

Aboriginal Rights, Reconciliation and Respectful Relations

by

Dawnis Minawaanigogizhigok Kennedy
J.D., University of Toronto, 2003
B.A., Brandon University, 2000

A Thesis Submitted in Partial Fulfillment
of the Requirements for the Degree of

MASTER OF LAWS

in the Faculty of Law

© Dawnis Kennedy, 2009
University of Victoria

All rights reserved. This thesis may not be reproduced in whole or in part, by photocopy or other means, without the permission of the author.

Supervisory Committee

Aboriginal Rights, Reconciliation and Respectful Relations

by

Dawnis Minawaanigogizhigok Kennedy
J.D., University of Toronto, 2003
B.A., Brandon University, 2000

Supervisory Committee

Dr. John Borrows, (Faculty of Law)
Supervisor

Dr. James H. Tully, (Department of Political Science, Department of Philosophy and
Faculty of Law)
Co-Supervisor

Abstract

Supervisory Committee

Dr. John Borrows, (Faculty of Law)
Supervisor

Dr. James H. Tully, (Department of Political Science, Department of Philosophy and Faculty of Law)
Co-Supervisor

Several ways of understanding aboriginal rights surfaced in the wake of section 35 of the *Constitution Act, 1982*, which recognizes and affirms aboriginal and treaty rights. During my Masters' studies, I journeyed these ways, propelled by a troubling dream that came to me while I was in law school.

The dream prompted me to reconsider rights and to choose my words with caution and with care. And yet when I thought of what my dream might be trying to tell me, I was afraid. I was afraid to question rights, especially aboriginal rights. There seemed to be so much of me tied up in the cause and construction of aboriginal rights.

All through law school I wanted there to be an answer I could find and defend. I wanted there to be a right way to think about aboriginal rights, something that would guarantee me a protected space to be. I wanted to continue pursuing that protection.

And yet, there was my dream. Among the *Anishinabe*, dreams are considered gifts, for they lead us toward our greatest laws and teachings. Though I was loath to question aboriginal rights, I was not willing to question my dream. So I readied myself, preparing to put aboriginal rights into question.

To my thesis, I brought all the learning I had done in and outside of law school. I also brought a question to guide me. To give me courage, I carried my faith in who I am, as

Anishinabe. Knowing for all that I am Dawnis Kennedy, I am also *Minawaanigogizhigok*, I set out to see what I would see.

The question that led me through understandings of section 35 is this: do recent understandings of aboriginal rights *within* Canadian law enable Canadian courts to transform adverse relations *with* indigenous legal orders? The answer I found is, not yet.

The interpretations of aboriginal rights I encountered have effected considerable change within Canadian law. However, my journey shows more is needed before the aboriginal rights framework can support respectful engagements with indigenous law. Indeed, without fundamental reorientation, I believe aboriginal rights jurisprudence will further entrench, rather than transform, Canadian law's adverse relations with indigenous peoples. I would ask judges, lawyers, legislators, and all who shape Canadian law, to break away from attempts to reconcile indigenous and Canadian law *within* Canadian legal orders and reorient themselves towards fostering respect *between* indigenous and Canadian legal orders.

In writing my thesis, I found cause for my concern with rights. And yet, this is not all that I found. Also, I found myself able to engage the world beyond the protective limits aboriginal rights provide. I found the ability to trust in another form of law, *Anishinabe inaakonigewin*, to understand my relations and actions in the world. This trust helped me to find the will to move beyond critiquing systems, toward engaging people.

Table of Contents

Supervisory Committee.....	ii
Abstract.....	iii
Table of Contents.....	v
Acknowledgments.....	vi
Dedication.....	viii
Chapter 1: INTRODUCTION.....	1
Introduction Too.....	8
Chapter 2: DEVELOPING A SUI GENERIS APPROACH	
(R. v. Sparrow).....	16
Chapter 3: ENGAGING WITH INDIGENOUS LAW	
(R. v. Van der Peet).....	28
Chapter 4: RELATIONS WITH INDIGENOUS LEGAL ORDERS	
(R. v. Mitchell).....	42
Chapter 5: RETREATING TO THE DIVIDE	
(R. v. Marshall; R. v. Bernard).....	57
Chapter 6: SECTION 35 AND INTERSOCIETAL LAW.....	64
Chapter 7: LOOKING AHEAD.....	75
Aangwaamizin.....	79
Bibliography.....	84
Appendix A: A Declaration of First Nations.....	93

Acknowledgments

My thesis and I received much support during our development.

On our behalf, I would like to thank the University of Victoria, the Law Foundation of British Columbia and the Social Sciences and Humanities Research Council for providing financial support for my studies and the Canadian Association of Law Teachers, the Canadian Council of Law Deans, the Canadian Law and Society Association, the former Law Commission of Canada, and University of British Columbia Press for the support I received through the Legal Dimensions Initiative.

I would like to acknowledge the late Dr Sammy Sam, Greg Sam, Marilyn Sam, everyone who participated in hosting the Aboriginal Awareness Camp at T'sartlip First Nation, Chief Robert Sam from Songhees First Nation, the keepers of *Wawadit'la*, The Mungo Martin House and the singers from Unity Drum Group, who prepared a space for me to live and to work in their homelands. *Huy ch qa Siem*.

I want also to acknowledge my husband Charles Yung and my cousins Courtney and Andrew Nelson, who lived with me during my years as a graduate student. Thank you, you made my house a home.

To Maxine Matilpi, UVic Law's Academic and Cultural Support Program Director, Xelimuxw/Kasalid, Bill White, UVic's Aboriginal Liaison Officer, Ani-yun-wiya, William McGhee, First Nations Counsellor at UVic's Indigenous Counselling Office, Roger John, Indigenous Advisor for UVic's Faculty of Human & Social Development and to my friends of the Indigenous Law Students' Association, the Indigenous Governance Program and Le,Nonet, *Miigwetch*, for your much appreciated support and sharing.

Miigwetch to my colleagues in UVicLaw's inaugural class and to the students who joined us later, you enriched my studies and my life.

To my supervisors, John Borrows and James Tully, to John McLaren and Jeremy Webber the directors of the University of Victoria's Graduate Program in Law and Society, to my teachers, Rebecca Johnson, Hester Lessard and Maureen Maloney and to UVic Law, I say *Chi Miigwetch*, for supporting the development of my work, for supporting the development of myself as a scholar and as a teacher and, most importantly, for supporting me, as a human being.

To my family, through blood, through clan and through lodge, *Gichi-miigwetch*. I learn to be who I am by watching your example.

To Liz Wheaton and Lorinda Felt, UVicLaw's Graduate Program Assistants, to Allyssa Case, Lorena Fontaine, Josephine Hartin, Kim Stanton, Claire Valgardson and to anyone else I convinced to read/edit my thesis, thank you thank you thank you thank you.

Chapters 2, 3, 4 and 5 of this thesis were published in modified form as "Reconciliation without Respect? Section 35 and Indigenous Legal Order", Chapter 3 of Law Commission of Canada's book *Indigenous Legal Traditions* (Law Commission of Canada, ed., *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77. Reprinted with permission of the Publisher from *Indigenous Legal Traditions* by the Law Commission of Canada (c) University of British Columbia Press 2007. All rights reserved by the Publisher.

Dedication

For my grandpa,

Who stood to protect the spirit of *Anishinabe*.

Waabinikweyaash izhinikaazo

Bizhiw odoodeman

Giizhawenamin.

Chapter 1: INTRODUCTION

*Wewenabozho nindinawemaaganidok
Minawaanigogizhigok indizhinikaaz niin.
Waabizheshi indoodem.
Bigawinishkoziibing nindonjii.
Aabiding Midewiwin.
Gaagige Ojibwe Anishinabe-kwe indow.¹*

My English given name is *Dawnis* (which is actually *Ojibwe* for daughter); my surname is Kennedy. I am an *Ojibwe* woman from *Bigawanishkoziibing*, which is also called Roseau River Anishinabe First Nation. I was raised primarily in the place now known as Brandon, Manitoba, about a three-hour drive from my mother's and my home community. I am of dual heritage, though I choose to identify myself as *Anishinabe*.

My mother's name was *Ozhaawashkogiizhigok* (Blue Sky Woman), Evelyn Marie Kennedy (née Nelson); she was of the *Bizhiw* (Lynx) clan. My grandfather was *Waabinikweyaash* (White Hair Blowing in the Wind Man), Stanley Nelson, also of the *Bizhiw* clan. My grandmother, *Miskogiizhigok* (Red Sky Woman), Marjorie Nelson (née Johnson), is of the *Migizi* (Bald Eagle) clan.² My surname came to me through my father, Kevin Kennedy, who also carries an *Anishinabe* name, *Waawaateinini* (Northern Lights Man). He was raised on Bell Island, Newfoundland by my grandfather, Kyran Kennedy, and my grandmother, Marie Kennedy (née Mason).

¹ These words, roughly translated, mean "Greetings, my relatives. Happy Day Woman is my name. Marten is my clan. I am from the place by Ragweed River. I am a first degree person of the heart way. I am forever *Ojibwe Anishinabe* woman".

² For a brief introduction to the Nelson/Johnson family, see Terrance Nelson, "*Anishinabe Aki* (Earth/Land)" in Roseau River Anishinabe First Nation, *Genocide in Canada* (Ginew: Roseau River Anishinabe First Nation Government, 1997) at 9, 12.

In the fall of 2000, I entered a bachelor of laws degree program at the University of Toronto, and in 2003, I began my initiation into the Three Fires *Midewiwin* lodge.³ These are two dissimilar institutions, which are structured differently and which play different roles in my life. However, the reason that I first began my legal education is also one of the many reasons I chose to enter the lodge: I wanted to find ways to contribute to my community.

The lodge provides me opportunities to learn the ways that were given to *Anishinabe* to carry, work with and maintain. These ways reflect particular understandings of creation and the roles of individuals within community. They serve to support the efforts of *Anishinabe* people to maintain good relations in this world: relations within community, relations between communities and relations between humans and the other beings of creation.

The experience of entering the lodge was one of ‘coming home’, to a place where I felt a profound sense of belonging. The teachings of the lodge have given me a deeper understanding of creation; they situate me within diverse relations to other beings of creation and provide a beautiful place for me to be, to be *Anishinabe*. The teachings of the lodge were ones with which I could identify and to which I was willing to commit. I believe that these teachings, coupled with the efforts of *Anishinabe* to live these teachings into the physical world – can support our people as we seek to live better lives for

³. For more information about the Three Fires *Midewiwin* Lodge, see “About the Three Fires Society”, Three Fires Midewiwin Lodge website (online) at <<http://www.threefires.net/tfn/about.htm>> (2009, April 29) (“The Three Fires Midewiwin Lodge is a contemporary movement of the sacred Midewiwin Society... Historically, the Midewiwin, sometimes referred to as the ‘Grand Medicine Society’, is the original spiritual way and keepers of the sacred knowledge, songs and ceremonies for the Anishinabe people... The Three Fires Midewiwin Lodge is a sacred place, both earthly and in the Spirit World, that was given to all Anishinabe by the Creator, G’zhemanitou... Members of the Three Fires Midewiwin Lodge are initiated into the various levels of the Midewiwin... The Three Fires Midewiwin Lodge meets in fellowship frequently, mainly at the four seasonal ceremonies which are held in Anishinabe communities throughout Anishinabek territory.”).

ourselves and for future generations. Through my participation in the lodge, I learn to draw upon the songs, ceremonies, teachings, and medicines of the *Anishinabe* as I endeavour to live a good life and support others as they do the same. In this way, the lodge has given me opportunities to contribute to my community.

Conversely, Law school provided me with opportunities to learn Euro-derived laws.⁴ These laws also reflect particular understandings of the world and the roles of individuals within creation and community. They structure relations within the world: relations within communities, relations between communities, and relations between humans and the other beings of creation.

I wish I could say that my initiation into Euro-derived legal thought was as empowering as my initiation into the lodge. However, to be honest, it was often a struggle.⁵ Legal studies gave me a deeper understanding of how Euro-derived law would situate me within a particular set of relations, while alienating me from others. Euro-derived law also offers me a place to be, to be indian.⁶ The dissonance between who I understand myself to be and who Euro-derived law would have me be, between how I understand my relation to

⁴ The majority of my legal education has been directed towards learning Canadian, and to a lesser extent, Euro-derived international law. I use the term *Euro-derived law* to refer to the law of European countries, the law of countries like Canada and the United States, which have developed their legal system based primarily upon that of European countries, and the law of international legal systems like the United Nations. It is often assumed that Euro-derived international law is global or universal in nature; however, the rules of this system were founded on the law of only a few European polities. Although many more polities have since become members of this system, I question the extent to which their participation has reformed its rules to reflect the laws of all current members. Furthermore, the vast majority of indigenous polities are not yet members of this system; it is not reflective of their forms of law and does not speak to the international laws, treaties and relations between indigenous peoples.

⁵ I would like to acknowledge the support that I obtained during my legal education. I received guidance and encouragement from numerous members of the legal community, mentors, faculty members, staff, students and the law faculties of which I became a part. Although my sense of struggle continued at different times throughout law school, the support I received helped me to find ways to make my legal education a rewarding, if not easy, experience.

⁶ Here the term *indian* refers to the legal status that indigenous people are accorded under Canadian law and not to citizens of India. See *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 91(24), reprinted in R.S.C. 1985, App. II No. 5; *Constitution Act, 1982*, s. 35(2), being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11; *Indian Act*, R.S.C. 1985, c. I-5, s. 2(1).

the world and how Euro-derived law would position me in relation to others, led me to question whether these laws could support our efforts, as *Anishinabe*, to live better lives for ourselves and our future generations. Through my participation in Canadian legal education, I learned to work with Euro-derived laws, fiduciary duties, remedies and rights, but I did not know how I could draw upon this law to help me live a good life, or to support others seeking to do the same. Thus, I questioned whether I could utilize my legal education to contribute to my community.

This, then, is a little bit of who I am. I am an *Anishinabe* woman of dual heritage, currently pursuing a Master of Laws degree at the University of Victoria. I have some training in Canadian law and I have had opportunities to learn more about *Anishinabe inendamowin*⁷. I am firmly committed to the teachings that the *Anishinabe* were given to work with and to maintain. And though I may question my relationship to Canadian law, I still seek ways to work with the knowledge I have gained during my legal studies.⁸

As an *Anishinabe* person, it is incredibly strange and disconcerting to look into the depths of Canadian law, for there you find an indian. You know that this indian is meant to be you, but she does not look like you, her relations are not your relations—and yet, there she is, looking back out at you.⁹ During your training, you will come to know this indian intimately. Her life spans several generations and many reincarnations. She is a creature of Euro-derived law. She is not you. And yet, you exist in peculiar relation to each other. Her existence works to justify forcible attempts to remake you, your family and your people in

⁷ *Anishinabe inendamowin* can be roughly translated as *Anishinabe* thought. Although I have been fortunate enough to receive some of the teachings given to *Anishinabe*, I am still learning to live them into my life. I am not an authority on *Anishinabe inendamowin*, but I am an *Anishinabe* learner. See below, at 12-13.

⁸ I am not alone in questioning my relationship to Canadian law. Professor Gordon Christie notes that such questioning is common among indigenous lawyers, judges and legal scholars. He finds that, “[m]any question their roles within the system, yet feel compelled to continue on. Aboriginal jurists commonly perceive the law as alien and oppressive – not “our” law, but “colonial law,” that of the oppressor.” Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2 *Indigenous L.J.* 67 at 68.

her image, to displace your relations for hers. Her definition has influenced the way others relate to you. She can be recast and repositioned—Euro-derived law has done so throughout the centuries—and yet, she remains but an indian, she is not *Anishinabe*.

My legal training left me questioning my relationship to this indian of Euro-derived law. She is not of my people. She is not my responsibility.¹⁰ Yet do I, with my knowledge of the law that defines her, have the power to remake her? Can I manipulate her and use her influence to benefit *Anishinabe* people? Could I, through our engagement, begin to lose myself in her, to lose my ability to see the differences between us? If I expose her and undermine her power, will the ability to influence our lives, as *Anishinabe* people, be enhanced or diminished?

It can do strange things to you, learning the law that is implicated in the oppression of your people. I asked myself, if I was smart enough, could I find the key that would enable this law to right itself? If I was clever enough, could I find ways to exploit this law and gain leverage to barter for a better future? If I was determined enough, could I follow the making of this law back to uncover its capacity to be otherwise? If I was wily enough, could I find the means to transform, decolonize, or indigenize this law? If I was foolish enough, could I unwittingly participate in oppressing indigenous people?

⁹ James (Sákéj) Youngblood Henderson speaks to a similar experience: “For most Indigenous students, the realization of their invisibility or transparency in Eurocentric curricula generates the systemic trauma of looking into a still lake and not seeing their images. Studying and learning the Eurocentric canon makes them become alien in their own worldview and eyes.” James (Sákéj) Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 *Indigenous L.J.* 1 at 6 [Henderson, “Indigenous Legal Consciousness”]. On indigenous peoples’ experiences within legal educational institutions see Patricia A. Monture, “Now That the Door Is Open: First Nations and the Law School Experience” (1990) 15 *Queen’s L.J.* 210; Robert A. Williams Jr., “Vampires Anonymous and Critical Race Practice” (1996-1997) 95 *Mich. L. Rev.* 741.

¹⁰ John Borrows notes that such a stance leads many indigenous students to question their own involvement in the aboriginal rights field. See John Borrows, “Tracking Trajectories: Aboriginal Governance as an Aboriginal Right” (2005) 38 *U.B.C. L. Rev.* 285 (“some Aboriginal students feel it is not their place to get involved in the field of Aboriginal law. They might say something like, “we didn’t create this mess, why should we have to clean it up, that’s Canada’s problem.” at 286-287).

Is this the power of Euro-derived law: its ability to draw us into itself with its potential for change, to keep us occupied by our efforts to work within it until we find all our relations and ourselves trapped inside its borders, transformed into isolated indians, lacking any memory of being *Anishinabe*?¹¹ Or has this law become what it is only by excluding our influence as it works to legitimate attempts to separate us from the land, the waters, the animals, the trees, the medicines, the children, the people, from our knowledges, our stories and our languages?¹² Can our people afford to risk working with this law? Can they afford not to?

Where does my responsibility lie as one of the too few (or too many) *Anishinabe* trained in Canadian law? This is the main question I carried with me out of law school. It is one I still carry with me today. Writing this thesis has allowed me to consider this question and to discover its relation to a dream that came to me during my second year in the bachelor of laws degree program at the University of Toronto Faculty of Law.

“Rights” came to me one night.

*The word danced up out of my belly, emerged from between my lips
and came to sit upon my nose.*

The word rested there for a moment, looking at me

¹¹ See generally Taiaiake Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) (“[T]he implication of a legalist approach is entrenchment in the state system as citizens with rights defined by the constitution of the colonial state, which is the defeat of the idea of an independent *Onkwehonwe* existence... Being “Indian” and being “aboriginal” is accepting a small self, imprisonment in the small space created for us by the white man: reserves, aboriginal rights, Indian Act entitlements, etc.” at 23, 165); See also —, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999) at 57-59 [Alfred, *Peace, Power, Righteousness*].

¹² See generally John Borrows, “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill L.J. 629 (“The incorporation of such a broad base of [First Nations] legal principles [into Canadian law] would make the law truly Canadian and, as a result, more equitable and fair.” at 654); See also —, “Creating an Indigenous Legal Community” (2005) 50 McGill L.J. 153 [Borrows, “Indigenous Legal Community”].

—its life giver—

and as it leapt from my body to begin its life journey

I heard the laughter of the trickster ringing through my soul.

These lines voice my dream. I found this dream disconcerting. All through law school, I heard that *Anishinabe* had rights: rights to this and rights to that. But I was afraid to question rights, especially aboriginal rights; there seemed to be so much of me tied up in their cause and construction. I wanted there to be an answer I could find and defend. I wanted there to be a right way to think about aboriginal rights, something that would guarantee me a protected space to be. And yet, there was my dream, prompting me to reconsider rights and choose my words with caution and with care.

Among the *Anishinabe*, dreams are considered gifts, for they lead us toward our greatest laws and teachings. Though I was loath to question aboriginal rights, I was not willing to question my dream. And so I prepared to put aboriginal rights into question. The question that led me through understandings of section 35 is this: do recent understandings of aboriginal rights *within* Canadian law enable Canadian courts to transform their adverse relations *with* indigenous legal orders? The answer I found is, not yet.

Section 35 has effected considerable change within Canadian law. However, my journey shows that more is needed before the aboriginal rights framework can support respectful engagements with indigenous law. Indeed, without fundamental reorientation, I believe aboriginal rights jurisprudence will further entrench, rather than transform, Canadian law's adverse relations with indigenous peoples. I would ask judges, lawyers, legislators, and all who shape Canadian law, to break away from attempts to reconcile

indigenous and Canadian law *within* Canadian legal orders and reorient themselves towards fostering respect *between* indigenous and Canadian legal orders.

In writing my thesis, I found cause for my concern with rights. Yet this is not all I found. I found myself able to engage the world beyond the protective limits aboriginal rights provide. I found I could trust in another form of law, *Anishinabe* law, to understand my relations and actions in the world. And, towards the end of my writing, I found myself willing to step away from berating systems and begin engaging people. Though this may not seem like much, it was more than enough for me.

Introduction Too

The aboriginal and treaty rights of the aboriginal peoples of Canada were recognized and affirmed by the supreme law of Canada, the newly patriated *Constitution Act, 1982*.¹³ Many understood the constitutional recognition and affirmation of aboriginal rights as a significant achievement, heralding the transformation of the Canadian state's relations with indigenous peoples.¹⁴ Since the entrenchment of aboriginal rights in Canada's constitution, Canadian legal orders are reconsidering their involvement in indigenous-Canadian relations. Indigenous people have benefited from the recognition of aboriginal rights.¹⁵ And although the language of rights was not originally known to

¹³ *Constitution Act, 1982*, *supra* note 6 (“The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed” s. 35(1); “The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.” s. 52(1)).

¹⁴ Not all indigenous peoples saw the entrenchment of aboriginal rights in the Canadian constitution as a positive event. See *e.g.* Eric Robison & Henry Bird Quinney, *The Infested Blanket: Canada's Constitution-Genocide of Indian Nations* (Winnipeg: Queenston House Publishing, 1985).

¹⁵ I am referring to the fact that the recognition of aboriginal rights has led to changes in Canadian government policy and practice. Since 1982, the interference indigenous people face when fishing, hunting and gathering is being increasingly questioned.

indigenous people, they are quickly becoming proficient in its use. So why question aboriginal rights?

