian courts find Her Majesty had good reasons to take them away, what possible faith and credence can we have in settler judges, systems and citizens to operate with principled good faith and clean hands? What image with respect to equity and fairness has been created? What standard would be established by *wahkohtowin*?

The final requirement, that any infringement be consistent with the special fiduciary relationship between Indigenous people and settlers speaks to the requirement that Her Majesty observe the principle discussed thoroughly in *Guerin v. The Queen*.⁷⁶⁴ That special relationship is exceptionally important as a principle. When the practice begins to meet the principle it will be an exceptional time for settler-Indigenous relations.

Never has the image of settlers having difficulty in reconciling principle with practice in the legal realm more evident than in the Supreme Court of Canada decisions in the *Marshall* case. In this instance, a Mi'kmaq man was charged with three federal fishery regulation breaches (unlicensed eel fishing, unlicensed eel selling and fishing during a closed season with illegal nets).⁷⁶⁵ He argued he had a treaty right to fish and sell the eel.

It is an interesting case as there is a specific provision of the Mi'kmaq treaty which pertained to trade. During the treaty negotiations, the Indigenous leaders requested that they could have truckhouses "for the furnishing them with necessaries, in Exchange for their Peltry."⁷⁶⁶ This negotiated point appeared in the treaty as a Mi'kmaq undertaking not to "Traffick, Barter or

⁷⁶⁴ *Guerin*, *supra* note 146.

⁷⁶⁵ *Marshall I*, *supra* note 6 at para 62.

⁷⁶⁶ *Ibid.* at para 29.

Exchange any commodities in any manner but with such persons or the Manager of such Truckhouses as shall be appointed or established by Her majesty's governor."⁷⁶⁷

The majority decision, written by Justice Binnie, provided that there was a thread of continuity from the past to the present as the Mi'kmaq always traded in fish. Justice Binnie went on to state that:

I would allow this appeal because nothing else would uphold the honour and integrity of the Crown in its dealings ...to secure their peace and friendship, as best the content of those treaty promises can now be ascertained.⁷⁶⁸

In this instance, context was important and the court stated that the treaty right claimed in this instance had to be examined "in light of the stated objectives of the British and the Mi'kmaq in 1760 and the political and economic context in which those objectives were reconciled."⁷⁶⁹ The court went on to determine that the treaty right was "not the literal promise of a truckhouse, but a treaty right to continue to obtain necessities through hunting and fishing, by trading the products of those traditional activities subject to restrictions that can be justified...".⁷⁷⁰ "Necessaries" was limited almost to a survival level.

To what degree the principle of honouring the treaty right was extended to the practice was examined more fully when the court, responding to lobbyists, heard an application for a hearing and to stay their decision in *Marshall*. Sitting once again⁷⁷¹ (this time to decide on the application to stay their decision), the court took the opportunity to "clarify" the *Marshall I* decision. That they chose to do so in a response to this application by one of the Interveners in the *Marshall I* decision (The West Nova Fisherman's Coalition) is an matter which speaks to judicial procedure, principles of judicial separation from political pressure and the nature of the trust relationship between Canadian courts and Indigenous nations and citizenship.

In this Supreme Court of Canada's second *Marshall* decision (*Marshall II*), the court reverted to the image of Indian as participant in a simplistic economy in discussing the extent to which this

⁷⁶⁷ *Ibid.* at para 71.

⁷⁶⁸ *Ibid.* at para 4.

⁷⁶⁹ *Ibid.* at para 41.

⁷⁷⁰ *Ibid.* at para 56.

⁷⁷¹ *Marshall II*, *supra* note 6.

treaty right could be practiced. The court stated that treaty rights could be regulated. They also stated that the Mi'kmaq were not guaranteed unregulated or unfettered fishing.⁷⁷² This right was limited to obtaining “necessaries through hunting and fishing by trading the products of those traditional activities subject to the restrictions that can be justified under the *Badger* test.”⁷⁷³ You could have licensing regimes which limited the Mi'kmaq people's treaty right, the court explained, you just had to do so on grounds which were justifiable (such as conservation).⁷⁷⁴ Terrifyingly, the court also stated that treaty rights could be breached for reason of economic and regional fairness, and recognition of historical reliance of non-Aboriginal people on fishing.⁷⁷⁵ International and Canadian precedents with respect to treaty interpretative principles were not examined in this discussion. What is also compelling is that there is no corresponding acknowledgment that the treaty rights would be observed in the name of economic fairness and in recognition of the historical reliance of Mi'kmaq people on fishing.

The *Marshall II*⁷⁷⁶ decision eradicated discussion of anything Indigenous – even as constructed within the settler imagination. Indigenous peoples became incidental to a discourse which was initiated by Indigenous peoples. The Mi'kmaq became a vehicle through which settler privilege and rights were more completely examined and entrenched in the Canadian legal imagination. Consider the effect this would have on Indigenous people observing the process and reading the words of the Supreme Court of Canada. The principle of impartial treaty interpretation and resolving ambiguity in favour of Indigenous people⁷⁷⁷ does not accord with the practice of treaty interpretation.

If, by this history of the interpretation of legislation, the image of Indigenous people is of participants in economies only as livelihood consumers, then the corresponding image of settler people is one of territorial and autocratic producers who are able to influence their justice system to support their wealth.

⁷⁷² *Ibid.* at para 2.

⁷⁷³ *Marshall I*, *supra* note 6 at para 5, quoted in *Marshall II*, *supra* note 6 at para 14. .

⁷⁷⁴ *Marshall II*, *ibid.* at para 21. “Don’t overreact”, they whispered to their settler brothers. “Here’s what you have to do...”.

⁷⁷⁵ *Ibid.* at para 41.

⁷⁷⁶ *Ibid.*

⁷⁷⁷ *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36.

F. Owning the Indian: Systemic Racism and the Development of New Legislative Schemes Which Pertain to Indigenous Peoples

In the context of Indigenous peoples, systematizing racism means that those prejudicial and stereotypical assessments made about Indigenous people's values and mores (in terms of the perception that values which differ from settler values are lesser ones) become entrenched in the institutions which the assessing peoples construct. Those constructions were based upon settler placement/construction of Indians at one end of a progressively human scale and themselves at the other. How the Indian was constructed was dependent upon the motivation of those who had undertaken the construction project. In the context of settler construction of Indigenous people, Berkhofer wrote:

That Indians lacked certain or all aspects of White civilization could be viewed as bad or good depending on the observer's feelings about his own society and the use to which he wanted to put the image.⁷⁷⁸

There is an interpretation of Indian as easily manipulated, and as this image became less obscured, adjectives such as "simple", "child-like", and "incompetent" became attached to it. Indian as spectacle, Indian as oddity, Indian as different – each served a specific purpose in the colonization of the territory now known as Canada. In any construction of the Indian by settler peoples, Indigenous people were and are perceived as different from settler peoples. Historic stereotypes mingle freely with new ones, but Indigenous peoples' 'incompetence' in the settler world and our alleged inability to function in contemporary times and places permeates constructed imagery about us. By this construction, we are eternally situated in some timeless ethnographic present.⁷⁷⁹ The difficulty with this is that the ethnography concerning Indigenous peoples has been so rife with stereotypes and false images that applying the historic findings to a contemporary understanding results in a skewed understanding of who Indigenous people actually *are* let alone who we actually *were*. As long as normative behaviour is understood to be behaviour which corresponds with the actions of Canadian society, Indigenous peoples are certain to be found lacking by Canadians. As difference is unquantifiable, it has become

⁷⁷⁸ Berkhofer, *supra* note 568 at 27-28.

⁷⁷⁹ Berkhofer writes that textual materials "continued mainly to describe Indian life in the timeless ethnographic present." *Ibid.* at 67.

associated with deficiency – even if the actual deficiency exists in the assessors' ability to quantify and understand.

The essential understanding to this entire dialogue is that Canada has not yet examined what normative means in an Indigenous context. Until the discussion of rights and laws is referential to the spaces occupied by our interpretation of our Aboriginal and treaty rights and our understanding of our laws, this deficiency standard will continue to be applied, we will continue to be judged as deficient and the settler systems will continue to attempt to absorb Indigenous citizens. Often, people ask me if this indicates a paradigm shift, as if this is an indicator of the fantastic. It does indicate a paradigm shift for settlers, yes. We have been interpreting and applying settler values and systems since we came into contact (in many instances, by law and much to our detriment). Settlers have yet to learn our paradigm. When they do, that will certainly be fantastic. Divorcing oneself from judgment to be able to see and understand borders on fantastic. To be able to do so, there must be distancing from ownership and superiority; there will be some measure of adherence to an understanding of cultural agnosticism if the image of the Indian is to be eradicated from the minds of settler decision-makers.⁷⁸⁰

This uncivilized and savage Indian image is one which has found its way into the Canadian criminal justice system. More particularly, it has found a home in the *Canadian Criminal Code*. This Indian, as savage, has certain corresponding attributes. The Indian as subject of law has become the Indian as incompetent. Constructing the Indian as deviant, requiring legislative guidance, and deficient has served a purpose in the Canadian consciousness. Implicit to the construction has been the understanding of the irresponsible Indian whose seemingly genetic deficiency has enabled settler governments to construct legal regimes regardless of Indigenous actualities. It has allowed for the development of non-Indigenous communities including governments, institutions and economies. The construction of the 'bad' Indian has allowed Canada to deny culpability for social upheaval in Indigenous nations as a result of the devastation of Indigenous nations, governments, legal systems and economies. With a denial of

⁷⁸⁰ Berkhofer also states that challenging ones values with moral agnosticism and relativity is key in the eradication of the image of the Indian and stereotyping of Indigenous peoples. *Ibid.* at 68.

culpability in hand and responsibility for the damage disclaimed the expansion of settler territories (literally and figuratively) has been immeasurably advanced.

The construction, then, served a purpose in the ongoing colonial expansion of settler interests, historically. In a contemporary sense, the *Criminal Code* and the proposed *First Nations Governance Act*⁷⁸¹ (and the affiliated legislative suite) will serve to advance the colonized legal, governmental and economic territory even further. Importantly, the bad Indian has now become the legal shorthand. With seeming verbal neutrality, the term Indian has strong associative powers in settler imaginations. The definition and understanding of the nature of 'Indians' included in the shorthand has become systematized after years of use. Who the Indian is perceived to be is evident in the legislation which must be constructed to protect the Indians from themselves. This stereotype is demonstrable in the proposed First Nations Governance legislation advanced by the government of Canada. The preamble of the proposed legislation reads, in part, as follows:

Whereas governments in Canada have certain capacities and powers facilitating good governance, accountability and economic development...

Whereas effective tools of governance have not been historically available under the Indian Act, which was not designed for that purpose;

Whereas bands within the meaning of the Indian Act require effective tools of governance....⁷⁸²

On the surface, the preamble speaks to the deficiency of Indian nations. It also addresses the superiority of Her Majesty's governance. The subtext in the preamble is that all First Nations are bad managers. Still naturally savage and undisciplined, the Indian requires the assistance of the great White (Canada) to guide, lead, supervise and manage him/her. Canada's "certain capacities and powers" which enable it to facilitate good government and economic development were obtained, in part, by the forced enfranchisement, removal, relocation and reservation of Indigenous peoples in this territory. By this logic, having achieved this massive project and been the beneficial party to the transaction, Canada must be skilled. Canada is a good manager. All Indian bands can be good managers if they abide by Canada's example, so the logic goes. That the *Indian Act* legally required band council styled governments for over a century and that this

⁷⁸¹ *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Act*, July 31, 2nd Session, 37th Parliament, 51 Elizabeth II, 2002 [*Accountability of Indians Bill, 2002*].

⁷⁸² *Ibid.* at Preamble.

legal requirement resulted in the dismantling of many traditional Indigenous governments (operating efficiently, effectively and accountably) is not addressed when arriving at the legislative conclusion that First Nations do not have effective tools of governance.

The biggest irony in this new proposed legislative regime is that it is based upon the principle of accountability. Requiring Indigenous nations to account for the meager resources which we have at the cost of Her Majesty's unaccounted for wealth and power as a result of colonization was and is ethically unsupportable. There are several other reasons for which the proposed legislative regime cannot be endorsed.

1. Accountability, as a governmental goal, is a completely warranted objective. Accountability must reflect the expectations, goals, principles and understandings of a society. To require accountability in the absence of an understanding of neither the impact of colonization on Indigenous government's capability to govern nor of the Indigenous nations' healthy, informed and anti-colonial expectations, goals, principles and understandings is irresponsible. To require Indigenous nations to show clean hands via legislation signed off with dirty ones is unconscionable.
2. Replacing the ineffective settler model of governance with a settler model of governance and accountability can surely be no more effective for the same reasons that the last model did not work. The colonial requirement that Indigenous people subscribe to the viewpoint of non-Indigenous people to become more 'civilized' is supremacist thinking. It also demonstrates complete disregard for the rules, regulations and standards in Indigenous nations, which is also premised upon false notions of inferiority of the Indian and superiority of the settler.
3. The legislative scheme, at least, subsumes and, at most, verbally re-cloaks the role of Her Majesty as a colonizer and the historic impact of the colonial regime on the ability of Indigenous people to effectively govern and develop Indigenous economies.⁷⁸³

⁷⁸³ The issue of "consultation" has been raised by almost every Indigenous representative organization, nation and entity in the country who have commented on the proposed legislation. Indigenous nations and governments decry

Responsibility for the financial and economic displacement of Indigenous nations is placed squarely with Indigenous government. The effect of over 140 years of oppression and the attempted dismantling of Indigenous governments and economies is directly linked to Indian mismanagement and there is no mention of Her Majesty's ownership, management or supervisory role in this regard.

4. The proposed legislation acknowledges that the responsibility for financial accountability of Indians resides with Indians. This is a noteworthy admission. The difficulty is that there are several levels of responsibility tied to this. If Her Majesty had clean hands, we could assume that this responsibility coincided with Canada's obligation to acknowledge other authorities existent in Indigenous nations and the obligation to fiscally provide for the process, procedures and costs associated with the damage inflicted upon those autonomies, governmental and economic institutions. If Her hands were clean, we would also assume that Canada was willing to fulfill its full fiduciary duty to the extent Indigenous law requires. However, given the realities of our shared history, many will assume that Her Majesty is attempting to offload her financial obligations by legislating and controlling public discourse on issues related to "increased Indian responsibilities".

One of the stated purposes of the proposed legislation which is relevant to this discussion is section 3(c) which provides:

3 The purposes of this Act are

- (c) to enable bands to design and implement their own regimes in respect of leadership selection, administration of government and *financial management and accountability*, while providing rules for those bands that do not choose to do so. (Emphasis mine).⁷⁸⁴

All of these are laudable goals *in the context of Indigenous assertion of Indigenous authority*. There is no indication that Her Majesty gave thought to the role that self-determination has as the authority under which Indigenous nations can assert these 'regimes'. This level of

the proposed legislation as their understandings and viewpoints respecting the same were not solicited or advanced, or they were ignored in the construction of the proposed legislation.

⁷⁸⁴ *Accountability of Indians Bill, 2002, supra* note 781 at s.3(c).

micromanagement is not only based on stereotypes, artificial understandings about Indigenous and non-Indigenous relations and a particularly imperialist understanding about the nature of settler authority over Indians, it also completely contradicts international standards which are beginning to find their way into the dialogue.⁷⁸⁵ In fact, section 7 of the proposed legislation requires, among other things, the construction of a financial management and accountability code including rules with relation to the preparation of annual budgets,⁷⁸⁶ the control of expenditures,⁷⁸⁷ internal controls with respect to purchases and tendering,⁷⁸⁸ lending of band funds,⁷⁸⁹ remuneration of council and employees,⁷⁹⁰ debt incurring and management,⁷⁹¹ band deficit,⁷⁹² and procedure related to amending the code.⁷⁹³

In addition to this, the Minister still had presumed managerial capacity over band councils in this proposed legislation. In section 10(3) Her Majesty permits herself to carry out a band financial assessment in a number of circumstances, including “the denial of an opinion, or an adverse opinion, by the band’s auditor on the band’s financial statements.”⁷⁹⁴ With settler asserted final and appellant authority with respect to the financial viability of First Nations, it would be difficult to conclude that the government of Canada is attempting to act any differently than an owner-manager with respect to Indigenous peoples who are impacted by the *Indian Act* and who might be impacted by the potential legislation.

There were two streams of control in the proposed legislation which are of most relevance to this paper. One relates to financial management and accountability and the other relates to law making and enforcement on reserve. The law making and enforcement realm (in a Canadian

⁷⁸⁵ The *Draft Declaration On the Rights of Indigenous Peoples* states, at Part I Article 31:

Indigenous Peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

Supra, note 90.

⁷⁸⁶ *Accountability of Indians Bill, 2002*, *supra* note 781 at s. 7(a).

⁷⁸⁷ *Ibid.*, s. 7(b).

⁷⁸⁸ *Ibid.*, s. 7(c).

⁷⁸⁹ *Ibid.*, s. 7(d).

⁷⁹⁰ *Ibid.*, s. 7(e).

⁷⁹¹ *Ibid.*, s. 7(f).

⁷⁹² *Ibid.*, s. 7(g).

⁷⁹³ *Ibid.*, s. 7(h).

⁷⁹⁴ *Ibid.*, s. 10(3)(c).

context) are seemingly addressed in a number of sections in the proposed legislative scheme. Law making powers addressed in this scheme include “laws for local purposes”⁷⁹⁵ and “laws for band purposes”.⁷⁹⁶ Most of these authorities are addressed within the current *Indian Act*. There is also a section dealing with laws in the realm of what is entitled “band governance”.⁷⁹⁷

Most relevant to this paper’s discussion of criminal jurisdictions and criminalizing the Indian were sections 19-27 dealing with the powers and jurisdiction of “enforcement officers” on reserve. Band laws may, by virtue of the proposed legislation, provide for fines of up to \$10,000 and prison sentences of up to three months.⁷⁹⁸ Within this context, band officers and the empowering council are then accountable for the enforcement of their own legislation, but the means of enforcement are limited to penalties which are useful ones within the colonial imagination. Band environmental protection laws can be made with penalties for contravention up to \$300,000 and six months imprisonment.⁷⁹⁹

The powers of the enforcement officer are written as standard powers, including enforcement, writing up violations and inspections. The powers with respect to search and seizure are quite broad and include entering any place on a reserve,⁸⁰⁰ requiring the production of documentation,⁸⁰¹ use of computers,⁸⁰² and/or reproduction of records or data.⁸⁰³ The enforcement officer may search and seize with a warrant⁸⁰⁴ or without⁸⁰⁵ and use force where authorized or accompanied by a warrant.⁸⁰⁶

⁷⁹⁵ *Ibid.*, s. 16.(1).

⁷⁹⁶ *Ibid.*, s. 17.(1).

⁷⁹⁷ *Ibid.*, s. 18.(1). This section also addresses a number of areas currently housed in section 76 of the current *Indian Act*. It also includes newer sections such as section 18.(1)(f) “conditions under which the council may enter into commercial or other transactions”.

⁷⁹⁸ *Ibid.*, s. 19.(1).

⁷⁹⁹ *Ibid.*, s. 19.(2).

⁸⁰⁰ *Ibid.*, s. 24.(1)(a).

⁸⁰¹ *Ibid.*, s. 24.(1)(b).

⁸⁰² *Ibid.*, s. 24.(2)(a).

⁸⁰³ *Ibid.*, s. 24.(3)(b).

⁸⁰⁴ *Ibid.*, s. 26.(1)and (2).

⁸⁰⁵ *Ibid.*, s. 27.(1).

⁸⁰⁶ *Ibid.*, s. 26.(4).

Again, the authorities are similar to those which are housed within the *Indian Act*, with the exception of the expansion of enforcement authorities. The paper trail both reinforces the image and serves as proof of the savage Indian requiring control. That the enforcement procedures and authorities follow a complex and regimented section of the proposed Act that deals with powers of governance, economic development and financial responsibility is quite problematic. The implication is that the enforcement powers can be used at the discretion of the supervisor (band council) or owner-operator (Minister) in the event the owner-operator does not agree with the band council. In addition, the ongoing image of Indian government as subset or primitive version of Canadian government, aside from the implications with respect to self-determination and self-government, has its roots in Indian person as subset and primitive version of settler person.

The ideological underpinning for the whole stratagem is the same as that which is the rationale for the *Indian Act*. That the Indian must be controlled and reined in by the settler (owner-operator) seems to be the same theme underlying the proposed legislation. The legislation provides that band councils must take responsibility for the documentation related to band finances. Managing the paperwork may in many instances actually be the paperwork of poverty. Placing emphasis on this and legislatively requiring the documentation seems inconceivably wasteful when other essential issues are being overlooked. The implication that this has with respect to the chain of authority and the ownership of the Indian is quite similar to those evoked by the *Indian Act*. The only difference is, with more than a century of colonial experience behind them and by addressing what are important concerns (without addressing the essential cause), this time the settler appears more informed and justified in his imperialism.

The image of the Indian as incompetent is entrenched, while naming the colonial despotism and oppression associated with social ills and financial woes in Indigenous nations is perceived as insurgent, almost ungrateful, behaviour. That the image is systemic cannot be doubted when Her Majesty now has created a legislative cure for the incompetent Indian.

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The worth of knowing the past.

I have wondered about the importance of examining our colonial past and what worth that can have in peaceful coexistence in our present. I want to be clear that I believe there is value in this, not as a stand alone accusatory exercise, but in sharpening our ability to identify imperialist agenda and colonial manipulation. This is not to say that the settlers' relations are imperialists or manipulators. It is to recognize the stereotypes and oppression that exist in court documents and court rooms; it is to recognize that current court decisions predicate many of their modern understandings on old misinterpretations, adjudications and understandings of Indigenous peoples, capacities and autonomies.

There is worth in this, not to condemn nor to blame, but to be absolutely aware (critically conscious) that colonial houses have colonial foundations. In order to remove ourselves and our understanding of our selves from a colonized consciousness, we require the awareness that colonization through law is not an historical fact.

In a sense, examining legalized oppression in an overt form allows us to more readily identify it when it appears in a subversive form.

Reviewing this legislative regime related to Indigenous and settler economies has allowed me to have perspective and distance that I would not have had if I was thrown into the mire of current discussions of accountability, Aboriginality and/or consultation. Examining the

construction of the Indian and the construction of Whiteness through Canadian legislation has allowed me small epiphanies, cold water showers.

It is one tool. Knowing how our relationship has formed with Canadians and what foundation it is built upon is one tool. Dwelling on it as blame or condemnation hold no interest for me, but if we are to address mutuality, reconciliation and modern relationships we must each know our shared past (to say nothing of our independent histories). It is also important that we act and actively reject inappropriate and inaccurate understandings of Indigenous humanity.

I have also learned, hopefully, not to replicate the errors of the colonizers.

G. Constructing Images of Whiteness

Walking through a Cree territory with friends a while ago, I heard a girlfriend admonish her son to stop wandering away from the group. When her reprimands failed, she warned him that those “White guys were going to come and take him away”. We kept walking and talking and it was not until months later that I began to think about what she had said. Often since then I have wondered, do settlers know that they are often thought of as a threat, a source of menace in our nations? Do settlers know they are the people under the bed?

This image of settler as unconscionable and dispassionate terror evolved over time. Many people feel that settler failure to adhere to the sacred promises made in treaty negotiations and treaty making has resulted in a demonstrable lack of humanity. Forcing us to obey laws which separated sister from brother and nation from nation also added to this. Pulling our children from our homes, forcing them to move away and sending them back with strange words on their tongues. Or worse, broken and damaged, this was the material from which “Whiteness” was constructed. Denying us our ability to participate in traditional economies and then shaming us by labeling compensation for that devastation “welfare” – that rotten man-made material became part of the construction project. Ensuring that we ended up on largely valueless land and that any damage that could be done to a territory (highway, railway, military) was done to ours – these are the remnants of the project with which Whiteness was constructed. Settler law and legislation enabled each construction project to occur. Settler law advanced settler civilization at Indigenous civilization’s cost. And because we were humane and largely respectful, we have been found (in settler eyes, and sometimes our own) to be lacking.

In writing this piece, the difficulty that I have been facing is that I did not want to develop a polemic, did not want to commit the wrongs that settler governments and citizens have perpetuated and which have cost us so dearly. I also did not want to resort to rhetoric to describe what no one talks about in mixed company; I did not want to be the one to name this, to label it. However, I have come to understand that it cannot be a polemic because we do not stand equally empowered on opposite sides of a debate. I am not advocating the creation of stereotypes.

