

Decolonizing or Recolonizing: Indigenous Peoples and the Law in Canada

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### **Abstract**

This thesis examines the limitations and drawbacks in using the law with respect to cases involving Indigenous rights and title. The research methodology has consisted of canvassing available writings, looking at case law, and interviews, with lawyers and individual participants in the judicial process. This thesis will demonstrate that tackling issues of rights and title through the Canadian judicial system is potentially dangerous to the advancement of Indigenous rights and title. The research design allows for a broad look at academic research, legal analysis, critical analysis and individual experiences with the law. The overarching goal of this thesis is to create dialogue within Indigenous communities with respect to the role of the Canadian legal system in their lives. Finally, a brief look at the ways in which Indigenous communities and peoples have used alternatives to legal forums will be presented, and the effectiveness of those alternatives will be examined.

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## **Introduction**

*“The master’s tools will never dismantle the master’s house”.*

*- Audre Lord*

The working premise of this research project is that the law as it relates to issues of rights and title has not only failed Indigenous peoples, but that it is also a potentially dangerous tool to be used in the pursuit of rights and title. The chapters to follow demonstrate this, by examining legislation and case law.

Indigenous peoples have been struggling for their freedom from the moment that the colonial regimes first tried to assert sovereignty over Indigenous territories. That struggle has ebbed and flowed, but it has remained a struggle nonetheless. Many Indigenous peoples have taken their struggle into the colonial courts, based on a belief that a justice system, any justice system, will in fact provide justice. Kanien’kehaka scholar Patricia Monture-Angus articulates her experience with the law; “I became involved in law because I believed in it. I believed that justice could be achieved through law. That sounds terribly naïve to me now”.<sup>1</sup>

As Monture-Angus recognizes, the justice Indigenous peoples seek is simply not available within the Canadian legal system. There is much critical analysis from within the system, about what needs to be changed within the justice system, which arguments need to be made, and how the courts could make adjustments to better facilitate its

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<sup>1</sup> Patricia Monture-Angus, *Journeying Forward, Dreaming First Nations’ Independence* (Halifax: Fernwood Publishing, 1999) at 9.

Indigenous clientele but rarely do those immersed in the system suggest abandoning it altogether. For some this may be the result of simple economics; we cannot forget that for many, Indigenous claims and court cases are a source of livelihood, and for many it is simply a stubborn resolve to continue to work in the system until something gives, and for many it is simply a case of the adage coined by Abraham Maslow, “If the only tool you have is a hammer, you treat everything like a nail”. In other words, for those immersed in the legal system, all problems are legal problems to be resolved by legal means. This approach ignores the fact that the law is not a value free enterprise, devoid of culture. Quite the opposite is true; law cannot be separated from culture and law operates to perpetuate culture. In the case of Canada, the law operates to perpetuate a colonial culture. Therefore, when we speak of Indigenous peoples emancipating themselves through the use of a foreign and imposed law, we are asking Indigenous peoples to adopt the very culture that created their oppression in the first place.

The *Calder v. Attorney General of Canada*<sup>2</sup> decision in 1973 marked a sea change in the legal landscape for Indigenous peoples in Canada. Suddenly, Indigenous peoples were allowed into a club they had previously been barred from<sup>3</sup>. This change however, was largely cosmetic. The legal system continues to be steeped in European ideologies, still perpetuating European myths that allow for land theft and cultural genocide. As Tony Hall, professor of Globalization Studies at the University of Lethbridge, states “the courts are exclusively rooted in a Constitutional heritage that, in the case of Canada, for

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<sup>2</sup> *Calder v. Attorney General of Canada*, (1973), 34 D.L.R. (3d) 145 [hereinafter *Calder*].