For the past several generations, indigenous people have worked to maintain their ways of being in and relating to the world, often in conditions of extreme adversity. Although gaining access to legal recognition through the aboriginal rights paradigm may serve to support such efforts, this claim is far from certain.¹⁶ The language of rights is not an indigenous language, but one based upon a way of relating to the world not our own.¹⁷ Many question whether indigenous understandings of world can be articulated through the language of rights.¹⁸ Moreover, many question the effect of using the language of rights upon indigenous understandings of relating to the world.¹⁹

In many indigenous communities, it is said that words have power; that they have a life of their own. It is important to recognize the power of words, to be careful how they are chosen. This, then, is the work I want to undertake: the work of gaining a deeper understanding of rights and their capacity to transform relations between indigenous peoples and settler societies, within (and among) indigenous communities and with other beings of creation. I do not attempt to address this issue comprehensively. I focus upon a small part of a larger task, that is, to gain deeper insight into the constitutional affirmation of aboriginal rights and its capacity to transform relations between Canadian law and

¹⁶ Noel Pearson, "On the Human Right to Misery, Mass Incarceration and Early Death" *Quadrant* 45:12 (December 2001) online: Quadrant <http://www.quadrant.org.au/php/articleview.php?article_id=1467>. (where Noel Pearson highlights the social breakdown that has accompanied advancements in indigenous peoples' formal rights in Australia).

¹⁷ See e.g. Mary Ellen Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies Cultural Differences" (1989-1990) *Can. Hum. Rts. Y.B.* 3; See also —. "Home/Land" (1991-1992) 10 *Can. J. Fam. L.* 17.

¹⁸ See e.g. Anna Zalewski, "From *Sparrow* to *Van der Peet*: The Evolution of a Definition of Aboriginal Rights" (1997) 55 *U.T. Fac. L. Rev.* 435 ("the idea of "rights" cannot adequately capture the way in which Aboriginal peoples think about themselves and their relationship to their community, land, and resources" at 445).

¹⁹ See e.g. Alfred, *Peace, Power, Righteousness*, *supra* note 11 at 140.

indigenous peoples. In particular, I ask how the aboriginal rights framework might support indigenous peoples' efforts to maintain their ways of relating to each other and to others beings of creation, which are embedded in indigenous legal orders.²⁰

The aboriginal rights paradigm and section 35 seek to structure relations between indigenous peoples and the Canadian state. However, any structuring of these relations depends upon and perpetuates a particular construction of another set of relations: those between indigenous and Canadian legal orders. This relationship is often overlooked in aboriginal rights discourse. However, understanding the relations between these legal orders is important because, for many generations, Canadian law's relations with indigenous peoples have harmed indigenous legal orders. If section 35 is to guide the Canadian state toward respectful relations with indigenous peoples, it must first be interpreted in a manner that allows Canadian law to transform its own adverse relations with indigenous peoples and legal orders. My thesis will therefore ask the following question: do recent understandings of aboriginal rights *within* Canadian law allow Canadian courts to participate in respectful relations *with* indigenous legal orders?

One of the important determinants of section 35's potential is the Supreme Court of Canada, which usually has the last legal word on its interpretation and application. Thus, in this thesis, I conduct a detailed doctrinal analysis of the judgments rendered by the Supreme Court in four cases: *R. v. Sparrow*;²¹ *R. v. Van der Peet*;²² *Mitchell v. M.N.R.*;²³

²⁰ Western theory attempts to draw "bright lines" that distinguish legal traditions from other 'non-legal' traditions. It is not yet clear to me that such delineations are important within indigenous communities. In this paper, I focus on indigenous traditions, institutions, and ways of life as they address what many understand to be "law" and can therefore be considered "legal". However, it may be that what I understand to be indigenous laws, legal traditions, institutions of law and legal orders can be equally understood as indigenous traditions or institutions of governance, education or medicine, among others.

²¹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [*Sparrow*].

²² *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [*Van der Peet*].

²³ *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, 2001 SCC 33 [*Mitchell*].

*and R. v. Marshall; R. v. Bernard.*²⁴ I chose these cases because they demonstrate different doctrinal approaches to the relationship of indigenous law to section 35, not because they represent a comprehensive overview. I use these cases to discover how judges in the Supreme Court understand the relations between Canadian and indigenous law. I draw upon skills learned in law school, subjecting the judgments in these cases to critical analysis and testing them for consistency with the foundation of respectful relations between Canadian and indigenous legal orders. Chapters Two, Three, Four and Five make particular use of this approach.

In Chapter Six, I extend this analysis to include a consideration of Canadian legal theory regarding intersocietal law. Again, I do not seek to provide a comprehensive overview of intersocietal law as it appears within legal theory. Rather, I have chosen to conduct a detailed analysis of a limited number of authors, paying particular attention to the writings of professors Brian Slattery and Mark D. Walters.

I have also endeavoured to draw upon the understandings I carry as *Anishinabe-kwe* as I developed my thesis, although their influence may be more subtle. In choosing my topic, I followed the dream I described above, as I have been taught that through our dreams we often receive direction from Spirit. My analysis is premised upon the continuing existence of indigenous legal orders, based on my own experience of the persisting influence of *Anishinabe* law within my life. I have also reflected upon stories, teachings and directions I have received. I have not written them here because they were not shared with me for this purpose; rather, they were meant to guide the development of my own understanding and judgment, so that I am able to make good decisions within my life.

²⁴ *R. v. Marshall; R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43 [*Marshall and Bernard*].

This reflection has led me to share a little bit of myself with you in this introductory chapter and in my conclusion, so that those reading my work will understand something of my location, my commitments, my experience and the questions that lie behind my thesis.²⁵ It has also led me to offer *assema* many times during my masters' studies, asking for guidance so that I might bring forward my thoughts in a good and respectful way. This thesis is a representation of my own thoughts, as someone endeavouring to learn the teachings that were given to the *Anishinabe*, it is not a representation of a collective *Anishinabe* or *indigenous* perspective. Likewise, my comments on *indigenous* and *Anishinabe* law are my own considered reflections upon my experiences within the *Anishinabe* legal order and my brief introductions to other indigenous legal orders. I am not an expert or an authority on *Anishinabe* law; I have not been raised up and given that responsibility. However, as *Anishinabe-kwe*, it is important that I continue to work towards living what I have been given, in all aspects of my life.

Chapter Two, immediately following, discusses *Sparrow*, in which the Supreme Court first considers aboriginal rights in the context of section 35. This case marks a considerable shift within aboriginal rights jurisprudence, calling for a new approach to aboriginal rights interpretation. However, the uncertainty regarding the Court's new approach, including its reluctance to question the Crown's assertion of sovereignty over indigenous peoples and its failure to engage indigenous laws, keeps the justices entrenched in adverse relations with indigenous legal orders.

Chapter Three focuses on *Van der Peet*, the first case to present a test for the interpretation of section 35 under the Constitution. *Van der Peet* is an important case

²⁵ On the importance of locating oneself as an indigenous researcher see e.g. Kathy Absolon & Cam Willett, "Putting Ourselves Forward: Location in Aboriginal Research" in Leslie Brown & Susan Strega, *Research as Resistance: Critical, Indigenous & Anti-oppressive Approaches* (Toronto: Canadian Scholars' Press, 2005) 97.

because it found that section 35 rights are informed by indigenous law. However, despite acknowledging indigenous law's relevancy to section 35, the *Van der Peet* test fails to give effect to this acknowledgement. The Court favoured an approach based upon indigenous practices rather than laws. Thus, *Van der Peet* did not provide an adequate explanation of the relationship between section 35 and indigenous law, giving indigenous peoples further cause to question its transformative potential.

Chapter Four reviews and analyzes *Mitchell*, which is the closest the Supreme Court has come to directly considering the relationship between indigenous and Canadian legal orders. It concludes that the Court is treading dangerously close to assuming that indigenous legal systems have been absorbed by Canadian law. Justice Binnie's concurring judgment goes even further, seeming to indicate that Euro-derived legal orders are the only ones relevant to the identification of aboriginal rights. Yet Chief Justice McLachlin's judgment could also spell trouble for the transformative potential of section 35, though it is more ambiguous. It is not clear from her approach whether she regards the absorption view as part of aboriginal rights doctrine prior to 1982 or whether she considers this view to be consistent with section 35. If this were the case, though her decision is not determinative, the Court could undermine section 35's potential transformative effect, since it would tie the constitutional recognition and affirmation of aboriginal rights to the belief that indigenous legal orders have been assimilated. If the absorption approach were adopted, Canadian law would remain unresponsive to the continuing existence of indigenous legal orders, cementing Canadian law's adverse relationships with indigenous legal orders within Canada's constitution.

Chapter Five's examination of *Marshall and Bernard* reveals that the Court neither endorses nor rejects the absorption model as a way of understanding relations between indigenous law, Euro-derived law and section 35. Instead, it sidesteps these issues by disregarding its earlier affirmation of indigenous law's relevancy to section 35. McLachlin C.J.C.'s limits indigenous perspective's role, making it difficult for Canadian judges to interpret aboriginal rights in a way that demonstrates respect for indigenous legal orders and indigenous peoples' conceptions of their relationship to and status within their territories. In McLachlin C.J.C.'s judgment, the rights available to indigenous peoples appear limited to those already available within the common law. This position does not bode well for section 35's ability to create more respectful relationships within indigenous legal orders. After completing my analysis of these cases, I conclude that the Supreme Court has thus far failed to demonstrate the potential within section 35, not having constructed a framework which enables Canadian law to participate in establishing respectful relations with indigenous legal orders.

In Chapter Six, I compare the absorption model discussed by McLachlin C.J.C. in *Mitchell* to Brian Slattery's generative theory of intersocietal law. I conclude that rather than addressing the problematic aspects of the absorption model, Slattery replicates them within a different understanding of aboriginal rights. Given the problematic ways in which the Court and Slattery have sought to explain indigenous law's relevance to section 35, I consider whether an inter-legal or intersocietal interpretation of Canadian aboriginal rights law can transform Canadian law's adverse relations with indigenous legal orders. I conclude that while conceiving of section 35 as intersocietal law is capable of effecting change within Canadian aboriginal rights law, more is required to transform its relations

with indigenous legal orders. I identify a need to move beyond attempts at reconciling indigenous and Canadian law *within* Canadian aboriginal rights law and towards a process of reconciliation, or in other words, working towards fostering respect within the relations *between* indigenous and Canadian legal orders.

In Chapter Seven, I ask: how might Canadian courts interpret section 35 *within* Canadian law in a manner that enables Canadian law to transform its adverse relations *with* indigenous legal orders? I do not answer this question, but I do share three insights that I have drawn from my journey through section 35 jurisprudence, which may help those who are looking to work towards such a transformation. First, indigenous *legal orders continue to exist*. Second, it is important that those working within the legal system acknowledge that they are acting within the existing relations between Canadian and indigenous legal orders. It is not enough for judges to get it right; lawyers, law professors and students must also be cognizant of their relations with indigenous legal orders. Finally, it is not enough for indigenous people to know their place within indigenous legal orders and where Canadian legal orders would position them. People from all walks of life take steps to learn about Indigenous legal orders. It is time that other people begin to ask themselves, what place, what role, what responsibilities, do we have as seen from within indigenous legal orders?

Chapter 2: DEVELOPING A *SUI GENERIS* APPROACH (*R. v. Sparrow*)

The *Constitution Act, 1982* came into force during Bora Laskin's tenure as Chief Justice of Canada. However, the Supreme Court did not engage substantively with section 35 until *R. v. Sparrow*, which was released two months before Laskin C.J.C.'s successor, Chief Justice of Canada Brian Dickson, retired from the Court.²⁶ The case arose when Ronald Edward Sparrow, a member of the *Musqueam* Indian Band, was charged under the *Fisheries Act*, with fishing contrary to stipulations of the food fishing licence issued to the *Musqueam* Indian Band by the Department of Fisheries.²⁷ The question before the Supreme Court was whether the restrictions contained in the licence were inconsistent with section 35.²⁸ The unanimous judgment of the Court, authored by La Forest J. and Dickson C.J.C., affirmed that the *Musqueam* had an aboriginal right to fish under section 35.²⁹ The Court sent the case back to trial to determine whether this right had been infringed, and whether any infringement could be justified under Canadian law.

²⁶ *Sparrow*, *supra* note 21. Section 35 issues were raised in three Supreme Court cases prior to *Sparrow*, however, these cases were decided without reference to the *Constitution Act, 1982*. Before retiring, Chief Justice Bora Laskin submitted a section 35 question to the Court regarding the hunting rights at issue in *R. v. Simon*. However, the Court decided the case solely on the basis of section 88 of the *Indian Act*, citing the appellant James Mathew Simon's request "that the appeal be dismissed without prejudice to the Micmac position based on other treaties and aboriginal rights" *R. v. Simon*, [1985] 2 S.C.R. 387, Dickson C.J.C. at para. 17; see also *ibid.* paras. 65-5. In *R. v. Horse*, the Court assessed a treaty rights claim without considering the potential application of section 35. They found that the right claimed was not guaranteed by the treaty, and therefore considered it unnecessary to initiate a section 35 analysis. The court did not appear to consider the possibility that the defendants might also have been exercising an aboriginal right under section 35. *R. v. Horse*, [1988] 1 S.C.R. 187, Estey J. In *R. v. Sioui*, the respondents, members of the Huron Band were charged under the *Parks Act* for conduct contrary to regulations made under this act. The court found that the respondents were protected by a treaty between the Huron and the British, which, in conjunction with section 88 of the *Indian Act*, exempted them from the regulations. The court analysed the treaty without reference to section 35. Potential aboriginal rights claims under section 35 were not considered because the respondents abandoned their arguments based on section 35 aboriginal rights. *R. v. Sioui*, [1990] 1 S.C.R. 1025, Lamer J. [*Sioui*]; *Parks Act*, R.S.Q. c. P-9.

²⁷ *Fisheries Act*, R.S.C. 1970, c. F-14.

²⁸ *Ibid.*, s. 34, 61(1).

²⁹ *Sparrow*, *supra* note 21 at 1099.

Although aboriginal rights were recognized under the common law prior to 1982, the extent of this recognition was severely restricted.³⁰ Before the Supreme Court's judgment in *Calder v. Attorney General of British Columbia*, aboriginal rights were considered wholly dependant on the will of the Sovereign, vulnerable to unilateral extinguishment and subject to government regulation.³¹ Even in *Calder*, the enforceability of aboriginal rights was uncertain. In this case, the prior occupation of indigenous peoples was found to give rise to rights within Canadian law; however, the Court split on the issue of whether these rights had been extinguished by general legislation.³² As Dickson C.J.C. and LaForest J. observe in *Sparrow*, for many years prior to 1982, aboriginal rights —“certainly as legal rights—were virtually ignored.”³³ Against this history, the *Sparrow* decision is often referred to as a landmark case for aboriginal rights and indigenous peoples.

Sparrow represents the Supreme Court's first engagement with section 35. In this case, the Court considers the status and enforceability of aboriginal rights within Canadian law and examines the relations between Canadian legislative and regulatory powers, common law aboriginal rights doctrine, section 35 rights and Crown sovereignty. It determined that Canadian law needed a new approach to aboriginal rights interpretation that attends to the unique nature of such rights. However, from the judgment, it is unclear whether such attentiveness functions to enable or limit the recognition of aboriginal rights.

³⁰ See e.g. *R. v. St. Catherine's Milling and Lumber Company* (1888), 14 A.C. 46 (P.C.).

³¹ *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313 [*Calder*]; See also Michael Asch, “From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-96” in Paul Havemann, ed., *Indigenous Peoples' Rights: in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999).

³² Three judges were of the view that any aboriginal title held by *Nisga'a* was extinguished by general legislation, three would have required the Crown establish extinguishment by demonstrating a ‘clear and plain’ intention and one judge rejected the *Nisga'a* appeal on other grounds. *Calder, ibid.*

³³ *Sparrow, supra* note 21 at 1103. See also Minister of Indian Affairs and Northern Development, Jean Chrétien, *Statement of Government of Canada on Indian Policy* (Ottawa: Indian and Northern Affairs Canada, 1969) (“aboriginal claims to land... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy” at 11).

The Court's overall approach to section 35 is of little help in resolving this uncertainty, for while it refused to carry some of the restrictive aspects of previous aboriginal rights doctrine forward into section 35 interpretation, it endorsed other aspects without reflection, creating tensions which persist in current jurisprudence. Thus, although *Sparrow* certainly marked the beginning of a shift in the conceptualization of aboriginal rights in Canadian law, it is unclear what effect, if any, this shift may have upon Canadian law's adverse relations with indigenous peoples.

In *Sparrow*, it was unequivocally determined that aboriginal rights are legal rights enforceable in Canadian law. The Court rejected the federal government's argument that the recognition and affirmation of aboriginal rights in the constitution was merely a preamble without legal effect.³⁴ Commenting upon the government's tendency to deny the legal significance of indigenous peoples' claims, it noted that, "[a]s recently as *Guerin v. The Queen*... the federal government argued in this Court that any federal obligation [to indigenous peoples] was of a political [as opposed to a legal] character."³⁵ The Court rejected this argument and found that section 35 contained a "substantive promise" and must be "construed in a purposive way."³⁶

The Court directly considered the relationship between section 35 rights and previous aboriginal rights jurisprudence and, in particular, it asked whether the aboriginal rights recognized and affirmed by section 35 were limited to those previously recognized by, or existing according to, Canadian common law. The Court stressed that the scope of section 35 "extends beyond" the effects of previous aboriginal rights doctrine,³⁷ citing the following words of professor Noel Lyon:

³⁴ *Sparrow*, *supra* note 21 at 1106.

³⁵ *Sparrow*, *supra* note 21 at 1105, referring to *R. v. Guerin*, [1984] 2 S.C.R. 335.

³⁶ *Sparrow*, *ibid.* at 1110, 1106, respectively, aff'g *R. v. Sparrow* (1986), 36 D.L.R. (4th) 246 (B.C.C.A.).

...the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.³⁸

In effect, the Court acknowledged that the rights recognized and affirmed by section 35 are not dependant upon prior recognition by Canadian law.³⁹ Furthermore, the Court found that, according to Canadian law, section 35 rights are pre-existing rights which do not owe their existence to the *Constitution Act, 1982*.⁴⁰

The Court also articulated their position on the relationship between section 35 rights and the legislative powers of Canadian government. The federal government argued that section 35 did not protect rights which were incompatible with previous government regulation.⁴¹ The Court rejected this argument, finding that government regulation cannot delimit an aboriginal right, in and of itself. It based this finding on its interpretation of the term ‘existing,’ as meaning “‘unextinguished’ rather than exercisable at a certain time in history.”⁴² However, although the Court set the bar for extinguishment higher than the mere

³⁷ *Sparrow*, *supra* note 21 at 1105. See also *Van der Peet*, *supra* note 22 at para. 225 (Where, in reference to the passage above, McLachlin J. writes: “Section 35(1) gives constitutional protection not only to aboriginal rights codified through treaties at the time of its adoption in 1982, but also to aboriginal rights which had not been formally recognized at that date.”).

³⁸ Noel Lyon, “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall L.J. 95 at 100, cited in *Sparrow*, *supra* note 21 at 1105-1106.

³⁹ This point was reaffirmed in later judgments. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, Lamer C.J.C. [*Delgamuukw*] (“the existence of a particular aboriginal right at common law is not a sine qua non for the proof of an aboriginal right that is recognized and affirmed by s. 35(1). Indeed, none of the decisions of this Court handed down under s. 35(1) in which the existence of an aboriginal right has been demonstrated has relied on the existence of that right at common law. The existence of an aboriginal right at common law is therefore sufficient, but not necessary, for the recognition and affirmation of that right by s. 35(1)” at para. 136); *R. v. Côté*, [1996] 3 S.C.R. 139, Lamer C.J.C. (where Lamer C.J.C. argues that section 35 would fail to achieve its purpose “if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers” at para. 52).

⁴⁰ See *Delgamuukw*, *ibid.*, Lamer C.J.C. (“On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather, it accorded constitutional status to those rights which were ‘existing’ in 1982”); See also *R. v. Van der Peet*, [1996] 2 SCR 507 (Factum of the Appellant) online: University of Saskatchewan, Native Law Centre of Canada <<http://www.usask.ca/nativelaw/factums/view.php?id=129>> at paras. 52-58 [*Van der Peet*, (Factum of the Appellant)].

⁴¹ See *Sparrow*, *supra* note 21 at 1084, 1097.

⁴² *Ibid.* at 1091, aff’g *R. v. Agawa* (1988), 28 O.A.C. 201, Blair J.A.; See also *Sparrow*, *ibid.* at 1099.

regulation of an aboriginal right,⁴³ it simultaneously endorsed the position that, prior to 1982, the Crown was able to unilaterally extinguish aboriginal rights simply by demonstrating the clear and plain intention to do so.⁴⁴ The National Indian Brotherhood/Assembly of First Nations, who intervened in the case, presented an perspective, contemplating the extinguishment of aboriginal rights solely through voluntary surrender.⁴⁵ The Court, however, did not scrutinize the claim that aboriginal rights were subject to unilateral extinguishment, nor did it articulate its reasons for endorsing this view.

The relationship between section 35 and the legislative powers of Canadian governments came up once again in respect to regulating the exercise of aboriginal rights.⁴⁶ Unlike the *Charter of Rights and Freedoms*, the text of section 35 does not include a clause explicitly de-limiting the exercise of aboriginal rights.⁴⁷ The Court rejected the submissions of Sparrow and the National Indian Brotherhood/Assembly of First Nations, who argued that section 35 protects the authority of indigenous peoples to regulate the exercise aboriginal rights and that it (in the words of the Court) denies “Parliament’s power to restrictively regulate aboriginal fishing rights.”⁴⁸ Instead, the Court found that Parliament could regulate aboriginal rights, subject to the condition that any infringement of section 35

⁴³ *Ibid.*

⁴⁴ See *ibid.* (“The test of extinguishment to be adopted, in our opinion, is that the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right” at 1091).

⁴⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075. (Supplementary Factum of the Intervenor) online: University of Saskatchewan, Native Law Centre of Canada <<http://www.usask.ca/nativelaw/factums/view.php?id=522>> at paras. 41-42. See also: UN Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, 7 April 1999, CCPR/C/79/Add.105 (1999) at para. 9 (where the Human Rights Committee, in reviewing Canada’s report under the *International Covenant on Civil and Political Rights (Covenant)*, found that the practice of extinguishing inherent aboriginal rights was incompatible with article 1 of the *Covenant*. *International Covenant on Civil and Political Rights*, 19 December 1966. 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No 47, 6 I.L.M. 368).

⁴⁶ See John Borrows, “Uncertain Citizens: The Supreme Court and Aboriginal Peoples” (2001) 80 Can. Bar. Rev. 15.

⁴⁷ *Canadian Charter of Human Rights and Freedoms*, s. 1, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, C. 11 (“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”).