However, I do acknowledge the difference between withstanding an onslaught and naming your attackers and screaming at the person you hold captive. In this captivity narrative, resistance requires we identify the hostage takers.

It is easy to see the stereotypes which have been constructed in the imagination of non-Indigenous peoples about Indigenous peoples. I wonder, does it ever enter the consciousness of settlers to ask what we think about them? Which characteristics of some are applied to the aggregate? How the laws settlers make and the laws they break define them in the eyes of those they have studied for so long? Do they think about what it means to break our laws and the price that will exact from them?

Settlers are allowed the luxury of making laws and somehow, as if it symbolizes something other than a response to colonization and the poverty and despair which are natural correlates of that, our response as Indigenous people to those laws is examined, measured and the assessments applied to us. In this way, we can be construed as perpetuating the myth of the inadequate Indian. The failures are measured and applied to us as a whole, the stereotype of the lawless Indian who is somehow more delinquent, seemingly inexplicably drawn to violence and crime, less human. The emerging image is one of despair and desolation, the dying Indian firmly entrenched in the collective consciousness of Canadians. This side of the polemic is clearly understood by many. What does it mean that we are consistently found lacking in terms of settler values and laws? What does it say about settler laws, values and principles that they are so clearly comfortable assuming superiority in settler-Indigenous peoples' relations? In an Indigenous context, those relations and the laws governing them were to be the basis of our interaction with settler people.

In the First Nations history passed on to the Elders, the arrival of the Europeans to the North American continent and the subsequent treaty relationship negotiated with them were reflected as part of the First Nations teachings, which had foretold the arrival of the Europeans to North America. These First Nations teachings identified for First Nations the framework upon which they were to create relationships with the arriving Europeans. First Nation's traditions and teachings required that the relationships they created with the Europeans be governed by the laws, values, and principles that First Nations had received from the Creator. These laws and principles described the relationships and responsibilities they possessed to and for the lands given to them by the Creator.⁸⁰⁷

⁸⁰⁷ Cardinal and Hildebrandt, *supra* note 18 at 7.

These laws have, as a fundamental basis, integrity, honour and cleanliness entrenched in them. Elder Jimmy Myo addressed the laws in this way:

We have laws as Indian people and those laws are not man-made, they are given to us by God...But, in my law, if you do such a thing [breach a sacred undertaking], even if no other human being is aware of it, you will always carry that for the rest of your life.⁸⁰⁸

The construction of Whiteness is not defined only by the way in which settlers constructed laws to govern the Indian's behaviour. Whiteness in the Indigenous imagination is not precisely constructed by settler failure to follow our laws (although this has been used as a comparative point). The Indigenous image of Whiteness has been constructed by the way in which settlers failed to honour their own laws and obligations in the context of our relationship. Almost immediately upon signing them, Indigenous citizens were concerned about settler contravention of the Treaties. Indigenous citizens made their concerns known. The perceived abrogation by Her Majesty in Right of Canada in the area of hunting and fishing rights was addressed in writing and in person. One concern advanced by Indigenous citizens:

...asked for Royal Inquiry into contraventions of treaty, particularly:
The failure of the Government to make regulations regarding the Indians' right to fish or trap at all seasons of the year on land originally surrendered by the Indians to the Government at the time of the treaty, subject to regulations, why the Indian Act provided that game laws be subject to 'the' province and as to whether or not a proclamation was ever published in relation to this matter.⁸⁰⁹

The construction of these legislative systems, without acknowledging Indigenous nationhood or citizenship or observing sacred obligations, also served to construct images of Whiteness in our imaginations. The consistent refusal by settlers to adhere to the provisions that they agreed to for their coming generations and the refusal of later generations to honour them (by word or action) has constructed an image of Whiteness that is dishonourable. That promises are not undertaken or cannot be relied upon has led many to believe that there can be no trusting relationship with settlers. This is painful to write. I cannot imagine what it is like to have that image applied to oneself.

⁸⁰⁸ Elder Jimmy Myo (Moosomin First Nation, Treaty 6), November 12, 1997, Treaty Elders Forum, Jackfish Lake Lodge, Cochin, Saskatchewan. Translated from Cree. *Ibid.* at 8.

⁸⁰⁹ Petition, Indian Treaties – Generally (1946-1948), Ottawa, National Archives of Canada (RG 10, Volume C-14225, File 1/1—11, 1948—1956).

It is important in this discussion to examine what the creation of legislative schemes which disregard Indigenous people and yet, in the Canadian mindset, define us. What does the *pro tanto* application of laws, legislation and policy which are heavily rooted in Western values and principles to another nation say about the Canadian nation? What other interpretations can be made about the Canadian citizenship's humanity if our laws, traditions and policies are disregarded even though Canadians possess the understanding that we have a right to these things? How can we perceive the Canadian citizenship if they ignore the United Nations, a Royal Commission and their own *Constitution* with respect to their treatment of Indigenous peoples? With so much forceful assertion of the requirement that the government of Canada must acknowledge Indigenous rights (including that of self-determination), it flies in the face as against Indigenous, Canadian and international laws for settlers to apply another round of administrative restrictions and legislative requirements based upon our response to colonization (including previous administrative restrictions and legislative requirements). In this construction, Whiteness is equated with lawlessness and situational ethics.

As a result of settlers' legislatively enforced ruthless disregard of Indigenous and treaty rights, distortion and enforcement with respect to citizenship, willful encroachment on Indigenous territories and the detrimental suppression of Indigenous languages, spiritualities, cultures, economies and governments, Whiteness equates with having no conscience. To accept this construction without questioning the historic bases for the relationship and the enduring and evolving inequities is unprincipled. For peoples whose systems of law and governance have historically been based on principles and in accordance with living a good (conscientious) life, the unconscionable life is an unenviable one. The emerging stereotype of "Whiteness" constructed by that understanding is one which draws heavily from the presence or absence of a conscience. In many Indigenous traditions, you carry your family name, history and personal actions and words with you for life. The law is that you act in a way that you can carry with you for life. These are heavy loads if you are not living a good (conscientious life).

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I am aware of the great weight that these words carry and know that I will have to carry them with me for life. In writing them down, I tried to ensure that I addressed the construction of Whiteness in the most respectful way that I could. The ethic of respect that many Indigenous people live with is one which I try very hard to sustain. The real concern that I have is that this respect has been repeatedly and historically construed as meekness or a weakness. Being silent has been interpreted as passivity, and I think we have paid dearly for that respectful silence. In this context, then, the paper seeks to develop a paradigm within which critical Indigenous thinking can take place. In that sense, the work is unapologetic, as it achieves a critical review of the hatred and/or disregard for the Indian that is integral to Canadian law making. That it does so without developing a polemic which demonstrably repeats the errors of the settler is my goal. It is with real trepidation that I did not define the terms "Indian" or "settler" in this piece. One person, era or administration cannot singularly take responsibility for the definition of the whole. Rather, I leave it to Indigenous peoples to define ourselves using the context, content and understandings which are meaningful to us as a group. The term "settler" and its modern - day ramifications will have to be defined by settler people after reviewing their histories, roles as settlers, and understandings which construct their identity. That project requires work among themselves.

Notably, this work has at times also lumped settler law with legislator, enforcement with adjudicator, government with governance. This is primarily due to the fact that the impact of colonization is so pervasive and so overwhelming that we respond to it as we see it: a wall of Whiteness. As we lurch from impact to impact, it is difficult to differentiate between

oppression and oppressor. That is for another paper, another Indigenous author and another day.

The principal goal of this paper (writing as Indigenous subject, observing settler as object) was based upon critical theory and the construction of a critical response to hatred and racism has been cathartic. In the development of this emancipation project, the sharpness of these words may pierce the numbness of colonial consciousness. They have certainly done so for me.

To say Canadian law and legislative schemes are racially biased, prejudicial or racist constructs shorthand which enables a Whitewash of Canadian legislative history. Presenting in this way allows legislators to situate racism in the past and creates a critique-less approach to legal analysis. So entrenched is the image of the Indian (constructed by supremacist thinking) that emancipating the actuality will take years of intellectual excavation. Who we really are as Indigenous peoples has been legally defined and regulated by successive non-Indigenous governments and citizens since they stepped on our territories. This is unacceptable. It is despotic and imperialist. More than that, it contravenes Indigenous, Canadian and international legal standards. Yet, we continue to respond to legislation which defines us. We have had our economies tied to our complacency, our existence tied to silence. In articulating our response to Whiteness and settler attempts to perpetuate Indigenous silence, my hope is that this construction project will facilitate more construction projects so that we take a step down the road to the development of an Indigenous critical consciousness. This paradigm shift is necessary to facilitate action and to initiate a colonial audit. That these words have weight and that I carry them for life does not make them

burdens, they are an indicator of an increasingly rapid moving paradigm shift. And that is fantastic.

H. Conclusion

The very strategy of deconstruction serendipitously reinvents its subject and instructs us that no complete deconstruction is possible.⁸¹⁰

One can always suspend beliefs and their putative criteria for justification, but one cannot escape one's praxis – one's linguistic and institutional engagements. One can always defer theoretical judgments about oneself, but in the meantime one continues to speak, act, work, play and assume social roles. This is the domain of communicative praxis, and it is here, we suggest, that we look for possible restoration of subjectivity.⁸¹¹

For the master's tools will never dismantle the master's house.⁸¹²

The renovation project anticipated by section 718.2 of the *Criminal Code* and by the proposed First Nations governance legislation will not work. We will not become worse Indigenous peoples or better White people. *An Act for the gradual enfranchisement of Indians*, the *Indian Advancement Act*, various *Indian Acts* and other legislative attempts to 'make the Indian competent' have not worked. After some period of deconstruction, new construction projects, Indigenous owned and operated projects, will have to be undertaken. This is going to require a colonial audit at the outset.

The truth of the matter is that no one will launch a study to see what Indigenous peoples think of Canadians. There will be no research into the root of Indigenous resentment of Canadians. No grant monies will be made available to examine the issue of the failure of Canadians to achieve educational requirements in our traditional training systems and there will not be any investigation of Canadian doctors treating Indigenous citizens without attaining the required standards in Indigenous medicine to be able to do so authentically, credibly and professionally.

⁸¹⁰ Calvin O. Shrag, "Subjectivity and Praxis at the End of Philosophy" in Hugh J. Silverman and Don Ihde, eds., *Hermeneutics and Deconstruction* (New York: State University of New York Press, 1985) 24 at 26.

⁸¹¹ *Ibid.* at 27.

⁸¹² Audre Lorde, *Sister Outsider* (Freedom, CA: The Crossing Press, 1984) at 112.

It is also unlikely that colonial relations can be examined in this context for legal reasons. We have not spoken as a unified and amplified voice on our view of Whiteness as our laws require we act respectfully. Respect is paramount in most Indigenous nations. Many people have followed the ethics and laws in our nations and have lived good lives by example, choosing not to discuss other people's shortcomings. Developing a critical consciousness in societies where non-judgment is advocated is a delicate balance and can be confused with (rightfully or wrongfully) disrespect.

The legal and legislative construction of the Indian in the Canadian imagination took a very long time to assemble; deconstruction will take some time as well. This is not just an eradication of the image, for the image is intertwined with truths, half-truths, absolute lies, historic understandings and contemporary realities. Our deconstruction of Whiteness will also take time and attention. There needs to be an ongoing project which will require both new construction and deconstruction. Colonialism has numbed us. It has been a bit like an erosion of our consciousness, slowly but surely even the most solid of our truths and understandings felt the pressure of the constant battering of settler law and legislation. As damaging as the constant barrage of value laden laws, legislation and policy has been, the implicit acceptance of the same by Canadians as part of the "status quo" has been even more so. As a result, we have found ourselves coming face to face with successive generations of Canadians (law-makers, law enforcers and legislators) who have implicitly accepted the faulty construction and development of our relationship even though it was built upon falsities and without conscience on intrinsic notions of supremacy and subjugation. The resultant internalization of the subjugation as a result of the new shorthand results in a preservation of the historic Canadian construction of the Indian. To be sure, the construction is flawed, but it is ever present. We need to undo the damage done by virtue of our shared history.

There will need to be acknowledgment and recognition of our right to determine our futures as Indigenous people. Acknowledgement and recognition can begin with an apology. It is not so radical to require an apology, to ensure that conscience meets with responsibility. If Canada wants to put down some of that baggage of conscience that it carries, there will have to be some truths told. Less attention will have to be paid to the price of duty and more attention will have

to be paid to the content of obligation. Surely it cannot be too extreme to acknowledge the role that colonial regimentation, departments, policies and legislation have in the ongoing oppression of Indigenous people. There is no post-colonial and there can be no post-colonial dialogue if the colonial is not acknowledged, addressed and potentially redressed. I do not address the issue of quantification or compensation. I would not know where to start.

The basis for this discussion is acknowledgment and recognition of the right to determine our own paths and destinies. There will need to be acknowledgement that our laws and traditions have merit and are the cornerstone for our own development. Canada will need to acknowledge its support for and commitment to Indigenous participation in our own lives at every level – even prior to Canadian government involvement in our lives at every level.

That is a part of the deconstruction of our shared history. Portions of it are beautiful and should remain untouched. In that, we share joint responsibility and have healthy relations. We can build and learn from these as we acknowledge and honour the role that each has played in establishment of the same.

This construction project requires a paradigmatic shift – we as co-inhabitants of this land have an obligation to examine the way we perceive each other and our responsibilities to each other and the land which we share. When our ancestors signed the treaties, there was a clear understanding of the importance of these relations and the obligations which we each undertook. We need to re-construct our relations with an eye to those already made and with an understanding that we are bound together, obliged to honour our previous obligations in a way which gives our contemporary relations meaning and trust. We cannot and should not forget our history together, but we can build a future which requires much less subterfuge and hierarchy if we begin our renovation project in earnest and in good conscience. The eradication of the image of settler as unconscionable will require a demonstrable record of clean hands.

Deconstruction requires that Indigenous peoples participate in our own lives – not as reactors, but as actors. Policy, law and government that Indigenous people develop are essential to this construction project. However, ensuring that we address colonial thinking and the impact it has

had on our traditions or, at least, on our understanding of our traditions, is an important part of the exercise. Perhaps this is as close as we will get to anything approximating deconstruction. This will require an examination of our own archival (largely oral) and legal sources. It will require an acknowledgment that as it took time, money and effort to build Canadian systems, there is an obligation of time, money and effort to re-build our own systems. That commitment to an Indigenous construction project and the commensurate acknowledgement of the attempted destruction of it, will build confidence in our future together.

Deconstruction requires that settler people begin to examine the possibility of moral agnosticism in a cultural context. It requires that settler people leave their familiar and alienate⁸¹³ themselves from the known. Alienation includes alienating self from participation in hierarchy and questioning assumptions made within that context. In a sense, it is an absolute shift. The shift is less from one paradigm to another than it is from judge to participant. For indeed, paradigm itself separates us and does not accurately describe the duty to and act of giving up your authority to assess and the taking up of the obligation to understand and acknowledge. If there is anything like a paradigm shift it is in moving Indigenous people from objects to subjects in settler peoples' understanding. Perhaps the anti-colonial resistance requires Indigenous citizenship to understand and acknowledge the impact that colonization has had on our systems and our citizenship. Perhaps the shift as oppressed requires us to assume the authorities publicly which were unacknowledged, or we had wrested from us, or which we sent underground.

Object becomes subject.

⁸¹³ Berkhofer, *supra* note 568 at 68.

VI. HONOURING THE VOICE WITHIN YOU: PRESERVING YOUR CRITICAL SELF IN THE STUDY AND PRACTICE OF LAW

So, this is the ending. Or the beginning. I don't actually know. There are few things that I know for sure, but writing this has helped me pull some of those vast theories and grand ideas into one place. My personal struggle has been not to see the we/they. And not to live in anger, blame and condemnation. It is not a peaceful struggle, fighting this colonization of the mind. It of course spills over into my professional and intellectual struggle and it is unsurprising that I have to challenge myself not to replicate that dichotomy in the work that I do.

I begin to see that there is something about chaos, chaos that some (they, and yes it is hypocritical) try to control. I see that law and lawful authority are constructed not just to own, but also to control. What in truth cannot be controlled. Owning places, controlling people, and colonizing minds are about notionally staking your claim on that which appears to be wild, uncontrollable and chaotic. Mindproperty offers no title and it cannot be transferred.

To be clear, we are talking about home. In our lands, on our territories, in our families, in our minds - all of the places in which we rightfully live. Defining and redefining rightful for us will never be authentic ownership and will never be actual control.

We are talking about the wonder and the wonderment⁸¹⁴ inspired in anyone who comes to our land, sits with our families and hears our languages. That wonder and wonderment is not, as it has been categorized to control chaos, stoicism or romanticism. It is a piece of something real and grounded that observers notice and participants understand as the normal fantastic. Our lives, our connection to home, our connection to each other, and the histories we share and sometimes will not share, inspire wonder.

Where is your home, we wonder? We are talking about places not your own and the resultant and established pattern of colonial aggression.

You claim. Your claim is impossible. We wonder how you can believe something impossible.

You inhabit. You are welcomed to share. We wonder why sharing is so difficult for you.

You assert ownership. As it is impossible, we reject it and continue as we should. We wonder how you sleep at night.

You impose rules to govern your ownership. As they are invalid and do not apply we ignore. We wonder who holds you responsible.

You arrest us. We protest (silently, covertly, violently). We wonder when the deluge will stop.

⁸¹⁴ "Wonder and wondering are closely related, and stories teach us that we cannot choose between them." J. E. Chamberlin, *If This Is Your Land, Where Are Your Stories?* (Toronto: Vintage Canada, 2003) at 3.

You teach your ownership, your history, and your rules in schools. We are forced to attend and we continue to learn our ways, try to acknowledge yours, and continue to live ours. We wonder if you are able to hear voices that do not sound like yours.

You regulate your regulations. We ignore. Some acquiesce. Some leave. Some assert our own. We wonder if it costs you as it costs us and what following our laws would cost you.

You tell us we need to be monitored. We listen to your requirements that we account for the capitulation to your rules, your claim, habitation, and ownership an intrinsic and inherent part of that accounting. We wonder if you think we actually accede to this.

You require us to account our failures as your domesticated and indentured colonized.

All along, we learn your Caucasian code, some become code talkers, and we translate the invasion of our lands, territories, homes and minds. We wonder what our next generation - angry and anti-colonial students of your tactics - will visit upon your communities, your families, your homes.

And then we begin to dismantle your colonial structure, assert our own laws, and reconstruct our nations. Claiming our lands, territories, homes and minds, our wonder and wonderment dissipated.

A. Introduction

There is something quite privileged and luxurious in having the time and distance required to be able to talk about critical thinking and the rejuvenation of Indigenous laws and philosophies. There is an arrogance in this that leaves me quite uncomfortable. Perhaps it is in assuming that you have an answer, the answer. What I have come to understand is that critical Indigenous consciousness is alive and robust. What I speak of and write about is not something I prescribe or detail to impose on any collective, community or nation. What I am doing is detailing my journey as a place marker for those in similar situations or who find use in it. I have something that I think is akin to guilt in taking the time to teach this topic, read about it and immerse myself in a theoretical exercise. Part of me always feels that I should be out in the field, practicing law and providing advice to Indigenous clients who are trying to save something (land, home, family, language, spirit). It is indulgent to talk about critical consciousness when the struggles we face in our every day are struggles for survival. Making the choice to look at fostering and planning for Indigenous critical legal consciousness comes from two places. The first is a place where we are subject, not object. Doing and naming, instead of ducking and weaving. The emergence or cultivation of a critical Indigenous legal consciousness is one way, I hope, in which we can tell and not ask what our rightful places are. The second is a place where we can look at a longer term and collective movement. After all of the splintering and fractionalization embedded in colonial attack and imposition, perhaps a collective critical Indigenous legal consciousness will enable us to address our concerns collectively as Indigenous peoples and encourage us to formulate actions that make sense in light of and accord with traditions related to Indigenous philosophies and laws within our own nations.

We have no common language, and the English legal language is the weapon of choice used against us in the colonial campaign. Developing our own common language as Indigenous peoples which defines and situates our nations (territory, home, sharing, responsibility, obligation, relations, family, citizen) can strengthen the ways in which we address our critical existence.

Indulging in theory of course leads to a discussion of praxis. Anti-colonialism is a noun and a verb. We need to think of what we will do with a collective critical Indigenous legal consciousness and what we will create or rejuvenate. Identifying traditional Indigenous philosophies and laws and the colonial laws, polices and regulatory schemes that impacted them is an idea and an action. Those ideas and action need to be followed up by the identification of the contemporary application and rejuvenation of Indigenous philosophies and laws. This is the praxis. This is the do. Some Indigenous nations may be doing or have done this. In my experience this is not the case everywhere. My hope is that we are able to talk collectively about where we come from, what happened and what we are going to do next.

There will be a need for translating, some sort of commonality of language that allows us to identify, define, acknowledge and assert among ourselves and with Canadians who we are, where we come from and what is ours. Some things will not translate and we will need to address the definition of those things in our tongues and in places that we understand. This is not THE answer. It is not AN answer. It is one means to get us to tables of our own construction in rooms that we organized that we can accept or reject.

I need to write this. Call it survivor's guilt.

B. Developing Critical Indigenous Legal Skills

In my undergraduate studies, I was not an outstanding law student. You see, my mind kept wandering over the cases we read and things kept occurring to me that were not in the cases: What had they done on this land since time began? Were they going to eat that hunt? Why were they self-medicating? Where were the kids? To me, the relationships between people, where they came from, and how they got before a judge, those were relevant and if the law wasn't dealing with those relationships, then I could not understand it. With the luxury of hindsight, I am able to say that I was deficient in Canadian law and I couldn't find relevancy in the facts pertinent to Canadian law. While I studied law, I was aware that it was very difficult for me to discern what "relevant" facts were. The facts that were meaningful and

relevant, to me, were those that addressed the power imbalances. Crime as a response to a longer, embedded, institutional, and racialized violence revealed significant facts to me that were not considered relevant by Canadian legal standards. One of the people who marked my papers during my legal training included a note that said something like: “The law is mostly wrong and she cannot identify a relevant fact to save her life. We should talk to her.”

The lesson that I learned from this is that “relevant” meant and means related to me, relevant to my relations.⁸¹⁵ I am proud of that. Relevancy in a Canadian legal context came to mean the degree to which information related to pertinent Canadian interests.

I was a very good student before I got to law school, and I was a very good student because I was so unable to be moved from my logic and I could prove anything with research and an argument. I had built a really strong ego on this skill, as arguing and proving things get you rewards. When I came to study law I realized that anyone could argue anything, that yes there was a skill in that, but that what you argued could be completely false, based on inaccuracy, misunderstanding or illogical presuppositions, and that argument could still win. At no time did I consider specious arguments, arguments based on crooked language or skewed research anything more than a means to an end. Law was the means and winning was the end. While I did not fully understand how mercenary this was at the time, I did know that argument and rationale (not rationality) were tools to serve a purpose and the purpose was winning (conquering, persuading, selling).

I don't want to de-value what we do, there is skill in being good at this and there is worth in learning to do it right; you can be an invaluable resource to communities, community members or whichever law firm you work for. Doing it right is the tool. The purpose, I will talk about later.

⁸¹⁵ Gerald Torres and Katherine Milun, “Translating “Yonnondio” by Precedent and Evidence: The Mashpee Indian Case” in Kimberle Crenshaw et al, eds., *Critical Race Theory: The Key Writings That Formed the Movement* (New York: The New Press, 1995) 177 at 184 [Crenshaw et al]. Referring to the Mashpee nation's interaction with American law, the authors wrote: “Relevance is the guide, but the question remains: Relevant to what?”

The lesson that I learned from this is that: In Canadian law and legal studies, if you repeat something often enough, get enough people to repeat it often enough (with logic, argument, persuasion) and do not question it enough, it will begin to sound like truth.

In my understanding of the Cree philosophy, winning is not the goal; the ultimate objective is to serve a purpose, to live with purpose. That purpose is informed by your tools (humility, respect, kindness, honour, cleanliness).