<sup>3</sup> From 1927 until 1951 it was illegal under the *Indian Act* for Indigenous peoples to take any type of claim or grievance into a Canadian court.

instance, draws all its legitimacy from the authority of the sovereign crown that established the framework for the colonization of the country”.<sup>4</sup>

In addition to the problems created by participating in a legal regime which is entirely rooted in colonialism, Indigenous peoples will also have a difficult time within the legal system because, as Kanien’kehaka man and policy analyst Russell Diabo, states, the legal system keeps, “moving the goalposts”.<sup>5</sup> In other words, even when Indigenous peoples believe they have achieved a “win” in the courts, that win can be reworked and reinterpreted in favour of the colonizer. The courts directly benefit from the riches of the colonizer, so the courts will favour the interpretation that legitimizes and perpetuates colonialism. This “moving of the goalposts” and changing the rules is deliberate on the part of the government and judiciary as part of the effort to maintain free access to Indigenous resources, such as Indigenous lands and oil/mineral rights. This need to retain access to resources will play an increasing role in legal decisions in the years to come, as the world’s resources become more and more depleted. Despite this, the law is still regarded by many Indigenous peoples and legal scholars as the only viable option with which to pursue claims to rights and title. But as Cree Nation woman and legal scholar Sharon Venne points out, it must be borne in mind that the colonial system will always look after itself, regardless of the costs to Indigenous peoples and cultures,

The versions of history penned by the colonizer always and invariably defend the colonial order, either by denying that the process of colonization has ‘really’ been colonizing, or to the extent that the opposite is sometimes acknowledged, by carefully applying the spin necessary to make the whole thing appear to have been of benefit to all concerned,

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<sup>4</sup> Anthony J. Hall, *The American Empire and the Fourth World* (Kingston: McGill-Queen’s University Press, 2003) at 42.

<sup>5</sup> Lecture by Russell Diabo (27 October, 2003).

victims as well as victimizers”. A system which cannot acknowledge the brutality of it’s past and present cannot be expected to make real or substantial change.<sup>6</sup>

The chapters that follow critique the colonial order of which Venne speaks. The first chapter examines the role of the Canadian Constitution<sup>7</sup> and legal interpretation of Indigenous rights and title. The second chapter examines the case law, primarily focusing on some of the more recent cases. Chapter three focuses on the Indigenous response to what has happened in the courts. The final chapter looks at how communities resist without resorting to legal means.

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<sup>6</sup> Sharon Venne. Introduction. *Perversions of Justice* by Ward Churchill. (San Francisco: City Lights Books, 2003) at xiii.

<sup>7</sup> *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11.

## **Chapter 1: Section 35: Analysis and Critique**

*Of all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive. It may be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end, for they do so with the approval of their own conscience.*

*C.S. Lewis*

In 1982, section 35 was added to the newly patriated Constitution of Canada. For many this signaled the beginning of a new relationship between the government and Indigenous peoples. But for others the words rang hollow. Now, over twenty years later, what has been the result of section 35? Have conditions changed for Indigenous people? Has it become easier to make rights claims? Have Indigenous peoples been enabled by section 35 to speak in their own voices? Has it led to a revitalization of culture? I argue that the addition of section 35 has done nothing to improve the lives of Indigenous peoples, and that it has in many ways, made conditions worse.

Why is it important to discuss the addition of section 35 to the Constitution? Section 35 essentially ushered in a new rights focused discourse in Canada, and paved the way for a new era of lawyers bent on emancipating Indigenous peoples. Of course that emancipation could only come on Canadian terms, and according to Canadian (and ergo colonial) values. Without section 35 there would likely still be relatively few cases with respect to rights and title in Canadian courts. As will be pointed out in this and later chapters, this would likely have been a good thing, but section 35 is a reality of the

Canadian legal landscape and an important starting point in discussing Indigenous rights and title issues in Canada.

### **The Context**

In order to understand the true impact of section 35 it is important to understand the context in which it was first entrenched. Section 35 was, in reality, a Constitutional afterthought, framed entirely by Euro-Canadian government officials, academics and lawyers, with no input from Indigenous peoples. The true aims of Constitutional patriation were twofold: the creation of national unity and to propel Canada's international image as a human rights conscious nation. The idea that section 35 was anything more than an afterthought is preposterous when considered in light of that fact that not even ten years earlier Pierre Trudeau described Indigenous rights as "historic might have been".<sup>8</sup> The final version of section 35 is as follows:

*35 (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.*<sup>9</sup>

The word "existing" was added at the insistence of some Premiers and the Department of Justice<sup>10</sup>, although the limitation was regarded as being implicit in the original wording. Former Member of Parliament Ian Waddell maintains that without the addition of section 35 the New Democratic Party (NDP) would likely not have approved

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<sup>8</sup> Ian Waddell, "'Building a Box, Finding Storage Space" in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35*, (Canada: Theytus Books, 2003).