⁴⁸ *Sparrow*, *supra* note 21 at 1102.

rights is justified by a valid legislative objective and in keeping with the relationship between indigenous peoples and the Crown.

When articulating its reasons for endorsing the infringement of section 35 rights, the Court looks to the Crown sovereignty to buttress its endorsement of Canadian legislative power. The Court insists that:

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 power, and indeed the underlying title, to such lands vested in the Crown.*⁴⁹

The Court relies upon the claim that Crown sovereignty has never been questioned, one which is factually untrue.⁵⁰ The Crown's assertions of sovereignty over indigenous peoples and "under" indigenous territories have been, and continue to be, subject to serious contestation within and beyond the bounds of Canadian law.⁵¹ Yet the Court in *Sparrow* tacitly accepts the Crown's claims to exclusive sovereignty over indigenous peoples—as is evident in its unconsidered endorsement of the Crown's ability to unilaterally extinguish aboriginal rights through clear and plain intent prior to 1982—failing to explain how it gained the legal right to sovereignty over indigenous peoples and under indigenous territories.⁵²

⁴⁹ *Ibid.* at 1103 [emphasis added].

⁵⁰ See e.g. John Borrows, "Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1.

⁵¹ See e.g. James Tully, "The Struggles of Indigenous Peoples for and of Freedom" in Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 36 at 51-58.

⁵² Professors Michael Asch and Patrick Macklem argue that this assumption is grounded in problematic notions of European superiority, is not supported by the text of the *Constitution Act 1867*, and "does violence to fundamental principles of justice and human rights in the modern world." Michael Asch and Patrick Macklem "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1992) 29 Alta. L. Rev. 498 at 510; *Constitution Act, 1867*, *supra* note 6. See also: John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L. J. 537.

In *Sparrow*, the Court determined that the constitutional recognition and affirmation of aboriginal rights demanded a new approach to understanding their relation to Canadian law.⁵³ It was conceivably open to the Court to justify this new approach solely on the basis of aboriginal rights newly recognized constitutional status; however, it did not do so. Rather, it grounded the requirement for a new approach in what it termed the *sui generis* nature of aboriginal rights.⁵⁴ The *sui generis* characterization of aboriginal rights, as professors John Borrows and Leonard Rotman explain, “connotes uniqueness and difference; literally translated, it means ‘of its own kind or class.’”⁵⁵ Although the Court is clear that section 35 demands a new approach because of the unique nature of aboriginal rights, it is decidedly less clear on why aboriginal rights are unique or of their own kind. The Court implied that the reason section 35 aboriginal rights are *sui generis* lies in the fact that something ‘exists outside’ British common law, which is nonetheless relevant in the interpretation of these rights. This fact is most evident in the Court’s assertion that it is crucial for Canadian judges to be “sensitive to the aboriginal perspective... on the meaning of the rights at stake”⁵⁶ and “careful to avoid the application of traditional common law concepts”⁵⁷ as they “develop their understanding of... the ‘*sui generis*’ nature of aboriginal rights.”⁵⁸ And yet, despite its call for a new approach and its ultimate decision that the *Musqueam* enjoy constitutionally protected fishing rights within Canadian law, it remains unclear whether the Court’s *sui generis* characterization of aboriginal rights is able, or even

⁵³ *Sparrow*, *supra* note 21 at 1111-1112.

⁵⁴ *Ibid.* at 1112.

⁵⁵ John Borrows & Leonard I. Rotman, “The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 *Alta. L. Rev.* 9 at 10 citing *Black’s Law Dictionary*, 6th ed., *s.v.* “*sui generis*”. On the *sui generis* nature of aboriginal rights, see also James (Sákéj) Youngblood Henderson, “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) 67 [Henderson, “Aboriginal Jurisprudence”].

⁵⁶ *Sparrow*, *supra* note 21 at 1112.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

intended, to work toward the transformation of Canadian law's adverse relation to indigenous peoples.

The Court's characterization of aboriginal rights as *sui generis* (including its admonition to avoid applying traditional common law concepts and to attend to indigenous peoples' conceptions of aboriginal rights) can be understood as either an enabling or a limiting device. To understand how this is so, one must remember that, in the past, the refusal to respect indigenous jurisdiction and to recognize indigenous claims was often justified on the basis of indigenous cultural difference.⁵⁹ Indigenous difference was employed to legitimate non-recognition of indigenous jurisdiction and claims in several ways, including the non-recognition of 'uncivilized' or 'non-European' peoples (grounded in differences between peoples) and the non-recognition of legal claims which do not conform to or are considered uncognizable to Euro-derived law (grounded in differences between legal orders).⁶⁰

When considered against non-recognition based on differences between legal orders, aboriginal rights' *sui generis* characterization could be seen as enabling section 35

⁵⁹ I qualify the term *indigenous difference* because in this context cultural differences are at issue; other differences (for example, the fact that indigenous peoples enjoy priority in time in relation to these lands) are not central to this analysis). The concept of indigenous difference is used primarily for convenience. However, it is important to remember that the cultural differences between indigenous peoples and settler societies are not one sided, and result as much from "settler difference" as they do from "indigenous difference." Overemphasizing indigenous difference often works to mask 'settler difference,' falsely depicting settler societies as the neutral norm.

⁶⁰ Although formal Euro-derived law often served to deny indigenous people's jurisdiction and legal orders, colonial powers and settler societies often acknowledged both in practice. See John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 155; ———. *Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006) at 128-131 [Borrows, *Indigenous Legal Traditions*]; Harold Cardinal & Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream Is That Our People Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000); John D. Hurley, *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: University of Saskatchewan Native Law Centre, 1985); Brian Slattery, *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979); Mark D. Walters, "The Morality of Aboriginal Law" (2006) 31 *Queen's L.J.* 470 [Walters, "Morality"]; Robert A. Williams, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997).

to recognize indigenous legal orders. Borrows and Rotman advocate for an enabling view of the *sui generis* characterization. They state:

This approach to interpreting Aboriginal rights is appropriate because, in many respects, Aboriginal peoples are unique within the wider Canadian population. Before their characterization as *sui generis*, previous common law doctrines often penalized Aboriginal difference. Now, the *sui generis* appellation potentially turns negative characterizations of Aboriginal difference into positive points of protection.⁶¹

This enabling view of the *sui generis* concept is consistent with professor Leroy Little Bear's argument in "A Concept of Native Title," which the Court cites regarding this idea.⁶² Under this interpretation, a '*sui generis*' approach to section 35 rights could be understood as enabling Canadian courts to recognize and affirm indigenous claims which do not derive their force from Euro-derived legal orders and do not conform to Euro-derived law.⁶³

However, when aboriginal rights' *sui generis* characterization is considered against non-recognition based on differences between peoples, it could also be seen a limiting concept. Upon this interpretation, the characterization of aboriginal rights as *sui generis* is employed to downgrade the rights to which indigenous people would be entitled according to Euro-derived law (if not for the fact that this law discriminates on the basis of differences between peoples).⁶⁴ This seems to have been the stance taken in *R. v. Guerin*,

⁶¹ Borrows & Rotman, *supra* note 55 at 11.

⁶² For Little Bear, understanding the premises upon which indigenous peoples relate to the world is necessary to properly comprehend the rights of indigenous peoples' and the rights of the Crown. He argues that "[i]f justice and fairness are underlying goals of today's government and court system, then the concepts and the philosophy of the Indian people should certainly be taken into consideration and given as much weight as British concepts and philosophy." Leroy Little Bear, "A Concept of Native Title" (1982) 5:2 Can. Legal Aid Bul. 99 at 105 as cited in *Sparrow*, *supra* note 21 at 1112.

⁶³ See Borrows & Rotman, *supra* note 53 ("Before [aboriginal rights'] characterization as *sui generis*, previous common law doctrines often penalized Aboriginal difference. Now, the *sui generis* appellation potentially turns negative characterizations of Aboriginal difference into positive points of protection." at 11 [footnotes omitted]).

⁶⁴ See *Ibid.* ("In the end, some may question whether the use of *sui generis* principles in the analysis of Aboriginal rights may hamper those groups who wish to use common law principles to support their rights. The authors share this concern." at 44)

which was cited by the Court in *Sparrow*.⁶⁵ In *Guerin*, a case decided without reference to section 35, Dickson C.J.C. describes “the *sui generis* interest... Indians have in the land,” as more than a personal right but, less than, beneficial ownership.⁶⁶ Although the Court referred to *Guerin* on the *sui generis* nature of aboriginal rights, it does not directly endorse either the enabling or the limiting approach to this concept.

The uncertainty that surrounds the *sui generis* characterization of aboriginal rights gives indigenous peoples cause for concern, particularly when one considers the ways in which indigenous difference has been employed by Canadian law in the past. Professor Patrick Macklem, for example, reveals a deep scepticism regarding the notion of indigenous difference, as it is employed within Canadian law. He finds that “Native difference is denied where its acceptance would result in the questioning of basic premises concerning the nature of property, contract, sovereignty or constitutional right. Native difference is acknowledged where its denial would achieve a similar result.”⁶⁷ Though the *sui generis* characterization of aboriginal rights is surrounded by uncertainty, the characterization itself is not problematic.

Indigenous peoples themselves have long maintained that their position within these lands is unique in comparison to that of the many other people now living among them. What makes the position of indigenous peoples unique is the fact that they have governed themselves within these lands for thousands of years: through their own laws, institutions and relations. Given the unique position of indigenous peoples in these lands, it

⁶⁵ *Guerin*, *supra* note 35 cited in *Sparrow*, *supra* note 21 at 1112.

⁶⁶ *Ibid.* at para. 93, Dickson J. A similar approach was also taken in *R. v. Sioui*, where the Court found that treaties between indigenous peoples and settler societies do not constitute international treaties. Rather, by virtue of their *sui generis* nature, indigenous-settler treaties are thought to fall “somewhere between the kind of relations conducted between sovereign states and the relations that such states had with their own citizens.” *Sioui*, *supra* note 26 at para. 26.

⁶⁷ Patrick Macklem, “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1990-1991) 36 McGill L. J. 382 at 392.

makes sense that the rights they are accorded within Canadian law are different in kind from the rights of others.⁶⁸ Indeed, Borrows and Rotman argue that aboriginal rights are *sui generis* precisely “because Aboriginal peoples have laws, traditions, customs, and practices which have developed, grown, changed -- and been invented -- as Aboriginal people have struggled for physical and cultural survival in North America.”⁶⁹ However, an approach that takes indigenous peoples unique position in these lands seriously would require an earnest reconsideration of Canada’s relationship with indigenous peoples, the foundation of the Canadian state within indigenous territories, and the purported monopoly of Euro-derived law within these lands. The Court’s judgement in *Sparrow* falls far short of this mark.

The *Sparrow* decision marks a shift in the interpretation of aboriginal rights. Canadian law no longer considers them to be subject to restrictive regulation without justification or vulnerable to unilateral extinguishment by the Crown. This certainly requires a corresponding shift in Canadian state practice as regards indigenous relations. In addition, the Court’s call for a *sui generis* approach seems to indicate a willingness to acknowledge that something ‘exists outside’ Canadian law which is nonetheless relevant to Canada’s constitution and indigenous-Canadian relations. The transformative potential of this tentative step, however, rests uneasily beside the Court’s reluctance to call the uncertain foundations of Crown sovereignty over indigenous peoples into question and its

⁶⁸ See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (Factum of the Intervenor) online: University of Saskatchewan, Native Law Centre of Canada <<http://www.usask.ca/nativelaw/factums/view.php?id=521>> [*Sparrow*, (Factum of the Intervenor)] (where the National Indian Brotherhood/Assembly of First Nations argued that indigenous peoples’ “claims and relationships to the fisheries are different in quality from other groups.” at para. 1).

⁶⁹ Borrows & Rotman, *supra* note 53 at 36. The National Indian Brotherhood/Assembly of First Nations makes a similar argument, basing its assertion that indigenous peoples claims and relations to the fisheries are different than other groups because their “own laws and customs for fishing resulted in the effective conservation of the various species.” *Sparrow*, (Factum of the Intervenor), *ibid*.

failure to ask how indigenous law might relate to the issues under consideration. The unanswered questions surrounding the *sui generis* characterization of aboriginal rights are critical determinants of whether this new approach can help Canadian law transform its adverse relations with indigenous legal orders and participate in establishing respectful relations between indigenous peoples and the Canadian state.

Chapter 3: ENGAGING WITH INDIGENOUS LAW (*R. v. Van der Peet*)

Just months after the *Sparrow* decision was released, Dickson C.J.C retired from the Supreme Court and Antonio Lamer was appointed Chief Justice of Canada. Six years later, Lamer C.J.C. authored the majority decisions in *R. v. Van der Peet*, *R. v. N.T.C Smokehouse Ltd.* and *R. v. Gladstone*, cases now commonly known as the *Van der Peet* trilogy.⁷⁰ The appellants in all three cases were charged under section 61(1) of the *Fisheries Act* for selling, or attempting to sell, their catch contrary to section 27(5) *British Columbia Fishery (General) Regulations*.⁷¹ All appellants claimed the regulations violated section 35 and were therefore invalid by way of section 52 of the *Constitution Act, 1982*. Of the three majority decisions, only *Gladstone* endorsed the appellants' section 35 rights claim, sending the case back to trial to determine whether the regulatory scheme's infringement was justified. Although the reasoning in all three judgments is similar, I will focus on *Van der Peet*, which contains the majority of Lamer C.J.C.'s analysis.

The *Van der Peet* case arose when Dorothy Marie Van der Peet, a member of the *Sto:lo*, was charged for selling ten salmon. Van der Peet did not contest the circumstances which led to the charge. She argued that the regulations under which she was charged violated the *Sto:lo* people's right to their fishery, which she understood to be protected by section 35. In Lamer C.J.C.'s view, Dorothy Van der Peet failed to demonstrate an existing

⁷⁰ The trilogy includes the following cases *Van der Peet*, *supra* note 22; *R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672; *R. v. Gladstone*, [1996] 2 S.C.R. 723 [*Gladstone*]. See *Van der Peet*, *ibid.* at paras. 1-4. The Supreme Court adjudicated section 35 claims prior to releasing the *Van der Peet* trilogy; however, none of the Court's previous analyses addressed these issues to the same degree. See *R. v. Nikal*, [1996] 1 S.C.R. 1013; *R. v. Badger*, [1996] 1 S.C.R. 771; *R. v. Howard*, [1994] 2 S.C.R. 299; *Quebec (A.G.) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159.

⁷¹ *Fisheries Act*, *supra* note 27, s. 61(1); *British Columbia Fishery (General) Regulations*, SOR/1984-248, s. 27(5).

aboriginal right to exchange fish for money or other goods (which he considered the relevant right) and affirmed the Court of Appeal's restoration of Van der Peet's conviction.⁷² However, L'Heureux-Dubé and McLachlin JJ. dissented in separate judgments. L'Heureux-Dubé J. found that the *Sto:lo* have an aboriginal right to fish, including "the right to sell, trade and barter fish for livelihood, support and sustenance purposes," and would have sent the case back to trial on questions of extinguishment and infringement.⁷³ McLachlin J. would have set aside the conviction and confirmed, in principle, the existence of an aboriginal right to sell fish for the purpose of sustenance.⁷⁴

In *Sparrow*, the Court called for the development of a new approach based upon the *sui generis* nature of aboriginal rights. Yet it did not explain why and how these rights were *sui generis*, nor did it make clear what a new *sui generis* approach would mean for aboriginal rights interpretation. These critical questions were not answered in *Sparrow*, and they arose again in *Van der Peet*. Though Lamer C.J.C. did not address the why and directly, his judgment in *Van der Peet* does provide a lens through which to understand the *sui generis* nature of aboriginal rights: that is, the *sui generis* nature of aboriginal rights can be explained by the relevancy of indigenous law to section 35 rights and the inter-legal characterization of aboriginal rights.

Van der Peet represents the Supreme Court's first explicit consideration of the relationship between section 35 and indigenous law. Lamer C.J.C., writing for the majority, determined that section 35 rights are informed by indigenous law. However, he fails to give effect to his recognition of indigenous law's relevancy to section 35 and does not adequately explain the relationship between section 35 and indigenous law. Thus, as Lamer

⁷² *Van der Peet*, *supra* note 22 at para. 93.

⁷³ *Ibid.* at para. 222.

⁷⁴ *Ibid.* at para. 322.

C.J.C. continues on in his judgment—articulating the underlying purpose of section 35, developing a definitional test for aboriginal rights, and determining how the exercise of aboriginal rights should be governed—he does so without considering section 35’s relation to indigenous law. The tests he develops favours indigenous practices over laws and fails to provide mechanisms through which Canadian courts can engage respectfully with indigenous laws. Thus, the *Van der Peet* decision gives indigenous peoples reason to question section 35’s capacity to transform Canadian law’s adverse relations with indigenous law and to carefully consider its potential impact on other relations indigenous peoples work to maintain.

Lamer C.J.C.’s most direct consideration of the relationship between indigenous law and section 35 occurs when he articulates the basis of section 35 aboriginal rights. He finds that section 35 rights have the same basis that Brennan J. identified for aboriginal title in Australian common law: the laws and customs of the peoples indigenous to the land.⁷⁵

Lamer C.J.C. cited the following portion of Brennan J.’s judgment in *Mabo v. Queensland* [No. 2]:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs. The ascertainment may present a problem of considerable difficulty, as Moynihan J. perceived in the present case. It is a problem that did not arise in the case of a settled colony so long as the fictions were maintained that customary rights could not be reconciled ‘with the institutions or the legal ideas of civilized society;’ ...that there was no law before the arrival of the British colonists in a settled colony and that there was no sovereign law-maker in the territory of a settled colony before sovereignty was acquired by the Crown... These fictions denied the possibility of a native title recognized by our laws. But once it is acknowledged that an inhabited territory which became a settled colony was no more a legal desert than it was ‘desert

⁷⁵ *Van der Peet*, *supra* note 22 at para. 40; *Mabo v. Queensland* [No. 2] (1992), 175 C.L.R. 1 (H.C. Aus.) [*Mabo 2*].

uninhabited' in fact, it is necessary to ascertain by evidence the nature and incidents of native title.⁷⁶

The particular aspect of this passage that Lamer C.J.C. explicitly incorporated into Canadian aboriginal rights jurisprudence was the assertion that aboriginal rights originate in, and are given content by, indigenous laws and customs.⁷⁷ Lamer C.J.C. does not explicitly link the relationship between section 35 and indigenous law to aboriginal rights' *sui generis* nature. Nevertheless, acknowledging that section 35 rights derive their content from indigenous law is consistent with the view articulated above; namely, that aboriginal rights are *sui generis* because indigenous peoples governed these territories through their own laws and institutions long before the arrival of settler societies.

Lamer C.J.C. also refers to academic works consistent with the view that section 35 rights are *sui generis* because of their relationship to indigenous laws. He cites the writings of Walters and Slattery in the following passage:

Mark Walters suggests... that the essence of aboriginal rights is their bridging of aboriginal and non-aboriginal cultures: '*The challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined... a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives.*'Similarly, Professor Slattery has suggested that the law of aboriginal rights is 'neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities' ...and that such rights concern 'the status of native peoples living under the Crown's protection, and the position of their lands, customary laws, and political institutions.'⁷⁸

⁷⁶ *Mabo 2*, *ibid.* at 58, citing *Re Southern Rhodesia*, [1919] A.C. at 233, cited in *Van der Peet*, *supra* note 22 at para. 40.

⁷⁷ *Van der Peet*, *ibid.*

⁷⁸ *Ibid.* at para. 42 [emphasis in the original], citing Mark D. Walters, "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 Queen's L.J. 350 at 412-413 [Walters, "British Imperial"]; Brian Slattery, "The Legal Basis of Aboriginal Title" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville: Oolichan Books, 1992) 120 at 120-121; Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can. Bar Rev. 727 at 737.

Lamer C.J.C.'s engagement with these issues provides him a prime opportunity to discuss the task of developing a *sui generis* approach to section 35, to situate his recognition of indigenous law's relevance to aboriginal rights and to articulate the effect of this recognition. However, he does not comment any further upon this relevance nor does he reflect upon the arguments of Walters and Slattery. Indeed, Lamer C.J.C.'s affirmation of indigenous law's influence upon section 35 rights sharply contrasts with the rest of his judgment, where indigenous law receives virtually no mention.⁷⁹

The underlying purpose that Lamer C.J.C. attributes to section 35 does not give effect to the relationship between section 35 and indigenous law. He explains section 35's dual purpose in the following way:

[T]he aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.⁸⁰

Here the unique position indigenous peoples hold within these lands is transformed into the cultural "distinctiveness" of aboriginal "societies." Likewise, the fact that indigenous peoples have governed these lands, through their own laws, for thousands of years is reduced to "prior occupation" or "pre-existence." In her dissent, McLachlin J. challenged Lamer C.J.C.'s omission of indigenous laws from the underlying purpose of section 35. Relying on principles from *Sparrow*, she argued that "s. 35(1) recognizes not only prior

⁷⁹ Although Lamer C.J.C. mentions indigenous laws in once more (in relation to another quotation from *Mabo*), he quickly replaces the term with "practices, customs, and traditions." *Van der Peet*, *supra* note 22 at paras. 42, 63.

⁸⁰ *Ibid.* at para. 41; See also *ibid.* at para. 31. Lamer C.J.C. employs the concept of reconciliation in a markedly different way than the Court in *Sparrow*, which asserted that section 35 requires courts to reconcile federal powers with federal duties and governments to cease denying or infringing aboriginal rights without justification. See also *ibid.* at paras. 230-231, McLachlin J., dissenting; see also Russell Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1996-1997) 42 McGill L. J. 993 at 998-999.

aboriginal occupation, but also a prior legal regime giving rise to aboriginal rights which persist.”⁸¹

Lamer C.J.C. spends the majority of his judgment developing a definitional test for section 35, one markedly inattentive to indigenous laws. Rather than providing a vehicle for structuring Canadian law’s engagement with indigenous law, the *Van der Peet* test focuses solely on identifying the “practices” or “activities” which were “elements of a practice, custom, or tradition” in which indigenous peoples engaged prior to contact.⁸² In her submissions to the Court, Van der Peet argued against this view, maintaining that the *Sto:lo*’s rights to their fishery could not be understood through a practice based approach. She explains:

Fishing rights are more closely defined as the relationship of the Sto:lo to the Creator, to the fish, to the fishery and to each other, their ancestors and generations unborn. The right embraces the ancient oral histories. It includes teaching the histories, prayers, laws, and the accumulated knowledge of the fishery to this generation, who in turn are expected to teach the next.⁸³

⁸¹ *Van der Peet*, *ibid.* at para. 230.

⁸² *Ibid.* at para. 56. Lamer C.J.C. equates practices, customs and traditions with “activities” when he states “...the court must bear in mind that the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact, and should vary its characterization of the claim accordingly” *ibid.*; See also *ibid.* (“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” at para. 46).