Studying law awoke me on many levels. I became acutely aware that the words that I read would not stay in me. It was frustrating, reading from after class until I fell asleep. The words would never stay. My classmates could recite the facts relevant to Canadian law in under five lines. Many could state the rule in one line. My briefing notes were twenty pages long at times. To this day, I could not tell you a word. This was hard. Having studied Indigenous Studies for four years before I went to law school, I knew I had an impeccable memory. Something about these words, this law and these rules would not sit with me. As well, I was spending much more time than my classmates interpreting the cases. Not until many years later after observing the smartest man I know struggle (he was fluent in Cree and advanced in Cree laws) as well did it come to me: we were studying three times (which I was later able to reduce to two steps). The first time we studied the cases to pass the test. The second time we studied to understand Canadian law. The third time we studied it to give it Cree context and de-mystify it. We were translating the law to see what meaning and import it could have for our peoples. Within all of this there was for me a constant voice, one which said: You need to learn this to be able to disregard it.

This is not a flippant or diminishing exercise. The real critical theory for me began when I heard that voice and came to understand what it meant. To live with purpose, I had to measure those laws against the principles and values that I brought with me to law school.

What I learned from this is that: When you hear that voice inside you telling you what to do, you have to pay attention to it.

From listening to this voice, I began to learn that relevance is subjective and that Canadian legal relevance⁸¹⁶ is often an integral part of colonial legal determinism. Actively examining Canadian law (often with unstated contexts and the real dispute, objectives and goals shrouded in Canadian legal language) was not the goal. I came to understand that this was a tool and that if I honed it I could utilize it in order to address purpose and a purposeful life. In law school I began to see that Canadian legal training was one tool. Starting to see the need to be able to translate and interpret that training in the context of legal determinism was another. Truth and legal determinism can very infrequently share the same space, and the struggle to “hear” truth or examine actuality cannot take place in spaces occupied by a presumption of settler experience as superior and Indigenous truth as unproven or unable to be proven.⁸¹⁷

From this I learned that: For us to be able to build something meaningful, we need to start by explaining why what is there is not acceptable. It was from all of these lessons that I began to understand the import of building a critical framework and committing to the amplification of a critical voice.

It is my proposition that without developing an arsenal of Indigenous critical theorists that we will see an increase in the construction and application of legislation which is predicated on the eradication of the rights of Indigenous citizens. Thinking critically, listening to that voice, and beginning to ask questions about relevancy, accuracy, assumptions, presumptions and who benefits from Canadian law is one essential tool in our tool box. Another is knowledge of our language. A third is knowledge of our laws. A fourth is the ability to translate between laws and legal systems effectively. All of these steps, I think, are ways and means by which we can rejuvenate and/or strengthen our citizens, our communities and nations. In order to strengthen (which I think is critical practice), we need to develop our Indigenous questions and rationales (critical thought) and begin to understand how colonizer law impacts us and why it is in/applicable.

⁸¹⁶ *Ibid.* at 185. Torres and Milun, in Crenshaw et al, write, about relevance in a legal context: “Treating relevance as though it were a neutral analytic category takes our attention away from the substantive standard being disputed because it requires the judge making the relevance determination to treat the substantive standard as a given...Relevance is a probability determination...The legal concept of relevance empowers a court to approve or disapprove certain narrative elements of a party’s story.”

⁸¹⁷ *Ibid.* at 178. The authors wrote that “The conflict between these systems of meaning – that of the Mashpee and that of the state – is really the question of how we can “know” which history is most “true”.

C. Indigenous Critical Consciousness and the Language of Law

The moral flexibility of law school made me uncomfortable; I was uncomfortable with how I was able to support unsupportable ethics and understandings. In order to address this discomfort – discomfort that would not let me sleep - I made the decision to try to never lie again. Sometimes I failed, but mostly I succeeded. This was difficult and I have examples where lying was not the easiest option, but the requested or required option.⁸¹⁸ Because I had been so silent in law school, because I had felt so isolated, because I did not know how to speak like a lawyer, I made the decision that I would treat colonizer law like a foreign language.

As a result, relevance was no longer unintelligible to me. It became a filter through which I was able to make determinations about the presumptions of authority and power. Canadian law and policy was no longer forgettable, it was a foreign language that required interpretation in order to capture the essence of conflict. Once I began to understand that the conflict was not just about adjudication of rights, but presuppositions of rightfulness and the enforcement of imperialism, I understood that it was more than acceptable to feel alienated from Canadian law, it was intellectually freeing. In time, it became evident that Canadian law would not settle with me and would not be retained in my mind because it was not supposed to live there. My goal was to respectfully visit it, much as you look at items in a museum. Each piece told me something about the owner, about imperialism and about the time and the place that it came from. As a visitor, I was able to see Canadian law as an archeological dig. The upper crust was what we see, the substrata the context and origin. Digging deeper let me find and examine notions of superiority embedded in the bedrock of Canadian law.⁸¹⁹

⁸¹⁸ At one point, I was directed by a client not to identify myself as or my affiliation with a First Nation when doing research. The distrust ran so deep in that relationship that revealing my identity was perceived as revealing my intent. Additionally, archives and other institutions were commonly perceived as foreign and/or biased (in favour of non-Indigenous governments) and I was assured that my work would be traced and tracked.

⁸¹⁹ Torres and Milun, in Crenshaw et al *supra* note 815 at 178. The authors write that this is the case in American law, as well, determining that: “In the case of the Mashpee the systems of meaning are irreconcilable: the politics of historical domination reduced the Mashpee to having to petition their “guardian” to allow them to exist, and the history of that domination has determined in large measure the ways in which the Mashpee must structure their petitions.”

From that I learned this: Study Canadian and American law thoroughly in order to take the implicit power from it.

From this point forward, it was no longer a given that Canadian law was right or powerful, it had to prove to me why it was right or powerful. I had to learn to learn Canadian law in order to unlearn it. I thought of it like a vaccine: I needed part of the disease in order to make myself immune to it.

This is no success story, and it is a road fraught with mistakes, revelation of my shortcomings, and demonstration of my capabilities and insecurities. This is no martyr tale. Many mistakes were and are made in gaining understanding and I grow every day, and make mistakes almost as frequently. But what I am armed with is the same gift that we all have. That voice in our head, the one that tells us something is unfair, inequitable, discriminatory, or unjust is the one that I came to know as a divining rod.

What I learned from that, is this: That voice within you is critical consciousness and when it tells you something is not equitable, not fair – you need to listen to that. You will need to further it and give it a voice and a vocabulary that will resonate and that will withstand the presumption of Canadian legal supremacy.

The Indigenous critical legal consciousness that I have now was born late in my life – when I was doing my Masters degree. I moved to the United States to study law again, this time with that voice beginning to resonate. My critical consciousness was the ground within which critical analysis and comparative legal theory were planted. Reading cases was no longer as painful as I saw it as beneficial to my development as water to a garden. Thinking of this process as developing my intellectual capacity for biculturalism made the process of raising and dismissing Canadian legal arguments so much easier. Thinking of Canadian law as a foreign language empowers us in a number of ways. It enables us to examine it, pull it apart, identify the object, parse the verbs and identify the action words. From this position, we are able to see with clarity the assumptive supremacy of Canadian law, the exclusionary tendency of law,

the presumptive condescension of supremacy in Canadian law. It allows us to understand, not just observe, how we came to be externally defined and regulated.

Comparing Canadian law to American law enabled me to see the commonality in imperial legal determinism. When I began to be able to see that fair minds, kind people, and some seemingly impartial judges made decisions based upon conceptualizations of Indigeneity and fairness that were completely foreign to me as a Cree halfbreed, it became clear that intent and understanding was informed by their own history, long-held rationales for colonization, and their own notion of birthright. Torres and Milun wrote of this in an American context “The problem with conflicting systems of meaning is that there is a history and social practice reflected and contained within the language chosen.”⁸²⁰ This “legal coding”⁸²¹ in itself is bias and results in inequity. Developing a critical Indigenous legal consciousness requires that we identify what is embedded in Canadian law and try to identify legal coding in order to defend against it and eradicate it.

Reviewing Canadian legal language meant identifying shared and divergent history, social practice and definition.⁸²² For example, home means something completely different to people who have to make homes in foreign territory. For settlers to define home, rules are written that incorporate notions of inherency. Laws have to be made which reinforce legitimacy. And, because there are competing interests, some notion of supremacy of interests has to be forged within the doctrines established to adjudicate rightfulness. Historically, the

⁸²⁰ *Ibid.* at 178.

⁸²¹ *Ibid.* The authors define legal coding as “confrontation between irreconcilable systems of meaning produced by two contending cultures.”

⁸²² In order to do this, to retain where I come from and not see my understanding of home, land, possession, obligation and responsibility “whitewashed”, I initially had to think of Canadian law as my enemy. To be able to identify, critically, where truth leeches through Canadian law I had to create fixed and limited intellectual space for Canadian legal definitions, Canadian legal history, Canadian social practices and Canadian legal definition. In order to accurately address oppression, I had to observe and define it myself from a place of strength. In order to understand the constancy of ethics and law in a Cree context, I had to look for Indigenous ethics in Canadian law. It also began to mean identifying unethical understandings entrenched in Canadian law. Then came the work of re-defining Canadian legal definitions. In order to do this, I had to remove myself from my inclusion in the existing definition and define words and concepts according to their meaning to me as a Cree person. It, again, meant learning, unlearning and re-learning terms, phrases, histories and laws. In this way, I was able to view Canadian law from the inside and outside. The true worth of the exercise was in deconstructing Canadian law; I could not construct Indigenous law, as it continues to exist. I had to objectify Canadian law so as not to be a part of it and to acknowledge that I have another home.

repudiation of non-newcomers' rights was made explicit with all of the racialized, stereotypical and discriminatory aspects clearly evident in the record.

Over time, when newcomers age and their next generations take control of those homes, inherency, legitimacy and supremacy become incorporated into the sprawling mass of legislation that is developed to protect those interests. Indigenous interests and rights must be explicitly stated in order to have recognition; they do not have that inherency, legitimacy and supremacy. The layers of colonial laws piled on top of the initial understanding that newcomers are entitled only serve to substantiate that understanding. English is the asphalt used to pave the roads on top of the layers of protection of that initial understanding of supremacy. The English legal language is used as a trowel to smooth over places where earth and plants break through the pavement.

What I learned from that is this: Colonizer law is a language. It is a foreign language. You need to be fluent in it not just to critique it, but to know how it does sometimes serve your purpose and how it is sometimes in the way of achieving your purpose.

Those lessons we learn about voice, about honesty, about trusting your instinct, about asking the questions about who has the power, who benefits from the law, who defines the content of the rights in question, whose legal supremacy is presumed, and what the aim/goal and supreme authority of law is, are important questions and the basis for critical Indigenous legal theory.

In my experience the theory of critical Indigenous legal theory is absolutely informed by the practice of Indigenous law. Upon completion of my Canadian legal education I began to work in a law firm. While I was there I was happy to be able to learn something new everyday, but I was cognizant that the voice that told me what was fair and what was unfair was rarely able to find equity in my work. It was a business, and like all businesses there were tradeoffs to be made in the name of client satisfaction. In my second year of practice I was contacted by a negotiator for a land claim from my traditional territory. He had heard my family name, where I was from and that I had studied in the United States. When he called

me he was at the edge of a forest fire, working on the fly while driving for his life. Still, he saw the work he was doing as his first priority. I had to meet him.

The nation working on having their nationhood and territorial boundaries recognized flew me up to see them that weekend. They found me a place in the community and treated me well. After one particularly taxing set of negotiations, the head negotiator took me aside and said to me, "How can you know what you are working to preserve unless you live on it, see all four seasons, and participate in the activities of the people?" I never moved back to the city. The community began to educate me in order to make me useful. Nine years of university education was so much easier and less intensive than the training and intellectual challenge they provided. And, that negotiator was right, I needed to be able to understand and interpret Canadian law, but there was a whole other side of the legal world that I was missing. Not just in the knowledge or information, but in the process as well. Cardinal and Hildebrandt wrote that traditional processes and forms must be observed as required by First Nation spiritual laws⁸²³ and observing the process and form began to amplify that voice in a way which I could not have imagined.

After flying in and out for a year and having difficulty with my firm for not producing enough billable hours (how could I bill by the hour when the community had no running water?) I arranged a meeting between the head negotiator and a partner in the law firm.

I have written and spoken about this before, but I find that over time and as I become more aware of the roots and branches of colonialism, I begin to understand this experience in another way. The community representative, completely fluent in Canadian law and Cree law, spoke about the origins of *Neheyiwak*, how the peoples in this nation had come to be in their traditional territories, how they lived, had a flourishing economy and good relations. He talked about the treaty commissioner coming through the prairies and carving pieces out of their lands, the government of Alberta coming in and by force taking lands, claiming lands, big business coming in and taking the trees, oils and other life from the land. He spoke of physical force, economic deprivation, razing of houses, legalized brutality and land theft. For

⁸²³ Cardinal and Hildebrandt, *supra* note 18 at 1.

two hours, in the same steady voice, he told the story of how home had become land, and how the land became understood as a land claim. When he finished the partner at the firm looked at him and said, “But that’s not fair.” That was all he had, this smart man. He was right; it was and is not fair. However, he had no language, no legal or other language that could even approximate or address the enormity of the legal racism, discrimination and prejudice that was occurring.

This may be the case for many people schooled in Canadian law.⁸²⁴ There is no vocabulary for oppression. There is no lexicon for the experiencing of, not the participation in, this attempted subjugation. There is no vernacular for the pervasiveness and impact of invasion on Indigenous citizens, communities, nations and territories. There is no way to strip the determinism and genocidal intent from the legal language. What we do not have is the language to express effectively in English or in English-based law how this historical pronouncement of superiority, reinforced by the legal presumption of our inferiority, permeates our lives and our homes. English and English-based law cannot enunciate this because it, itself, is the language of colonization. It has insufficient words to describe the impact and enduring nature of force because it is intrinsic to the language of domination.⁸²⁵

The language is colonized and there is a belief that the language is neutral. Aggression, dominion, breach, infringement, force, intrusion, and invasion are not an event for us, they are words along the spectrum of colonization (itself not so much an event as an ongoing process). While I understand that treaties cannot be understood in isolation,⁸²⁶ I also know that the non-Indigenous settlers’ colonial understanding informs the relationship in ways which further embed the values inherent in societies which perpetuate colonization.⁸²⁷

⁸²⁴ There are also many Canadian legal scholars who are trying to find the language and to understand their role in and observances of colonization and de-colonization. I note particularly the work of: Constance Backhouse, Norman Zlotkin, Ruth Thompson, Michael Jackson, Richard Bartlett, Kent McNeil, Leonard Rotman, Donna Greschner, Brad Morse, and Peter Hutchins to name a few.

⁸²⁵ Torres and Milun, in Crenshaw et al *supra* note 815 at 178 write that defending Indigenous rights requires, additionally, that “In order for the state to hear these claims, however, these Indians were forced to speak in a formalized idiom of the language of the state – the idiom of legal discourse.”

⁸²⁶ Cardinal and Hildebrandt, *supra* note 18 at 1.

⁸²⁷ The colonial understanding of Indians as irresponsible and impermanent is as evident in history as it is in our contemporary existence and have been used as justification for forced disenfranchisement, forcible relocation,

D. Liberation Practice

The pedagogy of the oppressed, as humanist and libertarian pedagogy has two distinct stages. In the first, the oppressed unveil the world oppression and through the praxis commit themselves to its transformation. In the second stage, in which the reality of oppression has already been transformed, this pedagogy ceases to belong to the oppressed and becomes a pedagogy of all people in the process of permanent liberation....⁸²⁸

At all stages of their liberation, the oppressed must see themselves as women and men engaged in the ontological and historical vocation of becoming more fully human...The insistence that the oppressed engage in reflection on their concrete situation is not to call an armchair revolution. On the contrary, reflection – true reflection – leads to action. On the other hand, when the situation calls for action, that action will constitute an authentic praxis only if its consequences become the object of critical reflection.⁸²⁹

Learning this lesson about the ownership and power embedded in the English language changed the way I understand Canadian law. Unlearning it at the same time that I began to learn the laws of our peoples was quite natural. An anti-colonial process and an anti-colonial act. My experience taught me that you have to live as if it is happening and think as if it is not. It also taught me that the purpose which Indigenous critical thinkers can achieve is a life in which you honour your obligations, using those tools you gathered along the way. My obligation was to learn the laws governing the land that I come from and to make sure that the relationship that I have with that land is one in which I honour my obligations to it.

This is what I learned from that: The land that you come from owns you, no matter what you have learned. You have a responsibility to be the best protector/lawyer that you can be, and that obligation is one for which you must take responsibility. I also learned that, as a Cree person and a person with Canadian legal training, I was situated in a space that placed additional obligations on me in achieving that purpose. My obligation meant that I had to build a bridge between what the Cree head negotiator and the law firm partner understood as truth. To become a facilitator of

usurpation of relationship with plants and animals, and the attempted codification of responsible governmental behaviour.

⁸²⁸ Freire, *supra* note 304 at 54.

⁸²⁹ *Ibid.* at 65-66.

that translation process means that I have several other responsibilities to which I must attend. What began as a translation problem became a translation project.⁸³⁰

To become a translator (transforming meaning, identifying the untranslatable), I am going to have to learn the Cree language fluently (and I envy those who already have it) and commit myself to a new teacher. My understanding of the nature of the foreign language of colonizer law and my immature understanding of Cree laws/Indigenous laws, has let me embark on comparative work related to philosophy, assumptions and underpinnings. For me to be able to fully and thoroughly address the colonized, racialized and gendered supremacy built into Canadian and American law, I need to be able to assert with fluency the *Neheyiwak*/Cree laws which in no or some ways resemble those laws.

To critique is one thing, and you need to be able to transcend mere picking apart – to develop comparative legal theory from an Indigenous context is necessary, important and obligatory work if you are privileged enough to have the tools to learn the same at your disposal.

Power structures have been established to ensure that presumed fairness can be achieved when we speak the language of Canadian law.⁸³¹ Canadian law is a patois of the English language and the English language houses supremacist actuality in the guise of fantastic possibility. Canadian law has become a medium of communication⁸³² which painfully reveals the nature of state sanctioned imbalance inherent within the medium and the message. Imperialism is quite inherent to “the Queen’s English” and in electing to communicate in this language, Indigenous national representatives must be aware of the intrinsic incompatibility between Indigenous intent and the capacity of English to represent that accurately. English language representation of Indigenous philosophies and laws is incommensurate with their essence, content, context and therefore their definition.

⁸³⁰ Torres and Milun, in Crenshaw et al *supra* note 815 at 178 wrote that translation “means of an example that law can follow (precedent), and examples that law can hear (evidence).” It is my contention that Canadian law has a very limited vocabulary and that its translation of Indigenous rights are limited because their precedents and evidence are informed by the language of domination and supremacy.

⁸³¹ Fairness, of course, can be culturally constructed and imbued with cultural norms. Canadian law has been constructed, defined and upheld in accordance with a very narrow and culturally informed language.

⁸³² Torres and Milun, in Crenshaw et al *supra* note 815 at 178.

We cannot bury the genuineness of Indigenous experiences, understandings and existences in an inadequate conversation. This conversation is frequently one sided and often results in pronouncements or decisions which are incomprehensible.

In a real and enduring sense, Whiteness in a Canadian context has become legal property.⁸³³ Whiteness has become synonymous not just with privilege but also with ownership. We are, I think, worse than invisible in the Canadian legal mindset. We have, by legal machinations, been rendered obsolete.⁸³⁴ Our territoriality presumed invalid – extinguished – as if this were possible. But the legal language is rich with Eurocentric possibilities. In the guise of presumed supremacy, it perpetuates notions of title and rightful settlement. The notion of extinguishment is predicated on Indigenous inferiority. Our rights are immediately defined as claims, linguistically delegitimized at the outset of our conversation. We must make claim to our own lands. Similarly, our birthrights of Indigenous citizenship are cloaked in the language of membership, a privilege for which we must apply. Home and citizenship become dependent and of value, therefore legalistically categorized and propertized. The understanding that everything is able to be acquired is integral to the Canadian legal language. Applied in this context, it means that Indigenous lands are perceived in that context to be severable from Indigenous histories, laws, and understandings of our relationship with our lands. In the context of Indigenous nationhood and citizenship, it means that Whiteness as property is able to be acquired (owned, taken, bought, conquered) and that Indianness as property is able to be legally taken, lost, relinquished, surrendered. The myth of legal supremacy is that it is the best that we can do or that it arises from mistake. If you have accepted the mistakes of your forefathers by accident and perpetuate them you are just as responsible for them.

⁸³³ Cheryl I. Harris, "Whiteness as Property", *ibid.* at 276.

⁸³⁴ In many instances, Indians are deemed to be non-Indians with the swipe of the Registrar's pen. For an example of this, see *Callihoo v. Canada (Minister of Indian Affairs and Northern Development)*, [2004] F.C.J. No. 1596 (F.C. T.D) (QL). Notably, the entire Michel Band was enfranchised in 1958. In some cases, Indian people have been constructed by Canadian law as well. For an instance where a non-Indian child of non-Indian parents was adopted by her Indian stepfather and applied for status, see: *Samson Cree Nation v. Canada (Registrar of Indian and Northern Affairs)*, [2005] A.J. No. 685 (Alta. Q.B.) (QL).

Worse than obsolete, we have been rendered participatory in this.⁸³⁵ As long as Indigenous philosophies and understandings are considered auxiliary and unnecessary to the conversation about Indigenous rightful holdings and righteousness this is not a conversation but a diatribe. But we need to have the conversation and it needs to take place in our own voices. Acknowledging that our stories and our iteration of our lives are fundamental to this discussion is a starting point. In a discussion of colonialism in an African American context, Sister Souljah wrote:

At the root of our confusion is a condition and mentality we all have passed down to us. It is a mentality that functions with or without our permission, on both a conscious and subconscious level. We don't discuss this problem though. It is a problem rooted in a forbidden topic...The forbidden topic is, shh, slavery and the behavioral, mental, spiritual and money problems it created. You know, the little episode of history that lasted only five and a half centuries, which means only five hundred and fifty years. Which represents only twenty-two generations of black folk. Sisters sold away from sisters, brothers sold away from brothers, wives separated from husbands, many of them raped by white men who denied fathering racially mixed babies. The African languages were illegal to speak. Reading was illegal to learn. Writing was illegal, too. African gods were illegal to worship. African ceremonies were illegal to perform. African beliefs and values were life-threatening to practice.⁸³⁶

Before slavery, we as African people had understanding and answers for most of life's basic questions. Our lives, beliefs, values, and rules were deeply rooted and clearly understood and respected by our communities. We celebrated life and encouraged and loved one another. We had strong families, schools, organizations and nations. We governed ourselves and had well-functioning economies, conducted trade, enjoyed sports, and took part in meaningful entertainment. We lived side by side with other Africans who spoke many languages and honored various traditions. We were not without problems, of course, but we managed to work them out among ourselves...Our old African way of life is not therefore considered a successful, meaningful, or profitable way of living. Our balanced and positive African way of thinking therefore was pressured, beaten, raped, murdered, and legislated out of the majority of us and banished from memory.⁸³⁷

⁸³⁵ I note the cases where individuals and nations must disprove the rights of other Indigenous citizens and communities in order to have their own rights upheld/noticed. See for example, a case in which the exclusion of non-band aboriginal communities from a First Nations Fund was held not to contravene the *Charter: Lovelace v. Ontario*, [2000] S.C.J. No. 36 (S.C.C.) (QL). See also the cases related to Indian membership at *supra* note 323. As well, Métis settlement membership rights have been rendered obsolete in the tribunal process with the stroke of a pen upon review by the Settlement Council (and later, Appeal Tribunal). For an example of this, see *Primeau v. Elizabeth Metis Settlement*, [1996] A.M.S.A.T.D. No. 16 (M.S. T.D.) (QL) in which Joanee Primeau was refused membership in the Elizabeth Métis settlement as there was no proof before the Tribunal that she was of Canadian Aboriginal ancestry (at para 37).

⁸³⁶ Sister Souljah, *No Disrespect* (New York: Vintage Books, 1994) at xi-xii.

⁸³⁷ *Ibid.* at xii-xiii.