<sup>9</sup> *Supra* note 7.

<sup>10</sup> *Supra* note 8.

the Constitution in the House.<sup>11</sup> But does this assertion make section 35 any more compelling as a tool for Indigenous emancipation? Section 35 could be viewed simply as a measure taken to placate any of the politicians who might oppose the Constitution. After all, who could oppose a document that, on the face of it, attempts to reconcile Indigenous rights with the rights of the Canadian state? In adding section 35 the government could argue that any who oppose it must be racist. Thus, section 35 was added, preserving Canada's international image of a fair and just society, arguably at quite a bargain, since this image is maintained merely with careful wording, smoke and mirrors. Tony Hall wonders if section 35 was more sinister, he states,

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.<sup>12</sup>

Almost ten years before section 35 became a reality, the 1973 *Calder* decision came down from the Supreme Court of Canada. The *Calder* case was brought by the Nisga'a against the government of British Columbia, with the Nisga'a seeking a declaration that their title to the land had not been lawfully extinguished. While the judiciary was split on whether or not Aboriginal title had been extinguished, they did agree that Aboriginal title "existed at law and continued to exist, unless validly extinguished".<sup>13</sup> Certainly this decision affected the federal and provincial governments stance on Aboriginal title issues. After the decision Pierre Trudeau commented, "Maybe

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<sup>11</sup> *Supra* note 8 at 19.

<sup>12</sup> *Supra* note 4 at 46.

<sup>13</sup> Thomas Isaac, *Aboriginal Law* (Saskatoon: Purich Publishing, 1995) at 20.

you have more rights than we thought you did”<sup>14</sup>. The government did not, however, make any sort of legislative changes, nor did they consult with Indigenous leaders to deal with the issues of unsettled land claims. Instead, less than a decade later, section 35 was added to the Constitution, with the government knowing that this would force Indigenous peoples into the untenable position of having to take any rights or title claims into the Canadian court system. Therefore, the final addition of section 35 could be viewed as a rights limiting mechanism and quite strategic; Trudeau and his cohorts in government were well aware that any difficulties that might arise as a result of section 35 would have to be disputed in a court. As with most issues that could be dangerous politically, this issue would be left to the judiciary.

However, leaving the interpretation of Indigenous rights to the courts is a dangerous proposition. Legal scholar Bradley Bryan notes, “Judges are ill-placed to render judgment on the practices of another culture, and much less on how they will subsist with English conceptions.”<sup>15</sup> Furthermore, arguing that the judicial process is somehow removed from politics, capable of making objective decisions, is simply naïve. The judiciary is rooted in the political; judges are appointed by politicians who expect those judges to carry out their mandate. Tony Hall notes, “Judges are exclusively beholden to federal and provincial politicians for their appointments”.<sup>16</sup> This point was made quite bluntly when Tom Berger was removed from the bench after taking the

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<sup>14</sup> “Nisga’a Tribal Council Presentation to Standing Committee on Aboriginal Affairs and Northern Development”, online: <<http://www.kermode.net/nisgaa/standing1.html>> (last modified: 4 November 1999).

<sup>15</sup> Bradley Bryan, “Property as Ontology: On Aboriginal and English Understandings of Ownership” (2000) 13 Can. J.L. & Jurisprudence 3 at 71.

<sup>16</sup> *Supra* note 4 at 42.

government to task when they initially tried to exclude Indigenous rights from the Constitution.<sup>17</sup>

Legal scholars Morton and Knopff point out that courts simply cannot stand in opposition to the majority, “Armed with neither ‘the sword nor the purse’ courts are normally too weak to oppose either the tyranny of the majority or that of a single despot”.<sup>18</sup> Confining the lives of Indigenous peoples to a legal analysis reduces issues into the box that is created by law. Legal scholar Peter Russell articulates, “lawyers are too prone to think of rights and liberties entirely in legal terms. They are apt to ignore the possibility that judicial decisions which remove or narrow legislative restrictions on rights and freedoms can have the effect of expanding social or economic constraints”.<sup>19</sup> In other words, the judiciary simply fails to see the big picture; in fact they have difficulty in seeing outside of their own chambers.