⁸³ *Van der Peet*, (Factum of the Appellant), *supra* note 40 at para. 105. In their factum, the Interveners Delgamuukw also contest approaches that “look at their hunting and fishing practices, rather than to search for the pre-existing legal rights of a society with laws, language, spirituality, and systems of management and authority.” They contend that “[r]eliance on this attitude reflects biases and prejudices of another era in history, and should be rejected by the courts today”. They also argue that:

...it is of fundamental importance to recognize that societies are ‘aboriginal’ because they evolved as distinct peoples with their own laws before the assertion of British sovereignty, and *not* because they conformed (or now conform) to any particular pattern of resource use. The majority was wrong in law to equate subsistence hunting and fishing with being “aboriginal.” For the purposes of these appeals, the essential features of the appellants’ societies at the assertion of European sovereignty were that they were organized to possess their lands, manage their resources, and govern themselves. It is the maintenance and development of those features, and not any particular pattern of resource use, which are the hallmarks of the appellants’ aboriginal rights.

Interveners Delgamuukw et. al., *R v. Van der Peet*, [1996] 2 SCR 507 (Factum of the Interveners) online: University of Saskatchewan, Native Law Centre of Canada <<http://www.usask.ca/nativelaw/factums/view.php?id=164>> at paras. 87, 88, 15, respectively. See also Henderson, “Aboriginal Jurisprudence,” *supra* note 55; John Borrows, “Frozen Rights in Canada: Constitutional Interpretation and the Trickster” (1997-1998) 22 *Am. Indian L. Rev.* 45 at 59 [Borrows, “Frozen Rights”].

According to Van der Peet's submissions, during the first several decades of *Sto:lo*-settler trade, settlers became part of the system of relations maintained by the *Sto:lo*. Trading relations, she argues, were supported by "Sto:lo laws, institutions and their relationship to their fishery."⁸⁴ Rather than seeking to continue or even to reconsider this relationship, the Van der Peet test seeks to displace it, instituting a new relationship based upon what the Court considers the crucial "activities" of indigenous societies' prior to their first contact with European peoples.⁸⁵ Ironically, Lamer C.J.C. justifies his preoccupation with the past and distances himself from indigenous law using the same passage through which he acknowledges indigenous law's relevance to section 35.

Immediately after Lamer C.J.C. affirmed indigenous laws as the basis of aboriginal rights he argues that "[t]o base aboriginal title in traditional laws and customs, as was done in *Mabo*, is, therefore, to base that title in the pre-existing societies of aboriginal peoples."⁸⁶ His emphasis on the word *traditional* diverts attention from the fact that it is the traditional laws of indigenous peoples which give rise to and define the content of section 35 rights.⁸⁷ This holds negative implications, not only for the treatment of indigenous laws within

⁸⁴ *Van der Peet*, (Factum of the Appellant), *supra* note 40 at para. 118.

⁸⁵ See *Van der Peet*, *supra* note 22 ("...the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies. It must, in other words, aim at identifying the practices, traditions and customs central to the aboriginal societies that existed in North America prior to contact with the Europeans." at para. 44); see also *ibid.* ("The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights." at para. 60).

⁸⁶ *Van der Peet*, *supra* note 22 at para. 40; See also *ibid.* at para. 41.

⁸⁷ Barsh & Henderson, *supra* note 80 ("Chief Justice Lamer quoted the foregoing passage from *Mabo* with approval but completely misconstrued its significance. He advanced it as support for the proposition that rights should be regarded as "aboriginal" only if they are rooted in antiquity, emphasizing the use of adjective "traditional" by the High Court while disregarding entirely the noun ("laws") to which that adjective was attached." at 1007-1008).

section 35 jurisprudence, but for the Court's ability to steer clear of the frozen rights approach rejected in *Sparrow*.⁸⁸

Legal orders, and therefore the laws within them, maintain a measure of continuity with the past and responsiveness to the present and future. They are therefore necessarily dynamic, while judicial constructions of indigenous practices, in and of themselves, are not. In another context, the Court itself identified the danger of focusing solely upon practices to the detriment of the principles that underlie them, stating:

The way to resolve these problems is not to avoid the historical analysis, but to make sure that one is looking not just at the existence of the practice itself... but at the rationale behind that practice and the principles which underlie it.⁸⁹

However, in the context of aboriginal rights, it is not enough for the Court to consider the rationales that underlie the practice, since the reasoning, meaning and principles behind the practices in which indigenous peoples engage are determined within indigenous legal orders. To avoid rendering aboriginal rights static, the Court must find a way to engage with indigenous laws as opposed to practices. The test developed in *Van der Peet*, however, does not enable Canadian courts to respond to the dynamic nature of indigenous laws. The role of indigenous laws, under the *Van der Peet* test, is confined to providing evidence of the 'facts' of indigenous existence prior to contact.⁹⁰ Thus, Canadian judges are led to engage with indigenous laws as though they were merely historical facts, reifying

⁸⁸ *Sparrow*, *supra* note 21 ("the phrase 'existing aboriginal rights' must be interpreted flexibly so as to permit their evolution over time... Clearly, then, an approach to the constitutional guarantee embodied in s. 35(1) which would incorporate 'frozen rights' must be rejected." at 1093). For critiques of this aspect of Lamer C.J.C.'s approach see Barsh & Henderson, *supra* note 80; Borrows, "Frozen Rights" *supra* note 83; Leonard I. Rotman, "Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada" (1997-1998) 36 Alta. L. Rev. 1; —, "Aboriginal Rights Law, Year in Review: The 1995-96 Term" (1997) 12 J.L. & Soc. Pol'y 34; Jonathan Rudin, "One Step forward, Two Steps Back - The Political and Institutional Dynamics behind the Supreme Court of Canada's Decisions in *R. v. Sparrow*, *R. v. Van der Peet* and *Delgamuukw v. British Columbia*" (1998) 13 J.L. & Soc. Pol'y 67; Bradford W. Morse, "Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*" (1996-1997) 42 McGill L. J. 1011; Zalewski, *supra* note 18.

⁸⁹ *Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519 at para. 28.

what are, in fact, dynamic processes. The shift of Lamer C.J.C.'s focus from indigenous laws to practices, then, leads Canadian law toward an approach that could have been avoided.

Lamer C.J.C. is aware that his approach leads him in this direction. He argues that this is precisely why it was necessary for him to incorporate a continuity requirement into the *Van der Peet* test. According to Lamer C.J.C., the concept of continuity is "...the means by which a 'frozen rights' approach to s. 35(1) will be avoided."⁹¹ However, the continuity requirement cannot mitigate his narrow and exclusive focus upon pre-contact societies during the definitional stage of the test, since the concept of continuity is itself a limitation that requires claimants seeking protection to activities which have maintained continuity with ones central to pre-contact indigenous societies.⁹² At best, the doctrine of continuity can allow for the "evolution" of the *form* of those activities, which is insufficient for

⁹⁰ Borrows makes a similar point regarding Lamer C.J.C.'s treatment of the *Gitksan adaawk* and the *Wet'suwet'en kungax*. In *Delgamuukw*, Lamer C.J.C. states: "the adaawk was relied on as a component of and, therefore, as proof of the existence of a system of land tenure law internal to the Gitksan, which covered the whole territory claimed by that appellant. In other words, it was offered as evidence of the Gitksan's historical use and occupation of that territory." This leads Borrows to conclude that Lamer C.J.C. "only saw the adaawk and kungax as something to be judged (and then only barely)." The court did not acknowledge that they carried legal standards by which to evaluate claims and contained "a competing jurisprudential narrative that potentially strained Canada's claim to legal exclusivity." *Delgamuukw*, *supra* note 39 at para. 94; Borrows describes the *adaawk* and *kungax* as an "unwritten collection of important history, legends, laws, rituals, and traditions... They speak of these peoples' proprietary rights and responsibilities in the disputed territories and they tell of indigenous legal regimes that govern relationships in their homeland." John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39 Osgoode Hall L.J. 1 at 28 See also —, "Indigenous Legal Community," *supra* note 12 ("Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law." at 173).

⁹¹ *Van der Peet*, *supra* note 22 at para. 64.

⁹² *Ibid.* at para. 63. This may be the reason that, when discussing the continuity requirement, Lamer C.J.C. reverses the time period in which the 'central and integral' nature of the activity is determined, stating: "Where an aboriginal community can demonstrate that a particular practice, custom or tradition is integral to its distinctive culture today, and that this practice, custom or tradition has continuity with the practices, customs and traditions of pre-contact times, that community will have demonstrated that the practice, custom or tradition is an aboriginal right for the purposes of s. 35(1)." However, the fact that Lamer C.J.C. felt the need to completely reverse his exclusive focus on pre-contact indigenous societies did not lead him to recant his earlier position: he turns only to the pre-contact time-period when determining whether the activity in the case before him was integral. *Ibid.* at paras. 63, 80.

avoiding a frozen rights approach.⁹³ Lamer C.J.C. tries to avoid the frozen rights approach by defrosting the ‘activities’ in which indigenous people engaged prior to contact. In the end, however, he is unsuccessful because he does not attend to the dynamic nature of the legal orders within which the significance of these activities is determined.

Lamer C.J.C.’s disregard for indigenous laws also affects the frameworks he advances to govern the exercise of section 35 rights. The majority decision in *R. v. Gladstone* provides a clear example of this fact. Here, Lamer C.J.C. significantly broadened the grounds upon which the Canadian state could infringe section 35 rights in accordance with Canadian law.⁹⁴ However, his unwillingness to acknowledge the existence of aboriginal law leads him to ground this expansion on an erroneous assumption: the distinction between rights with ‘internal limitations’ and those without. He explains:

That difference lies in the fact that the right at issue in *Sparrow* has an inherent limitation which the right recognized and affirmed in this appeal lacks. The food, social and ceremonial needs for fish of any given band of aboriginal people are internally limited -- at a certain point the band will have sufficient fish to meet these needs. The commercial sale of the herring spawn on kelp, on the other hand, has no such internal limitation; the only limits on the Heiltsuk's need for herring spawn on kelp for commercial sale are the external constraints of the demand of the market and the availability of the resource.⁹⁵

Lamer C.J.C. focuses exclusively on those limits on *Heiltsuk* participation in the commercial fishery which arise from market demand and supply, thus garnering support for his assertion that the Canadian state should have a greater opportunity to infringe the rights recognized and affirmed by section 35. He is unwilling to acknowledge that more than just market forces limit *Heiltsuk* participation in commercial fishing. In so doing, he

⁹³ *Ibid.* (“the activities may be the exercise in a modern form of a practice, custom or tradition that existed prior to contact” at para. 64).

⁹⁴ See Lisa Dufraimont, “From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada” (2000) 58 U.T. Fac. L. Rev. 1.

⁹⁵ *Van der Peet*, *supra* note 22 at para. 57.

outright ignores the fact that *Heiltsuk* law governs the engagement of *Heiltsuk* people in commercial fishing and that, in this way, such fishing is already limited. Thus, Lamer C.J.C.'s ignorance of indigenous law leads him to accept, without deliberation, the premise that Canadian law is the only one capable of governing the manner in which indigenous peoples exercise the rights they are found to possess at Canadian law.⁹⁶

Lamer C.J.C.'s disinclination to recognize indigenous laws as governing the exercise of aboriginal rights gives indigenous peoples due cause to be concerned about the effect of aboriginal rights jurisprudence on relations within their communities. This is particularly so given the fact that the majority of aboriginal rights recognized by Canadian courts thus far are highly individualized.⁹⁷ Together, these two aspects of Lamer C.J.C.'s section 35 interpretation may encourage indigenous people to exercise the aboriginal rights accorded them by Canadian law without fulfilling their responsibilities within indigenous legal orders. In this way, Lamer C.J.C.'s approach to section 35 could be understood as a potential threat to the sense of individual responsibility which sustains indigenous governance structures and communities.⁹⁸ Clifford Lytle and the late professor Vine Deloria spoke of this issue in relation to the American law. They explain that:

Traditional Indian society understood itself as a complex of responsibilities and duties. The [Indian Civil Rights Act of The United States] merely transposed this belief into a society based on rights against the government and eliminated any sense of responsibility that the peoples might have felt for one and other.⁹⁹

⁹⁶ See Borrows "Frozen Rights," *supra* note 81.

⁹⁷ See Christie, "Law, Theory and Aboriginal peoples" *supra* note 8 ("the right itself, while described as collective, is individualizable – while the right is held by communities, it is exercised by individuals." at 83.)

⁹⁸ *Ibid.* at 109.

⁹⁹ Vine Deloria Jr. & Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1984) at 213.

Therefore, section 35, as interpreted by the Court thus far, could actually work to undermine the sense of responsibility fundamental to the maintenance of indigenous legal orders.

That Lamer C.J.C. fails to recognize indigenous law does not mean that it is non-existent or irrelevant to the Court's considerations. It means only that Lamer C.J.C. is unable to see the relevance of indigenous law today.¹⁰⁰ To understand this, one must acknowledge the difference between the laws that are embedded in indigenous legal orders and Canadian aboriginal law. As professor Noel Pearson states in relation to aboriginal title, understanding this difference:

...allows us to see two systems of law running in relation to land. This is a matter of fact. No matter what the common law might say about the existence of native title in respect of land which is subject to an inconsistent grant, the fact is that Aboriginal law still allocates entitlement to those traditionally connected with the land subject of the grant. Aboriginal law is not thereby extinguished because it survives as a social reality. It is fictitious to assume that Aboriginal law is extinguished where the common law is unable to recognise that law.¹⁰¹

The non-recognition of indigenous law and Lamer C.J.C.'s focus on practices limit the ability of Canadian courts to engage respectfully with indigenous laws as *laws*: laws that are dynamic in nature, enmeshed within systems of interpretation, judgment, authority, and negotiation equal in complexity to Canadian legal orders and still functioning in and relevant to the lives of indigenous people today.¹⁰² The *Van der Peet* test does not stop

¹⁰⁰ See Borrows, *Indigenous Legal Traditions*, *supra* note 60 ("Though negatively affected by past Canadian actions, Aboriginal peoples continue to experience the operation of their legal traditions in such diverse fields as, *inter alia*, family life, land ownership, resource relationships, trade and commerce, and political organization" at 13).

¹⁰¹ Noel Pearson, "The Concept of Native Title at Common Law" in Galarrwuy Yunupingu, ed., *Our Land is Our Life: Land Rights – Past, Present and Future* (Queensland: University of Queensland Press, 1997) 150 at 155 [Pearson, "Native Title at Common Law"].

¹⁰² See Borrows, "Indigenous Legal Community," *supra* note 12 ("Numerous indigenous legal traditions continue to function in Canada in systemically important ways. They influence the lives of indigenous and non-indigenous peoples" at 160); Jeremy Webber, "Beyond Regret: Mabo's Implications for Australian Constitutionalism" in Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 60 [Webber, "Beyond Regret"].

courts from engaging with indigenous law. The questions the courts are asking continually bring judges face to face with it, whether or not they are willing or able to acknowledge this fact. The inappropriate focus of the test only makes it more likely that this engagement will work to further entrench Canadian law's adverse relationship with indigenous counterpart.

The problem with the definitional test in *Van der Peet*, then, is not just that it limits the scope of section 35 rights and broadens the grounds for their infringement, but that it encourages courts to treat indigenous law one more historical record. This leads to jurisprudence that is problematic, not just because Canadian judges get the 'facts' of indigenous existence wrong, nor because they get indigenous laws wrong—though they often do both. It is problematic because it hinders the courts' capacity to respect or respond to the dynamic nature and continued existence of indigenous laws. Such an approach does not protect what is 'central and integral' to indigenous societies. Rather, it functions to preserve a constitutionally protected space within which indigenous peoples can, if they choose, perpetuate the cultural stereotypes of Canadian judges.

Van der Peet explains *Sparrow's sui generis* characterization of aboriginal rights in terms of the relationship between section 35 and indigenous law. The *Van der Peet* test, however, fails to give effect to this relationship or to structure Canadian law's engagement with indigenous legal orders in a respectful way. Lamer C.J.C does not explain the dissonance between the recognition of indigenous law and the *Van der Peet* test's demonstrated disregard for its relevancy. Thus, while *Van der Peet* may explain *Sparrow's sui generis* characterization, it does not provide a *sui generis* approach to section 35 interpretation. Furthermore, *Van der Peet* does not remedy *Sparrow's* unconsidered

endorsement of Crown sovereignty over indigenous peoples, choosing instead to build upon it. As such, rather than providing an understanding of section 35 capable of transforming Canadian law's adverse relations with indigenous legal orders, *Van der Peet* posits frameworks which maintain them.

Chapter 4: RELATIONS WITH INDIGENOUS LEGAL ORDERS (*R. v. Mitchell*)

R. v. Mitchell represents the Supreme Court's first engagement with section 35 after Beverly McLachlin was appointed Chief Justice of Canada. This case arose when *Haudenosaunee* Grand Chief Michael Mitchell, also known as *Kanentakeron*, a Mohawk of *Akwesasne*, refused to pay duty charged under the *Customs Act* for transporting goods across the United States-Canada border.¹⁰³ Mitchell argued that he was exercising an aboriginal right to transport goods for personal or collective use or consumption across the border without paying duties or taxes to the government of Canada. McLachlin C.J.C. authored the majority judgment, finding that the evidence advanced by Mitchell failed to establish his claim and requiring him to pay duty. Binnie J. wrote a separate judgment in which Major J. concurred. Although Binnie J. reached the same result as McLachlin C.J.C., he would have incorporated the doctrine of sovereign incompatibility into section 35 analysis. By virtue of this doctrine, Binnie J. argued that the right Mitchell claimed could never have come into existence, finding it incompatible with Crown sovereignty.

In *Van der Peet*, Lamer C.J.C. suggested that aboriginal rights are characterized as *sui generis* because, being informed by indigenous law, they are therefore inter-legal or intersocietal in nature. A year later, in *Delgamuukw*, Lamer C.J.C. made the connection explicit. When considering aboriginal title, he states:

[Aboriginal title is] *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.¹⁰⁴

¹⁰³ *Customs Act*, R.S.C. 1985, c. 1 (2nd Supp.).

¹⁰⁴ *Delgamuukw*, *supra* note 39 at para. 112.

He goes on to clarify that the source of aboriginal rights lies not only in the prior occupation of these territories by indigenous peoples, but in “the relationship between common law and pre-existing systems of aboriginal law.”¹⁰⁵ However, Lamer does not explain the nature of this relationship nor remedy the *Van der Peet* test’s disregard of indigenous law, leaving a critical question unresolved, namely, upon what basis the Court could simultaneously recognize a relationship between aboriginal rights and indigenous laws *and* fail to provide mechanisms to engage with indigenous legal orders. This question raises another equally crucial issue, that is, how we are to understand the nature of the relationship between indigenous and Canadian legal orders.

The judgments delivered in *Mitchell* are the closest the Supreme Court has come to directly considering the relationship between indigenous and Canadian legal orders. McLachlin C.J.C.’s majority judgment does not address the relationship between legal orders directly. Nonetheless, a close analysis reveals indications of a particular conception of the relationship between indigenous and Canadian legal orders, one I will refer to as the absorption model. Although this model could potentially explain many otherwise conflicting aspects of Lamer C.J.C.’s approach to section 35 interpretation, the Court did not endorse the model as a way of understanding its *sui generis*, inter-legal nature. Doing so would have required Canadian courts to re-affirm rather than transform Canadian law’s adverse relation to indigenous legal orders; for this model presumes that indigenous legal orders were assimilated into Canadian law upon the assertion of Crown sovereignty. By contrast, Binnie J.’s judgment does not attempt to clarify Lamer C.J.C.’s claim that aboriginal rights arise out of relations between indigenous and Canadian law. Indeed, he

¹⁰⁵ *Ibid.* at para. 114

dismisses it, arguing instead that aboriginal rights are derived from and limited by Canadian sovereignty. According to Binnie J.'s analysis, indigenous laws were not even assimilated into Canadian law, but were merely displaced.

Before addressing the majority judgment, I will review the judgment authored by Binnie J. This contains the most direct articulation of a position on the relationship between indigenous and Canadian legal orders in recent Supreme Court aboriginal rights jurisprudence. Indeed, McLachlin C.J.C.'s own comments regarding the relations between Canadian legal orders, indigenous legal orders, and section 35 seem, in large part, a response to it.

Binnie J.'s position on the nature of the relationship between indigenous and Canadian legal orders was developed in response to the arguments advanced by Mitchell, as is evident in the following, now infamous, passage:

Counsel for the respondent does not challenge the reality of Canadian sovereignty, but he seeks for the Mohawk people of the Iroquois Confederacy the maximum degree of legal autonomy to which he believes they are entitled because of their long history at Akwesasne and elsewhere in eastern North America. This asserted autonomy, to be sure, does not presently flow from the ancient Iroquois legal order that is said to have created it, but from the *Constitution Act, 1982*. Section 35(1), adopted by the elected representatives of Canadians, recognizes and affirms existing aboriginal and treaty rights. If the respondent's claimed aboriginal right is to prevail, it does so not because of its own inherent strength, but because the *Constitution Act, 1982* brings about that result.¹⁰⁶

Here, Binnie J. appears to be arguing that the *Constitution Act, 1982* is the exclusive source of section 35 rights. At a later point in the judgment, however, he acknowledges, that the concept of aboriginal rights has several sources, although he fails to identify them.¹⁰⁷ When

¹⁰⁶ *Mitchell*, *supra* note 23 at para. 70, Binnie J., dissenting. This small passage has attracted much criticism; indeed, an entire book was written in response. See Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Press, 2003) at 10 [Walkem & Bruce, *Box of Treasures*].

¹⁰⁷ *Mitchell*, *ibid.* at para. 144.

considering his judgment as a whole it becomes clear that in the passage above Binnie J. is not really arguing that the *Constitution Act, 1982* supplanted other sources of aboriginal rights. Rather, he is asserting that aboriginal rights derive their legal basis from Crown sovereignty, an understanding that maximizes the influence of Euro-derived law on the definition of aboriginal rights and curtails the corresponding influence of indigenous legal orders.¹⁰⁸

Although Binnie J. does not identify the ‘several’ sources of aboriginal rights nor the relations among them, he does go into some detail regarding the relationship between British colonial law, common law aboriginal rights doctrine, and section 35. He argues that the concept of aboriginal rights under the common law was ‘built around’ doctrines of British colonial law.¹⁰⁹ And, even though he acknowledges the Court’s efforts to move away from colonial and common law doctrines in *Sparrow*, he protests that “the language of s. 35(1) cannot be construed as a wholesale repudiation of the common law.”¹¹⁰ In his words, section 35 is a “new chapter,” not a “new book.”¹¹¹ Rather than using the opportunity *Sparrow* provided to step back from common law aboriginal rights or colonial legal doctrines, Binnie J. advocates for the incorporation of colonial and pre-1982 common law doctrines (or more specifically their limitations on aboriginal rights) into section 35.¹¹²

With this background in mind, the question remains: what room does Binnie J. leave for

¹⁰⁸ See also *ibid.* (where Binnie J. argues first, that treaty rights are a promise made by the Crown and as such are an expression of Crown sovereignty and second that the recognition of indigenous laws and customs flows from the presumption that the Crown intended to respect those customs and the rights which resulted from them. at paras. 138-139, 141-144, respectively).