Ensuring that we absolutely begin our rejuvenation discussion with a thorough understanding of where our laws come from, how they have been passed to us, what our obligations are with regard to them and how and when we tell them are ways in which we accord them the respect that they deserve. Telling them in their pure and honest form, giving voice to them in principled ways in accordance with protocol is an anti-colonial act. I hope I am not naïve but hopeful when I say, the rest will follow. This cannot be about blame. This is not about pity. I actually think that we have not addressed the colonization and White supremacy that exists in Canada and which has so pervasively impacted our peoples. An Indigenous student said in my nation building course, “The time when we can expect guilt to motivate non-Aboriginal people is over. We have to get over it and move on or we will continue to live lives of despair.” I wrote it down and have been thinking about that since. I think that there is a profound difference between inspiring guilt and requiring that people take responsibility for their actions, and for perpetuating the actions initiated by their forefathers. My reason for writing, for speaking and for requiring people to examine White supremacy in the guise of law is not to inspire guilt. It is painful to address it and discuss it, but if we don’t raise the veil on the actions, words and intent of White supremacists and White supremacy⁸³⁸ then our silence renders us complicit. We need to examine it because the impact and the entrenchment of that supremacy are so ingrained in the language of Canadian law that we may not even see it. Identifying it, naming it and translating it defuses its power and gives us voice and lets us participate in establishing anti-colonial and anti-racist strategies and agendas.⁸³⁹ We cannot talk about nation building in the absence of identifying the source of damage to our nations. Similarly, we cannot identify rebuilding strategies without determining the nature of the damage. In this carefully woven braid of rejuvenation, reclamation, and rebuilding we have to make sure we identify the rot which has infected and affected the ancient fibres.

⁸³⁸ bell hooks, *supra* note 33 at 28. In the chapter titled “Teaching Race and Racism”, hooks writes of this “...I state my preference for using the word White supremacy to describe the system of race-based biases we live within because this term, more than racism, is inclusive of everyone.”

⁸³⁹ Some anti-racism scholars, authors, and advocates whose work have informed the way I think about this include Patricia Williams, Derrick Bell, Cornel West, Kimberle Crenshaw, Duncan Kennedy, Joe Singer, Martha Minow, Malinda Smith, Kate Sutherland, Tim Quigley, Margo Nightingale, Constance Backhouse, and Mari Matsuda.

If we are to fulfill our obligation to make good relationships with our cousins, then we are going to have to understand the power imbalance, perceived and actual, between us as relations. In order to do that, we are going to have to learn from our mistakes. This means rejuvenating and revitalizing our ceremonies and teaching the importance of them in every conceivable manner and place that are in accordance with our laws and protocols. Our laws require that we make sure that our everyday includes orality, ceremony and spirituality.

E. Praxis

Let me see if I have this right:

- *Written is more reliable than spoken.*
- *Getting there second means you have first right to it.*
- *Books are more informative than dreams.*
- *Singing is not relevant.*
- *Land is idle.*
- *When you take land it is rightful, before we can fulfill our obligations and remind you of our relationship with it, you label it a claim and insist we prove it.*
- *When you assert that sovereignty crystallized it is not fantastic, it is reality and cannot be argued.*
- *When we assert that our sovereignty is inherent and ongoing and our rights to land, that is fanciful and leads to an argument.*
- *Your rights are presumed and ours must be proven.*

Who is the savage? It is barbarism. This land is fertile because our ancestors and relations were here thousands of years and became that earth. Surely that is some measure of rightful belonging. We belong to that land.

The PRAXIS⁸⁴⁰ of critical Indigenous theory involves three stages:

Identification of the Traditional Indigenous Philosophies and Laws

Identification of Colonial Laws, Policies and Regulatory Schemes Impacting Indigenous peoples

Identification of the Contemporary Application and Rejuvenation of Indigenous Philosophies and Laws

1) Identification of Traditional Indigenous Philosophies and Laws

The only place a grounded approach to the rejuvenation of Indigenous philosophies and laws can start is with the identification of those philosophies and laws. Many will argue that those are known and those are shared with community members in the way that they should be shared. This may be true. It may be true in many instances, it may be true in some instances, or it may be true in few instances. With the number of Indigenous peoples who speak our language certainly not increasing and apparently decreasing, it would be hard to argue that philosophies and laws which are grounded in those languages are being passed on to the same degree as in years past.

A formulaic approach to the rejuvenation of the traditional philosophies and laws will never work. However, one which involves Spiritual Leaders, Elders, community members and Indigenous scholars and historians at the outset will have the best chance of success.

⁸⁴⁰ After we read Freire's *Pedagogy of the Oppressed* (*supra* note 304), I ask my students a question that they begin to repeat to each other daily: "Great critique. Now what are you going to do with it? What is the praxis?"

Each nation will have to determine the format, the means of gathering the information and the means of storing it. Fundraising and grant applications addressing community based research projects will have to be undertaken with Indigenous ethics, protocols and laws in mind. An international Indigenous think tank could be convened to address not only means to access and preserve the information, but also the ways and means to preserve its integrity. Much of the difficulty in this exercise will be related to the concerns about sharing the information or it being used against Indigenous peoples (in litigation, politics, or other ways). Settler relationships (with their ancestors, with their past, with their obligations) will need to be examined as well. In this, there is much that Indigenous citizens can teach. We have learned the hard way that trust is earned and we cannot pretend that the colonial experience has not happened for theory or practice.

I am well aware that none of this can occur without an agenda that concurrently addresses Indigenous healing, health and healthy communities. In fact, we have overused the terms wellness and health, and we have in no way come close to addressing the imbalance flourishing in many Indigenous nations and in urban centres where Indigenous peoples live. Living in balance is one of those fundamental tenets of Indigenous nationhood and Indigenous citizenship and the manifestation of ill health impacts how we can look at rejuvenation, but it is synonymous with rejuvenation and fundamental to its practice. And, indeed, we need to look at rejuvenation of those traditions and traditional understandings as our practice.

Identifying and rejuvenating traditional Indigenous philosophies and laws requires that we, as Indigenous citizens, commit to rejuvenation. It requires that we address community concerns at the outset and that initiatives are community driven.⁸⁴¹ There is an actuality here – our people are becoming more dispersed, highly mobile, and many are leaving home.⁸⁴² Without an

⁸⁴¹ One example of this includes the successful implementation and operation of the Joe Duquette High School in Saskatoon, Saskatchewan. The high school is founded on traditional Indigenous principles of education and is governed by an Indigenous parents' council, Elders' council and principal. Others include the Mother Of Red Nations Women's Council of Manitoba, Inc. which provides voice and representation for Aboriginal women across Manitoba.

⁸⁴² For additional information on issues of urbanization, relocation and dispersal of Indigenous peoples, see A.J. Siggner, "Urban Aboriginal Populations: An Update Using the 2001 Census Results" in David Newhouse and

understanding of where we come from many may elect not to return. It may well be that people living in the community and who speak their language and practice their ceremonies will never need to address these issues as they are living proof of the constancy of tradition. However, in order to meaningfully address the diaspora that has occurred as a result of colonization, we should be able to at least address how contemporary Indigenous understandings and traditional philosophies and laws interact and inform each other. Central to this is the rejuvenation of our philosophies and laws.⁸⁴³

This is not about codification or commodification. It is about preparing for renewal and sharing in places where we have not quite been able to do so before. We also need to be mindful in this discussion that this has been done successfully for thousands of years. Without a budget, without western business organization, and without external conflict.

Rejuvenating the sharing of Indigenous philosophies and laws requires not just commitment but a concerted effort with no agenda or end goal other than making the information available in meaningful ways which observe traditional means to inform the most Indigenous citizens as possible. Yes, there are understandings that are not translatable but there are teachings that are universally important to Indigenous community members.

Identifying and sharing those responsibilities and obligations that Indigenous peoples have as a result of being First Peoples are important. Developing an understanding of the nature of our relationships with our land and rejuvenating and sharing those understandings will be key in our success. Knowing the relationships and interrelationships of our spheres of being is vitally important in identifying our laws and philosophies. Cardinal and Hildebrandt wrote about the evolution of institutions, but that those institutions grew in their relationship to the land.⁸⁴⁴ What I am suggesting is not just that we have to identify the philosophies and laws governing

Evelyn Peters, eds., *Not Strangers in These Parts: Urban Aboriginal Peoples* (Ottawa: Government of Canada Policy Research Initiative, 2003) 15 at 18, online: Policy Research Publications webpage < <http://policyresearch.gc.ca/page.asp?pagenm=aboriginal>>. The authors note that census figures for 2001 had 49.1 per cent of peoples of Aboriginal identity living in urban centres.

⁸⁴³ I am thankful to some really beautiful spiritual leaders and Indigenous academics for taking the risk to discuss these openly, including Elder William Commanda, Elder Margaret Quinney, Elder Alex Denny, the late Elder Rose Auger, the late Harold Cardinal, the late Vine Deloria Jr., Ovide Mercredi, and Maria Campbell, among others.

⁸⁴⁴ Cardinal and Hildebrandt, *supra* note 18 at 3.

Indigenous relationships (to non-Indigenous peoples, to land, to each other) but that we must also address the institutions that have been impacted, altered, dismantled, destroyed or stunted in their growth due to the colonial presence. This means identifying our philosophy and laws and rejuvenating the “inherent link between political philosophy and laws.”⁸⁴⁵

Indigenous politics and government have a direct relationship with Indigenous philosophies and laws, a relationship that colonial law in its intrusive and besiegement of legislation and policy has been unable to disunite. In identifying traditional Indigenous philosophies and laws we will also need to undertake to locate and renew those relationships. Identification, understanding and recognition are fluent in the reclamation and rejuvenation of Indigenous philosophies and laws. Their interconnectedness is difficult to observe but is palpable under the surface of any discussion (legal, social or political) related to Indigenous ways of knowing and rights acknowledgment.

Indigenous law unifies Indigenous peoples in ways that have transcended language in the past. The Great Law of Peace allowed differing nations with different languages to collectively come together as a nation.⁸⁴⁶ Akwesasne Notes wrote of this:

The society was founded on concepts of moral justice, not statute law, and the rules of the society were designed to ensure that each member’s rights were absolutely protected under law.⁸⁴⁷

Identifying the spiritual (moral) basis of those laws and understanding the beauty, integrity, fairness and humanity of those laws and philosophies will enable us to proceed towards acknowledging the judicious reasonableness inherent within them. Addressing the peacefulness and harmony⁸⁴⁸ within those teachings is key in rejuvenation. In fact, the inherent peacefulness has been addressed by Indigenous scholars in the context of the Peacemaker as essential “not for the establishment of law and order, but for the full establishment of peace.”⁸⁴⁹

⁸⁴⁵ Akwesasne Notes, *supra* note 217 at 31.

⁸⁴⁶ *Ibid.* at 35.

⁸⁴⁷ *Ibid.* at 38.

⁸⁴⁸ Cardinal and Hildebrandt, *supra* note 18 at 5.

⁸⁴⁹ Akwesasne Notes, *supra* note 217 at 33.

We cannot presume that Indigenous laws and philosophies will conflict with Canadian laws when doing this work, because rejuvenating Indigenous philosophies and laws is central to the discussion about conflict of laws and conflict resolution. As our laws have their origin in our relationship with our Creator, then the law as a unifying force (in our relationships with land, animals, each other and settler peoples) needs to be identified and openly discussed in observance of our protocols and the traditions surrounding sacredness and oral traditions. Rights are not just legal rights, Blackfoot Elder Lazarus Wesley says, they are tied to spirituality.⁸⁵⁰ Identifying the relationship of spirituality to law, law to governance, and the institutions required to sustain this relationship is essential praxis in the rejuvenation and celebration of those laws and philosophies.

As those relationships define our obligations and responsibilities, we need to address the relationships that we as Indigenous peoples have to our land and what obligations we have to meet. We also need to examine our obligations and relationships to our other relations to determine what philosophies, principles and laws govern our interaction. In identifying and discussing these, recording (oral or otherwise) and transmitting them to our citizens, we will be able to determine how the law binds us.

It seems nonsensical to write it, after thinking it, that we can actually envision and activate what Iroquois teachers have called a “spiritually healthy society”⁸⁵¹ and “universal justice.”⁸⁵² It is even more difficult to imagine people “using their purest and most unselfish minds.”⁸⁵³ I think, however, that identifying the sense of Indigenous philosophies and laws is exactly what is required. As peoples obliged to live by these rules there must be some notion of responsibility to keep those relationships with land, citizens and societies alive and functional.

Communicating that sense in a vast community traditional education plan and vast Canadian re-education program is required.

⁸⁵⁰ Treaty 7 Elders and Tribal Council with Walter Hildebrandt and Dorothy First Rider, *The True Spirit and Original Intent of Treaty 7* (Montreal: McGill – Queen’s University Press, 1996) at 90, quoting Elder Lazarus Wesley.

⁸⁵¹ Akwesasne Notes, *supra* note 217 at 33.

⁸⁵² *Ibid.*

⁸⁵³ *Ibid.*

Journal

As I write this, I keep thinking about the response from our citizens. You can't write that way, trust me, I know. The voice in my head, stronger now than when I began this project, says: "Why not you? Why not someone exactly like you?" My father was Swedish but I can tell anyone who asked that I grew up a Cree girl, thinking with my Cree leg. I did not grow up on a reserve. I did not grow up on a Métis settlement. I grew up in a small northern town and was quite aware of being a Cree girl. I was treated like a Cree girl and I was profoundly and proudly aware of where I come from. I also know that that small northern town is in Cree territory. These things inform who I am. I live in a small northern town now, in Cree territory. For many years, while I was being educated in the western system, I lived in urban centres. I am representative, if statistics are accurate, of the 49.1% of our citizens who live offreserve. Many of us do not speak our languages, many of us were alienated or moved from our families and communities. Who am I to talk about Indigenous traditions and healing Indigenous communities? I am a Cree woman who has been fortunate enough to be taken in by fine Cree and Métis leaders, scholars and storytellers. I am an Indigenous citizen who is not a victim or a victimizer, who has suffered the indignity of racism and who has celebrated the wealth that is Indigenous spirituality. Who am I to talk about this? I am someone who is conscious, conscientious, and who is constantly looking to expand my consciousness to be able to live in accord with those rules. Before I had those teachers, I had books, and only books to teach me about our history and politic. Before I could find the four books on the bookshelf - three of which were rife with racialized characterizations of Indigenous peoples posing as 'fact' - I had only African and African American writings and stories to inform me and in which I could hear our voices. Those writers and storytellers were what kept my spirit and mind alive in places where it was presumed to be dead.

Living by a set of rules that I felt within me and then outside of me because I committed to learning our principles and protocols, I have led a beautiful life where Indigenous people who live by those principles embrace me. Why should I talk about this? Because it is given with good intent. Because critical Indigenous thinkers will weigh it and respond to this in meaningful ways. Because I have the right of a citizen to make my views known.

Who am I to write this? I am a self-made Cree halfbreed who wants the cookbook made available to the next generations.

If I were the person to map out how to regain our health and to record and pass on our language and traditions, my plan would look something like this:

- 1. Gather the most respected, big E Elders in one place for an organizational session.
Remote. Ceremonial sites.*
- 2. Gather the scholars in one place for an organizational session.*
- 3. Gather international Indigenous spiritual leaders, Elders and scholars in one place for a session.*
- 4. Have these overlap one another.*
- 5. Discuss and strategize about ways to address protocol, information sharing and safely presenting Indigenous principles and laws.*
- 6. This is work fundamental to healing and wellness, but is also a part of reparations.
Law suits and economic development address reclamation and development.*

Reclamation without reparation does not address the colonial impact. Development without healing, rejuvenation and reparation cannot be successful.

- 7. Defining and developing an Inter-nation organization to support the work of the nations and communities.*
- 8. Identifying teams from Indigenous nations and communities who can undertake the organization of location, protocols, and goal setting.*

2) Identification of Colonial Laws, Policies and Regulatory Schemes Impacting Indigenous Peoples

Initially, I have to address that the Royal Commission on Aboriginal Peoples did good work in this area.⁸⁵⁴ Colonization and its impacts were addressed at length in the public statements and research of the Commission. What I am suggesting is that the information is of course valuable and that we need to address Canadian law, policy and government as a colonial tool. We also need a contextualized discussion that does not limit participation or discussion but which specifically addresses the intent, language and action of these laws, policies and government. Storytelling and oral histories are exceptionally important in this anti-colonial exercise. Seeing your experience mirrored in the experience of Indigenous citizens across the country is fundamental to recognition of the vastness and toxicity of the colonial experience.

We also need to address, specifically, how the colonial regime (given effect through law, policy and regulation) impacts us historically, contemporarily and in our everyday. This work needs to evolve from a critical Indigenous legal perspective and from an anti-colonial place (although they are absolutely intertwined in my mind and experience).

Identification is not just naming the problem. Identification is recognizing the existing tools and providing opportunities for additional tools to train Indigenous community members to observe, critically analyze and assess the impact of colonial machinery on Indigenous nations and citizens. Colonialism is a boundless organism, informing our macro-systems and the minutiae of our everyday. We cannot know how far its talons have reached; we do not know the degree to which each one of us has been impacted by the colonial program. In order to free ourselves from the grip of colonization we will need to be able to observe it with some critical distancing. We can only do this if we are equipped with the tools of anti-colonial thought and critical Indigenous thinking. For many people, these are strong assets already in their possession. For many of us, we have one tool but not the other. Some are schooled in western ways of knowing. Some are schooled in Indigenous ways of knowing. A fortunate number have both. All of us can learn

⁸⁵⁴ *RCAP Report, supra* note 268 at v.1, p.2.

about gaze, distance, and subjectivity by learning to speak in those languages and know where our home language comes from.

Identification of colonial laws, policies and regulatory schemes impacting Indigenous peoples requires that we commit to learning to speak our own language and access our traditional understandings, commit to an examination of legalized colonization and its impact on Indigenous peoples, commit to training critical thinkers, and commit to being trained as critical Indigenous thinkers. It also requires that we honour the protocols and ceremonies in our nations as they apply to critique and behaviour modification.

We have done the best that we could with the information that we had. Canadian legal information is predicated upon non-Indigenous beliefs, understandings, laws and philosophies. We need more information. We must draw upon our existing bodies of information and expand upon it. Improving access to that information will immeasurably assist in the rejuvenation of Indigenous ways of knowing. While that body of knowledge will require refinement, as important is that we improve access to that information in strict adherence to our laws.

We have responded to that information over time through Canadian courts – the interpreter of Canadian laws. We need more information and we need different interpreters. Venue and voice have to be understood to be Indigenous self-determined constructs. Reliance upon an institution vested in the perpetuation of that institution to make determinations about our interests and understandings is not only extra-jurisdictional, but is also unprincipled. To be fair, the Canadian legal system has access to little or no information about Indigenous philosophies and laws. But, when it does include the little information that it is provided there is no context and no theoretical underpinnings in place to give that precious little information accuracy, genuineness or authenticity. The training and understanding required to access the information, let alone interpret it with an authentic voice (to say nothing of earning the right to do so) takes a lifetime of training and is rightfully situated in Indigenous spiritual leaders and Elders.

In terms of identification, we need our people best trained in our philosophical and legal traditions and best trained in the Canadian legal language to sit together and develop a critical

Indigenous review of the Canadian legal tools of colonization. Some of us have been schooled in each tradition, but arguably there is no one fluent in both languages at this time. We cannot just pronounce Canadian law bad, we need to enunciate the failings at a functionally critical level. One or two scholars who publish now and then on the topic is insufficient, we have the capacity to develop a team of scholars (in every sense of the word) from our spiritual leaders, Elders and western academic experts.

For law to be just, there needs to be impartiality and legitimacy. We have not had this in the Canadian system and many of us do not ever expect the Canadian legal system to be impartial to us or our interests. Our interests, while there seems to be a magical meeting place in environmentalism and conservation, rarely cross the ideological or philosophical line of shared understanding with non-Indigenous people. We cannot expect impartiality because that would require that systems divorce themselves from result and that individuals make decisions which impact them and their families negatively. There is no neutrality in systematized colonialism.

Legitimacy requires lawful authority. It has not been invested in Canadian courts. We have not assigned it to them. Not actual express or implied authority.

Domination is not authority. We know the source of authority in our nations.

Journal

Today marks the passing of one of the Elders in our community. I barely know her, but I know what I owe her. She was radical. Radically departing from the Canadian legal and governmental colonial agenda. There are stories of her storming Indian Affairs, while armed, and occupying the premises. The last time I saw her was at another funeral. Another funeral. Another leader lost. Another link to our pasts gone. There are so many stories untold and those links between that little old woman occupying Indian Affairs and my experience 30 years later doing the same thing. We have so little time with these oral legal texts, these oral legal history books. We know about our lived experience of colonization and we see it in the nod of heads, the chuffing of throats and the firmness of pointed lips. We have come through hell together and those who survived do not always want to tell the tale. It is a tremendous accomplishment to have survived you, Canada.

Those of us who are able to tell the story are gifted. Those who are able to step outside of their own experience and see the intent, impact and continuing effects of our colonial reality are doubly gifted. Those who lived to tell and compare, share and reflect upon traditional understandings and what colonization really costs the colonizers are a gift to us. To survive it and tell about it, critically and honestly is radical.

Radicalism is the new realism.

3) Identification of the Contemporary Application and Rejuvenation of Indigenous Philosophies and Laws

I work with the most amazing students.⁸⁵⁵ In 2006, in my critical theory class at the University of Ottawa, they continued to work well into the summer with me (even though the class ended in January). We would teleconference from wherever we were in the country, record it, transcribe it, and work on an article together. A rich, rich conversation and thoughtful relations developed. We have had many hours devoted to reconciling Indigenous notions of respect and humility and the development of a critical approach to Canadian law.

These students were so willing to teach and learn, it has been a phenomenal experience to hear and read their experience and theory of colonialism. When we discussed case law and the futility of speaking of sacred things in foreign places and in a foreign language, I became quite aware of the nature of my discomfort with Canadian legal language and venue for the discussion of the philosophies, beliefs and laws that we live under as Indigenous people. Through our discussion and their commitment to the first Critical Indigenous Legal Theory course in the country, we were able to address the conceptualization and actuality of law (Indigenous and Canadian) and look for shared spaces, understandings and terminology as an attempt to resolve both the overriding conflict of laws and the bridge created and perpetuated by colonization. We discussed most of the things that appear in this paper. My sense of the room (all Indigenous students but one) was that there was too little information, too vast a colonial reality, and something of an investment in knowing Canadian law (and understandably so). What I was not prepared for was the strength of the critical consciousness and the capacity of the students to acknowledge that there is a live voice in them. That voice, they taught me, is ever-present and is under constant pressure (in their Canadian legal training and their everyday) to be silent. There was also an awareness that the enormity of resistance (a term which some refused) is weighty and requires a personal commitment and intellectual development in order to think and act in a resistant manner.

⁸⁵⁵ I am particularly thankful for the lessons I have learned from Scott Robertson, Matthew Angeconeb, Amanda McBride, Karrie Barrie, Katherine Koostooshin, Cynthia Westway, and Darren O'Toole.

What teaching resistance taught me was that the Canadian legal system from top to bottom is constructed on theories of objectivity, relevancy and probability that are predicated on normative presumptions about behaviour, rightfulness and equality. All of that is historically premised and contemporarily presented. While we studied case law and legislation and its impact on Indigenous peoples, I was struck at how familiar this was. How ingrained this understanding was within us as students of law. But it also struck me that the new laws, cases and policies sounded eerily familiar and timeless.

The essential understanding that I came to is this: These courtrooms are our modern Valladolid. Using the foreign language of title, property, ownership and rights we still have de Sepulveda echoing in our ears, denying the rationality, the capacity and humanity of Indigenous peoples. We cannot have the land we have always been a part of as we are less able to demonstrate (occupancy, constancy, permanency, organized society) our humanity. Those same arguments about what constitutes civility are entrenched in Canadian legal standardization related to land ownership and that language is used to justify the further invasion and disenfranchisement of our peoples and territories.

The uniquely brilliant feature of this colonial exercise is that Canadian interests are represented both by de Sepulveda (Canada) and de las Casas (Canadian courts) in the guise that neutrality and fairness will be achieved in this robust legal argument. We are not entirely silenced, but we are speaking through translation many words and ideas that cannot be translated. We cannot expect Canadian courts to protect our rights because even within their legal understanding of us, our perceived barbarism there is an entrenched notion of the standardization of English legal civility.