It could further be argued that the addition of section 35 simply gave lawyers too much power over the daily lives of Indigenous peoples. Legal scholar Michael Mandel, in speaking of the Charter, notes that,

The Charter has puffed up lawyers and courts to the point where their values are becoming the most important ones. In a word, the Charter has legalized our politics. But legalized politics is the quintessential conservative politics. Not only does the legal profession not have a more democratic technique for resolving political issues - far from it – the legal technique actually obscures these issues by dealing with them in

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<sup>17</sup> *Supra* note 7 at 19.

<sup>18</sup> F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000) at 36.

<sup>19</sup> Peter H. Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms” (1989) 61 *Can. Bar Rev.* 30.

abstractions that are meant to disguise the political nature of the choices being made.<sup>20</sup>

Rights language in itself is problematic, forcing Indigenous peoples to litigate in order to have rights recognized. Further, implicit in any kind of rights dialogue is the notion that rights are given, that there is a grantor and grantee. Indigenous peoples pursuing rights within the Canadian political and/or landscape entails participation, and ultimately co-optation into the Canadian system. By entrenching section 35 of the Constitution the politicians were effectively ensuring that Indigenous peoples would have to take any and all claims to court, further legitimizing the institutions of the Canadian state, and removing Indigenous issues from the political sphere. Effectively, Indigenous peoples were relegated to a world whereby they would have to ask for their rights from their colonizing oppressor, and in order to ask for those rights, they would necessarily legitimate their oppressor.

Section 35 is essentially a “negative” in human rights discourse. Negative rights are essentially ones that can be taken away, such as freedom of speech, press etc. while positive rights are ones that are additive and are only noticed by their absence, such as the right to education, health care or housing. Positive rights demand an action by government, while negative rights require that the government merely refrain from actively denying something. Indigenous rights are generally negative rights in the Canadian court system, in that they generally only demand that the government refrain from, for example, not allowing for traditional fishing practices, but a positive right

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<sup>20</sup> Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1994) at 5.

would demand that the government actually facilitate the practice of Indigenous culture. In fact, to date there has not been a single Indigenous rights case before the courts which makes a demand of positive action on the part of government. Thus far all cases have been rooted in defence of the exercise of Indigenous rights, there are no cases whereby the government is asked to facilitate the practice of any Indigenous right. Over time this can have the effect of convincing people that Indigenous rights are not inherent, but are only worthy of protection if a court finds them worthy. It erases the ability of Indigenous communities to decide what practices and traditions will be maintained. In many cases, particularly when section 35 is raised in a case of an Indigenous person being criminalized for an action, it ensures that the rest of Canada, and some members of Indigenous communities begin to regard those who have retained their traditional practices as criminals and radicals.

Anishnabe legal scholar John Borrows argues that the initial problem with section 35 was the fact that it left Indigenous rights undefined. However, would a definition of Indigenous rights, or the content of those rights be a better alternative? An initial definition by Parliament would have completely denied Indigenous peoples a role in shaping their own futures. Michael Mandel notes that in asking Parliament to act to protect the rights of individuals or collectives we are ignoring the entire historical function of western government, since “for most of our history Parliament was the official representative, not of the people, but of property”.<sup>21</sup> However, a definition provided by the courts will not result in a definition any more reflective of actual Indigenous needs or wants, unless that definition could be constructed by Indigenous

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<sup>21</sup> *Ibid.*

people. But that too is problematic, in that it forces Indigenous rights to conform to the needs and demands of a specific time. Arguably, judicial interpretation is just as final as Constitutional entrenchment; common law requires courts to act on precedent.