¹⁰⁹ *Ibid.* at para. 114.

¹¹⁰ *Ibid.* at para. 150; see also *ibid.* at para.149.

¹¹¹ *Ibid.* at para. 115.

¹¹² Binnie J. would have incorporated the colonial law doctrine of sovereign incompatibility into the definitional stage of the *Van der Peet* test. This doctrine would limit section 35 rights to those compatible with the exercise of Crown sovereignty, circumventing the burden *Sparrow* placed upon the Crown both to demonstrate a clear and plain intention to extinguish aboriginal rights prior to 1982 and to justify its infringement of aboriginal rights. See *ibid.* at paras. 149-154; *Sparrow, supra* note 21 at 1099, 1002.

indigenous law—the law in which section 35 rights are said to originate and through which they derive their content—to influence section 35 analysis? The answer is, not much.

Under Binnie J.’s analysis, the only legal orders that are clearly relevant to the identification of aboriginal rights are Euro-derived. Section 35 aboriginal rights seem, in Binnie J.’s mind, solely the product of aboriginal ‘pre-contact practices’ and European-based legal orders as is evident in his description of the process through which judges are to section aboriginal rights:

in considering whether the evidence gives rise to the claimed right, it is necessary to look at all of the evidence to determine whether, in its totality, it establishes not only a pre-contact practice that was capable of being carried forward under the new European-based legal orders but a practice that is compatible with Canadian sovereignty.¹¹³

Here we see Lamer C.J.C.’s focus on pre-contact “practices” and “activities” replicated and combined with an exclusive focus on European-derived legal orders with the limitation of sovereign compatibility. As such, rather than countering the problematic effects of the *Van der Peet* test, Binnie J. further entrenches them.

It appears that Binnie J. considers indigenous law irrelevant to section 35, at least in its own right. Indigenous law seems relevant only insofar as it can be demonstrated that the Crown intended for them to be so. Thus, for Binnie J., there is no existing relationship between indigenous and Canadian legal orders other than that created by the Crown (which is more accurately understood as the Crown’s relationship to itself). As a partial explanation why he might take such a position, we can turn to his response to a famous passage in *Worcester v. Georgia* where Chief Justice Marshall of the United States Supreme Court states:

¹¹³ *Mitchell*, *ibid.* at para. 123; see also *ibid.* at para. 73

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have *rightful* original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.¹¹⁴

In response, Binnie J. writes, “nevertheless, this is what happened. From the aboriginal perspective, moreover, those early claims to European ‘dominion’ grew to reality in the decades that followed.”¹¹⁵ It is through this concept of European settlers’ rightful dominion over indigenous peoples that Binnie J. defends the position taken by Lamer C.J.C. in *Gladstone* and *Delgamuukw*, that “distinctive aboriginal societies exist within, and are a part of, a broader social, political and economic community, over which the Crown is sovereign”.¹¹⁶ From this perspective, it seems that Euro-derived legal orders completely displaced indigenous legal orders during the transition to Canadian sovereignty.

Rather than offering an argument to support his assertion that Canadian dominion over indigenous peoples is rightful, Binnie J. attempts to make their existence within Canada sound attractive: without their laws, their legal orders, their institutions of governance, but with access to the small, though constitutionally protected, space *Van der Peet* created for indigenous peoples to do practices the Court believes are “aboriginal.” He argues that because indigenous peoples would be allowed to do Court-certified “aboriginal” practices, this, in itself, would somehow effect “reconciliation between

¹¹⁴ *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 at 542-543 (1832) at 543 (emphasis added). Binnie J., however, only quoted the following section “It is difficult to comprehend the proposition, that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied...” *ibid.* as cited in *Mitchell*, *ibid.* at para. 112.

¹¹⁵ *Ibid.* at para. 113.

¹¹⁶ *Ibid.* at para. 133, citing *Gladstone*, *supra* note 70 at para. 73; *Delgamuukw*, *supra* note 39 at para. 165; see also *Mitchell*, *ibid.* at para. 112.

Canadian society and *its* aboriginal communities.”¹¹⁷ I would disagree with Binnie J., that his vision of section 35’s effect upon the relationship between indigenous peoples and the Canadian state represents “partnership without assimilation.”¹¹⁸ It could be argued that the only offer made to indigenous peoples by Binnie J. is the offer to become partners in their own assimilation, and that the only reconciliation he proposes is for them to reconcile themselves to their domination under Canadian sovereignty.¹¹⁹

Major J. was the only Justice who concurred with Binnie J. The rest of the Supreme Court endorsed the judgment authored by McLachlin C.J.C., who did not address the relationship between indigenous and Canadian legal orders directly. However, the absorption model, which proposes a particular understanding of the relationship between these legal orders, appears in McLachlin C.J.C.’s judgment. It is unclear how the majority of the Supreme Court Justices position themselves in relation to the absorption model. McLachlin C.J.C.’s description of the absorption model appears to be her brief

¹¹⁷ *Ibid.* at para. 123 (emphasis added).

¹¹⁸ *Ibid.* at para. 130. Binnie J. describes Canadian sovereignty as a form of “merged sovereignty” arguing that “aboriginal and non-aboriginal Canadians together form a sovereign entity with a measure of common purpose and united effort.” *Ibid.* at para 129. Upon this basis, he attempts, unilaterally, to alter the *Gus-Wen-Tah*, a treaty created through many years of negotiation between the leaders of European and *Haudenosaunee* peoples. Some have argued that this is a positive step, indicating a willingness to reinterpret Crown sovereignty in a manner more favourable to indigenous peoples. (See Doug Moody, “Thinking Outside the 20th Century Box: Revisiting ‘Mitchell’—Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government” (2003-2004) 35 *Ottawa L. Rev.* 1). However, despite Binnie J.’s efforts, I fail to see how his conception of “merged sovereignty” differs from an assertion of Canadian sovereignty over indigenous peoples. For a critique of Binnie J.’s re-conceptualizations of Canadian sovereignty and the relationship between the *Haudenosaunee* and Canada see: Gordon Christie, “The Court’s Exercise of Plenary Power: Rewriting the Two-Row Wampum” (2002) 16 *Sup. Ct. L. Rev.* (2d) 285 [Christie, “Rewriting the Two-Row Wampum”].

¹¹⁹ See *Mitchell*, *ibid* at para. 144. In this context, the act of reconciling accords with the following meaning of ‘reconcile’: “[t]o bring into a state of acquiescence (with) or submission to a thing.” *Oxford English Dictionary*, 2d ed., s.v. “reconcile” (8. a.). This view of reconciliation is akin to what Mark Walters describes as a one-sided approach to reconciliation where aboriginal perspectives and aspirations are adapted to fit within “an otherwise fixed and immutable constitutional reality represented by the idea of Crown sovereignty.” If this is so, he warns that the process of reconciliation “may become one of *resignation* rather than reconciliation: aboriginal peoples may have to resign themselves to the fact that they live under the Crown’s sovereignty and adjust their expectations and aspirations accordingly.” Walters, “Morality,” *supra* note 60 at 501 (emphasis in original). Walters does not characterize Binnie J.’s view of reconciliation as one-sided; however, for the reasons above, I disagree. See *ibid.* at 512.

approximation of the way aboriginal rights are constructed within English law, colonial law, and the Canadian common law prior to 1982.¹²⁰ I question whether it is her understanding of aboriginal rights according to section 35 for the following reasons: she employs a descriptive tone when discussing the absorption model, in contrast to the rest of the judgment;¹²¹ re-emphasizes the fact that section 35 “extends beyond the aboriginal rights recognized at common law” immediately following her description of the absorption model;¹²² and uses the term *absorption* in relation to the doctrines of continuity and sovereign incompatibility, both of which she was hesitant to incorporate into section 35.¹²³ Although the Court has not endorsed this model as a way of understanding the relations between indigenous and Canadian legal orders, the possibility that this view lies behind current aboriginal rights jurisprudence can not be easily discounted. McLachlin C.J.C.’s wording at the end of this passage is almost identical to that of the *Van der Peet* test.¹²⁴ Furthermore, it may provide an explanation of the otherwise contradictory aspects of recent section 35 jurisprudence, no matter how problematic that explanation may be.

Before analyzing McLachlin C.J.C.’s description of the absorption model, it is important to pay close attention to what the absorption model says about the relationship

¹²⁰ There are indications that McLachlin C.J.C.’s discussion of the absorption model is her description of the British colonial doctrine of continuity. See *ibid.* at para. 62. On the doctrine of continuity in British colonial law see Walters, “British Imperial,” *supra* note 78.

¹²¹ *Mitchell*, *supra* note 23 at paras. 8-9.

¹²² *Ibid.* at para. 10, citing *Delgamuukw*, *supra* note 39 at para. 136.

¹²³ According to McLachlin C.J.C., the doctrine of sovereign incompatibility is sourced in the doctrine of continuity, which governs the absorption of indigenous laws into the new legal regime. Regarding the relationship between such doctrines and section 35, she states: “[t]his Court has not expressly invoked the doctrine of ‘sovereign incompatibility’ in defining the rights protected under s. 35(1)... I would prefer to refrain from comment on the extent to which colonial laws of sovereign succession are relevant to the definition of aboriginal rights under s. 35(1) until such a time as it is necessary to do so”. *Mitchell*, *ibid.* at paras. 63-64. See also: *ibid.* at paras. 61-62.

¹²⁴ See *ibid.* (“...the practices, customs, and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.” at para. 10).

between indigenous and Canadian legal orders. In the beginning of her judgment, McLachlin C.J.C. writes:

Long before Europeans explored and settled North America, aboriginal peoples were occupying and using most of this vast expanse of land in organized, distinctive societies with their own social and political structures. The part of North America we now call Canada was first settled by the French and the British who, from the first days of exploration, claimed sovereignty over the land on behalf of their nations. *English law, which ultimately came to govern aboriginal rights, accepted that the aboriginal peoples possessed pre-existing laws and interests, and recognized their continuance in the absence of extinguishment, by cession, conquest, or legislation...*

Accordingly, European settlement did not terminate the interests of aboriginal peoples arising from their historical occupation and use of the land. *To the contrary, aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them. Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.*¹²⁵

Thus, an absorption model approach to section 35 would explain the relations between section 35 rights, indigenous law and indigenous and Canadian legal orders in the following way: first, indigenous legal orders existed; upon the assertion of Crown sovereignty, they ceased to exist; and, simultaneously, indigenous laws were assimilated into the law of Canada. These allegedly assimilated laws were transformed from laws that governed the ways in which indigenous people participated with others in the world into “interests”. These “interests” in turn become common law “rights” structuring the relationship between the Canadian state and “its” aboriginal peoples, marking the boundary

¹²⁵ *Ibid.* at paras. 9-10 (emphasis added, footnotes omitted).

of a legally protected space within the Canadian state for indigenous people to do what Canadian judges consider “aboriginal cultural practices.”¹²⁶

If the absorption model is understood as McLachlin C.J.C.’s description of Euro-derived aboriginal rights doctrines prior to 1982, the issue that the majority declined to determine is what effect, if any, the constitutional recognition and affirmation of aboriginal rights has had upon Canadian law’s understanding of the relationship between legal orders. If the absorption model were incorporated into section 35, it is conceivable that the Court would understand its effect as limited to according constitutional status to the rights resulting from the assimilation of indigenous legal orders and extending Canadian law’s recognition to another sub-set of similar rights previously unrecognized under the common law.

Indigenous legal orders would certainly exert more influence on the content of section 35 rights under the absorption model, as compared to the approach advocated by Binnie J. in *Mitchell*. These legal orders would be understood to have been assimilated into, rather than displaced by Canadian law upon the assertion of sovereignty. Indigenous legal orders, though assumed not to have survived the assertion of sovereignty, would still influence section 35 rights and in this way contribute to structuring the relationship. As the product of their assimilation, aboriginal rights would be defined by indigenous law but enforceable within Canadian law.¹²⁷ In this way, the absorption model provides an

¹²⁶ Christie refers to this approach as ‘compassionate colonialism,’ “for it envisions a complete transfer of power to the Crown, but with the *rights* of the indigenous peoples afforded the protection expected of other subjects of the Crown,” as opposed to ‘ugly colonialism,’ the approach that the Court seems to be moving towards. Christie, “Rewriting the Two-Row Wampum,” *supra* note 118 at 300.

¹²⁷ McLachlin C.J.C. makes a similar statement in *Van der Peet* when endorsing Mark Walters’ argument that aboriginal rights must be understood to incorporate both indigenous and European legal perspectives. She explains that, in interpreting section 35, Canadian judges “apply the common law, but the common law we apply must give full recognition to the pre-existing aboriginal tradition.” *Van der Peet*, *supra* note 22 at para. 232.

explanation for aboriginal rights' intersocietal nature and the Court's failure to consider the implications of indigenous legal orders' continuing existence. However, accepting this particular explanation could undermine whatever potential section 35 holds to transform the adverse relations between indigenous and Canadian legal orders and to work toward any meaningful form of reconciliation between existing indigenous peoples and the Canadian state.

Under the absorption model, judges would seek to reconcile Canadian law, Crown sovereignty and the Canadian state with the interests they attribute to indigenous peoples based on judicial interpretations of indigenous law prior to the assertion of sovereignty. There are three problems with this approach. Firstly, it reduces reconciliation to a process not unlike reconciling financial accounts. Reconciliation within the absorption model focuses on attempting to find the right number of rights to off set Crown sovereignty and the assimilation of indigenous legal orders.¹²⁸ Secondly, it seeks exclusively to reconcile the interests that judges attribute to peoples prior to the assertion of sovereignty. Although today's indigenous peoples may receive benefits from such efforts, these benefits are indirect; they are not intended to address the interests judges might otherwise attribute to indigenous peoples based on indigenous law today.¹²⁹ Thirdly, and most importantly, the adequacy of this entire approach wholly depends on the non-existence of indigenous legal orders after sovereignty had been asserted.

¹²⁸ See Christie, "Law, Theory and Aboriginal Peoples," *supra* note 8 ("The general non-Aboriginal perception seems to be that the law has acknowledged Aboriginal rights, and that the fundamental challenge centres on working out the appropriate crystallization of these rights in the Canadian legal/political landscape" at 69); see also Walters, "Morality," *supra* note 60 at 499-500 (where he argues that 'reconciliation' in the context of section 35 means (or should mean) more than reconciling financial accounts and implies a moral exercise).

¹²⁹ Today's indigenous peoples are understood to benefit from the judicial attribution of an interest—and thus a corresponding right—to indigenous peoples historically, because in so doing, Canadian judges also sanction the exercise of this right by contemporary indigenous peoples.

The absorption model is subject to the same flaw as Binnie J.'s approach, that is, it rests upon the claim that settler societies' were capable of unilaterally terminating (according to Binnie J.'s approach) or assimilating (according to the absorption approach) indigenous legal orders by merely asserting sovereignty. This claim is strongly contested by indigenous peoples, and as long as it remains so, any approach based on it is unlikely to lead to reconciliation.¹³⁰ Moreover, Canadian law's denial of the continuing existence of indigenous legal orders does not render them non-existent.¹³¹ Indigenous legal orders have never drawn their authority from Euro-derived law and they do not require its recognition to remain in existence. Indigenous legal orders continue and influence the lives of indigenous peoples.¹³² If the absorption approach were adopted, Canadian law would remain unable to respond to the continuing existence of indigenous legal orders, further exacerbating its adverse relations with the legal orders indigenous to these lands.

The absorption model would not reduce indigenous laws purely to fact, as Lamer C.J.C.'s approach did in *Van der Peet*. However, under this model, indigenous laws would remain historical in nature. Thus, the absorption model, like the practice-focused approach in *Van der Peet*, limits the ability of Canadian judges to attend to the dynamic nature of indigenous laws. The judiciary, when interpreting indigenous law during their section 35 analysis, would be understood as sifting through the ruins of indigenous legal orders for bases upon which to attribute interests to the people who lived under them. The accuracy of

¹³⁰ This is true even if one understood reconciliation as merely the process of securing indigenous peoples' resignation to Crown sovereignty. See Appendix A: A Declaration of First Nations, below ("The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind. The Laws of the Creator defined our rights and responsibilities.... The Creator has given us the right to govern ourselves and the right to self-determination. The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation").

¹³¹ See Pearson, "Native Title at Common Law," *supra* note 101.

¹³² See Borrows, *Indigenous Legal Traditions*, *supra* note 60 ("Indigenous legal traditions can have great force and impact in people's lives despite their lack of prominence in broader circles" at 14); See also James (Sákéj) Youngblood Henderson, "First Nations' Legal Inheritances in Canada: The Mikmaq Model" (1996) 23 *Manitoba Law Journal* 1 at para. 2 [Henderson, "The Mikmaq Model"].

such interpretations is certainly questionable, given that the majority of Canadian judges operate at a vast temporal and philosophical remove from indigenous laws.¹³³ However, the role the absorption model would assign Canadian judges does not appear particularly problematic until it is acknowledged that indigenous legal orders continue to exist.

When the continuing existence of indigenous legal orders is acknowledged it becomes obvious that understanding aboriginal rights according to the absorption model places judges in a difficult position. As professor Jeremy Webber attempted to warn the Australian Court:

the simple enforcement by the courts of interests held under indigenous law would produce detrimental results: it would displace indigenous methods of social ordering, freeze the development of indigenous law, and place the administration of that law in the hands of non-indigenous tribunals.¹³⁴

The absorption model obscures the continuing connection between indigenous laws and the legal orders in which they are embedded, leading Canadian judges to believe that they can define, construct, and control indigenous laws, even when they themselves have no knowledge, training, or authority in relation them. When the continuing existence of indigenous legal orders is recognized, it is clearly necessary for Canadian judges to grapple

¹³³ As Henderson argues, “only those who have been taught within the system itself and in its language can really comprehend it.” Henderson, “Aboriginal Jurisprudence,” *supra* note 55 at 73. On the differences between indigenous and western philosophy generally see: Leroy Little Bear, “Aboriginal Paradigms: Implications for Relationships to Land and Treaty Making” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) 26; —, “Jagged World Views Colliding” in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77; Gregory Cajete, *Native Science: Natural Laws of Interdependence* (Santa Fe: Clear Light Publishing, 2000); Willie Ermine “Aboriginal Epistemology” in Marie Battiste & Jean Barman, eds., *First Nations Education in Canada: The Circle Unfolds* (Vancouver: UBC Press, 1995) 101; James Dumont, “Justice and Aboriginal People” in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Roundtable on Aboriginal Justice Issues* (Ottawa: Canada Communication Group Publishing, 1992); James (Sákéj) Youngblood Henderson, “Postcolonial Ghost Dancing: Diagnosing European Colonialism” in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 57; Murray Sinclair, “Aboriginal People and Euro-Canadians: Two World Views” in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1994) 19; Umeek (E. Richard Atleo), *Tsawalk: A Nuu-Chah-Nulth Worldview* (Vancouver: UBC Press, 2004) pp. xi-xx; Anne Walters, ed., *American Indian Thought: Philosophical Essays* (Malden: Blackwell Publishing, 2004).

¹³⁴ Webber, “Beyond Regret,” *supra* note 102 at 85.

with the fact that the authority to interpret indigenous law is governed by indigenous legal orders. In light of this, the absorption model, like Lamer C.J.C.'s *Van der Peet* analysis, has not equipped Canadian judges to understand their own role as interpreters of section 35.

One of the greatest limitations of the absorption model is its inability to appreciate and respect the nature and purpose of indigenous law. Indigenous laws are not merely rules or customs that generate interests at Canadian law. They cannot be understood as though they were separate from the dynamic processes through which indigenous peoples live their laws into the physical world.¹³⁵ Moreover, the purpose of indigenous legal orders is not to generate interests to define Canadian aboriginal rights. Indigenous legal orders are directed, first and foremost, towards supporting the efforts of indigenous peoples to maintain good relations in this world: relations within communities, relations between communities and relations between indigenous peoples and the other beings of creation. Indigenous laws work to structure the roles and responsibilities of indigenous peoples in terms of these relations.¹³⁶

The absorption model attempts to place Canadian judges to provide the long overdue, authoritative, and final determination of the relationship between indigenous

¹³⁵ Consider the following words of Robert Yazzie, Chief Justice of the Navajo Nation:

One of the biggest mistakes people make about First Nations' law is that it is either a "rule" or it is a "custom"... Students of traditional indigenous law are often so busy going around look for rules and customs that they miss the point - indigenous law is about respect and relationships. None of us can look for models outside our own hearts, minds, souls, families, and communities. Many First Nations share the same kind of values. I think we all honor and cherish relationships, respect, speaking in a good way, prayer, humility, and all the other values we think of as being uniquely indigenous knowledge... So let's not get too intellectual about the words "values" and "tradition". They're not hard to find. They're in your hearts and they're in the collective consciousness of your communities. We just need to build our sense of community by applying what we have from the mind the heart and the spirit. To bring them out to use as law.

Robert Yazzie, "Cultural Values" (Address delivered to the 10th Annual Conference of the Indigenous Bar Association: Traditional Values, Laws and Governance, November 1998, Vancouver, B.C.) in Indigenous Bar Association in Canada, *10th Annual Conference: Traditional Values, Laws and Governance Summary Report* prepared by Michelle Hopkins 3 online: <<http://www.indigenousbar.ca/conferences/1998doc/iba%201998%20conference.PDF>> at 4.

¹³⁶ See Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 2003).

peoples and the Canadian state.¹³⁷ However, Canadian judges are unable to provide such a determination because they can only consider implications indigenous laws may hold for Canadian law. Canadian judges do not have the authority to make determinative interpretations regarding indigenous laws, which are also necessary for understanding indigenous-Canadian relations. Under the absorption model, Canadian judges would attempt to define indigenous-Canadian relations with reference to indigenous laws which speak to the relations between indigenous peoples and the other beings of creation (such as the land, the fish and the trees). Ironically, the absorption model completely disregards indigenous laws that speak directly to the nature of respectful relations between indigenous peoples and the Canadian state. Because indigenous legal orders are presumed to be assimilated, Canadian law is understood to be the only vantage point from which to judge indigenous-Canadian relations.