In the classroom, we engaged in a fairly lengthy and heated conversation about a scholar who was recommending changes to the Canadian legal system to ensure that Indigenous voices and stories are heard. One of the students indicated that he was frustrated by one Indigenous author and said: "How can he continue to say that we can emancipate ourselves using the Canadian court system when it is a part of the colonial machine?" Truer words. Admittedly, we had read Freire, hooks and Audre Lourde on that day. The question that arose from our discussion was:

how can we expect a part of the colonial machine to hold the colonial machine responsible for colonial machinations?

How can we expect de las Casas to separate himself from the colonial machine which places him as a spokesperson? Notionally, the Canadian court system constructs an air of equity by cloaking our participation in that de las Casas role of justifier. In actuality, though, we are not foreign or external to this argument and we do not situate ourselves as observer or justifier. We do not argue what is perceived as our humanity. And we speak in another language from another set of principles. Requiring us to justify our position with regard to our homes/lands automatically situates us in seats of peril. The land is the profitable discussion, but it cloaks another argument about capacity and therefore humanity.

Each time we hear about Indigenous peoples going to court to protect their land (land claim, title argument, property dispute) we are actually talking about whether or not we will acknowledge that Indigenous peoples are and have been human enough to hold on to territories in the way that settler peoples assert that humans do.

In identifying the contemporary application and rejuvenation of Indigenous philosophies and laws it is important to state that to do this, we are going to have to learn how to learn Canadian law. We will need to emancipate ourselves from the Canadian legal colonization of our minds. This will require not only knowing our own knowledge base but also what the colonizer knows. To remain critical while studying Canadian law, we are going to have to think of it as a different language, translating our thoughts and understandings to the most meaningful representation of the same. This fluency is only part of the task, though. We need to be fluent in our own languages, philosophies and laws and we need to translate from that place. Our first language, our Indigenous legal language, needs to be the place that ground us, the place that we situate our perspectives from, and where we translate from.

To remain critical, we need to think of Canadian law as foreign, incapable of accurate translation and as a second language. As a second language, we can visit it and accord it as much respect as we can, even get good at it, but it is not our home, not our mother tongue, and we need to make

that clear. The task is not to become fluent in that Canadian law / language. It is firstly to acknowledge the responsibility to provide Indigenous language instruction to embed proficiency in populations impacted by Indigenous law. Secondly, it is to know how to protect yourself from colonization of your mind by Canadian legal training and language.

Thinking critically in the context of Indigenous legal theory requires that legal scholars give up preconceived notions of uni/mono/singular definitions and that we give up our logomachy (arguments about words).⁸⁵⁶ Intrinsicly assigning worth and multidefinitonal status to words that have been colonized and generally assumed by the Canadian legal establishment to have one colonial meaning (law, government, authority, sovereignty) is part of the resistance. Training yourself to identify linguistic colonization is another. Colonial mindset inhabits words and philosophies, taking over and claiming meaning for itself, developing in many of us an imperialist myopia in which we assume seemingly innocuous “generally” acceptable language is universal.⁸⁵⁷ Eliminating that universality and creating intellectual and legal spaces for Indigenous conceptualization and actualities is part of the struggle in re-framing your language and decolonizing your mind.

In addressing identification of the contemporary application and rejuvenation of Indigenous philosophies and laws, I tell students that they have to trust in themselves that their Indigenous voice is a reflection of something actual. In this way, the identification really is about developing a contemporary critical Indigenous consciousness. In a Canadian legal context, I think there is a comparable fantastic equivalent. Thinking like a “reasonable” person and assuming there is one standard of reasonableness or likelihood is incredible and almost unimaginable. It takes a tremendous leap of faith to be able to assert that there is one standard. One voice of rationality in us. Critical Indigenous legal consciousness development requires that we listen to that voice of rationality within us. I tell students this: I don’t always know it when I see it, but I am learning to pay attention to that feeling, the one that says “This feels odd.” “This

⁸⁵⁶ Note the arguments over English words related to what is a treaty (*Marshall I* and *Marshall II supra* note 6, *Horseman, supra* note 661, and *Sioui, supra* note 43), what constitutes a living (livelihood, sustenance, or essentials), who is an Indian [*supra*, note 834 and *Martin v. Chapman*, [1983] S.C.J. No. 29 (S.C.C.) (QL)], and what is an Indian or what is a band [*Papaschase Indian Band No. 136 v. Canada (Attorney General)*, [2004] A.J. No. 999 (Alta. Q.B.) (QL)].

⁸⁵⁷ I note the Canadian legal universalization of legal terms such as “treaty”, “status”, “non-status”, “land claim”.

feels unfair.” It is a bit like responding to manipulation; you know something is off but you can’t (yet) quite put your finger on it.

Over time and with practice we hone those skills and listen to that voice in an effort to address rejuvenation. We need to be able to address what is home (what is ours, what that voice directs) and separate it from colonial constructions and definitions of the same. Being able to change our unconscious awareness of much of the colonial aggression to a critical Indigenous consciousness requires that we inform our minds as well as our bodies in response. The difficulty is: How do you resist what you do not see / understand / know is there? The identification of the contemporary application and rejuvenation of Indigenous philosophies and laws requires that we inform ourselves using contemporary tools and ancient ones. We need to ask questions, listen to that feeling, talk to people, read those who resist/resisted and recognize that there are few absolutes in Canadian law that are safe within which to situate yourself.

We need to address in a contemporary context and using traditional philosophies and laws what our relationship with our land is. Many of us speak of it, know it and proclaim it.⁸⁵⁸ We need to regularize the understanding and continue to share the information in oral traditions, writing, our own texts and media about our obligation and responsibility to land because of our relationship. We need to define and describe our home. For our children, for our systems, for Canadians and for Canadian systems.

Additionally, we need to discuss the meaning and import of reciprocity of relationships. Not just to identify and educate, but to assert and transform the body of knowledge accessible to and referential for Indigenous citizens and Canadian citizens. In truth, we need to hear it again as Indigenous peoples, but we also need to have the information accessible by non-Indigenous peoples. Our laws are rarely codified and oral traditions pass them down. If we are to assert that non-Indigenous peoples are breaking our laws (by not according with what laws their relationship prescribes) then we need to know the standards that we are all required to live by.

⁸⁵⁸ I have been fortunate to learn from my friend and colleague, the late Harold Cardinal, Chief Bernard Ominayak, Maria Campbell, Mary Ellen Turpel-Lafond, Winona Wheeler, Bev Jacobs, Maisie Cardinal, Sheldon Cardinal, and Stephen Augustine among others.

We also need to understand and inform ourselves that many, many people live by these laws and philosophies currently and that identification of the contemporary application of them is already done. They just live it. Many of us do not have access to the everyday and want to be a part of our nations' rejuvenation. Even those citizens who do have access to language and the laws are often interested in how to gather broader acknowledgement and recognition from nations. In this sense, addressing the elemental understandings and their role in the emancipation of Indigenous peoples from colonization is a fundamentally empowering act. Not just of anti-colonialism but of the establishment in the public domain of Indigenous legal realism.⁸⁵⁹ The construction of Indigenous legal identity has to be done by Indigenous peoples in an Indigenous context for any sort of rejuvenation to be valid or meaningful.

We need to address the liberation of Indigenous thought, language and culture in a broadly based manner. Education of and by Indigenous scholars and thinkers needs to be incorporated into curriculum development, classroom (outdoor or indoor) presentation, and home schooling for Indigenous children. This will mean development of Indigenous cultural camps, schools and jurisdictions for education. It will mean the development of Indigenous capacities and credential granting status. We need to preserve our language and distinct cultures and share them with Indigenous youth.

We need to develop and assert the authorities and capacities to provide critical thinking and critical and comparative Indigenous studies education for our leaders, community members, and other Canadians. This means developing coursework and writings on critical thinking from an Indigenous perspective and lobbying for the inclusion in primary and secondary schools, high schools, university and professional education institutions. We need to take leadership in critical Indigenous education, establishing our own institutions and institutional affiliations to share the information as broadly as possible.

We need to perform cultural audits in our community to determine the availability of, access to, and capacity for language, philosophy, laws, culture and critical thinking education. This will

⁸⁵⁹ There is much information that is sensitive, sacred, and/or irresponsible to share. This information has been and should be held closely by the Indigenous historians and spiritual leaders to whom it has been entrusted.

look significantly different in Indigenous territories than it will in urban settings. We have sometimes overlooked our own resources and assets (human and otherwise) to problem-solve. In order to effectively address Indigenous nation rejuvenation we need to determine what resources and strengths we already have.

We need to institutionalize Indigeneity. From a critical perspective, this means holding leadership and citizenship accountable for the inclusion of Indigenous theories, teachings, and lessons in the everyday. We “must form governments that will serve to prevent the abuse of human beings by other human beings and that will ensure peace among nations and peoples.”⁸⁶⁰

We need to define and assert definitions of health, wellness and community strength contemporarily in ways which are tied to those laws and philosophies. We have allied ourselves with an economic development swell for two decades now because there has been access and funding which accompanies this (it takes money to make money). We need to address the forms of wealth which are not necessarily readily observable under the microscope of economic wealth.

We need to hold public officials and offices accountable for the inclusion and celebration of Indigenous principles, worldviews and philosophies in laws and policies and related to Indigenous peoples. Those laws and policies need to be assessed from a critical Indigenous legal perspective to address what is unacceptable, what contradicts Indigenous laws, and where there may be common ground. I have said that critiquing without a goal of building something better is little more than clever wordsmithing. We need to address the intellectual, philosophical, moral and legal transgressions and fissures. We need to do so in order to become actors in this movement and elevate ourselves from recipient/receiver/complicit/observer/reactor. We also need to do it in order to address what it is that we require and/or desire as self-determining peoples. If we are to build and plan, if our capacity is to meet our requirements, and if our understanding is to eclipse our experience, we need to address the “why”. We need to assert what we require and desire. We don’t do this in order to respond to the policy and law. We do this in order to de-educate and de-mystify colonization – we do so in order to decolonize ourselves and to address that this is the time and the place where we no longer accept colonial

⁸⁶⁰ Akwesasne Notes, *supra* note 217 at 32.

rule. An Indigenous reasoned critique enables us to move forward and address our own education and the ways and means in which our laws and policies will support our self-determined and autonomous capacities.

We need to gather as Indigenous nations and discuss our colonial experience. We need to gather as Indigenous nations and discuss our philosophies and laws in order to examine the possibilities for unity, our strengths and the possible obstacles we might face. We need to address problem solving in a critical way and take responsibility for our own education and alliance building. Each of us needs to meet our obligation to become schooled in our own language and our own culture. For an urban Indigenous person, this may mean actively developing a language program at the Friendship Centre, developing a language preservation board, paying a community member for lessons. It may mean developing an Elders' forum and applying for funding to get urban Elders together in one place a few times a year. It may be organizing a cultural camp in affiliation with another organization, finding funding for an urban stories conference or buying cassette tapes, taking trips to Indigenous communities to make alliances, or offering your skills as a volunteer to an Indigenous college. It starts with one person, the revolution of one. For Indigenous peoples who live in their traditional territory, it may mean providing the structure and funding for Elders to meet and take a leadership role in the education of children. It may mean developing Indigenous schools and lobbying for the inclusion of Indigenous information in all schools.

F. Translating?

1) Critical Tools

Developing a critical framework, particularly an Indigenous critical framework, means that we have to develop that toolkit, those glasses that allow us to look at the world in a different way. In a real sense, it means that you have to do an internal audit to know what your perspective is, what your tools are, and which tools you need to gain.

I will give you a personal example, because I think that it has relevance to the discussion and may make it easier to understand what I am talking about. My internal audit includes the

knowledge of what it is to have to steal toilet paper because you have no money. My internal audit includes the knowledge of what it feels to be maligned and disregarded because of your gender. My internal inventory includes a full file of observations and understanding about what it is like to have a racial/gender slur thrown at you. My internal audit includes a file on the effect that being an Indigenous woman has on the interaction that you have with store clerks, airline clerks, clothing store personnel, potential employers, and potential landlords.

My internal audit also includes a sharp understanding of the notion of inclusiveness as one who has been excluded repeatedly. My internal audit includes an excellent skill set that allows me to interpret and examine Canadian law from a grounded place as I am schooled in Canadian law. My audit identifies that my Cree language skills are wanting, my knowledge of Indigenous laws and philosophies is still expanding, and I have a very strong connection with the land that my people come from. I still live here. My ground is hallowed and has been nourished by lessons in classrooms, at kitchen tables, in ceremonies and boardrooms. My internal audit reveals that I am honest. That I strive for respect and humility in all events. That after being silent, painfully so, for many years I now have voice.

For each one of us who found it, regained it, searching for it or born with it, that voice is important.

I want you to know that as a person silenced for years, I have come to understand that critical theory is the place where I am able to validate and give voice to all of these tools that an internal audit reveals. Law school and legal training related to 'facts', 'relevant facts' and objectivity has been a major silencing factor in many peoples lives. Critical theory is the place where you can give that invaluable experience, not in books or enumerated fully anywhere else. My theory and understanding is that a fact is relevant if it resonates and gives voice to facts which have not been deemed relevant before.

What I have come to understand is that our experience and lives lived, our voices and our perspectives, are relevant facts. I also know that as Indigenous peoples our visceral response to what we read and how we perceive it is an essential part of our critical framework. While we

develop our understanding of critical Indigenous legal theory, when we are examining anti-colonial and resistant approaches to colonial thought (laws), know that our response to the same, identifying the impact it has on us, identifying the silenced voices and missing relevant facts is an anti-colonial and resistant act. Our rage, our anger, our joy, and our silencing are an important part of the critical Indigenous theory that can be developed with authenticity and with an eye to your emerging critical consciousness. That we can separate the same is some mythical existence, which according to Battiste and Henderson assumes that our language and sensual response is inessential to and independent of some categorical⁸⁶¹ and quantifiable essence that exists outside of the natural world.

Giving voice to it as action is important; our experience and understanding adds to a pool of limited information and knowledge. However, it is important that we acknowledge that regardless of the pool of information that we contribute to (should we choose) and the degree of our development as critical thinkers, that some concepts, theories, philosophies, laws and worldviews will likely remain untranslatable.⁸⁶²

To some degree, sharing our philosophies and laws, institutionalizing and educating about our philosophies and laws may allow us to identify a shared experience and broach the possibility of a shared language, but this requires all actors in the colonial experience to name their participation and address responsibility and obligation in a meaningful way. For this reason, some things will be untranslatable.

Maybe the truth of it is that the English language (and Canadian legal language) is untranslatable. That grammar is loaded against us; superiority and ownership entrenched in its verbs. Its nouns and pronouns alienate and objectify us. Hearing ourselves pronounced 'they' so often, some of our people begin to believe in our otherness. If we do so, we would follow the Anglo-Canadian logic and linguistic path to the homes and circumstances you have built. We have onus and responsibility, there is no doubt of that. One of them is honouring the treaties that

⁸⁶¹ Marie Battiste and James Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage A Global Challenge* (Saskatoon: Purich Publishing Ltd., 2000). At pages 24-25 the authors write about the fissure that exists between Eurocentric thinkers (who believe that knowledge can be quantified and categorized) and Indigenous thinkers (who feel and sense information, which is part of a knowledge base).

⁸⁶² Chamberlin, *supra* note 814 at 14.

we have made. Perhaps we did not translate your intention well. Living outside of balance is observable, but untranslatable. Taking what you cannot own is untranslatable. Deciding who is a citizen of a foreign nation is untranslatable. Taking children from their parents and the language from their tongues is untranslatable.

And our translation problem was not just a theoretical one, but a practical one. Once we did send our children off to schools to learn your language there was, at least, a fair share of alienation that occurred.⁸⁶³ From community, family, self. Those who made the sacrifice to leave did not always return. Some who returned were changed. Through dogma. Through design. Through choice. They could not translate what they no longer knew or wanted to remember. So we became reliant on good natured people who tried to translate our experience through their own filters of oppression or who tried to imagine colonization. As if they were not a part of it. As if we did not have our own tradition of intellectualism and professionalism.

It is difficult to translate a human, the humblest of creatures, coming into another human's home and pronouncing that by virtue of showing up he had as many rights as the Creator into a complex set of understandings about the roles of the Creator.

The malleability and adaptive nature of Canadian legal ideals and principles is difficult to translate in the context of concrete understanding and consistency of belief.

As a result of these complex and unshared spaces of understanding, it has been useful for many of us to develop our thoughts and understandings of life among the colonizers in two ways (Mari Matsuda calls this dual consciousness).⁸⁶⁴ We have been required to learn a multiple consciousness in order to resist the colonial tide. We need to know where we come from, what our source of strength is, what our beliefs are, how we received and treat our territory, what our obligations are, how we are connected to ancestors and family, and the full and rich nature of our

⁸⁶³ For additional readings on this topic, see Roland D. Chrisjohn and Sherry Young, *The Circle Game : Shadows And Substance In The Indian Residential School Experience In Canada* (Penticton, B.C.: Theytus Books, 1997), Marie Battiste and Jean Barman, *First Nations Education In Canada : The Circle Unfolds* (Vancouver : UBC Press, 1995), Agnes Grant, *No End Of Grief : Indian Residential Schools In Canada* (Winnipeg : Pemmican Pub., 1996), Linda Jaine, ed., *Residential Schools: The Stolen Years* (Saskatoon : University Extension Press, Extension Division, University of Saskatchewan, 1995).

⁸⁶⁴ Marie Matsuda, "Looking to the Bottom" in Crenshaw et al, *supra* note 815, 63 at 67.

existences as Indigenous peoples. Our second consciousness means that we also need to know how to interpret the mores, motivation and intent of settler peoples. We need to know how they gave effect to this and how this impacts us as peoples. This enables us to resist the colonial impact. However, we also need to develop another consciousness, one which stems from a thorough understanding of where we come from and where non-Indigenous peoples come from: we need to develop a consciousness of and capacity to not only resist colonization but also to rejuvenate Indigeneity. This anti-colonial consciousness in which we identify how we can honour the place we come from in light of our colonial experience is what we are struggling with when we amass on our borders, when we develop our self-determining capacities, and when we build our own schools.

Identifying why we are so dislocated and whose obligation it is to clean that mess up is the start. The real challenge is the rejuvenation of that place we come from in an anti-colonial and Indigenous loving context. In this third consciousness the praxis is living a good life, maintaining those principles and requiring that all peoples take responsibility for the development of a strong relationship as cousins. It means addressing obligations and requiring that people take responsibility for their actions and the colonial apparatus. It means taking responsibility and acknowledging who benefits from colonization, who has economic wealth and land holdings as a result of their investment and role in colonization. It is about acknowledging not just racial privilege, but the privileges that history has bestowed on families, communities and settlements. Acknowledging that there has been benefit taken without cost and that there is a price tag (economic, social, or otherwise) attached to that benefit, regardless of the free ride to date.

In his article, "Racial Realism" Derrick Bell writes that is hard to argue that "*Black people will never gain full equality in this country...This mindset [racial realism] or philosophy requires us to acknowledge the permanence of our subordinate status. That acknowledgement enables us to avoid despair and frees us to imagine and implement racial strategies that can bring fulfillment and even triumph.*"⁸⁶⁵ I am not ready to be a racial realist, or at least accept that reality. I am aware that a praxis of anti-colonialism requires that there is optimism and hope. While I am

⁸⁶⁵ Derrick Bell, Jr., "Racial Realism" in Crenshaw et al, *supra* note 815, 302 at 306.

aware that we speak entirely different languages, I live in hope that we can articulate a new idiom. This will mean that in addition to dismantling the colonial apparatus and parsing how that has influenced the language of Canadian law, that we will all have to find or create the means to listen to those ancient voices in the places that we live now.

2) Critical Checklist

Studying Canadian law in Canadian and American laws schools helped build the beginnings of a critical perspective for me. The tools that I took from that experience were those which enabled me to question all intent, relevance and analysis. Just as western law holds itself out as value neutral, so is the value that I assign to the logic, analysis and decisions. Knowing that any side can win given the strength of argument and the resources to build a case is quite liberating. Disengaging ourselves from the role of participants who select the information and rules and replicate it in our arguments and choosing as critical thinkers not to invest ourselves in the findings or commit to the rules allows us to examine them from positions of observers. My experience is that when I allowed myself to accept the outsider status that I have in the Canadian legal system as valid and worthwhile, I was able to understand that Canadian law is a tool in a toolkit. Committing to the community that I come from and knowing that that place, the people and the lessons coming from them are the only real home that I have allowed me to begin to understand the worth and importance of home in our observation of Canadian law. As long as we are home, then our intellectual and physical responses to Canadian law are measurable and validated. As long as we are home, we are able to ground our experience of Canadian law in a healthy and respectful discussion of the intent, impact and effect of Canadian legalized colonization on our people.

Grounding our critique from home enables us to include balance (spiritual, emotional, physical and intellectual) in our observation and critique of colonial law. We are able to ask the questions that law schools and court rooms require we leave at the door. Those questions are an articulation of our response to colonization and leaving them at the door requires a form of cooptation that silences us. Those questions that we ask, and frankly what we have always

spoken about, are at the root of Indigenous consciousness. When we read a case in my critical Indigenous legal theory course, I ask students to tell me: What are your impressions (dangerously close to, “How does this make you feel”)? The question is an important one. As an Indigenous student and scholar, I have found my thoughts and understandings footnoted, alluded to, diminished or ignored. Asking Indigenous students what their impression and understanding of case law is invites them into the Canadian legal home. It also encourages critical Indigenous legal theorists not to leave their Indigenous understanding at the door and demonstrates that the experience, understandings and knowledge they bring from their homes are valuable and valued.

I encourage students to do the fantastic: tell me if this feels fair or just, tell me what interests are protected, tell me what assumptions are made about your community, tell me if there is evidence of pan-Indianism in the court’s decision. Once those thoughts are validated and our understandings acknowledged, then we are able to ask questions and observe logical inconsistencies from an Indigenous analytical perspective. Our critical Indigenous legal consciousness develops because we are better able to understand the determinative and acquisitive facets of Canadian law. We are better prepared to analyze who defines the right, who benefits from the right, and who benefits from the precedent. In doing this we are also able to determine what assumptions are made about Canadians, Canadian law and Canadian governmental rights. We can determine whether there is a capacity to address Indigenous understandings and laws from our territory and understanding.

I am happy to remain a visitor.

In my experience teaching critical Indigenous theory I have found it useful for students to address western logic in ways that require not only that we look to assumptions of authority but also presumptions of characteristics of Indigeneity (which sometimes transfer to presumptions related to the determinations related to rights).⁸⁶⁶ If it is assumed that the Indigenous relationship

⁸⁶⁶ See the taxation cases including and following *Williams v. Canada*, [1992] 1 S.C.R. 877, involving Indian peoples who must meet a number of “connecting factors” in order to receive their tax free right, arriving at a formula that intrinsically looks like: the more connected to White society you are, the less Indian you are, the less Indian

with land can be severed and is contingent, that sovereignty can be divested by intent, that Indigenous rights are subject to foreign interest because they showed up, it is important that we identify not only who benefits from Canadian law but what characteristics of Indigeneity are presumed to render us 'rightless' (children, unaccountable, incapable).

In scrutinizing Canadian law from home we are able to see notions of supremacy in action, explicit or implicit in Canadian law, cases, and policies. We are able to participate in the identification of our oppression and free ourselves of that internalized image of ourselves. The solution has to begin and end with Indigenous peoples' understanding of the nature and roots of our colonized oppression. We also need to think of this as an exercise that begins with identification and knowledge and which will enable us to discuss emancipation. Freire wrote of this:

The solution cannot be achieved in idealistic terms. In order for the oppressed to be able to wage the struggle for their liberation, they must perceive the reality of oppression not as a closed world from which there is no exit, but as a limiting situation which they can transform. This perception is necessary but not a sufficient condition for liberation; it must be the motivating force for liberating action.⁸⁶⁷

We need to consider our Indigenous rights those which came to us as obligations from an Original source. We need to do this critically to enable us to move from the observation of our Canadian legal reality⁸⁶⁸ to acting upon it and rejuvenating our own actuality. In this way we are able to see the construction of our legal identity by Canadian courts and governments as an external and colonial misconceptualization and assert our own philosophies and laws governing the same with renewed vigour. One challenge I put to my students is to examine case law critically and to develop those skills, I ask them to use the following checklist:

The Critical Indigenous Legal Theory Checklist

1. What is your first response to the reading of the materials?
2. Is there an emotional response?

rights (in this case, taxation) apply to you. However, see the *Corbiere* decision, *supra* note 6, in which residency on the reserve was found not to be required in order to vote in band council elections.