### **The Indigenous Response**

When the patriation of the Constitution was first being contemplated, Indigenous peoples reacted both by rigorous protest and by taking their claims to the highest court in England.<sup>22</sup> The case, *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs Ex Parte: The Indian Association of Alberta, Union of New Brunswick Indians, Union of Nova Scotia Indians*<sup>23</sup>, was based on a claim that, because of treaties and other obligations entered into by the Crown, the Crown still owed a duty to Indigenous peoples in Canada. The claim was dismissed but it also made the inadequacy of bringing issues before the court apparent. Lord Denning's pronouncements on the issues before him made it clear that the judiciary is in no position to truly comprehend Indigenous rights or to understand the historic (and current) denial of those rights, stating, "Our long experience of these matters taught us how to treat the indigenous peoples. As a matter of public policy, it was of the first importance to pay great respect to their laws and customs and never to interfere with them except when necessary in the interests of peace and good order".<sup>24</sup> Denning goes on to say, "There is nothing, so far as I can see, to warrant any distrust by the Indians of the Government of Canada".<sup>25</sup> To make this statement Denning must essentially deny the genocide that has been conducted by the

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<sup>22</sup> *The Queen v. The Secretary of State for Foreign and Commonwealth Affairs, et al.*, [1981] 4 C.N.L.R. 86 (H.L.).

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid* at p. 3.

<sup>25</sup> *Ibid.*

colonial government. Of course, to admit that the Canadian government should not and cannot be trusted would also implicate the British Crown, a road on which Denning no doubt did not want to travel. Admitting the actions of both the past and present would necessarily involve making amends, and truly creating a new relationship. Given that the Canadian government is still profiting from the oppression of Indigenous peoples it is unlikely that they will make this choice willingly.

The day the Constitution Act was officially proclaimed was declared a “day of mourning” by the National Indian Brotherhood. Cree scholar Eric Robinson and Henry Bird Quinney said of section 35,

During early colonialism, infested blankets were used to wipe out entire Tribes and Nations of the Original Peoples of this land now called Canada... 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.<sup>26</sup>

However, the addition of section 35 divided Indigenous peoples. The Union of British Columbia Indian Chiefs (UBCIC) advocated strongly for the inclusion of Indigenous peoples in the Constitution. The “Constitutional Express” left Vancouver for Ottawa in November of 1981, full of Indigenous leaders, including George Manuel and Philip Paul, determined to see Indigenous peoples included in the Constitution. Legal scholar William Pentney asserts that many Indigenous leaders were aware of the

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<sup>26</sup> Eric Robinson and Henry Bird Quinney, *The Infested Blanket* (Winnipeg: Queenston House Publishing, 1985) at xix.

“fragility of their legal guarantees”.<sup>27</sup> Pentney goes on to describe the fears of some Indigenous leaders who “faced the possibility that their claims of special status and unique rights would be unilaterally destroyed by a change in government policy”.<sup>28</sup> These fears were well-founded; only ten years previous the government had attempted to enact the White Paper, legislation designed to remove all special status from Indigenous peoples. But has section 35 protected First Nations from the whims of government policy? The answer is a resounding no. Russell Diabo points out that the government, through various policies over the last thirty years has effectively enacted the White Paper.<sup>29</sup>

### **Section 35 in the Courts**

The first case to substantially deal with section 35 was that of *R. v. Sparrow*<sup>30</sup>. In this case Mr. Sparrow was charged with fishing with a net too large under the *Fisheries Act*. The court first notes that section 35 only protects those rights in existence as of 1982, it does not revive previously extinguished rights. The court goes on to hold that the existing rights “must be interpreted flexibly” and allow for “evolution over time”.<sup>31</sup> In this case it was held that the right claimed, the Aboriginal right to fish, had not been extinguished, and that the mere regulation of a right was not enough to extinguish it. Most legal scholars characterized this ruling as a win. But did section 35 truly grant victory regarding the Indigenous right to fish? Of course it did not. The right to fish has

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<sup>27</sup> William Pentney, *Aboriginal Rights Provisions in the Constitution Act*, (Saskatoon: University of Saskatchewan, 1987) at 23.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Supra* note 5.