In *Mitchell*, the Court touched upon and then attempted to skirt around what I believe is the central question at stake in aboriginal rights jurisprudence: namely, the nature of the relationship between indigenous and Canadian legal orders. This question must be directly addressed in order to understand the *sui generis*, inter-legal, nature of aboriginal rights. The absorption model advances a particular conceptualization of the relationship between legal orders that could explain the *sui generis*, inter-legal nature of aboriginal rights. However, it is unable to support the transformation of Canadian law's adverse relations with indigenous legal orders and would limit Canadian law's capacity to participate in any meaningful form of reconciliation between indigenous peoples and the Canadian state.

¹³⁷ This understanding is also evident in many judicial descriptions of section 35. For example, see: *Van der Peet*, *supra* note 22 at para. 230, (where McLachlin J. states “[section 35] seeks not only to reconcile [indigenous]... claims with European settlement and sovereignty but also to reconcile them in a way that provides the basis for a just and lasting settlement of aboriginal claims.”)

Chapter 5: RETREATING TO THE DIVIDE (*R. v. Marshall*; *R. v. Bernard*)

The final Supreme Court judgment I consider were rendered in the joint decision *R. v. Marshall*; *R. v. Bernard*.¹³⁸ These cases stem from charges laid against Joshua Bernard from Eel Ground First Nation and Stephen Frederick Marshall (and 34 other *Mi'kmaq*) from Millbrook First Nation. Marshall was charged with cutting timber on Crown lands contrary to Nova Scotia's *Crown Lands Act*, while Bernard was charged under the New Brunswick *Crown Lands and Forest Act* for unlawful possession of logs cut on Crown lands by other *Mi'kmaq* community members.¹³⁹ Both argued that as *Mi'kmaq*, they did not require authorization to log, citing both aboriginal title and the "peace and friendship treaties" negotiated between the British and the *Mi'kmaq*, *Maliseet* and *Passamaquoddy* in 1760 and 1761.¹⁴⁰ Writing for the majority of the Court, McLachlin C.J.C. reinstated the convictions, finding that respondents did not possess aboriginal title to the cutting sites and that commercial logging activities by the *Mi'kmaq* were not protected under the treaties of 1760-61.¹⁴¹ Although LeBel J. (Fish J. concurring) reached the same result, he wrote a separate judgment arguing that the majority's approach focused too narrowly on common law concepts.

¹³⁸ *Marshall and Bernard*, *supra* note 24. The Court did not directly consider the relationship between indigenous law and section 35 in *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 SCC 69.

¹³⁹ *Crown Lands Act*, R.S.N.S. 1989, c. 114, s. 29; *Crown Lands and Forest Act*, S.N.B. 1980, c. C-38.1, 67(1) (c).

¹⁴⁰ Aboriginal harvesting rights were not asserted in this case.

¹⁴¹ *Marshall and Bernard*, *supra* note 24 at paras. 39, 106. Shortly after delivering its judgment in *Marshall and Bernard* the Supreme Court granted leave to appeal *R. v. Gray* and *R. v. Sappier*, cases which concern aboriginal and treaty harvesting rights on Crown lands for personal use. *R. v. Gray*, [2004] 4 C.N.L.R. 201 (N.B.C.A.) (where the New Brunswick Court of Appeal found that the Gray established that the *Mi'kmaq* possessed an aboriginal right to harvest trees for personal use, on Crown lands within traditional *Mi'kmaq* territory at para 27); *R. v. Sappier*, [2004] 4 C.N.L.R. 252 (N.B.C.A.) (where the New Brunswick Court of Appeal determined that Sappier and Polchies, as members of the *Maliseet* community, hold treaty and aboriginal rights to harvest trees for personal use on Crown lands within their traditional territory at para.106).

In *Mitchell*, the Court was directly confronted with unresolved issues regarding the relations between indigenous law, section 35 and various forms of Euro-derived law,¹⁴² tensions present throughout section 35 jurisprudence. Under McLachlin C.J.C.'s authorship, the majority of the Court described, but did not endorse the absorption model. This model would explain the *sui generis*, inter-legal nature of aboriginal rights, but would do so by undercutting the Court's capacity to change its relations with indigenous legal orders. Thus, both the relation between the absorption model and current section 35 jurisprudence and the tensions created by Lamer C.J.C.'s contradictory treatment of indigenous law in *Van der Peet* remain unresolved.

In *Marshall and Bernard*, McLachlin C.J.C. neither endorses nor rejects the absorption model as a way of understanding relations between indigenous law, Euro-derived law and section 35. Instead, she—and the majority of the Court along with her—attempts to sidestep these issues by disregarding the Court's earlier affirmation of the relevance of indigenous law to section 35. It is almost as though she goes out of her way to remove any reference to indigenous law from the text of her judgment. The judgment leaves one with the impression that the many complicated questions regarding the relations between indigenous law, Euro-derived law and section 35 have vanished into thin air. By contrast, LeBel J.'s judgment challenges this shift, emphasizing these very same issues. Ironically, LeBel J.'s stance towards the majority judgment in *Marshall and Bernard* is strikingly similar to the one McLachlin J. took towards Lamer C.J.C.'s majority judgment in *Van der Peet*. Although both judgments addressed the respondents' aboriginal title and treaty rights claims, I will limit my analysis to those portions of them dealing with the

¹⁴² Particularly British colonial law, English and Canadian common law and Canadian constitutional law.

aboriginal title claim, where the contention over the relevance of indigenous law is more readily apparent.

In *Marshall and Bernard*, McLachlin C.J.C. ignored the Court's previous affirmation of indigenous law as one of the primary sources of section 35 rights. She describes aboriginal rights as though they were sourced exclusively in indigenous people's prior occupancy and use of these lands,¹⁴³ diverging both from her earlier critique of Lamer C.J.C.'s excessive focus on prior occupation and of his assertion that aboriginal rights are also sourced in the relationship between aboriginal legal systems and the common law.¹⁴⁴ Thus, rather than addressing Lamer C.J.C.'s failure to give effect to his affirmation, the Court attempts to distance itself from this affirmation entirely.

McLachlin C.J.C.'s retreat from the Court's recognition that aboriginal rights are sourced in indigenous law leads her to recast the role of aboriginal perspectives in the identification of section 35 rights and reformulate the reasoning behind the requirement that judges be sensitive to aboriginal perspectives. Originally, Dickson C.J.C. and La Forest J. considered it necessary for Canadian courts to be "sensitive to the aboriginal perspective... *on the meaning of the rights at stake*".¹⁴⁵ Earlier statements made by the Court indicated that this requirement flowed from the inter-legal nature of section 35 rights and the fact that section 35 cannot be understood solely in terms of common law concepts. This inter-legal characterization of aboriginal rights would require McLachlin C.J.C. to engage with the very thing she seeks to avoid: indigenous law. Thus, in *Marshall and*

¹⁴³ See *Marshall and Bernard*, *supra* note 24 ("Aboriginal peoples used the land in many ways at the time of sovereignty. *Some uses*, like hunting and fishing, *give rights* to continue those practices in today's world. Aboriginal title, *based on occupancy* at the time of sovereignty, is one of these various aboriginal rights." at 38, emphasis added, citations omitted).

¹⁴⁴ *Delgamuukw*, *supra* note 39 at para. 112.

¹⁴⁵ *Sparrow*, *supra* note 21 at 1112.

Bernard, she restricts the role of ‘the aboriginal perspective’ to providing a vantage point from which Canadian judges can consider the past practice at issue, rather than the right.¹⁴⁶

In the approach taken by McLachlin C.J.C. in *Marshall and Bernard*, the criteria for establishing aboriginal title are derived entirely from the common law. Indigenous laws do generate aboriginal rights or influence their nature, indeed, even the practices of indigenous people do not. The most an indigenous practice seems capable of doing is gaining indigenous people access to a right which exists under the common law. As McLachlin C.J.C. states:

The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people. But in translating it to a common law right, the Court must also consider the European perspective; *the nature of the right at common law must be examined to determine whether a particular aboriginal practice fits it...*

we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of *common law title to land...*

aboriginal title to land... is established by aboriginal practices that indicate possession similar to that associated with title at common law.¹⁴⁷

Absent in McLachlin C.J.C.’s analysis is any indication that aboriginal rights are generated within the relationship between indigenous and Canadian law. Indeed, she leaves one with the impression that there are a limited number of pre-fabricated rights available within the common law and that the only thing indigenous about aboriginal title is the people who are found to possess it. In this particular case, for example, McLachlin C.J.C. finds that the right to control the land and to exclude others is “basic to the notion of title at common law.”¹⁴⁸ Rather, than investigating indigenous conceptions of the relationship to territory,

¹⁴⁶ See *Marshall and Bernard*, *supra* note 24 (“The Court must consider the pre-sovereignty practice from the perspective of the aboriginal people” at para. 48). See also *ibid.* at para 52.

¹⁴⁷ *Ibid.* at paras. 48, 61, 54, respectively.

¹⁴⁸ *Ibid.* at para. 64.

the Court asks, does the practice signify exclusive possession, “in the sense of intention and capacity to control,” within indigenous peoples’ “world and value system.”¹⁴⁹

McLachlin C.J.C. limits the role of indigenous perspectives, making it difficult for Canadian judges to interpret aboriginal rights in a manner demonstrating respect for indigenous legal orders and peoples’ conceptions of their relationship to and status within their territories. The rights available to indigenous peoples appear limited to those already obtainable within the common law. McLachlin C.J.C. seems unconcerned with the possibility that indigenous peoples may have understandings of their relationship to territory that differ from the common law concept of title and are that nonetheless worthy of respect.¹⁵⁰ It is unclear where this leaves the Court in relation to its earlier declaration that aboriginal rights are *sui generis*. Certainly, it does not appear that McLachlin C.J.C. interprets the *sui generis* nature of aboriginal rights as an enabling concept, but it remains to be seen whether she rejects this characterization all together. As the Court did not endorse the assertion of aboriginal title in either case, McLachlin C.J.C. did not comment upon whether she sees the content of aboriginal title as *sui generis*. However, it does seem that the only role the *sui generis* has left under this approach is that of limiting, or downgrading, aboriginal rights.

In his judgment, LeBel J. takes a strong stance against McLachlin C.J.C.’s failure to give effect to the Court’s earlier affirmation of indigenous law’s relevancy to aboriginal rights and highlights the incompatibilities between her judgment and previous section 35

¹⁴⁹ *Ibid.* at paras. 70, 69. See also *ibid.* (“It is therefore critical to view the question of exclusion from the aboriginal perspective” at para. 64).

¹⁵⁰ See *ibid.* (“The common law, over the centuries, has formalized title through a complicated matrix of legal edicts and conventions. The search for aboriginal title, by contrast, takes us back to the beginnings of the notion of title. Unaided by formal legal documents and written edicts, we are required to consider whether the practices of aboriginal peoples at the time of sovereignty compare with the core notions of common law title to land.” at 61).

jurisprudence. He emphasises the *sui generis* nature of aboriginal title and, in contrast to the majority's limitation upon the role of aboriginal perspectives in section 35 jurisprudence, he argues:

The role of the aboriginal perspective cannot be simply to help in the interpretation of aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title...

aboriginal conceptions of territoriality, land-use and property should be used to modify and adapt the traditional common law concepts of property in order to develop an occupancy standard that incorporates both the aboriginal and common law approaches. Otherwise, we might be implicitly accepting the position that aboriginal peoples had no rights in land prior to the assertion of Crown sovereignty because their views of property or land use do not fit within Euro-centric conceptions of property rights.¹⁵¹

Here, LeBel J. takes a clear stance on the *sui generis* characterization of aboriginal rights, arguing that it should be understood as a concept that enables, and indeed requires, Canadian law to recognize rights which are not grounded within Euro-derived law and which he believes would otherwise be ignored.

For LeBel J., aboriginal title, as an aboriginal right, is defined by its relationship to indigenous and to Canadian law. He states that aboriginal title "has been recognized by the common law and is in part defined by the common law, but it is grounded in aboriginal customary laws relating to land."¹⁵² He reminds the Court of its previous statements constructing aboriginal title as an inter-legal right.¹⁵³ LeBel J. recognizes that "it is very difficult to introduce aboriginal conceptions of property and ownership into the modern property law concepts of the civil law and common law systems."¹⁵⁴ However, it is certain that he understands this to be the goal. Indeed, he speaks highly of Cromwell J.A.'s

¹⁵¹ *Ibid.* at para 130, 127, respectively (reference omitted).

¹⁵² *Ibid.* at para. 128.

¹⁵³ In the following passage, LeBel J. quotes heavily from Lamer C.J.C.'s judgment in *Delgamuukw*:

judgment in the Nova Scotia Court of Appeal, endorsing his attempts to reconcile *Mi'kmaq* and common law perspectives on ownership, to transpose indigenous perspectives and experiences upon “the structures of the law of property,” and to bridge the gaps between “sharply distinct cultural perspectives on the relationship of different peoples with their land.”¹⁵⁵

LeBel J. advocates for interpreting the *sui generis*, inter-legal nature of aboriginal rights as an enabling concept, supporting Lamer C.J.C.’s recognition of aboriginal rights as rights arising out of the relationship between indigenous and Canadian legal orders. However, as shown in the earlier analysis of the absorption model discussed in *Mitchell*, though transform Canadian law’s adverse relations with indigenous legal orders may require an enabling approach to aboriginal rights’ *sui generis* nature, it is not sufficient. LeBel J., while arguing effectively against the majority’s neglect of the Court’s previous comments on the relationship between section 35 rights and indigenous legal orders, does not indicate whether he would accept or reject the absorption model, nor does he provide an alternative understanding of the relations between indigenous legal orders, section 35 and Canadian law.

A dimension of the *sui generis* aspect of aboriginal title that is of particular relevance to the issues on appeal is the source of such title. As with all aboriginal rights protected by s. 35(1) of the *Constitution Act, 1982*, aboriginal title arises from the prior possession of land and the prior social organisation and distinctive cultures of aboriginal peoples on that land... It originates from “the prior occupation of Canada by aboriginal peoples” and from “the relationship between common law and pre-existing systems of aboriginal law”, The need to reconcile this prior occupation with the assertion of Crown sovereignty was reinforced in *Delgamuukw* when Lamer C.J. stated that common law aboriginal title “cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives”.

Ibid. at para 129, citing *Delgamuukw*, *supra* note 39 at paras. 114, 112, respectively (references omitted).

¹⁵⁴ *Ibid.* at para. 128.

¹⁵⁵ *Ibid.* at para 130.

Chapter 6: SECTION 35 AND INTERSOCIETAL LAW

In previous chapters, I reviewed recent Supreme Court section 35 jurisprudence through four cases, *Sparrow*, *Van der Peet*, *Mitchell* and *Marshall and Bernard*. This analysis demonstrates that current Supreme Court section 35 jurisprudence does not provide a framework for Canadian law's participation in respectful relations with indigenous legal orders. In *Sparrow*, the Supreme Court attributed particular rights to indigenous peoples through section 35, modifying Canadian law's perspective of the position and status of indigenous peoples and the powers and obligations of the Canadian state. In *Van der Peet*, the Court found that the laws of indigenous peoples are relevant to section 35 and, indeed, inform section 35 rights. However, this finding was not given effect in *Van der Peet's* definitional test or in frameworks governing the exercise of aboriginal rights under section 35. Moreover, as demonstrated when examining of the absorption model, giving effect to indigenous law's relevance to section 35 is not enough to transform Canadian laws' adverse relations with indigenous legal orders. The decisions in *Marshall and Bernard* show that the majority of the Court is attempting to avoid the issue altogether. Meanwhile, the two Justices who would defend indigenous law's relevance to section 35 lack an alternate framework to support engagements with indigenous law that are respectful of indigenous legal orders.

To date, the absorption model is the only approach discussed by the Supreme Court that attends to its characterization of aboriginal rights as *sui generis*, inter-legal rights informed by indigenous laws and that articulates a position on the relations between indigenous legal orders, section 35 and Canadian law. However, understanding these

relations through this model would hinder Canadian judges in supporting the establishment of respectful relations between legal orders, and would reduce section 35 to a mechanism that secures benefits for indigenous people within Canadian law's existing relations with indigenous legal orders. From within the absorption model it is impossible to consider the perspectives of those committed to the maintenance and revitalization of indigenous legal orders. As a result, if the absorption model were adopted by the Supreme Court, section 35 jurisprudence would further the divide between indigenous and Canadian legal orders. The absorption model, however, is not the only way of understanding these relations and the *sui generis*, inter-legal nature of section 35 rights.

In *Van der Peet*, Lamer C.J.C. cited two passages that characterize aboriginal rights as *sui generis* rights, arising within relations between indigenous and Canadian legal orders. The first passage he drew from Walters' work, where he states:

*[t]he challenge of defining aboriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures... a morally and politically defensible conception of aboriginal rights will incorporate both legal perspectives.*¹⁵⁶

Both the passage quoted by Lamer C.J.C. and the absorption model describe the process of reconciling indigenous and Canadian legal orders in the abstract, as an intellectual endeavour. Although the absorption model is certainly not attributable to Walters, one could understand it as an extremely limited way of implementing the ideas expressed in this passage.¹⁵⁷ Through the absorption model, Canadian judges would consider indigenous law prior to the assertion of Crown sovereignty, reconcile it to existing Canadian law and

¹⁵⁶ *Van der Peet*, *supra* note 22 at para. 42 [emphasis in the original], citing Walters, "British Imperial," *supra* note 78.

¹⁵⁷ This passage appears only in the final passage of Walter's article, which explored the possibility that the British constitutional rules of colonial expansion, namely, the doctrine of continuity, may afford indigenous law more protection than the prior occupancy model ultimately adopted by Lamer C.J.C. In contrast to the absorption model, he found that according to the doctrine of continuity indigenous legal systems survived the assertion of sovereignty (albeit in a diminished capacity). Walters, "British Imperial," *ibid.*

arrive at an interpretation that takes both these legal perspectives into account. This model, however, does not reflect the other view of aboriginal rights Lamer C.J.C. referred to in *Van der Peet*

The second passage Lamer C.J.C. used to explain the *sui generis* nature of aboriginal rights came from Slattery. In particular, Lamer C.J.C. quoted Slattery's assertion that the law of aboriginal rights is "neither English nor aboriginal in origin: it is a form of intersocietal law that evolved from long-standing practices linking the various communities."¹⁵⁸ According to this author, the doctrine of aboriginal rights is a distinctive body of law generated by the interactions between indigenous peoples and settler governments and informed primarily by "the actual circumstances of life in America, the laws and practices of indigenous societies, imperial law and policy, and broad considerations of comity and justice," and supplemented by fundamental principles of justice.¹⁵⁹ Slattery's characterization of aboriginal rights seems very different from the absorption model, which is premised on the assimilation of indigenous peoples and their institutions rather than on their participation creating of an indigenous societal law. However, closer examination reveals that, like the absorption model, Slattery's notion of indigenous societal law is equally problematic.

The absorption model provides an inadequate framework to enable Canadian courts to participate in the establishment of respectful relations with indigenous legal orders for three main reasons. First, it includes a temporal limitation constraining the influence of indigenous law and legal orders, making it difficult for the Court to acknowledge their engagements with existing indigenous legal orders. Second, it assumes that Canadian

¹⁵⁸ *Van der Peet*, *supra* note 22 at para. 42 citing Slattery, "Understanding Aboriginal Rights," *supra* note 78 at 737.

¹⁵⁹ Brian Slattery, "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Can. Bar Rev. 196 at 200; See also *ibid.* at 199 [Slattery, "Making Sense"].

judges have the capacity and the authority to render determinative interpretations of indigenous law. And third, it presumes that Canadian law unilaterally determines what constitutes respectful (or just) relations between indigenous peoples and the Canadian state and between indigenous and Canadian legal orders, ignoring the indigenous laws that speak to these relations.¹⁶⁰ Rather than providing a framework that addresses these problematic aspects of the absorption model, Slattery's generative intersocietal law model is subject to similar critiques.

For Slattery, aboriginal rights are not the product of indigenous legal orders assimilation into Canadian law. Rather, he sees them as products of this intersocietal law. This law, in Slattery's view, emerged out of indigenous-settler relations (informed in part by indigenous laws and practices); it "coalesced into a distinct branch of common law now known as the doctrine of aboriginal rights," beginning in the seventeenth century and ending in 1763.¹⁶¹ As a concept within British imperial and later Canadian law,¹⁶² Slattery argues that the common law doctrine of aboriginal rights was subject to modification by 'competent legislatures' absent constitutional protection.¹⁶³ In contrast, Slattery asserts that after the aboriginal rights doctrine crystallized, indigenous legal orders lost their capacity to influence external relations.¹⁶⁴ In his opinion, they are circumscribed by the conditions of

¹⁶⁰ One might argue that the recognition of indigenous legal orders *within* (as opposed to by) Canadian legal orders is capable of transforming Canadian law's adverse relations with indigenous legal orders. This step would address the first two aspects of the absorption model that I find problematic. However, it would not address the third issue unless indigenous peoples and their legal orders are understood as a sub-system of Canada and Canadian legal orders from *within* the particular indigenous legal order perspective considered.

¹⁶¹ Slattery, "Making Sense," *supra* note 159 at 200; See also: —, "Aboriginal Sovereignty and Imperial Claims" (1991) 29 Osgoode Hall L. J. 681 at 700; —, "Understanding Aboriginal Rights" *supra* note 78 at 736-737.

¹⁶² Slattery, "Making Sense," *ibid.*

¹⁶³ *Ibid.* ("This conclusion flows from a standard doctrine of British law attributing paramountcy to Acts of Parliament." at 204).

¹⁶⁴ *Ibid.* ("When the Crown gained suzerainty over a North American territory, the doctrine of aboriginal rights provided that the local customs of the indigenous peoples would presumptively continue in force, except insofar as they were unconscionable or incompatible with the Crown's suzerainty." at 201)

Crown suzerainty, and in force only insofar as is provided for by the doctrine of aboriginal rights.¹⁶⁵

While the absorption model is wholly dependant on the assumed assimilation of indigenous legal orders, Slattery's model depends upon the validity of his assertion that the intersocietal law embodied in the doctrine of aboriginal rights *actually* "bridges the gap" between understandings of indigenous settler-relations in both indigenous and Euro-derived legal orders. Slattery presumes that the doctrine of inter societal law determines the way s that indigenous and Canadian legal orders interact and considers indigenous legal orders no longer capable of contributing to or interpreting this law. Thus, within Slattery's model, knowing whether the doctrine actually bridges the gap is not only impossible, it is irrelevant.¹⁶⁶ Furthermore, the idea that the doctrine of aboriginal rights actually 'bridges the gap' between Canadian and indigenous legal orders seems ludicrous, given that every indigenous peoples has its legal orders and by the time the doctrine crystallized, British settlers had not yet come into contact with some of the peoples it purports to govern.¹⁶⁷ Indeed, I find little reason to accept the claim that aboriginal rights doctrine as it is conceived by Slattery actually represents a form of intersocietal law that can claim to bind the indigenous peoples who were engaged in negotiating their relations with British settlers prior to 1763.