⁸⁶⁷ Freire, *supra* note 304 at 49.

⁸⁶⁸ Freire wrote of this, "...the oppressed must confront reality critically, simultaneously objectifying and acting upon that reality." *Ibid.* at 52.

3. Intellectually, what is your first response?
4. What filter / tools do you need to access the information in its entirety?
5. What is missing for this case to be understandable to you? What don't you know?
6. Is there an oppressed/oppressor in this situation?
7. Whose voice is heard/not heard?
8. What are the 'relevant' facts that you see or that you see as missing?
9. Is there an inclusion issue?
10. What worldview is represented? What worldview is not?
11. Are there shared values in evidence?
12. Are there Eurocentric assumptions made?
13. Are there stereotypes in evidence, un/addressed?
14. What values are addressed in the context of this incident/case/idea/understanding?
15. Which values are not addressed?
16. What ethical / moral / natural grounding is in evidence or missing?
17. What does your critical consciousness tell you about this particular incident/case/idea/understanding?
18. Is there a notion of reciprocity?
19. Respect?
20. Interconnectedness?
21. Balance?
22. Is there de/humanization evident?
23. What Indigenous laws are being broken here?
24. What evidence is there of Indigenous world views (i.e. government)?
25. How does the incident/case/idea/understanding inform your understanding of the actuality or need for Indigenous inclusion or autonomies in this area?
26. What does de-colonization mean in the context of your contribution the judge's / Crown's / other understanding?
27. Are there assumptions made about:
 - the natural world
 - perceptions about / linguistic categorization of the natural world
 - inferences which can be made or have been made arriving at "truths"

28. Is this a complete story? If not, what is missing?
29. What does your analysis tell you about the need for reform / reeducation / reconciliation?
30. What is your obligation?
31. What is the praxis you move towards?

It is hard work. After time, the list lengthens or shortens but the notion of critical Indigenous legal analysis can become intrinsic to your thinking and it compels you to think critically. While the list is explicit and students make the assessments out loud, it is at times difficult to hear the analysis and discussion. Part of it is that addressing oppression/colonialism in this manner requires that you examine your own complicity in it and commitment to its eradication. In identifying many of the answers to these questions we are required to take an accounting of White supremacy and audit colonialism and imperialism. This is painful and I can tell you from experience that discussing the same opens up a whole unimagined realm of pain and disclosure as people intricately relate to the process and/or effect of supremacy on themselves, their families and nations.⁸⁶⁹ The space between “this happened” and “I did this” or “I feel this” is curtailed and a consciousness about responsibility, obligation and responsiveness often evolves. bell hooks has written of this, in the context of racism:

This disconnect between their conscious repudiation of race as a marker of privilege and their unconscious understanding is a gap we have to bridge, an illusion that must be shattered before a meaningful discussion of race and racism can take place.⁸⁷⁰

In using this list, expanding on it, and sharing with others I hope that I have participated in praxis which identifies and names oppressors and oppression and which separates toxicity from good intention, kindness and hope. More importantly, I am able to address what is equitable and what is fair in a Cree context because I thoroughly understand the Master’s house and the construction flaws. My toolkit includes information, analysis and knowledge grounded in my home. I have also come to understand what a privilege it is to have knowledge and information and how rare understanding is.

⁸⁶⁹ bell hooks wrote of this, “In a culture of domination almost everyone engages in behaviors that contradict their beliefs and values.” hooks, *supra* note 33 at 29.

⁸⁷⁰ *Ibid.* at 26.

Coming to this place I am well aware that the strict Cree laws regarding *tapwewin* (truth)⁸⁷¹ are and I hope that the list that all of us develops brings us closer to an understanding of the Indigenous laws regarding honesty in the telling of our experience of and responsibility for Canadian law.

⁸⁷¹ Cardinal and Hildebrandt, *supra* note 18 at 48.

Letter

December 17, 2006

Dear Friend,

I am remembering you so much this week as I finish this paper. I remember once that you came to me and asked me to find out all I could about the ways in which African Americans responded to colonization. You wanted writing and readings on critical theory. I wonder if we all had a primer on this, if we all were able to speak globally and more broadly about colonizer action and the actions of people who faced that violence, if we would be better able to win some of these battles?

When I started writing this, you were alive. I thought we would have hours to talk about this and that you would be able to read this, let me know where I was too harsh (and let me know when my English self was too present). My hope is that I have written the paper that you had hoped you would find out there, the one which didn't exist, the one which allows us to pull our ideas together with other peoples who are facing colonial realities. The one which allows us to see the particulars of our colonial experience as the invention of peoples who want control of our homes/lands.

I have never pretended to be an expert on our laws and I did what you said, and referred to the sources you trusted. It is humbling to know how little I know. It is exciting to know how much I have to learn.

I miss you on this journey and wonder how our toolkits would have developed as we grew old.

G. Conclusion

These things stay with me:

We never gave up the land. We cannot give the land. We have been on the land since time began. We are the rightful peoples on those lands.

We agreed to share. We entered sacred treaties addressing that sharing. We have met our obligations in those treaties.

We are citizens of our nations. We have been dissected, labeled, named and categorized externally. We assert our own nationhood and citizenship.

Our relevancy and precedents, as foreign as that terminology is, are embedded in our philosophies, laws and lives lived. Our precedents include the experience of colonization and interaction with colonizers. This is relevant to our existence but it is not the defining characteristic of our lives. Our defining characteristics have been and need to continuously be identified in our voices. From our homes.

People will fight to the death to protect family, home and nationhood. We are fighting for our lives.

Critical skills are just one item in a toolkit that includes our language, ceremonies, history, blood memories and a host of other unimaginably rich tools. Protecting these and giving them effect can be strengthened, I believe, by strengthening our critical tools. Our critical tools that need enhancing include the development and strengthening of our Indigenous critical consciousness and our language of Indigenous law. In order to critique and give strength to the praxis that moves our critique forward, we need to acknowledge and access the skills related to interpreting and critiquing Canadian law from Indigenous places. Identification of our own “made in Indigenous nations” praxis can effectively start with the identification of our traditional Indigenous philosophies and laws in accordance with our laws and protocols. Identification,

assertion and acknowledgement are intricately linked and can enable us to address what additional tools we need to give effect to those relationships governed by our philosophies and laws. Identification is not enough. If it was, we would have seen huge changes after the release of the Royal Commission on Aboriginal People's *Report*. Identification of colonial laws, policies and regulatory schemes impacting Indigenous peoples cannot occur in a knowledge vacuum. Identification has to include motivation and education for it to be a dynamic praxis and not an information exercise.

Similarly, the identification of the contemporary application and rejuvenation of Indigenous philosophies and laws cannot be effective without reference to the host of other tools in our Indigenous critical consciousness tool kit. The obligations and responsibilities that we have as Indigenous peoples must be addressed in the context of translation. Some things cannot be translated. Others cannot and should not be translated. In order to address the rejuvenation of those philosophies and laws we need to be aware of our precedent – our relationship with and interaction with non-Indigenous citizens and government. We need to be cognizant of the impact that sharing information, traditions, laws and philosophies has had in the past. We also need to be aware of the importance of translating and sharing knowledge in accordance with the nature of the relationship that we have. As cousins, we have some obligations and responsibilities to each other and information sharing can be done in the context of what that relationship requires. Some translation can occur. In concert with a strategic information sharing plan with an existing or developed Indigenous critical legal consciousness, we will be able to inform about our intent and actuality.

There are spaces of shared experience that we can reflect upon and perhaps build upon. Settlers have demonstrated that they too have the capacity to share stories and honour histories. What is a courtroom if not a space where storytelling occurs (albeit in a very limited language)?⁸⁷² This is not just about translating unlike terms into a shared language, it is also about identifying, informing about and asserting your language. I am not talking about informing Canadian courts about our language, but about developing critical strategies for the advancement of an

⁸⁷² Torres and Milun, in Crenshaw et al *supra* note 815 at 178. The authors wrote of storytelling: "Courts are like mirrors they reflect where we are from a space where we are not."

Indigenous critical consciousness. Of course, I hope the Canadian system will expand its vocabulary and that English legal language and philosophies will evolve to address the imbalance of power.⁸⁷³ Torres and Milun wrote of this (in terms of the Mashpee nation's struggle with the American legal system to define their citizenship):

The law does not permit the Mashpee's story to be particularized and yet to remain legally intelligible. By imposing specific "ethnolegal" categories such as "tribe" on the Mashpee, law universalizes their story; this universalizing process eliminates the differences the dominant culture perceives as destabilizing.⁸⁷⁴

Our experience within the Canadian legal system is quite similar.⁸⁷⁵ Predicated upon notions of owner and owned, superiority and inferiority (at least, of rights or claims), and self and other, the legal dialogue with regard to Indigenous peoples is one based on permission. With that vocabulary of assumed authority entrenched we cannot have an honest or egalitarian legal story told. "Instead, the inability of the law to hear or equally weigh, culturally divergent versions of "the truth" should be examined to help us understand how social knowledge is constructed"⁸⁷⁶ the authors wrote.

We are talking about the truth. How to share our truth. How to ensure that our truth is uncorrupted. How to make sure that our truth is defined by our citizenship and told in our own language and voices. Law is easy. Truth is hard. Law, in its purest form, should be about finding ways to peacefully co-exist with each other. The hard truth is that Canadian law and law making does not accomplish this. Developing and exercising a critical Indigenous legal consciousness is one tool that will assist us in telling our truth and achieving our own peace.

Rejuvenating our own laws and philosophies requires that we share the knowledge with our nations and identify what these laws and philosophies look like in their truest form, how they have been impacted by colonization, and how we will give them contemporary life in light of our beliefs, values, worldviews and existences. We cannot find peaceful co-existence until we

⁸⁷³ *Ibid.* at 180, in which the authors refer to the narrowed legal definitions of community and citizenships in which changing the legal definition of terminology reflected the changing relations of power.

⁸⁷⁴ *Ibid.* at 179.

⁸⁷⁵ The ethnolegal categorization and divisions related to identity (status Indian, non-status Indian, treaty Indian, Métis, Inuit) and to community and national designation (bands, in a Canadian legal context) does not enable a humanly (let alone legally intelligible) story of our actuality.

⁸⁷⁶ Torres and Milun, in Crenshaw et al *supra* note 815 at 178.

engage in a concerted decolonization of our minds. As we are told by the Mohawk, if our minds are healthy we desire peace.⁸⁷⁷

In this way, peace can come to us in acknowledging that "...creation is intended for the benefit of all equally...The world does not belong to humans..."⁸⁷⁸ Law can unify.⁸⁷⁹ Canadian law has been and continues to be a source of disharmony and division among Indigenous nations. We are obligated to each other as relations and have shared and dissimilar responsibilities. Canadian legal training and the Canadian legal system has contributed to colonizing of our minds. If we were to pursue a dichotomous agenda we would not be pursuing a good relationship of mutual and respectful co-existence.

Above all, there must be hope that Indigenous laws, philosophies and systems can be rejuvenated and that critical Indigenous legal theory can support these efforts.

⁸⁷⁷ Akwesasne Notes, *supra* note 217 at 32.

⁸⁷⁸ *Ibid.* at 33.

⁸⁷⁹ The editors of Akwesasne Notes wrote, "The law unified the peoples, saying that they were distinct from one another only because they spoke different languages." *Ibid.* at 35.

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Rejuvenation, I have come to realize, does not have to mean that anything is lost, that anyone has lost something, or that anything is altered, depleted or changed. Rejuvenation does not have to mean "breathing new life" into something. The life exists. It can mean, however, that for those of us who have watched our laws, traditions and understandings from the outside there is an obligation to animate ourselves, stimulate our understanding of them, and restore our own faith in their profoundly important teachings. In a sense, we are our own renovation project. Indigenous critical thinking lets us examine how to most respectfully engage with our ancient teachings in a way which does no harm to the places and people we come from.

There is an accounting here, but before we can audit any other system, any other government, or any other laws, we need to take responsibility for our reconciliation with and knowledge of our own (and the protocols regarding the same).

We owe our children hope. Hope that the colonial steamroller will run out of the fuel of imperialism. Hope that we can contribute to the depletion of the fuel of ignorance and aggression. Hope that knowing the language and culture of oppression will aid in its defeat.

So, where are we going then? Where does this take us? Mostly, I think it takes us to places we have been. Places we continue to live in. Places that continue to live within us. I am excited to see where rejuvenation and celebration can take us. We have the luxury of time; there is no dying Indian in this story. We have proven to be resilient. Mere survival has

never been the goal; reclaiming and retaining the quality of life that permits us to celebrate in our languages, in our territories, in our homes is not resistance. It is life.

All of which is said with good intention.

**APPENDIX A: A Sampling of Indigenous women missing in Canada or killed as of
November, 2005.**

Person missing or killed	Accused / Perpetrator	Rural / Urban	Details	Sentence?	Year
Serena Abbotsway ⁱ	Robert Pickton	Vancouver, BC	DNA of 29 year old found at Pickton farm.	Robert Pickton charged with murder.	August 1, 2001
Yvonne Marlene Abigosis ⁱⁱ	Unknown	Vancouver, BC	Missing 23 year old	Unsolved	January 1, 1984 – May 22, 2002
Sharon Nora Jane Abraham ⁱⁱⁱ	Unknown	Vancouver, BC	Missing 35 year old	Unsolved	2000-2004
Rachel Adams ^{iv}	Unknown	Lion's Bay, BC	Murdered	Unsolved	October 3, 2004
Bernadette Ahenakew ^v	Unknown	Rural Sherwood Park, AB	Found in a ditch	Unsolved	Found October 25, 1989
Laura Anne Ahenakew ^{vi}	Cindy Caron	Saskatoon, SK	Stabbed	Charged with second degree murder, committal to stand trial for first degree murder at trial. CA upheld.	September 20, 1985
Inusiq Sarah Akavak ^{vii}	Kootoo Korgak	Iqaluit, NWT	Strangled	Accused appealed his second degree murder conviction. Life in prison without parole eligibility for 12 years. Appeal dismissed.	February 10, 2000
Gertrude Anderson ^{viii}	Unknown	Unknown	Unknown	Unknown	Unknown
Patricia Andrew ^{ix}	Gilbert Paul Jordan	Vancouver, BC	Alcohol poisoning. Jordan was present at 6 drinking incidents, each involving an Aboriginal woman. Six women died from over-consumption of alcohol.	No charge was laid related to Patricia; one conviction of manslaughter in the death of Vanessa Buckner.	June 28, 1985
Cassandra Lailoni Antone ^x	Unknown	Richmond, BC	Murdered 20 year old	Unsolved	June 1, 1997
Anna Mae Pictou Aquash ^{xi}	Arlo Looking Cloud	Indigenous from Canada Dakota Badlands	Shot 24 year old	Guilty of first degree murder.	February 1975 – February 24, 1976
Lorrain Arrance ^{xii}	Unknown	Unknown	Unknown	Unknown	Unknown
Sharon Arrance ^{xiii}	Unknown	Unknown	Unknown	Unknown	Unknown

Susan Assin ^{xiv}	Unknown	Rural Kenora, ON	Stabbed	Unsolved	June 17, 1974
Laverna Avigan ^{xv}	Unknown	Unknown	Unknown	Unknown	Unknown
Lorraine Sue Awasis ^{xvi}	RCMP	Alert Bay, BC	40 year old shot during a "domestic disturbance".	Investigation	February 28, 2003
Crystal Peggy Baker ^{xvii}	Unknown	Coquitlam, BC	35 year old found floating in Fraser River (foul play)	Unsolved	April 22-May 19, 2002
Karen Baker ^{xviii}	David Raymond Couture	Vancouver, BC	Suffocation / strangulation	Guilty of second degree murder. Appeal allowed and new trial ordered.	September 12, 1986
Alice Baldhead ^{xix}	Baldhead	Cote Indian Reserve, SK	Shot	At trial, manslaughter and 10 years. On appeal, reduced to three years.	May 13, 1965
Marie Edith Banks ^{xx}	Unknown	Winnipeg, MB	Strangled 18 year old	Unsolved	July 26 - August 15, 1983.
Janet Basil ^{xxi}	Unknown	Vancouver, BC	33 year old stabbed to death	Unsolved	August 1, 1985
Nadine Beaulieu ^{xxii}	Foster parents Clifford and Laura Richard	Pine Creek First Nation, MB	23 month old died of blow to stomach	Charged with manslaughter and failure to provide the necessities of life.	February 21, 1996
Patricia Belcourt ^{xxiii}	17 year old arrested.	Edmonton, AB	Burnt to death	A 17-year-old was charged with second-degree murder and interfering with a dead body.	August, 2001
Samantha Evelyn Belcourt ^{xxiv}	Unknown	Edmonton, AB	Missing	Unsolved	October 9, 2004 – has been seen since then
Deanna Marie Bellerose ^{xxv}	Unknown	Edmonton, AB	Missing	Unsolved	August, 2002
Edna Bernard ^{xxvi}	Unknown	Leduc, AB	Burned	Unsolved	September 23, 2002
Christine Billy ^{xxvii}	Unknown	Unknown	Unknown	Unknown	Unknown
Lorna Ulmer-Billy ^{xxviii}	Unknown	Surrey, BC	Missing 14 year old	Unsolved	January 7, 2005
Farro Bird Kerry Naytowhow Greg Naytowhow ^{xxix}	17 year old male	Montreal Lake, SK	Shot	March 15, 2006 court appearance scheduled.	March 2, 2005

Shawna Lee Bird ^{xxx}	A.J.S.	Mameo Beach, AB	16 year old beaten to death	Charged with second degree murder. Jasmine Rowan and Kimberley Paul were proceeded against as adults. 17 year old applied for proceeding to be heard in youth court. Court found proceedings would take place in adult court.	August 21-22, 2001
Cheryl Lynn Black ^{xxxI}	Unknown	Edmonton, AB	Burned	Unsolved	May 18, 2004
Nancy Jane Bob ^{xxxii}	Trevor Rodney Peters	Vancouver, BC	Murdered	Life sentence	August, 1990
Dahleen Kay Bosse ^{xxxiii}	Unknown	Saskatoon, SK	Missing	Unsolved	May 18, 2004
Eileen Bradburn ^{xxxiv}	Jeffrey Crane	Winnipeg, MB	Kicking – blunt impact trauma to the head	Originally charged with second degree murder, plea to lesser offense of manslaughter. Eight years imprisonment	February 14, 2002
Delores Dawn Brower ^{xxxv}	Unknown	Edmonton, AB	Missing	Unsolved	May 13, 2004
Ada Elaine Brown ^{xxxvi}	Unknown	Prince George, BC	Found dead in bed, aneurism following a beating	Unsolved	2001
Christine Brown ^{xxxvii}	Terry Samuel Arnold	Hedley, BC	15 year old sexually assaulted and hit on head with a rock	Appealed finding of first degree murder. The appeal was allowed and a new trial ordered.	Summer, 1991 Remains discovered October 31, 1992
Annette Bruce ^{xxxviii}	Unknown	Unknown	Unknown	Unknown	Unknown
Vanessa Buckner ^{xxxix}	Gordon Paul Jordan	Vancouver, BC	Plied with liquor and drank to death.	Manslaughter, Sentenced to 2 years.	October 11, 1987
Maggie Lee Burke ^{xl}	Unknown	Edmonton, AB	Missing	Unsolved	December 9, 2004
Constance Lynn Cameron ^{xli}	Unknown	Winnipeg, MB	Strangled	Unsolved	August 3, 1984
Trina Campbell ^{xlii}	Robert Douglas Worth	Brampton, ON	Decapitated 12 year old	At trial, found guilty of second degree murder and sentenced to life imprisonment without parole for 23 years. Appeal dismissed. Leave to appeal to SCC dismissed.	December 13, 1987

Gail Cardinal ^{xliii}	Unknown	Rural Fort Saskatchewan, AB	Remains found.	Unsolved	1983
Jessica Cardinal ^{xliiv}	Unknown	Edmonton, AB	Found in an alley	Unsolved	June 14, 1997
Joyce Marie Cardinal ^{xliv}	Todd Christopher Elliot	Edmonton, AB	Beaten, doused with gasoline and burned alive	Arrest made: Todd Christopher Elliot	November, 1993
Loran Carpenter ^{xlvi}	Unknown	Unknown	Unknown	Unknown	Unknown
Kim Casimer ^{xlvii}	Voyne Mathias Baptiste	Near Oliver, BC	21 year old sexually assaulted and killed by blows to the head	At trial, first degree murder, while committing/attempting to commit a sexual assault. On appeal, the conviction was upheld.	December 22, 1989
Charlene Catholique ^{xlviii}	Unknown	Snowdrift, NWT	Missing	Unsolved	July 18, 1990
Annie Cedar ^{xlix}	Unknown	Unknown	Unknown	Unknown	Unknown
Donna Charlie ⁱ	Gerald Smaaslet	Prince George, BC	Cause of death could not be determined. 22 year old Donna's head was never found.	Guilty of second degree murder. Case appealed, new trial ordered. Smaaslet was found guilty of confining and assaulting Cheryl Koe in 2001. ⁱⁱ	September 1-8, 1990
Sherry Charlie ⁱⁱⁱ	Ryan Dexter George	Port Alberni, BC	Suspicious death of 19 month old	Charged with second degree murder. Plead guilty to manslaughter and sentenced 10 years.	September, 2002
Donna Chartrand ^{liii}	Unknown	Unknown	Unknown	Unknown	Unknown
Tracey Leigh Chartrand ^{liv}	Unknown	Vancouver, BC	Body found in shallow grave	Unsolved	April, 1995
Rosa Chicksi ^{lv}	Ernest Raddi	Tuktoyaktuk, NWT	27 year old stabbed 56 times	10 year sentence	June 15, 2001
Heather Chinnock ^{lvi}	Unknown	Vancouver, BC	Missing	Unsolved	April 1, 2001
Christina Lorraine Christison ^{lvii}	Cyrus Thunder Crane	Whalley, BC	Beating and stabbing.	Second degree murder, parole eligibility at 10 years	April 18, 2002
Holly Cochrane ^{lviii}	Unknown	Unknown	Unknown	Unknown	Unknown
Amanda Cook ^{lix}	Clayton George Mentuck	Rosburn, MB	Blows to the head and face	Charged with second degree murder. Acquitted	July 13, 1996
Josephine Coty ^{ix}	Unknown	Vancouver, BC	Missing	Unsolved	1996

Nina Louise Courtepatte ^{lxi}	Michael Erin Briscoe Joseph Wesley Laboucan 17 y.o. male 17 y.o. female	Stony Plain, AB	13 year old killed by blunt force trauma	Four individuals charged with first degree murder.	April 4, 2005
Dawn Crey ^{lxii}	Unknown	Vancouver, BC	Murdered 43 year old	Unsolved DNA identified at Pickton farm.	November 1, 2000
Laura Lee Cross ^{lxiii}	Unknown	Rural Halifax, NS	Skeletal remains found. Police believe she is a victim of homicide.	Unsolved	July 13, 2001 – October 14, 2002
Sonya Nadine Mae Cywink ^{lxiv}	Unknown	Rural Iona, ON	Murdered	Unsolved	August 25-30, 1994
Catherine Mary Daignault ^{lxv}	Unknown	Vancouver, BC	40 year old beaten to death	Unsolved	May 31, 1989
Crista/Crysta Lynn David ^{lxvi}	Unknown	New Westminster, BC	Smothered 21 year old	Unsolved	March 21-25, 1992
Carol Davie ^{lxvii}	Unknown	Unknown	Unknown	Unknown	Unknown
Carol Ruby Davis ^{lxviii}	Unknown	Burnaby, BC	29 year old stabbed to death	Unsolved	June 20, 1987
Deanna Daw ^{lxix}	Michael Tetu (common law spouse)	Fort Frances, ON	Shot	Manslaughter. 10 years, eligible for probation in five years.	October 29, 2000
Carol Ann Deiter ^{lxx}	Unknown	Unknown	Unknown	Unknown	Unknown
Lana Derrick ^{lxxi}	Unknown	Terrace, BC	Missing 19 year old	Unsolved	October 7, 1995
Naomi Leigh Desjarlais ^{lxxii}	Unknown	Regina, SK	Shot and killed	Unsolved	March 25, 1987
Rose Desjarlais ^{lxxiii}	Wilson Nepoose wrongfully convicted.	Hobbema, AB	Skeletal remains found.	Unsolved	January, 1986
Sarah Jean Devries ^{lxxiv}	Unknown	Vancouver, BC	Missing 29 year old, DNA found on Pickton farm.	No charges laid. Unsolved	April 14, 1998