<sup>30</sup> *R. v. Sparrow*, [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

<sup>31</sup> *Ibid.*

long been an Indigenous right, regardless of section 35 or the ruling of Chief Justice Dickson.

Arguably the *Sparrow* decision only acted to limit the content of the right to fish. The court states that while section 35 operates to protect Indigenous rights it is limited in that legislation can curtail, or destroy outright, any Indigenous right if the legislation is justifiable and meets a valid objective. The court goes on to point out that within section 35, “the words ‘recognition and affirmation’, incorporate the government’s responsibility to act in a fiduciary capacity with respect to aboriginal peoples”.<sup>32</sup> The word fiduciary is akin to a trust, so in essence the court is affirming that Indigenous peoples are under a trust in relation to the Crown, dependent on the Crown to exercise those rights. In effect the courts are enforcing a paternal relationship between the federal government and Indigenous peoples. Further, government is being put in a position whereby they must concede to Indigenous rights or alternatively come up with a justification for interfering with those rights. In either case the court is asking the government to be the gatekeeper of Indigenous rights, a role which is fraught with conflict. Moreover, by placing on the Crown a trust obligation the court is in effect, taking any future issues of Indigenous sovereignty out of the picture. A trust obligation implies that not only rights, but also title is vested in the Crown.

The court has always been fond of using tests to determine the scope of rights; it makes things easier for them in that they merely have to fit the cases before them into predetermined boxes. The tests developed in one case are carried over to apply to all

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<sup>32</sup> *Ibid.*

future cases as the Canadian court system operates on the basis of precedent. In other words, decisions must be made on the basis of previous decisions, allowing the courts to only be as enlightened as their most enlightened predecessors. Patricia Monture-Angus states, “By wedding ourselves to the decisions of the past, we continue to entrench in present-day form, the oppressive relations of Canadian, British and French history”.<sup>33</sup>

Canadian law has now reduced issues of Indigenous rights into checklists, such that, in order to even be recognized a right, Indigenous issues must fall neatly into limits and legal fictions created by previous court decisions. Scholar Russel Barsh and Mi’kmaq legal scholar James Henderson explain the failings of the precedent system, “Lawyers often speak of legal doctrine as ‘evolving’. This evokes an image of adaptive improvement, a gradual progress from generalization to specialization. Legal concepts do not always ‘evolve’. When a court is satisfied with the ramifications of a new rule, regardless of its validity, it entrenches it through the use of extensions: differentiation, specialization, evolution”.<sup>34</sup> Post section 35 the court increased the amount of tests developed vis-à-vis Indigenous rights, starting with Sparrow’s test for determining whether an aboriginal right has been infringed and whether that infringement can be justified. *R. v. Van der Peet*<sup>35</sup> would develop these tests even further.

The *Van der Peet* case was also about fishing, but this case involved the sale of fish, specifically the sale of ten salmon caught under an Indian food-fishing license. Dorothy Van der Peet argued that she had an Aboriginal right to sell fish under section

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<sup>33</sup> *Supra* note 1 at 59.

<sup>34</sup> Russel Barsh and James Henderson, *The Road* (Berkeley: University of California Press, 1980) at 140.

<sup>35</sup> *R. v. Van der Peet*, [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].

35. The court in this case affirmed what the court had said in *Sparrow*, namely that Aboriginal rights can be regulated or infringed. The court further held that 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. A number of factors must be considered in applying the "integral to a distinctive culture" test. The court must take into account the perspective of the aboriginal peoples, but that perspective must be framed in terms cognizable to the Canadian legal and Constitutional structure.<sup>36</sup>

The court goes on to describe ten factors that must be applied in order to determine whether or not an Aboriginal right exists. The *Van der Peet* case defines Aboriginal rights for future cases, and forced those rights into a rigid set of factors, John Borrows states,

Chief Justice Antonio Lamer has now told us what Aboriginal means. Aboriginal is retrospective. It is about what was, 'once upon a time', central to the survival of a community, not necessarily about what is central, significant, and distinctive to the survival of these communities today. His test has the potential to reinforce troubling stereotypes about Indians. In order to claim an Aboriginal right, the court's determinations of Aboriginal will become more important than what it means to be Aboriginal today.<sup>37</sup>