¹⁶⁵ *Ibid.* at 204.

¹⁶⁶ Slattery, "Making Sense," *supra* note 159 at 198.

¹⁶⁷ I am not arguing for the application of Slattery's intersocietal customary law to be limited in geographical scope. Rather, I am arguing that the normative basis upon which he establishes the doctrine of aboriginal rights as the sole legal framework governing relations between indigenous and Canadian societies and legal orders does not flow from a body of intersocietal law that bridges the gap between these legal orders. In lieu of demonstrating that this body of intersocietal law addresses the issues of contention between indigenous and settler legal orders, Slattery draws upon 'the basic principles of justice' to lend normative force to the intersocietal law embodied in the doctrine of aboriginal rights.

Slattery's model includes a temporal limitation constraining the full influence of indigenous law and legal orders, rendering it difficult for the Court to acknowledge aspects of their engagement with this system. Slattery argues that this allegedly intersocietal law governs interactions between legal orders and determines the conditions of their continuing existence. His model places this law squarely within the interpretive monopoly of Canadian courts and renders irrelevant the indigenous laws which speak to the nature of the relationship between indigenous peoples and settler societies. As such, Slattery's understanding of intersocietal law, like the absorption model discussed by McLachlin C.J.C., fails to provide a framework to understand section 35 in a way capable of transforming Canadian laws' adverse relations with indigenous legal orders or enabling Canadian courts to participate in respectful relations with them.

During the more than fifteen years that the Supreme Court has sought to give effect to section 35, the constitutional recognition and affirmation of aboriginal rights has certainly promoted change *within* Canadian legal orders. Section 35 has changed the way Canadian law understands the status and position of indigenous peoples, the powers and obligations of the Canadian state and the relations that exist between Canada and the peoples indigenous to these lands. And yet, section 35, as it has been interpreted by the Supreme Court thus far, has done little to transform Canadian law's adverse relations *with* indigenous legal orders. Given the current state of section 35 jurisprudence, I wonder whether the constitutional recognition and affirmation of aboriginal rights can do more than provide indigenous people access to benefits within Canadian law's adverse relations with

indigenous legal orders.¹⁶⁸ Many have argued that section 35 (and aboriginal rights doctrine more generally) is nothing more than another attempt to entice the long-sought acquiescence of indigenous peoples to the adverse relations that the Canadian state and Canadian law seek to impose.¹⁶⁹ Still others hold the hope that section 35, understood differently, could become something more.¹⁷⁰ Walters' recent article, "The Morality of Aboriginal Law," serves as an excellent example of this position.¹⁷¹

With particular reference to the majority decision in *Marshall and Bernard*, Walters concludes that, at present, the idea of intersocietal law is an ideal rather than a reality.¹⁷² Nonetheless, he argues that if Canadian aboriginal rights law were understood as an intersocietal law, it could hold "the promise of reconciliation between two very different legal traditions in terms of justice and equality."¹⁷³ Given my conclusions regarding the absorption model and Slattery's theory of intersocietal law, I think it also important to ask

¹⁶⁸ See Taiaiake Alfred & Jeff Corntassel, "Being Indigenous: Resurgences Against Contemporary Colonialism" (2005) 40 *Government and Opposition* 497 ("in Canada today, many Indigenous people have embraced the Canadian government's label of 'aboriginal', along with the concomitant and limited notion of postcolonial justice framed within the institutional construct of the state. In fact this identity is purely a state construction that is instrumental to the state's attempt to gradually subsume Indigenous existences into its own constitutional system and body politic since Canadian independence from Great Britain – a process that started in the mid-twentieth century and culminated with the emergence of a Canadian constitution in 1982. Far from reflecting any true history or honest reconciliation with the past or present agreements and treaties that form an authentic basis for Indigenous-state relations in the Canadian contexts, 'aboriginalism' is a legal, political and cultural discourse designed to serve an agenda of silent surrender to an inherently unjust relation at the root of the colonial state itself." at 598).

¹⁶⁹ See e.g. Robinson & Quinney, *supra* note 12 (where Robinson and Quinney compare the constitutional recognition and affirmation of aboriginal rights to attempts by settlers to eradicate indigenous peoples by gifting them with disease infested blankets. "Today in a 1980's style of colonialism, Canada is trying to blanket the First Nations with the 1982 Canada Act. It is infested with colonialism and the death of Indian Nationhood. Today, Indian Nations must not trade off our Sovereign Nationhood for this modern form of genocide" at xix); Anthony J. Hall, *The American Empire and the Fourth World* (Kingston: McGill-Queen's University Press, 2003) ("The question is therefore raised whether the existing Aboriginal and treaty rights is anything more than a fine-sounding phrase to mask and justify the continuing colonial rule of dominant societies rooted primarily in the European heritage over smaller Aboriginal societies that have retained some modicum of their Aboriginal identities." at 42).

¹⁷⁰ See e.g. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002); Henderson, "Aboriginal Jurisprudence," *supra* note 55.

¹⁷¹ Walters, "Morality," *supra* note 60.

¹⁷² *Ibid.* at 517.

¹⁷³ *Ibid.* at 472.

whether the reconciliation of indigenous and Canadian legal traditions through an intersocietal interpretation of Canadian aboriginal rights law would transform Canadian law's adverse relations with indigenous legal orders.

For Walters, an intersocietal law is one that is “neither aboriginal nor non-aboriginal in character, but which arises from the meeting and subsequent interaction of aboriginal and non-aboriginal laws and which serves to identify the inter-relationship between, and the respective spheres of, these laws.”¹⁷⁴ To become “truly” intersocietal, he argues, Canadian aboriginal rights law must focus reconciling indigenous peoples’ prior claims to land and sovereignty and Crown sovereignty, a goal which implies “a process of mutual adjustment and adaptation by aboriginal and non-aboriginal legal traditions... in short, the articulation of a constitutional middle ground upon which a truly intersocietal law may emerge.”¹⁷⁵ This process, in Walters’ view, would result in a fundamental reconceptualization of Canadian aboriginal rights law, one requiring the introduction of aboriginal conceptions of the rule of law.¹⁷⁶ Walters argues that these conceptions would, in turn, require Canadian law to fundamentally alter its understanding of Crown sovereignty, indigenous-Canadian relations and existing treaties.¹⁷⁷

Although Walters does not directly consider either the absorption model or Slattery’s theory of intersocietal law, he seems to argue for an approach that requires considerably more consideration of, and in his words, humility towards, indigenous law. Although he does not propose an intersocietal theory of section 35 in detail, he does not explicitly incorporate a temporal limitation on the influence of indigenous law or legal orders. In addition, while he advocates for the incorporation of indigenous conceptions of

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.* at 501.

¹⁷⁶ *Ibid.* at 518-519.

¹⁷⁷ *Ibid.*

the rule of law into Canadian aboriginal rights law, he does not argue that Canadian judges are capable of rendering authoritative interpretations of such law.¹⁷⁸ Furthermore, the reconceptualization of Canadian aboriginal rights, as articulated by Walters, would promote the direct consideration of indigenous laws which governing relations between communities as a necessary element of understanding relations between indigenous peoples and settler societies.¹⁷⁹ Thus understood, section 35 appears to be more conducive to the establishment of respectful relations between indigenous and Canadian law than Slattery's theory or the absorption model. It would certainly be an improvement over the one-sided approach to reconciliation that Walters argues is dominant in current aboriginal rights jurisprudence (one which seeks to reconcile indigenous peoples to Crown sovereignty).¹⁸⁰ Walters argues that a 'truly' intersocietal approach to Canadian aboriginal rights law requires a fundamental reorientation *within* Canadian law. However, I wonder whether such a reorientation would also transform Canadian law's adverse relations *with* indigenous legal orders.

Walters gives several indications that his reconceptualization of Canadian aboriginal rights law would require the participation of indigenous peoples and the serious consideration of the ways in which indigenous laws may be relevant to establishing more legitimate relations between indigenous peoples and the Canadian state.¹⁸¹ However, he does not directly contemplate the relations between Canadian and indigenous legal orders.

His consideration of intersocietal law focuses heavily upon the changes it might effect

¹⁷⁸ *Ibid.* at 519.

¹⁷⁹ See *ibid.* at 479-494 (where Walters argues that the record of the treaty councils held in the 1900s must be read with an understanding of aboriginal legal traditions and, in particular, with reference to the ceremonies through which relations between the indigenous peoples often referred to as the Six Nations were governed and the Six Nations Confederacy was established).

¹⁸⁰ See *ibid.* at 510. On this point see Ardith Walkem, "Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning" in Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Penticton: Theytus Press, 2003) 196.

within Canadian law. This is not surprising as many discussions of indigenous, Canadian and intersocietal law focus wholly upon reconciling indigenous and Canadian law *within* section 35 jurisprudence. But no matter how much section 35 is reconceptualised better respond to the development of intersocietal law, I would question whether this reconceptualization, alone, can establish respectful relations between indigenous and Canadian legal orders.

At the end of the day, reconceptualizing Canadian aboriginal rights law can only be guaranteed to effect change *within* Canadian legal orders. Section 35, even when understood as a site of interaction between indigenous and Canadian law or as informed by intersocietal law, is still but one such site which exists *within* Canadian law. It is the vehicle through which Canadian law contemplates its understanding of the status of indigenous peoples, settler societies, the Canadian state, indigenous law, Canadian law, intersocietal law and the myriad of relations that exist among them. Aboriginal rights provide a ‘recognition space’¹⁸² that exists within Canadian law, but I do not believe it is the only such space relevant to the governing of relations between indigenous and Canadian legal orders, nor do I believe it is the only one relevant to determining what constitutes respectful, just, or lawful relations between indigenous peoples and the Canadian state.

I believe that there are corresponding recognition spaces that exist within each indigenous legal order. Within these spaces, the status of settler societies, the Canadian state, indigenous peoples, Canadian law, indigenous law, intersocietal law and the relations

¹⁸¹ See “Morality,” *supra* note 60 (“it is for [indigenous peoples] to say what role, if any, . . . aboriginal conceptions of the rule of law might play in shaping the structure of Canadian aboriginal law today” at 518); *ibid.* note 99 (where Walters acknowledges the need for adaptation *by* aboriginal legal traditions, as opposed to judicial adaptations *of* aboriginal legal orders); *ibid.* at 519 (where Walters argues that Canadian aboriginal law need not provide definitive answers regarding how to adapt Canadian constitutional theory to better fit with aboriginal legal traditions, “it only requires a general form or structure of law that permits aboriginal and non-aboriginal relations to evolve through political interactions and dialogue”).

¹⁸² See Pearson, “Native Title at Common Law,” *supra* note 101.

among them, are considered by indigenous peoples, according to their laws, through their own legal processes. Indigenous people may make decisions regarding preconditions for respectful relations between themselves and the Canadian state or between indigenous and Canadian legal orders, according to indigenous law. Yet such decisions do not determine corresponding standards according to Canadian legal orders, any more than the standards set by Canadian law determine those within indigenous legal orders. It is for this reason that any reconciliation of indigenous and Canadian law cannot be achieved solely *within* section 35.

Section 35, can at most, work towards developing approaches *within* Canadian law that enable the transformation of Canadian law's adverse relations *with* indigenous legal orders. A true reconciliation between indigenous and Canadian law is not some theoretical endpoint that attempts to resolve or disappear the differences between them, rendering them part of a unified whole. In my mind, the only desirable and attainable reconciliation lies in nurturing respect within the context of relations *between* these legal orders, which shall exist for as long as the sun shines, the grass grows and the waters flow. Whether the understandings and approaches developed within Canadian aboriginal rights law are indeed able to render Canadian law's engagement within these relations more respectful depends on the extent to which they demonstrate an awareness of the corresponding conceptualizations with indigenous legal orders, are persuasive when seen from within indigenous legal orders and support dynamic processes of negotiation and deep engagement not only between indigenous peoples and the Canadian state, but also between indigenous and Canadian legal orders.

Chapter 7: LOOKING AHEAD

My exploration of section 35 jurisprudence has left me with few answers and more questions. Where does the path towards respectful relations between indigenous and Canadian legal orders lie? Can section 35 be understood in a way which enables Canadian law to foster such relations? Can the *sui generis*, inter-legal or intersocietal characterization of aboriginal rights *within* Canadian law work to transform Canadian law's relations *with* indigenous legal orders? How can the impact of current adverse relations be redressed?

Though I cannot provide definitive answers to such questions, there are three insights I would like to share. These insights have been central to this thesis and I believe their acknowledgement is a necessary part of the transformation of Canadian law's relations with indigenous legal orders. These are not new ideas, but I believe they are important enough to warrant frequent revisiting and reaffirming, particularly when one is engaged in reading aboriginal rights jurisprudence on a regular basis.

First and foremost, *indigenous legal orders continue to exist*.¹⁸³ Certainly our legal orders, our institutions, our ways of life, have been affected by generations of concerted efforts to destabilize them. Certainly, we, as indigenous people, face many challenges as we seek to apply our laws to situations that are new to us,¹⁸⁴ as we work to support our communities in times where the need for revitalization and regeneration often seem overwhelming.¹⁸⁵ Certainly, we were not always able to effect what we would most like to see happen in the world, but such power is not required to maintain our ways of being, our

¹⁸³ Henderson, "The Mikmaq Model," *supra* note 132 ("before all else, one must be prepared to recognise that First Nations had their own legal systems, before the arrival of the Europeans, and that they still do." at 2); Borrows, *Indigenous Legal Traditions*, *supra* note 60 at 14.

¹⁸⁴ For example, in the course of their work, my colleagues Kinwa Bluesky and Jacinta Ruru consider how we might, as indigenous peoples, draw upon our traditions as we form new relations with indigenous peoples globally and develop comparative indigenous methodologies.

legal orders, or our governance structures.¹⁸⁶ Though the choices available to us may be severely restricted, as *Anishinabe* people, we have continued to make decisions among options that were available.¹⁸⁷ There have always been and will always be indigenous people who make these decisions according to their understanding of indigenous laws and the ways that were given to them. Our legal orders, institutions and ways of being, although they have certainly been affected and challenged by Canada's history of colonialism, continue to operate within the lives of individuals, families, and communities choosing to live them.¹⁸⁸

Second, those who attempt to work within the Canadian judicial system need to acknowledge the continuing existence of indigenous legal orders. This recognition must be used to understand what is actually going on in section 35 jurisprudence. When Canadian courts attempt to structure relations between the state and indigenous peoples within section 35, they are *not* bringing *law* to the *context* of indigenous-settler relations.¹⁸⁹ Likewise, courts are *not* employing Canadian law to safeguard the legal interests that indigenous peoples' ancestors held under prior indigenous legal orders.¹⁹⁰ Rather, courts are

¹⁸⁵ See Christie, "Law, Theory and Aboriginal Peoples," *supra* note 8 ("Canadian society and the Canadian state devised numerous strategies over the last few centuries designed to undercut aboriginal cultures, and in particular Aboriginal processes of moral education. The result is a world in which the need for justice in Aboriginal communities *between* aboriginal people is overwhelming, but where most observers do not acknowledge the role that non-Aboriginals have played in creating the circumstances of justice making this so" at 112).

¹⁸⁶ As I understand them, the legal orders, governance structures and life ways of the *Anishinabe* do not require the *Anishinabe* peoples to exercise total control within the territories in which they lived. Indeed, it was often acknowledged that, as human beings, the *Anishinabe* had very little control over events because the many other-than-human beings are understood to be active, self-determining agents within creation. See Murray Sinclair, "Aboriginal Peoples, Justice and the Law" in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994) 173 at 176.

¹⁸⁷ See John Borrows, "Indian Agency and Taking What's Not Yours" (2003) 22 Windsor Y.B. Access Just. 253.

¹⁸⁸ See Borrows, *Indigenous Legal Traditions*, *supra* note 60 at 13.

¹⁸⁹ This is the premise that lies behind a practice-based approach to understanding aboriginal rights wherein Euro-derived legal orders attribute rights to indigenous peoples based on "aboriginal" practices.

¹⁹⁰ This is the premise upon which the absorption model is based, one based upon the indigenous legal orders' non-existence after the assertion of sovereignty.

engaging with indigenous legal orders that exist today, or more accurately, they are acting within existing relations between Canadian and indigenous legal orders.¹⁹¹

Finally, indigenous legal orders continue to govern the relations that indigenous people, both individually and collectively, maintain with other beings of creation, *including the many peoples who now live among us within our territories*. Indigenous legal orders may not be the only ones which seek to govern these relations. However, this fact does not render the laws governing these relations within indigenous legal orders irrelevant. On the contrary, the governance of indigenous peoples' relations by indigenous legal orders requires the Canadian judiciary to enter into a considered engagement with indigenous legal orders if they want to begin a process of reconciliation with indigenous peoples.

Considered engagement with indigenous legal orders is necessary whether courts are attempting to reconcile indigenous and Canadian law or to reconcile the existence of the Canadian state within indigenous territories with the fact that indigenous peoples have governed themselves within these lands for thousands of years. In either case, the question that must be confronted is what constitutes just, respectful, or lawful relations, either between indigenous peoples and the Canadian state, or between indigenous and Canadian legal orders. Given that multiple legal orders conceive of these relations in different ways,

¹⁹¹ Tully makes an analogous argument in the context of imperial relations between the West and indigenous peoples and Western and non-Western constitutional forms and constituent powers.

The non-West is full of laws and governments... Modern imperialism does not operate *directly* on the constituent power of others, but on their civilizational organization of constitutional forms and constituent powers... [Thus, Indigenous peoples' counteractions against modern imperial civilizing projects] are not the counteractions of 'constituent power' alone within a constitutional formation, but of civilizational complexes of constitutional forms and constituent powers. Consequently, western expansion is not the unilateral unfolding of world-historical processes of constitutionalisation and constituentisation that the languages and theories of modern imperialism presume. It is, rather, the *interaction* between the imperial spread of discursive and non-discursive practices of modern constitutionalization on the one side and the multiplicity of counteractions of diverse Indigenous civilizations on the other side.

James Tully, "Indigenous Peoples and the Western Constitutional Form and Constituent Power Complex" (unpublished: on file with author, 2006) at 20-21.

little can be said *a priori* about what kinds of conceptualizations would be likely to secure affirmation from within all the legal orders seeking to govern indigenous Canadian relations. But even to sustain the hope that this might one day, those involved within each legal order need to acknowledge that indigenous-Canadian relations are often viewed in radically dissimilar ways within other legal orders. Those involved must also demonstrate a commitment to engaging with these different conceptualizations in considered and respectful ways.

To prepare to work towards establishing respectful relations with indigenous peoples, those working with Canadian law must be willing to learn how indigenous laws speak to the relations between indigenous peoples, the Canadian state and their own legal orders. Indigenous peoples know what place they would be assigned within the Canadian state, within Canadian law. We are confronted with the Indian on a daily basis. She is our constant shadow. Some of us have even studied her trajectory, her history, her stories within Canadian law and policy. It is time for others to ask, to ask and to listen. It is time for people to ask indigenous peoples: what place, what role, what responsibilities would you place upon me within your legal order? Who am I in your eyes? How do you understand our relation to each other? This may be a difficult step. People may be afraid that indigenous legal orders would offer them no place, no role within indigenous territories, beyond responsibility. They may be afraid that indigenous peoples would want to restrict those who live among them to a place as confined, constrained and conflicted as that which indigenous peoples have been assigned within Canadian legal orders, within the Canadian state and within Canadian society. Knowing somewhat of *Anishinabe* law, I doubt this would be the case, you see indigenous law is different from Canadian law.

Aangwaamizin

Where does my responsibility lie, as an *Anishinabe-kwe* trained within Canadian law? Can I honour my commitment to our own ways of being and relating as I seek to work within this framework? How should I work with the uncertainties that I carry about Canadian aboriginal rights? What effect might my work have upon the way I understand myself and my relations? These are the questions that led me to pick up this work. I now know a little bit more about the dream about rights that came to me as I studied Canadian law. How has this helped me to understand my own work?

It seems too much to ask of myself, to engage with the law that would bind me within the space occupied by the indian. Even the aboriginal rights paradigm, which is often thought of as a remedy for the violent attempts to remake indigenous peoples into indians, carries its own form of violence. Section 35 has not let go of the Indian; rather it has transformed her. Her space is a little bigger, she has been given room to engage in a few practices previously denied her, and yet she remains an indian, an indian dressed up as an aboriginal. She has been promised reconciliation, which will give her a few more relations to the world (those sanctioned by Canadian law). But she must only remain passive, incapable of relating to her creator, or to others on her own; she must engage with the world solely through the Canadian state.¹⁹²

Some days, working with such laws seems like a burden too heavy to carry. And yet, as professor James (Sákéj) Youngblood Henderson reminds me, there is a stark reality

I must face:

¹⁹² See Alfred & Cornthassel, *supra* note 168 (“aboriginals... identify themselves solely by their political legal relationship to the state rather than by any cultural or social ties to their Indigenous community or culture or homeland... [pulling] Indigenous peoples away from cultural practices and community aspects of ‘being Indigenous’ towards a political-legal construction as ‘aboriginal’ or ‘Native American’, both of which are representative of what we refer to as being ‘incidentally Indigenous’.” at 599).

Eurocentrism and colonial thought still imprisons colonized indigenous peoples and Indigenous lawyers. Eurocentric thought has dreamed imaginary societies that generate our cognitive prisons. Eurocentric law and punishment has sustained them. These noble visions, however, have remained flawed and the legal systems they have created have trapped Indigenous peoples... Unfortunately, the modern boundaries of our imprisonment are both cognitive and physical.¹⁹³

Canadian law still wields a considerable influence, which adversely affects the lives of indigenous peoples. For some, this influence is indirect, working to justify economic and physical violence that others visit upon them. For others, this influence is direct, working to shape their perceptions of the world, and of their responsibilities and roles within it. Thinking about my responsibility as one educated in Canadian law, I must not forget that Canadian law, through those whom it shapes, continues to have a physical impact on ourselves as indigenous people and all our relations. I must think about this as I make the choices available to me.

Still, increasing the number of aboriginal rights recognized by Canadian courts under section 35 and bringing existing aboriginal rights jurisprudence to bear upon the rest of Canadian law cannot be my sole endeavour. Such efforts may mitigate some of the physical and economic constraints embedded in Canadian law's indirect influence on indigenous people. However, strengthening aboriginal rights does not alleviate, and indeed, may perpetuate, Canadian law's direct adverse affect upon indigenous people and the negative influence of Canadian aboriginal rights law. Canadian law operates directly upon indigenous people who are satisfied with the potential benefits the aboriginal rights paradigm could afford. Such people are seemingly content, believing that their efforts within the Canadian law will see them safely safeguarded within Canadian legal orders, trusting Canadian law to inform them of any roles and responsibilities that they, as

¹⁹³ Henderson, "Indigenous Legal Consciousness," *supra* note 9 at 14.

indigenous peoples, must maintain. Approach section 35 in this way leaves little motivation to maintain indigenous legal orders.