Stacy Diabo ^{lxxv}	Alexis Delisle	Kahnawake, QB	Deceased had multiple wounds	Charged with second degree murder. Pleads not guilty: self-defence	September 23, 2003
Judy Dick ^{lxxvi}	Robert Bonisteel	Vancouver, BC	Stabbed in heart and stomach	27 years later and Ontario man is found guilty of first degree murder with no parole eligibility for 25 years.	February 6, 1975
Lizzie Dominick ^{lxxvii}	Gregory Dennis Narcisse	Unidentified location, BC	Vaginal injury and extensive bruising. Asphyxiation.	Charged with murder	August 19, 1993
Cheryl Duck ^{lxxviii}	Unknown	Winnipeg, MB	15 year old had injuries and died from hypothermia	Unsolved	December 5, 1987
Velma Marie Duncan ^{lxxix}	Unknown	Williams Lake, BC	Missing	Unsolved	May, 1972
Gloria Duneult ^{lxxx}	Unknown	Unknown	Unknown	Unknown	Unknown
Jackaleen Patricia Dyck ^{lxxxi}	Unknown	Winnipeg, MB	23 year old stabbed 28 times	Unsolved	October 3, 1980
Oolayou Egetsiaq ^{lxxxii} (Mother of male victim)	Jopey Atsiqtaq	Iqaluit, NWT	Stabbed in torso, neck and abdomen	Life imprisonment without eligibility for parole for 15 years.	Trial 1988
Moira Erb ^{lxxxiii}	Unknown	Winnipeg, MB	Murdered	Unsolved	August 2 – September 17/23, 2005
Barbara Eyapaise ^{lxxxiv}	Frederick Richard Abma	Rural Alberta, 40 km from Calgary	Remains found	Frederick Richard Abma charged with murder. Trial postponed until 2003. Found guilty of first degree murder, no parole for 25 years.	January 17, 2002 (remains found April 27, 2002)
Chantel Ferguson ^{lxxxv}	Unknown	Unknown	Unknown	Unknown	Unknown
Jerry Ferguson ^{lxxxvi}	Unknown	Unknown	Unknown	Unknown	Unknown
Roberta Marie / May Ferguson ^{lxxxvii}	Unknown	Cultus Lake, BC	Missing 19 year old	Unsolved	August 24, 1998
Sandra Flamond ^{lxxxviii}	Unknown	Unknown	Unknown	Unknown	Unknown
Amanda Flett ^{lxxxix}	Unknown	Unknown	Unknown	Unknown	Unknown
Georgette Flint ^{xc}	Unknown	Elk Island National Park, AB	Decomposed body found.	Unsolved	September 13, 1988

Elaine Flowers ^{xc1}	Barry Herbert Allen (common law husband)	Rigolet, Labrador	Shot twice	Guilty of first degree murder.	October 13, 1985
Elaine Keewatin Flowers ^{xc2}	Blair Allen Pelletier	Regina, SK	Shot	Charged with and convicted of first degree murder.	May 11, 1981
Rena Fox ^{xc3}	Unknown	Northwestern ON	Her frozen and beaten body was found on the side of a highway	Unknown	February 28, 2003
Laura Frank ^{xc4}	Unknown	Unknown	Unknown	Unknown	Unknown
Jennifer Furminger ^{xc5}	Robert Pickton	Vancouver, BC	28 year old	Charged with murder.	December 27, 1999
Julie Gambler ^{xc6}	Unknown	Unknown	Unknown	Unknown	Unknown
Martha Garvin ^{xc7}	Unknown	Unknown	Unknown	Unknown	Unknown
Sandra Gaudet ^{xc8}	Taillefer Duguay	Val d'Or, QB	Strangulation	Taillefer gets a new trial for first degree murdered ordered. For Duguay, a stay of proceedings ordered.	March 9-10, 1990
Lisa Marie Gavin ^{xc9}	Unknown	Vancouver, BC	Strangled, sexually assaulted and beaten 21 year old	Unsolved	August 13, 1988
Melanie Geddes ^c	Unknown	Regina, SK	Missing	Unsolved	August 13, 2005
Ruby Verna Genaille ^{c1}	Abraham Adolphus Genaille	Shoal River (Sapotaweyak) First Nation	Murdered 45 year old	Charged with murder	January 5, 2004
Brenda George ^{c2}	Unknown	Unknown	Unknown	Unknown	Unknown
Christa Marie George ^{c3}	Unknown	Chilliwack, BC	Suspicious death in alleyway	Unknown	Unsolved
Graffie George ^{c4}	Alec John	Indian Reservation, YK	Subdural haemorrhage covering the left side of the brain	Charged and found guilty of manslaughter. Appeal dismissed.	August 21, 1967
Norma/Lorna George ^{c5}	Unknown	Aldergrove, BC	34 year old died from exposure	Unsolved	September 30-October 5, 1992
Pamela George ^{c6}	Steven Tyler Kummerfeld Alexander Dennus Ternowetsky	Regina, SK	Blows from blunt object	Manslaughter, six and a half years each.	April 18, 1995
Alishia Germaine ^{c7}	Unknown	Prince George, BC	Murdered 16 year old	Unsolved	December 1-9, 1994 (body found)
Joanne Ghostkeeper ^{c8}	Unknown	Edmonton, AB	Strangled	Unsolved	December 25-26, 1996

Kari Ann Gordon ^{cxix}	Unknown	Little Lillooet Lake, BC	Murdered 26 year old	Unsolved	January, 1997- March, 1998 (body found)
Lisa Marie Graveline ^{cx}	Thong Thanh Huynh	Vancouver, BC	34 year old stabbed to death	Arrested and charged with second degree murder. Was to go to trial in 2004.	Found May 1, 2000
Andrea Grey ^{cxxi} Rhonda Whitehead	Unnamed (common law husband)	Whitefish Lake First Nation, AB	Shot	Murderer killed himself after killing Andrea in front of their 5 children.	May 29, 1999
Sylvia Ann Guiboche ^{cxii}	Unknown	Winnipeg, MB	Missing 21 year old	Unsolved	Mid July, 2003
Rene Gunning ^{cxiii}	Unknown	Edmonton, AB - Fort St. John, BC	Missing 20 year old	Unsolved	February 19, 2005
Rebecca Guno ^{cxiv}	Unknown	Vancouver, BC	Missing	Unsolved	June 23-25, 1983
Michelle Gurney ^{cxv}	Unknown	Vancouver, BC	Missing 19 year old	Unsolved	December 11, 1998
Elizabeth Bertha Halkett ^{cxvi}	Tania Denise Ross Cory Robin Dreaver	Saskatoon, SK	Dead before burned	May 1, 2006 trial	Match 19, 2004
Glynnis Lee Hall ^{cxvii}	Stacey Willier	Edmonton, AB	Stabbed to death	Charged with murder	October 31, 2004
Nicolle Hands ^{cxviii}	Unknown	Winnipeg, MB	Stabbed	Unsolved	October 2, 2003
Ruby Anne Hardy ^{cxix}	Unknown	Vancouver, BC	Missing 37 year old	Unknown	1998 - March 27, 2002
Vera Harry ^{cxx}	Gilbert Paul Jordan	Vancouver, BC	Alcohol poisoning Jordan was present at 6 drinking incidents, each involving an Aboriginal woman. Six women died from over-consumption of alcohol.	No charge was laid related to Vera; one conviction of manslaughter in the death of Vanessa Buckner.	November 19, 1986

Veronica Harry ^{cxxi}	Unknown	Unknown	Unknown	Unknown	Unknown
Candace Henderson ^{cxxii}	Donald William Fontaine	Thompson, MB, Highway 6	Killed when accused intentionally slammed car into semi-trailer	Fontaine appealed the conviction for first degree murder in 2002. Fontaine also appealed the conviction for second degree murder in 2005.	April 3, 1999
Janet Henry ^{cxxiii}	Unknown	Vancouver, BC	Missing 37 year old	Unsolved	June 25, 1997
Violet Delores Herman ^{cxxiv}	Unknown	Vancouver, BC	40 year old stabbed to death	Unsolved	July 10, 2002
Deborah Holmes ^{cxxv}	James Barry Bradley	Stratford, PEI	Axe blows to head, neck and spinal cord	Guilty of first degree murder, life with no chance of parole for 25 years.	July 1, 2001
Pamela Holopainen ^{cxxvi}	Unknown	Schumacher, ON	Missing	Unsolved	December 15, 2003
Tanya Marlo Holyk ^{cxxvii}	Unknown	Vancouver, BC	Murdered	Robert Pickton charged with murder.	October 29 – November 3, 1996
Tracy Lyn Hope ^{cxxviii}	Unknown	Unknown	Unknown	Unknown	Unknown
Marlene Buffalo-Hudson ^{cxxix}	Unknown	Unknown	Unknown	Unknown	Unknown
Shelia Hunt ^{cxxx}	Unknown	Unknown	Unknown	Unknown	Unknown
Leanne Irkotee ^{cxxxi}	Accused Adrien VanEindehoven	Rankin Inlet, NWT	Murdered	March 2006 trial for second degree murder.	April 23, 2004
Sherry Irving ^{cxxxii}	Robert Pickton	Vancouver, BC	Murdered	Charged with murder.	April 1997- March, 1998
Doreen Jack ^{cxxxiii} (and Ronald, Russell and Ryan)	Unknown	Prince George, BC	Missing	Unsolved	August 1, 1989.
Jane Jack ^{cxxxiv}	Stanley Strong (common law husband)	Keewatin, ON	Multiple stab wounds	Charged with second degree murder. Guilty of manslaughter. 30 months in custody.	April 27/28, 1995
Lynn Minia Jackson ^{cxxxv}	Unknown	Rural Wetaskiwin, AB	Body discovered	Unsolved	Found June 21, 2004
Sally Jackson ^{cxxxvi}	Unknown	Unknown	Unknown	Unknown	Unknown
Connie (and Ty) Jacobs ^{cxxxvii}	RCMP Constable Dave Voller	Tsuu T'ina First Nation, AB	Shot	Inquiry held	March 22, 1998
Lorraine Jacobson ^{cxxxviii}	RCMP Constable Russ Chanin	Whe-La-Le-U, BC	Shot woman with a large butcher knife, the RCMP says	Unknown	Friday before March 4, 2004
Mary Jane Jimmie ^{cxxxix}	Unknown	Fraser River Banks, BC	Brutally murdered	Unsolved	June 26, 1987

Cheryl Ann Joe ^{cxl}	Brian William F. Allender	Vancouver, BC	Murdered and sexually mutilated	First degree murder conviction.	January 20, 1992
Donna Joe ^{cxli}	Unknown	Gilbert's Island, NB	Homicide	Unsolved	September 28, 1992
Kayla John ^{cxlii}	George Roswell Osmond	Zeballos, BC	Murder of 13 year old	Charged with first degree murder.	April 26-27, 2004
Martina May Johnnie ^{cxliii}	Patrick William Simpson (common law spouse)	Fort St. James, BC	Multiple stab wounds in heart, abdomen, and arm.	Second degree murder charge upheld at CA.	November 2, 1995
Samantha Johnnings (Infant) ^{cxliv}	Frederick Alexander Brooks	Hamilton, ON	Sperm sample degraded. Evidence of prior abuse by accused. Jailhouse confession	Convicted of first degree murder with intent to cause death while committing a sexual assault. Life imprisonment without eligibility for parole for 25 years. Appeal to CoA allowed. Appeal to SCC dismissed.	December 13, 1992
Mary Johns ^{cxlv}	Gilbert Paul Jordan	Vancouver, BC	Alcohol poisoning. Jordan was present at 6 drinking incidents, each involving an Aboriginal woman. Six women died from over-consumption of alcohol.	No charge was laid related to Mary; one conviction of manslaughter in the death of Vanessa Buckner.	July 30, 1982
Cheryl Ann Johnson ^{cxlvi}	Unknown	Sydney, NS	Although partially nude, no foul play ruled, cause of death found to be drowning.	Unsolved	May 3, 2001

Mary Johnson ^{cxlvii}	Gilbert Paul Jordan	Vancouver, BC	Alcohol poisoning. Jordan was present at 6 drinking incidents, each involving an Aboriginal woman. Six women died from over-consumption of alcohol.	No charge was laid related to Mary; one conviction of manslaughter in the death of Vanessa Buckner.	November 30, 1980
Pauline Johnson ^{cxlviii}	Unknown	Unknown	Unknown	Unknown	Unknown
Sandra Johnson ^{cxlix}	Unknown	Thunder Bay, ON	Murdered	Unsolved	February 13, 1992
Lorna Jones ^{cl}	Unknown	Unknown	Unknown	Unknown	Unknown
Diana May Joseph ^{cli}	Unknown	Prince George, BC	Missing 22 year old	Unsolved	September 23, 2004
Sheila Kahnapace ^{clii}	Accused Melvin Johnson	Regina, SK	Hypothermia	Cab driver who dropped her off acquitted.	November 19, 2000
Kalwakeri Karonhienhawitha ^{cliii}	Skahatati (Angus Jacobs)	?, QB	Beaten to death	Charged with manslaughter. Appeal dismissed.	Unknown
Donna Marie Kasyon ^{cliv}	Unknown	Saskatoon, SK	20 year old stabbed to death	Unsolved	June 15, 2002
Tamra Jewel Keepness ^{clv}	Unknown	Regina, SK	Missing five year old	Unsolved	July 5, 2004
Dawn Keewatin ^{clvi}	Unknown	Unknown	Unknown	Unknown	Unknown
Debbie Kennedy ^{clvii}	Unknown	Unknown	Unknown	Unknown	Unknown
Charlene/Cherlene Keri ^{clviii}	Unknown	Vancouver, BC	Discovered in a pool of blood.	Unsolved	1990
Cara King ^{clix}	Unknown	Rural Sherwood Park, AB	Found in a field	Unsolved	Found September 1, 1997
Rebecca Jean King ^{clx}	Unknown	North Bay, ON	Missing	Unsolved	October 21, 1999
Betsy Kalaserk-Kirby ^{clxi}	Ian Adam Kirby	Yellowknife, NWT	Hung self, husband did not intervene	Three years imprisonment, reduced for remand time to 20 months.	September 30, 2003
Donna Rose Kiss ^{clxii}	Unknown	Vancouver, BC	Strangled 25 year old	Unsolved	August 2-21, 1986
Sandy Ann Rose Korba ^{clxiii}	Marik Ellsworth (common law husband)	Kelowna, BC	22 year old hit with axe in head repeatedly	Charged with second degree murder, Crown elected to accept a plea of manslaughter. 10 years.	July 9, 2001

Donna Kusugak ^{clxiv}	Allen Kabvitok	Rankin Inlet, NWT	Strangled and mutilated	Originally charged with first degree murder, downgraded to second degree murder. Manslaughter, 14 years, no eligibility for parole for 7 years.	March, 2003
Carmen L'Hirondelle ^{clxv}	Randy Kendall Cardinal	Kinuso, AB	Foul play, body found near car	Charged with second degree murder	October 18, 2003
Francesca Laboucan ^{clxvi}	Dallas Chalifoux	Lubicon Lake Nation, AB	23 year old stabbed in liver, spleen, diaphragm, heart	Plead guilty to manslaughter and was sentenced to 10 years in prison.	February 3, 2003
Shirley Lynn Laboucan ^{clxvii}	Joseph Loonskin (common law spouse)	Jean D'or Prairie Reserve, AB	Stabbed to death	No information.	April 11, 2003
Maria Laura (Lorna) Laliberte ^{clxviii}	Unknown	Vancouver, BC	Missing 52 year old	Unsolved	January 1- March 8, 2002
April Lambert ^{clxix}	Robert Chris Mckenzie	High Level, AB	12 year old run over by van, burnt body twice and remains thrown over a bridge	Appealed conviction for manslaughter and interference with human remains. Appeal dismissed. Sentenced to 14 years on the manslaughter charge and four and a half years on the remains charge	August, 1998
Mary Florence Lands ^{clxx}	Unknown	Vancouver, BC	Missing 28 year old	Unsolved	1991
Stephanie Lane ^{clxxi}	Unknown	Vancouver, BC	Missing 20 year old	Unsolved	January 10, 1997 – March 11, 1997
Barbara Laroque ^{clxxii}	Unknown	Unknown	Unknown	Unknown	Unknown
Brenda Hazel Larose ^{clxxiii}	Reynold Larose (estranged husband)	Burnaby, BC	Stabbed numerous times	Appeal of a second degree murder charge is successful, new trial ordered.	February 23, 1990
Danielle Larue ^{clxxiv}	Unknown	Vancouver, BC	Missing 25 year old	Unsolved	December, 2002
Madeleine Lavalee ^{clxxv}	Unknown	Unknown	Unknown	Unknown	Unknown
Dierdre Lavalley ^{clxxvi}	Unknown	Unknown	Unknown	Unknown	Unknown
Bernadette Leclair ^{clxxvii}	Larry Scott Runholm	Thunder Bay, ON	Accused's sperm in deceased's vagina Suffocation	Plead guilty to second degree murder. Imprisonment for life. Parole ineligibility was set at 20 years.	August 7, 1987

Doreen LeClair and Corrine McKeown (sisters) ^{clxxxviii}	William Dunlop McKeown	Winnipeg, MB	Doreen was 51 and Corrine was 52 when stabbed to death	Second degree murder, life sentence, no eligibility for parole for 17 years.	February 16, 2000
Lisa Leo ^{clxxxix}	Unknown	Unknown	Unknown	Unknown	Unknown
Geraldine Letendre ^{clxxx}	Paddy Noskey (common law spouse)	Loon River Cree Nation, AB	Shot to death	Was found guilty of second degree murder and sentenced to life in prison.	June 7, 2002
Susan Brenda Levasseur ^{clxxxvi}	Cecil Junior Houle	Ebb and Flow First Nation, MB	28 year old died of loss of blood due to trauma	Charged with second degree murder.	April 6, 2004
Mary Lidguerre ^{clxxxvii}	Unknown	Vancouver, BC	Skeletal remains of murdered 30 year old found	Unsolved	July 7 - August 16, 1996
Monika Lillmeier ^{clxxxviii}	Unknown	Unknown	Unknown	Unknown	Unknown
Bobbie Lincoln ^{clxxxix}	Unknown	Unknown	Unknown	Unknown	Unknown
Tawnya Megan Lisk ^{clxxxv}	Unknown	Vernon, BC – Calgary, AB	Missing 16 year old	Unknown	July 18, 2004
Richard "Kellie" Little ^{clxxxvi}	Unsolved	Vancouver, BC	Missing 28 year old	Unsolved	April 23-20, 1997
Verna Littlechief ^{clxxxvii}	Unknown	Vancouver, BC	Missing 34 year old	Unsolved	1978-2002
Christina Littlejohn ^{clxxxviii}	Eddie Smith	Rouseau River First Nation, MB	Missing 35 year old	Charged with second degree murder.	1968
Shirley Lonethunder (Lone Thunder) ^{clxxxix}	Unknown	Saskatoon, SK	Missing	Unsolved	1991
Kimber Leanne Lucas ^{cx}	Unknown	Halifax, NS	Strangled	Unsolved	November 23, 1994
Verna Lyons ^{cxci}	Unknown	Unknown	Unknown	Unknown	Unknown
Jean MacDonald ^{cxcii}	Unknown	Northwestern ON	Unknown	Unknown	Unknown
Jocelyn "Chippy" McDonald ^{cxci}	James Kakegamic	Minaki, MB	Strangled	First degree murder, life sentence no eligibility for parole.	October 16, 2000- March 29, 2001
Honey Joy McKay ^{cxci}	Blaine Everette (common law husband)	Berens River First Nation, MB	21 year old assaulted and died of exposure	Originally charged with second degree murder, guilty plea for manslaughter, five year sentence	November 15, 2003
Phoebe Mack ^{cxci}	Delme John Evans (husband)	Sidney, BC.	Death of 28 year old resulting from headlock	Charged with second degree murder. Manslaughter conviction. 12 year sentence.	January 7, 2002
Lois Mackie ^{cxci}	Unknown	Unknown	Unknown	Unknown	Unknown

Laura Mah ^{ccvii}	Unknown	Vancouver, BC	Missing	Unsolved	August 1, 1985
Rhoda Maksagak ^{ccviii}	Unknown	Cambridge Bay, NWT	49 year old murdered	Unsolved	March 12, 2004
Tania Marsden ^{ccxix}	Unknown	Winnipeg, NB	Strangulation of 18 year old	Unsolved	September 9, 1998
Dorothy Martin ^{cc}	Gerald Robert Wilson (common law husband)	The Pas, MB	Shot in mouth	Accused found not guilty of second degree murder but guilty of manslaughter. Sentenced to 7 years and appealed. Appeal allowed and a new trial ordered.	April 26, 1996
Kristal Eileen Martin ^{ccci}	James Robert Labbe	Victoria, BC	32 year old hit in the head repeatedly with an object	In 2001, Labbe appealed a second degree murder finding and won his appeal. The judge ordered a new trial on the manslaughter charge.	June 18, 1999
Mavis Mason ^{ccii}	Unsolved	Rural Edmonton, AB	Stabbed to death	Unsolved	October 25, 1990
Adele Matinet ^{cciii}	Unknown	Northwestern ON	Unknown	Unknown	Unknown
Anne Medwayosh (Costin) ^{cciv}	Jean Victor Beulac	Vancouver, BC	Severely beaten, cause of death was drowning	At trial, convicted of first degree murder. SCC ordered new trial related to provision of judge and jury who speak both official languages.	February 17, 1981
Rose Merasty ^{ccv}	Unknown	Unknown	Unknown	Unknown	Unknown
Cherissa-Lynn Mercer ^{ccvi}	Unknown	Surrey, BC	Missing	Unsolved	September 25, 2001
Eva Mitchell ^{ccvii}	Unknown	Kelly Lake, BC	Missing 83 year old	Unsolved	August 20, 2004
Elaine Moar Daughter Haily Moar ^{ccviii}	Unknown	Winnipeg, MB.	Missing 32 year old and 16 month daughter	Unsolved	January 28, 2004
Cheryl Moonias ^{ccix}	Unknown	Thunder Bay, ON	Missing 15 year old	Unsolved	Thursday before May 31, 2005
Vivian Moore ^{ccx}	Thomas James Mathewson	Kenora, ON	Child died of blows received	Charged with manslaughter in death of Vivian. A sentence of five years. Leave to appeal refused.	?1966
Brenda Moreside ^{ccxi}	Stanley Willier (spouse)	High Prairie, AB	44 year old was stabbed to death	Charged with second degree murder. Has pleaded not guilty.	February 13 or 25, 2005

Gale Annetta Morrison ^{ccxii}	Dwain Elliot Taylor	Terrace, BC	29 year old struck on the head by very severe force	Appeal allowed and new trial ordered.	April 11, 1993
Glenda Morriseau ^{ccxiii}	Unknown	Winnipeg, MB	Beaten to death	Unsolved	July 17 – August 7, 1991
Jacqueline Marie Murdock ^{ccxiv}	Unknown	Prince George, BC	Missing 28 year old	Unsolved	August, 1997
Jennifer Naglingiq ^{ccxv}	Accused Mark King Jeffrey Accused Ivan Kilabuk Joamie	Iqaluit, NWT	Raped and murdered in her home	First degree murder against Joamie.	December 6, 2002. Trial date set for September 11, 2006 for Jeffrey. On January 3, 2003 it was reported that the charge against Joamie was stayed for one year.
Jarita Naistus ^{ccxvi}	Unknown	Lloydminster, SK	Murdered	Unsolved	October 2, 2005
Shirley Napope ^{ccxvii}	John Wayne Crawford	Saskatoon, SK	Brutally raped, tortured and murdered	Guilty of first degree murder.	1992-94
Victoria Nashacappo ^{ccxviii}	Unknown	Saskatoon, SK	Missing	Unsolved	September, 2002
Debbie Neeclose ^{ccxix}	Unknown	Unknown	Unknown	Unknown	Unknown
Delphine Nikal ^{ccxx}	Unknown	Smithers, BC	Missing 16 year old	Unsolved	June 13, 1995
Shirly Nix ^{ccxxi}	Unknown	Unknown	Unknown	Unknown	Unknown
Jessica Leah Noskey and Allen Roy Grey ^{ccxxii}	Daniel Justin Laboucan	Peace River, AB	Shot	Unknown	July 23, 2001
Madeline Noskey ^{ccxxiii}	Unknown	Trout Lake, AB	Unknown	Unknown	Unknown
Roberta Okeymow ^{ccxxiv}	Mathew Colin Cardinal Douglas Paul Parenteau (not a party to appeal)	Unknown	Stabbed 15 times	Cardinal was convicted of first degree murder and appealed. Appeal dismissed. Co-accused died prior to appeal.	Unknown