One might say that countering the effects of colonialism is required for indigenous peoples to maintain their legal orders. However, this is itself a colonial narrative that seeks to distance us from the indigenous legal orders that have continued to exist. It is what Taiaiake Alfred and Jeff Corntassel call the danger latent within “allowing *colonization* to be the only story of Indigenous lives.”¹⁹⁴ They insistently remind us, that “[w]e do not need to wait... to validate our vision... we need only start to use *our* Indigenous languages to frame our thoughts, the ethical framework of *our* philosophies to make decisions and to use *our* laws and institutions to govern ourselves.”¹⁹⁵ Thus, it is important that when I choose to engage with Canadian law, I also remember to balance this engagement with participation in my own, *Anishinabe* legal order.

I find section 35 aboriginal rights to limiting a paradigm to live my life through. I am not satisfied by a life lived through Canadian law. I am determined to live the life that was given to me, as *Anishinabe*. I find *Anishinabe* law full; I am able to draw upon it to make sense of the world and to find a good life, a good way within it. I feel I have a responsibility, to pick up this legal inheritance, for this inheritance enables me to work with indigenous people who have become disheartened and who have lost faith with all law. The many indigenous people who find their lives not worth living.

When I return home, to my territory, my community, my family and the influence of the lodge, there is much work for me to do. There I learn to live our teachings into my life, endeavour to assume my own responsibilities within our order, and to prepare to pass

¹⁹⁴ Alfred & Corntassel, *supra* note 168 at 601 (emphasis in the original).

¹⁹⁵ *Ibid.* at 614, (emphasis in the original).

on what knowledge I gain. Though Canadian courts would rather I leave them to decide what must be safeguarded for future our descendants, it is our responsibility, my responsibility, one that I cannot bequeath to others. I remember the words spoken by my uncle when the *Royal Commission on Aboriginal Peoples* came to *Bigawinishkoziibing*:

In our history it tells us of a prophecy of the seventh fire, fire representing time, eras. In that prophecy, it says that in the time of seventh fire a new people will emerge to retrace the steps of our grandfathers, to retrieve the things that were lost but not of our own accord. There was time in the history of Anishnabe people we nearly lost all of these things that we once had as a people, and that road narrowed...

But today we strive to remind our people of our stories once again, to pick up that work that we as Anishnabe people know. *It is our work and we ask no one to do that work, for it is our responsibility to maintain those teachings for our people.*¹⁹⁶

Charles Nelson
Roseau River Anishinabe First Nation

Although there is much for me to do when I am within the *Anishinabe* community, I find inspiration, rejuvenation and healing as I begin to pick up this work.

I am but a learner at home; I have many Elders, teachers and encouragers to look to as I endeavour to learn the lessons that live within their words and within their lives. Our teachings contain beautiful thoughts, strengthening me within. I hear the teachings of the Seven Grandfathers resound as our community members find their way home, assume their roles and pick up their work: *Wisdom, Love, Respect, Bravery, Honesty, Humility, Truth.*¹⁹⁷ I find it more difficult to bring these teachings forward to guide my own engagements with Canadian law, to guide my engagements in what might one day become an inter-legal, intersocietal law. But I am trying. I know that the teachings that were given to the

¹⁹⁶ Report of the Royal Commission on Aboriginal Peoples, v. 1. *Looking forward, looking back* (Ottawa: Canada Communications Group, 1996) at Chapter 15:2 (online) (emphasis added); Charles Nelson draws upon a prophecy which was written down by Eddie Benton Banai. See Eddie Benton-Banai, *The Mishomis book: The Voice of the Ojibway*. (St. Paul, MN: Red School House, 1988).

¹⁹⁷ Benton-Banai, *The Mishomis Book*, *ibid.* at 64.

Anishinabe were not meant to guide us only in those times before others came to live among us. They are forever, they are to guide all of my actions throughout my life. As I continue this work to live the teachings, even into my engagements with Canadian law, one word gives me strength: *Aangwaamizin*. In *Anishinabemowin*, *Aangwaamizin* means to be determined; however, I have also heard it interpreted as meaning to tread carefully.¹⁹⁸ It is in both of these ways that I will endeavour to continue my work:

Aangwaamizin!

Gagigeh Anishinabe-kwe indow!

-
- (1) To cherish knowledge is to know **WISDOM**
 - (2) To know **LOVE** is to know peace
 - (3) To honor all of the Creation is to have **RESPECT**
 - (4) **BRAVERY** is to face the foe with integrity
 - (5) **HONESTY** in facing a situation is to be brave
 - (6) **HUMILITY** is to know yourself as a sacred part of the Creation
 - (7) **TRUTH** is to know all of these things

¹⁹⁸ See *Ayaangwaamizin: The International Journal of Indigenous Philosophy, Statement of Purpose* (online) Lakehead University <<http://flash.lakeheadu.ca/~agaamiz/stpurpose.html#anchor146430>>.

Bibliography

LEGISLATION

British Columbia Fishery (General) Regulations, SOR/1984-248.

Canadian Charter of Human Rights and Freedoms, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, C. 11.

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II No. 5.

Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

Crown Lands Act, R.S.N.S. 1989, c. 114.

Crown Lands and Forest Act, S.N.B. 1980, c. C-38.1.

Customs Act, R.S.C. 1985, c. 1 (2nd Supp.).

Fisheries Act, R.S.C. 1970, c. F-14.

Indian Act, R.S.C. 1985, c. I-5.

Parks Act, R.S.Q. c. P-9.

JURISPRUDENCE

Calder v. British Columbia (A.G.), [1973] S.C.R. 313.

Delgamuukw v. British Columbia, [1997] 3 S.C.R. 1010.

Mabo v. Queensland [No. 2] (1992), 175 C.L.R. 1 (H.C. Aus.).

Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage), [2005] 3 S.C.R. 388, 2005 SCC 69.

Mitchell v. M.N.R., [2001] 1 S.C.R. 911, 2001 SCC 33.

Quebec (A.G.) v. Canada (National Energy Board), [1994] 1 S.C.R. 159.

R. v. Agawa (1988), 28 O.A.C. 201.

R. v. Badger, [1996] 1 S.C.R. 771.

- R. v. Côté*, [1996] 3 S.C.R. 139.
- R. v. Gladstone*, [1996] 2 S.C.R. 723
- R. v. Gray*, [2004] 4 C.N.L.R. 201 (N.B.C.A.).
- R. v. Guerin*, [1984] 2 S.C.R. 335.
- R. v. Horse*, [1988] 1 S.C.R. 187.
- R. v. Howard*, [1994] 2 S.C.R. 299.
- R. v. Marshall*; *R. v. Bernard*, [2005] 2 S.C.R. 220, 2005 SCC 43.
- R. v. N.T.C. Smokehouse Ltd.*, [1996] 2 S.C.R. 672.
- R. v. Nikal*, [1996] 1 S.C.R. 1013.
- R. v. Sappier*, [2004] 4 C.N.L.R. 252 (N.B.C.A.).
- R. v. Sioui*, [1990] 1 S.C.R. 1025.
- R. v. Simon*, [1985] 2 S.C.R. 387.
- R. v. Sparrow*, [1990] 1 S.C.R. 1075.
- R. v. Sparrow* (1986), 36 D.L.R. (4th) 246 (B.C.C.A.).
- R. v. St. Catherine's Milling and Lumber Company* (1888), 14 A.C. 46 (P.C.).
- R. v. Van der Peet*, [1996] 2 S.C.R. 507.
- Rodriguez v. British Columbia (A.G.)*, [1993] 3 S.C.R. 519.
- Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

GOVERNMENT DOCUMENTS

Minister of Indian Affairs and Northern Development, Chrétien, Jean. *Statement of Government of Canada on Indian Policy* (Ottawa: Indian and Northern Affairs Canada, 1969).

Canada. *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996).

Roseau River Anishinabe First Nation. *Genocide in Canada* (Ginew: Roseau River Anishinabe First Nation Government, 1997).

Royal Commission on Aboriginal Peoples. *Aboriginal Peoples and the Justice System: Report of the National Roundtable on Aboriginal Justice Issues* (Ottawa: Canada Communication Group Publishing, 1992).

SECONDARY MATERIALS: MONOGRAPHS

Alfred, Taiaiake. *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough, Ont.: Broadview Press, 2005).

———. *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford: Oxford University Press, 1999).

Asch, Michael. ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997).

Battiste, Marie. ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000).

Battiste, Marie, & Jean Barman. eds., *First Nations Education in Canada: The Circle Unfolds* (Vancouver: UBC Press, 1995) 101.

Benton-Banai, Eddie. *The Mishomis Book: The Voice of the Ojibway* (St. Paul: Red School House, 1988).

Borrows, John. *Indigenous Legal Traditions in Canada* (Ottawa: Law Commission of Canada, 2006).

———. *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

Cajete, Gregory. *Native Science: Natural Laws of Interdependence* (Santa Fe: Clear Light Publishing, 2000).

Cardinal, Harold, & Walter Hildebrandt. *Treaty Elders of Saskatchewan: Our Dream Is That Our People Will One Day Be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

Cassidy, Frank. ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville: Oolichan Books, 1992).

Deloria, Vine, Jr., & Clifford M. Lytle, *The Nations Within: The Past and Future of American Indian Sovereignty* (Austin: University of Texas Press, 1984).

Gosse, Richard, James Youngblood Henderson & Roger Carter. eds., *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich Publishing, 1994).

Hall, Anthony J. *The American Empire and the Fourth World* (Kingston: McGill-Queen's University Press, 2003).

Havemann, Paul. ed., *Indigenous Peoples' Rights: in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999).

Hurley, John D. *Children or Brethren: Aboriginal Rights in Colonial Iroquoia* (Saskatoon: University of Saskatchewan Native Law Centre, 1985).

Hylton, John H. ed., *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1994).

Iverson, Duncan, Paul Patton & Will Sanders. eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000).

Monture-Angus, Patricia. *Journeying Forward: Dreaming First Nations' Independence* (Halifax: Fernwood Publishing, 2003).

Robinson, Eric, & Henry Bird Quinney. *The Infested Blanket: Canada's Constitution-Genocide of Indian Nations* (Winnipeg: Queenston House Publishing, 1985).

Slattery, Brian. *The Land Rights of Indigenous Canadian Peoples* (Saskatoon: University of Saskatchewan Native Law Centre, 1979).

Umeek (Atleo, E. Richard). *Tsawalk: A Nuu-Chah-Nulth Worldview* (Vancouver: UBC Press 2004).

Walkem, Ardith. & Halie Bruce. eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Pennicton: Theytus Press, 2003).

Walters, Anne. ed., *American Indian Thought: Philosophical Essays* (Malden: Blackwell Publishing, 2004).

Wilkins, Kerry. ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004).

Williams, Robert A. *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600-1800* (New York: Oxford University Press, 1997).

Yunupingu, Galarrwuy. ed., *Our Land is Our Life: Land Rights – Past, Present and Future* (Queensland: University of Queensland Press, 1997).

SECONDARY MATERIALS: ARTICLES

- Absolon, Kathy, & Cam Willett. "Putting Ourselves Forward: Location in Aboriginal Research" in Leslie Brown & Susan Strega, *Research as Resistance: Critical, Indigenous & Anti-oppressive Approaches* (Toronto: Canadian Scholars' Press, 2005) 97.
- Alfred, Taiaiake, & Jeff Corntassel. "Being Indigenous: Resurgences against Contemporary Colonialism" (2005) 40 *Government and Opposition* 497.
- Asch, Michael. "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-96" in Paul Havemann, ed., *Indigenous Peoples' Rights: in Australia, Canada and New Zealand* (Oxford: Oxford University Press, 1999).
- Asch, Michael, & Patrick Macklem. "Aboriginal Rights and Canadian Sovereignty: An Essay on *R. v. Sparrow*" (1992) 29 *Alberta Law Review* 498.
- Barsh, Russell Lawrence, & James Youngblood Henderson. "The Supreme Court's *Van der Peet* Trilogy: Naive Imperialism and Ropes of Sand" (1996-1997) 42 *McGill Law Journal* 993.
- Borrows, John. "Creating an Indigenous Legal Community" (2005) 50 *McGill Law Journal* 153.
- . "Tracking Trajectories: Aboriginal Governance as an Aboriginal Right" (2005) 38 *University of British Columbia Law Review* 285.
- . "Indian Agency and Taking What's Not Yours" (2003) 22 *Windsor Yearbook of Access to Justice* 253.
- . "Listening for a Change: The Courts and Oral Tradition" (2001) 39 *Osgoode Hall Law Journal* 1 at 28.
- . "Uncertain Citizens: The Supreme Court and Aboriginal Peoples" (2001) 80 *Canadian Bar Review* 15.
- . "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 *Osgoode Hall Law Journal* 537.
- . "Frozen Rights in Canada: Constitutional Interpretation and the Trickster" (1997-1998) 22 *American Indian Law Review* 37.
- . "Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government," in Michael Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 155.

———. “With or Without You: First Nations Law (in Canada)” (1996) 41 McGill Law Journal 629.

———. “Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation” (1994) 28 University of British Columbia Law Review 1.

Borrows, John, & Leonard I. Rotman. “The *Sui Generis* Nature of Aboriginal Rights: Does it Make a Difference?” (1997) 36 Alberta Law Review 9.

Christie, Gordon. “Law, Theory and Aboriginal Peoples” (2003) 2 Indigenous Law Journal 67.

———. “The Court's Exercise of Plenary Power: Rewriting the Two-Row Wampum” (2002) 16 Supreme Court Law Review (2d) 285.

Dufraimont, Lisa. “From Regulation to Recolonization: Justifiable Infringement of Aboriginal Rights at the Supreme Court of Canada” (2000) 58 University of Toronto Faculty of Law Review 1.

Dumont, James. “Justice and Aboriginal People” in Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Roundtable on Aboriginal Justice Issues* (Ottawa: Canada Communication Group Publishing, 1992).

Ermine, Willie. “Aboriginal Epistemology” in Marie Battiste & Jean Barman, eds., *First Nations Education in Canada: The Circle Unfolds* (Vancouver: UBC Press, 1995) 101.

Henderson, James (Sákéj) Youngblood. “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004) 67.

———. “Postcolonial Indigenous Legal Consciousness” (2002) 1 Indigenous Law Journal 1.

———. “Postcolonial Ghost Dancing: Diagnosing European Colonialism” in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 57.

———. “First Nations’ Legal Inheritances in Canada: The Mikmaq Model” (1996) 23 Manitoba Law Journal 1.

Little Bear, Leroy. “Aboriginal Paradigms: Implications for Relationships to Land and Treaty Making” in Kerry Wilkins, ed., *Advancing Aboriginal Claims: Visions/Strategies/Directions* (Saskatoon: Purich Publishing, 2004).

———. “Jagged World Views Colliding” in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) 77.

——. “A Concept of Native Title” (1982) 5:2 Canadian Legal Aid Bulletin 99.

Lyon, Noel. “An Essay on Constitutional Interpretation” (1988) 26 Osgoode Hall Law Journal 95.

Macklem, Patrick. “First Nations Self-Government and the Borders of the Canadian Legal Imagination” (1990-1991) 36 McGill Law Journal 382.

Monture, Patricia A. “Now That the Door Is Open: First Nations and the Law School Experience” (1990) 15 Queen’s Law Journal 210.

Moody, Doug. “Thinking Outside the 20th Century Box: Revisiting ‘Mitchell’ - Some Comments on the Politics of Judicial Law-Making in the Context of Aboriginal Self-Government” (2003-2004) 35 Ottawa Law Review 1.

Morse, Bradford W. “Permafrost Rights: Aboriginal Self-Government and the Supreme Court in *R. v. Pamajewon*” (1996-1997) 42 McGill Law Journal 1011.

Nelson, Terrance. “*Anishinabe Aki* (Earth/Land)” in Roseau River Anishinabe First Nation, *Genocide in Canada* (Ginew: Roseau River Anishinabe First Nation Government, 1997).

Pearson, Noel. “On the Human Right to Misery, Mass Incarceration and Early Death” (December 2001) *Quadrant* 45:12 online: Quadrant <http://www.quadrant.org.au/php/article_view.php?article_id=1467>.

——. “The Concept of Native Title at Common Law” in Galarrwuy Yunupingu, *Our Land is Our Life: Land Rights – Past, Present and Future* (Queensland: University of Queensland Press, 1997) 150.

Rotman, Leonard I. “Creating a Still-Life Out of Dynamic Objects: Rights Reductionism at the Supreme Court of Canada” (1997-1998) 36 Alberta Law Review 1.

——, “Aboriginal Rights Law, Year in Review: The 1995-96 Term” (1997) 12 Journal of Law and Social Policy 34

Rudin, Jonathan. “One Step forward, Two Steps Back - The Political and Institutional Dynamics behind the Supreme Court of Canada's Decisions in *R. v. Sparrow*, *R v. Van der Peet* and *Delgamuukw v. British Columbia*” (1998) 13 Journal of Law and Social Policy 67.

Sinclair, Murray. “Aboriginal People and Euro-Canadians: Two World Views” in John H. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues* (Saskatoon: Purich Publishing, 1994) 19.

Sinclair, Murray. “Aboriginal Peoples, Justice and the Law” in Richard Gosse, James Youngblood Henderson & Roger Carter, eds., *Continuing Poundmaker and Riel’s Quest:*

Presentations Made at a Conference on Aboriginal Peoples and Justice (Saskatoon: Purich Publishing, 1994) 173.

Slattery, Brian. "Making Sense of Aboriginal and Treaty Rights" (2000) 79 *Canadian Bar Review* 196.

———. "The Legal Basis of Aboriginal Title" in Frank Cassidy, ed., *Aboriginal Title in British Columbia: Delgamuukw v. The Queen* (Lantzville: Oolichan Books, 1992) 120.

———. "Aboriginal Sovereignty and Imperial Claims" (1991) 29 *Osgoode Hall Law Journal* 681.

———. "Understanding Aboriginal Rights" (1987) 66 *Canadian Bar Review* 727.

James Tully, "Indigenous Peoples and the Western Constitutional Form and Constituent Power Complex" (unpublished: on file with author, 2006).

Tully, James, "The Struggles of Indigenous Peoples for and of Freedom" in Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 36.

Turpel, Mary Ellen. "Home/Land" (1991-1992) 10 *Canadian Journal of Family Law* 17.

———. "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies Cultural Differences" (1989-1990) *Canadian Human Rights Yearbook* 3.

Walkem, Ardith. "Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning" in Ardith Walkem & Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35* (Pennicton: Theytus Press, 2003) 196.

Walters, Mark D. "The Morality of Aboriginal Law" (2006) 31 *Queen's Law Journal* 470.

———. "British Imperial Constitutional Law and Aboriginal Rights: A Comment on *Delgamuukw v. British Columbia*" (1992) 17 *Queen's Law Journal* 350.

Webber, Jeremy. "Beyond Regret: Mabo's Implications for Australian Constitutionalism" in Duncan Ivison, Paul Patton & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 60.

Williams, Robert A. Jr. "Vampires Anonymous and Critical Race Practice" (1996-1997) 95 *Michigan Law Review* 741.

Zalewski, Anna. "From *Sparrow* to *Van der Peet*: The Evolution of a Definition of Aboriginal Rights" (1997) 55 *University of Toronto Faculty of Law Review* 435.

OTHER DOCUMENTS

Ayaangwaamizin: The International Journal of Indigenous Philosophy, *Statement of Purpose* (online) Lakehead University
<<http://flash.lakeheadu.ca/~agaamiz/stpurpose.html#anchor146430>>.

Assembly of First Nations, *A Declaration of First Nations* (1981) online: Assembly of First Nations <<http://www.afn.ca/article.asp?id=52>>.

Black's Law Dictionary, 6th ed. (St. Paul, Minn.: West, 1990).

International Covenant on Civil and Political Rights, 19 December 1966. 999 U.N.T.S. 171, arts. 9-14, Can. T.S. 1976 No 47, 6 I.L.M. 368

Oxford English Dictionary, 2d ed. (Oxford: Clarendon Press, 1989).

R. v. Sparrow, [1990] 1 S.C.R. 1075 (Factum of the Intervenor) online: University of Saskatchewan, Native Law Centre of Canada <<http://www.usask.ca/nativelaw/factums/view.php?id=521>>.

R. v. Sparrow, [1990] 1 S.C.R. 1075 (Supplementary Factum of the Intervenor) online: University of Saskatchewan, Native Law Centre of Canada <<http://www.usask.ca/nativelaw/factums/view.php?id=522>>.

R v. Van der Peet, [1996] 2 SCR 507 (Factum of the Interveners) online: University of Saskatchewan, Native Law Centre of Canada <<http://www.usask.ca/nativelaw/factums/view.php?id=164>>.

R. v. Van der Peet, [1996] 2 SCR 507 (Factum of the Appellant) online: University of Saskatchewan, Native Law Centre of Canada <<http://www.usask.ca/nativelaw/factums/view.php?id=129>>.

Three Fires Midewiwin Lodge, "About the Three Fires Society", Three Fires Midewiwin Lodge website (online) at <<http://www.threefires.net/tfn/about.htm>> (2009, April 29)

United Nations Human Rights Committee. *Concluding Observations of the Human Rights Committee: Canada*, 7 April 1999, CCPR/C/79/Add.105 (1999).

Yazzie, Robert. "Cultural Values" (Address delivered to the 10th Annual Conference of the Indigenous Bar Association: Traditional Values, Laws and Governance, November 1998, Vancouver, B.C.) in Indigenous Bar Association in Canada, *10th Annual Conference: Traditional Values, Laws and Governance Summary Report* prepared by Michelle Hopkins 3 online: <<http://www.indigenousbar.ca/conferences/1998doc/iba%201998%20conference.PDF>>.

Appendix A: A Declaration of First Nations

A Declaration of First Nations

We the Original Peoples of this land know the Creator put us here.

The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind.

The Laws of the Creator defined our rights and responsibilities.

The Creator gave us our spiritual beliefs, our languages, our culture, and a place on Mother Earth which provided us with all our needs.

We have maintained our Freedom, our Languages, and our Traditions from time immemorial.

We continue to exercise the rights and fulfill the responsibilities and obligations given to us by the Creator for the land upon which we were placed.

The Creator has given us the right to govern ourselves and the right to self-determination.

The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation.¹⁹⁹

¹⁹⁹ Assembly of First Nations, *A Declaration of First Nations* (1981) online: Assembly of First Nations <<http://www.afn.ca/article.asp?id=52>>.