Cherish Nicole Billy Oppenheim ^{ccxxv}	Robert Raymond Dezwaan	Merrit, BC	Brutally beaten to death 16 year old	Guilty of second degree murder. 15 years in prison.	October 13, 2002
Helen Betty Osborne ^{ccxxvi}	Dwayne Johnston (only one convicted)	The Pas, MB	Johnston, James Robert Paul Houghton, Lee Scott Colgan and Norman Bernard Manger, were involved in the death. Brutally beaten.	Life imprisonment without eligibility for parole for 10 years. Houghton acquitted. Colgan got immunity for testifying. Manger was not charged.	November 13, 1971
Felicia Solomon Osborne ^{ccxxvii}	Unknown	Winnipeg, MB	Murdered	Unsolved	March 24 – June 11, 2003
M.S.P. ^{ccxxviii}	Joe James Ward	Whitehorse, YN	Strangled	Sentenced to four years imprisonment for manslaughter.	March 2, 1996
Vivian Rose Paddy ^{ccxxix}	Unknown	Edmonton, AB	Beaten to death	Unsolved	December 8, 2001
Georgina Faith Papin ^{ccxxx}	Robert Pickton	Vancouver, BC	DNA found at Pickton farm	Charged with murder.	March 2, 1999-2000
Fabian Paquette ^{ccxxxii}	Dale Eliason	Prince George, BC	Head injury from severe beating. 42 years old	Convicted of manslaughter, given 7 years imprisonment.	February 5, 2002
Precious Pascal ^{ccxxxiii}	15 year old boy	St. Theresa Point, MB	Blood loss due to trauma	Charged with second degree murder.	January 21, 2004
Crystal Lee Paskemin ^{ccxxxiiii}	Kenneth David MacKay	Rural Saskatoon, SK	14 year old with skull crushed by vehicle, body burned and dragged. Court found a reasonable inference that at least attempted sexual assault occurred	Convicted of first degree murder. An appeal was dismissed.	December 29, 2000
Dora Patrick ^{ccxxxv}	Unknown	Unknown	Unknown	Unknown	Unknown

Barbara Paul ^{ccxxxv}	Gilbert Paul Jordan	Vancouver, BC	Alcohol poisoning. Jordan was present at 6 drinking incidents, each involving an Aboriginal woman. Six women died from over-consumption of alcohol.	No charge was laid related to Barbara; one conviction of manslaughter in the death of Vanessa Buckner.	September 11, 1981
Maxine Paul ^{ccxxxvi}	Unknown	Unknown	Unknown	Unknown	Unknown
Patricia Pendleton ^{ccxxxvii}	Scott Clifford Aune	Mission, BC	29 year old stabbed 21 times in the throat and 5 times in the torso	Charged with second degree murder, found not guilty	June, 1992
Mary Ida Periard ^{ccxxxviii}	Michel Leo Joseph Periard	Saddle Lake First Nation, AB	Murdered	Charged with second degree murder.	February 28, 2005
Jennifer (Jennie) Pete ^{ccxxxix}	Unknown	Unknown	Unknown	Unknown	Unknown
Thelma Janice Pete ^{ccxl}	James Wade French	Kamloops, BC	53 year old beaten to death	Charged with second degree murder	December 3, 2004
	Richard Steven Collins	Kamloops, BC	53 year old beaten to death	Charged with second degree murder	December 3, 2004
Maxine Suzanne Peters ^{ccxli}	Darrel Blackbird	Walpole Island, ON	34 year old shot	Charged with murder	Sunday preceding June 13, 2004
Rose Minnie Peters ^{ccxlii}	Unknown	Vancouver, BC	Strangled, beaten and sexually assaulted 28 year old	Unsolved	April 3, 1988
Tammy Lee Pipe ^{ccxliii}	Unknown	Agassiz, BC	Missing 24 year old	Unsolved	Body found September 2, 1995
Marjorie Pironen ^{ccxliv}	Unknown	Unknown	Unknown	Unknown	Unknown
Monique Pitre ^{ccxlv}	Unknown	Rural Fort Saskatchewan, AB	Murder	Unsolved	Found January 7, 2003
Wendy Poole ^{ccxlvi}	Unknown	Vancouver, BC	Beaten to death	Acquitted.	January 26, 1989
Terrilyne Poulette ^{ccxlvii}	Unknown	Ekasoni First Nation, NS	Missing and foul play suspected	Unsolved	February 28, 2005

Rachel Liz Quinney ^{ccxlviii}	Unknown	Edmonton, AB	Body found	Unsolved	Found June 11, 2004
Amber Tara-Lynn Redman ^{ccxlix}	Unknown	Fort Qu'Appelle, SK	Missing	Unsolved	July 15, 2005
Michelle Remi/mi ^{cc}	Unknown	Surrey, BC	Missing 14 year old	Unsolved	October 6, 2003
Maureen Riding-At-The-Door ^{cccli}	Unknown	Unknown	Unknown	Unknown	Unknown
Belinda Ritchie ^{ccclii}	Unknown	Unknown	Unknown	Unknown	Unknown
Darlinda / Dawn Ritchie ^{cccliii}	David Raymond Couture	Vancouver, BC	Suffocation / strangulation	Guilty of second degree murder. Appeal allowed and new trial ordered.	September 12, 1986
Nya Robailard ^{cccliv}	Unknown	Unknown	Unknown	Unknown	Unknown
Rhonda Runningbird ^{ccclv}	Unknown	Rocky Mountain House, AB	Missing	Unsolved	March 30, 1995
G.S. ^{ccclvi}	J.S. (daughter)	Kinistino, SK	63 year old stabbed	Manslaughter. Sentenced to two years incarceration.	May 30, 1997
Roberta Saddleback ^{ccclvii}	Unknown	Unknown	Unknown	Unknown	Unknown
Cynthia Sanderson ^{ccclviii}	Anthony Barr	Prince Albert, SK	Run over by a truck. Witnesses allege the driver yelled racial epithets	has been charged with criminal negligence causing death, impaired driving and driving with a blood alcohol level over the legal limit	August 31, 2004
Leona Sanderson ^{ccclix}	Unknown	Saskatoon, SK	Missing	Unsolved	May 29, 2005
Janice Saul ^{ccclx}	Unknown	Unknown	Unknown	Unknown	Unknown
Laurie Scholtz ^{ccclxi}	Unknown	Unknown	Unknown	Unknown	Unknown
Leanne Scholtz ^{ccclxii}	Unknown	Unknown	Unknown	Unknown	Unknown
Elsie Sebastien ^{ccclxiii}	Unknown	Vancouver, BC	Missing	Unsolved	October 16, 1992
Mary Jane Serloin ^{ccclxiv}	John Wayne Crawford	Lethbridge, AB	Murder	10 years in prison.	December 23-25, 1981
Colleen Shook ^{ccclxv}	Unknown	Burnaby, BC	Stabbed while getting off a bus	Unsolved	1975
Dorcas Gail Shorson ^{ccclxvi}	Unknown	Surrey, BC	Missing 24 year old	Unsolved	April 2, 2005
Therena Silva ^{ccclxvii}	Unknown	Winnipeg, MB	Decomposed body found	Unsolved	December 15, 2002
Gladys Simon ^{ccclxviii}	Unknown	Campbellton, NB	Missing	Unsolved	June 24, 2004

Beatrice Sinclair ^{cclxxix}	Unknown	Winnipeg, MB	Body found in river, unclothed with a .288 blood alcohol level. Unknown	Unknown	May 14, 1974
Julie Smith ^{cclxxx}	Unknown	Unknown	Unknown	Unknown	Unknown
Peggy Snow ^{cclxxxi}	Unknown	Unknown	Unknown	Unknown	Unknown
Felicia Solomon ^{cclxxxii}	Unknown	Winnipeg, MB	Two body parts found in river	Unsolved	March 25, 2003-April 3, 2003
Starr Solway ^{cclxxxiii} And 3 year old daughter Danika	John Leadbeater	Shouldice, AB	Shot and home set ablaze	Unsolved	April 3, 2002
Dorothy Anne Spence ^{cclxxxiv}	Unknown	Vancouver, BC	Missing 33 year old	Unsolved	August 6 - 30, 1995
Bernadine Standingready ^{cclxxxv}	Unknown	Vancouver, BC	Found murdered	Unsolved	November 12, 1991
Jacqueline Stanicia ^{cclxxxvi}	Unknown	Winnipeg, MB	Missing	Unsolved	August 14, 2003
Diane Stewart ^{cclxxxvii}	Unknown	Penticton Indian Reserve, BC	Missing 26 year old	Unsolved	December 31, 1996
Luanne Stolarchuk ^{cclxxxviii}	Unknown	Unknown	Unknown	Unknown	Unknown
Mrs. Wayne Stonechild ^{cclxxxix}	Unknown	Unknown	Unknown	Unknown	Unknown
Donna Stony ^{cclxxx}	Unknown	Unknown	Unknown	Unknown	Unknown
Jane Louise Sutherland ^{cclxxxxi}	Unknown	Ottawa, ON	Strangled and skull crushed from repeated blows	Unsolved	October 23, 1984 - 1986
Minnie Sutherland ^{cclxxxii}	Unknown	Hull, QB	Hit and run	Unknown. Notably, Police officers disregard and use racial epithets	December 31, 1988
Janet Sylvestre ^{cclxxxiii}	Unknown	Saskatoon, SK	Found murdered	Unsolved Had previously been raped by John Wayne Crawford.	October, 1994
Marion Taylor ^{cclxxxiv}	Lorenzo Hiscock	Toronto, ON	Beating	At trial, 20 year sentence ordered. On Appeal, a sentence of 14 years was ordered. Manslaughter.	Date unknown, case heard in 1962
Noreen Taylor ^{cclxxxv}	Unknown	Winnipeg, MB	32 year old died of massive head and internal injuries	Unsolved	August 15, 2001

Shirley Taylor ^{cclxxxvi}	David Saunders	?Sudbury, ON	Stabbed	Convicted for manslaughter. Sentenced to 8 years in prison.	Unknown
Eva Taysup ^{cclxxxvii}	John Wayne Crawford	Saskatoon, SK	Strangled	Guilty of second degree murder.	1992-94
Donna Doris Tebbenham ^{cclxxxviii}	Larry Scott Runholm	Thunder Bay, ON	Accused's sperm found in deceased's vagina. Suffocation	Plead guilty to second degree murder. Imprisonment for life. Parole ineligibility was set at 20 years.	May 11-12, 1987
Roxanne Thiara ^{cclxxxix}	Unknown	Burns Lake, BC	Murdered 15 year old	Unsolved	November, 1994
Cassandra Coralee Thomas ^{ccxc}	Unknown	Cross Lake, MB	Cause of death of 23 month old undetermined	Unsolved	November 6, 2003
Patricia Thomas ^{ccxc1}	Gilbert Paul Jordan	Vancouver, BC	Alcohol poisoning. Jordan was present at 6 drinking incidents, each involving an Aboriginal woman. Six women died from over-consumption of alcohol.	No charge was laid related to Patricia; one conviction of manslaughter in the death of Vanessa Buckner.	December 15, 1984
Ruby Ann Threlfell ^{ccxcii}	Unknown	Vancouver, BC	Strangled to death	Unsolved	January 12, 1980
Arlene Thunder ^{ccxciii}	Russell Allan Noskey	Peace River, AB	Beaten	Guilty of culpable homicide.	1994
Elena Assam-Thunderbird ^{ccxciv}	Barry Thurston James	Ottawa, ON	17 year old, sexual assault suspected, head injuries, drowning	Convicted of first degree murder with no chance of parole.	June 1, 2002
Elsie Tomma ^{ccxcv}	Unknown	Unknown	Unknown	Unknown	Unknown
Deborah Toulouse ^{ccxcvi}	Presumed Lawrence Toulouse	Wikwemikong First Nation, ON	Shot	Presumed murder/suicide (Lawrence Toulouse dead at scene)	May 18, 2002
Heather Tuckatuck ^{ccxcvii}	Unknown	Kuujuaapik, NWT	Missing	Unsolved	December 24, 2001
Rachel Turley ^{ccxcviii}	Unknown	Squamish, BC	Beaten and strangled 20 year old	Unsolved	October 28, 1985.
Barbara Joan Twoheart ^{ccxcix}	Edwin John Twoheart	Fort Alexander Indian Reserve, MB	Shot	Appealed charge of murder in the second degree. Appeal	May 23, 1978

				dismissed.	
Wynona Umpherville ^{ccc}	Unknown	Saskatoon, SK	Missing	Unsolved	June 15, 2005
Unidentified 14-16 year old girl ^{ccc1}	Unknown	Vancouver, BC	Unknown	Unsolved	1985-1990
Unidentified 15 year old girl ^{ccc2}	Edward Dennis Isaac	Prince George, BC	Strangled, stabbed in breast and vagina	Pled guilty to second degree murder and sentenced to life and ineligibility for parole for 15 years.	August 16, 1982
Unidentified 17 year old girl and sister ("Vickie" "Tara") ^{ccc3}	Unknown	ON Reserve	Missing	Ran away from adoptive parents.	1999
Unidentified 18-35 year old woman ^{ccc4}	Unknown	Near Fredricton, NB	Homicide	Unsolved	September 28, 1992
Unidentified 33 year old woman ^{ccc5}	Unknown	Langley, BC	Found in a ditch	Unsolved	August 10, 1993
Unidentified mid-30s woman ^{ccc6}	Unknown	Vancouver, BC	Stabbed	Unsolved	March 2, 1994
Unidentified – mother of Lisa Graveline ^{ccc7}	Unknown	Vancouver, BC	Murdered	Unsolved	June, 1999
Unidentified woman ^{ccc8}	Ginger	Alberni, BC	Unknown	Unknown	Unknown
Unidentified woman ^{ccc9}	Vladimir Walter Bacan	Vancouver, BC	Stabbed	Crown appealed from an 18 month sentence for manslaughter. Appeal dismissed.	Prior to 1977
Unidentified woman (aunt to the accused) ^{ccc10}	Sheila Young	Bloodvein First Nation, MB	Stabbed	Appeal of the accused from manslaughter term of 4.5 years. Reduced on appeal to 2 years less a day.	August 23, 1997
Unidentified woman (Julian) ^{ccc11}	Alex Louie	Vernon, BC	Shot	At trial, sentenced to be hanged.	April 2, 1903
Sherry Ann Upright ^{ccc12}	Richard Benjamin Spencer	Edmonton, AB	Strangled her to death before car rollover	Charged with first degree murder. Appeal dismissed.	January 3, 1999
Margaret Vedan ^{ccc13}	Unknown	Vancouver, BC	Stabbed 41 year old	Unsolved	April 7, 1988
Chantal Marie Venne ^{ccc14}	Unknown	Esquimalt, BC	Strangled, tortured, sexually assaulted 21 year old	Unsolved	February 25, 1986
C.W. (Toddler) ^{ccc15}	S.R.M. (father)	Leq'a:mel First Nation, BC	Suffocation	Pled guilty to assault causing bodily harm, criminal negligence causing death, and interfering with human remains. Sentenced to six and a half years.	2002

Patricia Wadhams ^{cccxxvi}	Unknown	Unknown	Unknown	Unknown	Unknown
Tanya Wallace ^{cccxxvii}	Unknown	Unknown	Unknown	Unknown	Unknown
Maxine Wapass ^{cccxxviii}	Unknown	Winnipeg, MB	Missing	Unsolved	May 16, 2002
Maxine Wapass ^{cccxxix}	31 year old Bear	Saskatoon, SK	Remains found	Suspect arrested.	May 16, 2002
Calinda Waterhen ^{cccxxx}	John Wayne Crawford	Saskatoon, SK	Strangled	Guilty of second degree murder.	1992-94
Jennifer (Jenny) Waters ^{cccxxxi}	Unknown	Unknown	Unknown	Unknown	Unknown
Jaime Wheeler ^{cccxxxii}	Suspect arrested.	Saskatoon, SK	Stabbed 56 times	Suspect arrested. Charged with second degree murder.	March 12, 2000
Brenda Whitecap (Logan) ^{cccxxxiii}	Unknown	Vancouver, BC	Missing	Unsolved	circa 1996
Katrina Whitecrow ^{cccxxxiv}	Unknown	Northwestern ON	Murdered	Unknown	2003
Chassidy Whitford (toddler) ^{cccxxxv}	Shawn Mackinaw	Lakahahmen Reserve, BC	Smothered to death	Charged with manslaughter, indignity to human remains and assault causing bodily harm. Plead guilty to criminal negligence causing death, assault causing bodily harm, and indignity o human remains.	On or about September 21, 2002
Alberta Williams ^{cccxxxvi}	Unknown	BC	Murdered	Unsolved	September, 1988
Angie Williams ^{cccxxxvii}	Unknown	Surrey, BC	Murdered	Unsolved	December 9, 1997
Cindy Williams ^{cccxxxviii}	Unknown	Unknown	Unknown	Unknown	Unknown
Olivia Gayle Williams ^{cccxxxix}	Unknown	Vancouver, BC	Missing 22 year old	Unsolved	December, 1996 – July 1997
Ruby Williams ^{cccxxxx}	Unknown	Unknown	Unknown	Unknown	Unknown
Teressa Williams ^{cccxxxxi}	Unknown	Vancouver, BC	Missing	Unsolved	July 21 1988 – March 1999
Lisa Marie Willier ^{cccxxxii}	Unknown	Bonnyville, AB	Missing	Unsolved	October 13, 2004
Mona Wilson ^{cccxxxiii}	Robert Pickton	Vancouver, BC	Murdered	Robert Pickton charged with murder.	November 23, 2001
Ramona Wilson ^{cccxxxiv}	Unknown	Smithers, BC	15 year old deceased found near airport	Unsolved	June 11, 1994
Wannita Wolf ^{cccxxxv}	Donald Earl Blind	Regina, SK	18 year old shot	Charged with second degree murder. He entered a plea of guilty to manslaughter. Sentenced to 7 years.	May 22, 1999

Brenda Wolfe ^{cccxxxvi}	Robert Pickton	Vancouver, BC	Murdered	Charged with murder.	February 1, 1999
Sunshine April Wood ^{cccxxxvii}	Unknown	Winnipeg, MB	Missing 16 year old	Unsolved	February 20, 2004
Lorraine Wray ^{cccxxxviii}	Unknown	Edmonton, AB.	Manual strangulation	Unsolved	December 1, 1990
Crystal Wright ^{cccxxxix} (seven months pregnant)	Unknown	Kelowna, BC	Found dead	Murderer got 2.5 years.	September 26, 1991.
Elizabeth Rose Yendo ^{cccxl}	A.J.E.	Wrigley, NWT	Drowned, evidence of violence	Manslaughter. 5 years	1971. Found guilty in 2000
Lisa Marie Young ^{cccxli}	Unknown	Nanaimo, BC	Foul play suspected in missing 21 year old's disappearance	Unsolved	June 30, 2002
Victoria Lynn Younker ^{cccxliv}	Unknown	Mission, BC	Remains found	Unsolved	October 21, 1995

ⁱ Native Women's Association of Canada, "Remembering Our Missing and Murdered Aboriginal Sisters", online: Sisters in Spirit <<http://www.sistersinspirit.ca/engremember.htm>> [Sisters in Spirit]. "MISSING/MURDERED CASES," online: Missing / Murdered Native Women website

<<http://www.missingnativewomen.ca/native3.htm>> [Missing / Murdered Native Women website].

Nichole Tanguay, "Memorial for Missing Women" *Turning Point Native Peoples and Newcomers Online* (15 November 2002), p. 6, online: Turning Point website <<http://www.turning-point.ca/forum/read.php>> [Turning Point website].

ⁱⁱ Sisters in Spirit, *ibid.* K. Bolan and L. Kines, "Grim tally of missing women threatens to grow" (26 July 2002), online: Times Colonist reprinted at Missing People website <http://www.missingpeople.net/grim_tally_of_missing_women_threatens_to_grow_july_26_2002.htm> [Missing People Net].

ⁱⁱⁱ CBC News, "More names added to list of missing women" (6 October, 2004), online: CBC Vancouver <http://vancouver.cbc.ca/regional/servlet/View?filename=bc_names20041006>. Missing / Murdered Native Women website, *supra* note i.

^{iv} Missing / Murdered Native Women website, *ibid.*

^v *Ibid.* Sisters in Spirit, *supra* note i.

^{vi} *R. v. Caron*, [1990] S.J. No. 147 (Sask. C.A.) (QL). Sisters in Spirit, *ibid.*

^{vii} *R. v. Korgak*, [2003] Nu. J. No.3 (N. C.A.) (QL).

^{viii} Sisters in Spirit, *supra* note i.

^{ix} Sisters in Spirit, *ibid.* *R. v. Jordan*, [1988] B.C.J. No. 3011 at 2 of 5 (B.C.S.C.) (QL) [*Jordan* at BCSC].

^x Sisters in Spirit, *ibid.* Turning Point website, *supra* note i. Missing / Murdered Native Women website *supra* note i.

^{xi} Sisters in Spirit, *ibid.* N.A., "Anna Mae Pictou Aquash", online: Native Metis Women's Council <http://www.nativemetiswomenscouncil.com/files/Anna_Mae_Pictou_Aquash.htm>.

^{xii} Sisters in Spirit, *ibid.*

^{xiii} *Ibid.*

^{xiv} *Ibid.* Turning Point website, *supra* note i. Missing / Murdered Native Women website, *supra* note i. L. Kruzenga, "Justice Denied Continues to Haunt" (March, 1999), online: AMMSA website

<<http://www.ammsa.com/windspeaker/windguest99.html>>. J. Bronskill and S. Bailey, "Media, police called apathetic" *The Halifax Herald Limited* (25 September 2005), online: Herald online <www.herald.ns.ca/>.

^{xv} Sisters in Spirit, *ibid.*

^{xvi} Missing / Murdered Native Women website, *supra* note i.

^{xvii} *Ibid.* Sisters in Spirit, *supra* note i.

^{xviii} Sisters in Spirit, *ibid.*

^{xix} *Regina v. Baldhead*, [1966] 4 C.C.C. 183 (Sask. C.A.).

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- ccxxxv *Jordan* at BCSC, *supra* note ix.
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- cccxi *R. v. Young*, [1998] M.J. No. 495 (Man. C.A.) (QL).
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- cccxi *Sisters in Spirit*, *ibid.* Missing / Murdered Native Women website, *ibid.*
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- cccxi *Ibid.* *R. v. McCulloch*, [2004] S.J. No. 139 (Sask. Q.B.) (QL).
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- cccxi *Sisters in Spirit*, *ibid.* Turning Point website, *ibid.* Note that either Ramona or Mona Wilson (above) has been listed on the *Sisters in Spirit* website as "Mona".
- cccxi *R. v. Blind*, [1999] S.J. No. 597 (Sask. C.A.) and *R. v. Blind*, [2000] S.J. No. 732 (Sask. Q.B.) (QL), at para 40.
- cccxi *Sisters in Spirit*, *supra* note i. Missing / Murdered Native Women website, *supra* note i. Turning Point website, *supra* note i. Missing People Net, *supra* note ii.
- cccxi Winnipeg Crimestoppers, *supra* note xx.
- cccxi *Sisters in Spirit*, *supra* note i. CBC News, "Edmonton's murdered women" (21 October 2005), online: CBC News <http://www.cbc.ca/news/background/edmonton_murders/>.
- cccxi Missing / Murdered Native Women website, *supra* note i. Turning Point website, *supra* note i.
- cccxi *R. v. A.J.E.*, [2000] N.W.T.J. No. 79 (N.W.T. S.C.) (QL). There is no mention of ethnicity in this case. However, I note that the deceased last name is also one of the names of the signatories to Treaty 11.
- cccxi *Sisters in Spirit*, *supra* note i. Missing / Murdered Native Women website, *supra* note i. Turning Point website, *supra* note i.
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