*Van der Peet* presents many problems, including evidentiary problems. As John Borrows points out the court establishes "non-Aboriginal characterizations of aboriginality, evidence and law as the standards against which Aboriginal rights must be measured...these factors compel the conformity of Aboriginal rights to Western

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<sup>36</sup> *Ibid.*

<sup>37</sup> John Borrows, *Recovering Canada: The Resurgence of Indigenous Law*, (Toronto: University of Toronto Press, 2002) at 60.

formulations of law to secure recognition and affirmation in Canada's Constitution".<sup>38</sup> Further, the court in *Van der Peet* removes Aboriginal rights from the common law, confining them to a purely Constitutional analysis.<sup>39</sup> Of course by confining Aboriginal rights to a Constitutional analysis the court is forcing Aboriginal parts to be part of, and therefore under, Canadian sovereignty.

*Delgamuukw v. British Columbia*<sup>40</sup> was, like *Sparrow*, hailed as a win for Indigenous peoples. *Delgamuukw* involved the assertion of Gitksan and Wet'suwet'en title to a tract of territory as well as self-government. Legal scholar Patrick Macklem described the decision as making "it clear that proprietary authority over land subject to Aboriginal title vests in the Aboriginal nation".<sup>41</sup> He goes on to state that the court in *Delgamuukw* interprets section 35 in "an expansive manner".<sup>42</sup> One can only come to these conclusions however, if one has only given a cursory glance at the decision. In fact, *Delgamuukw* asserts Crown sovereignty stronger than before, describing Aboriginal title as a mere "burden on the Crown".<sup>43</sup> The court further limited claims to title by stating that any uses to which title are put must conform to an "Aboriginal" use, which of course will have to be defined by non-Aboriginals. In specifically addressing section 35 the court noted that section 35 operates so that Aboriginal rights could be unilaterally extinguished prior to 1982. Viewed in this way the court seems to be saying that section 35 actually acts to diminish Aboriginal rights and title, or at the very least it diminished

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<sup>38</sup> *Ibid*, page 66.

<sup>39</sup> Mark D. Walters, "The "Golden Thread" of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1998/99) 44 McGill L.J. 711.

<sup>40</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*].

<sup>41</sup> Patrick Macklem, *Indigenous Difference and the Constitution of Canada*, (Toronto: University of Toronto Press, 2001) at 94.

<sup>42</sup> *Ibid* at 172.

<sup>43</sup> *Supra* note 40.

rights and title not protected prior to 1982. Of course, this ignores that it was the colonial government that decided which rights could remain in place prior to 1982, and most of the rights that did remain unregulated and intact did so only because the colonial government simply failed to note that such rights might exist.

*R. v. Marshall*<sup>44</sup> was considered another “win” for Indigenous peoples. In that case Donald Marshall Jr. was acquitted of catching and selling eels. The court determined that, as a result of treaty and section 35, the Mi’kmaq do have a right to catch and sell fish. But the court limited that right to earning a “moderate livelihood”.<sup>45</sup> In a subsequent case<sup>46</sup> that right was further restricted so that it could be regulated extensively by the federal government.

### **Effects of Section 35 and Judicial Interpretation on Indigenous Peoples**

What have been the impacts of section 35 on the daily lives of Indigenous peoples? Given the case law the impact has been at best, unnoticeable, or at worst, damaging. Thomas Sampson of the Tsartlip notes, “Section 35 has not helped us much, because Tsartlip people continue to be criminalized when we exercise our treaty rights to hunt and fish as formerly, and our own laws for those things keep coming into conflict with federal and provincial laws”.<sup>47</sup>

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<sup>44</sup> *R. v. Marshall*, [1999] 3 S.C.R. 456 [hereinafter *Marshall*].

<sup>45</sup> *Ibid* at p. 7.

<sup>46</sup> *R. v. Marshall*, [1999] 3 S.C.R. 533 (hereinafter referred to as *Marshall II*).

<sup>47</sup> Thomas Sampson, “Douglas Treaty Perspective on Section 35” in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35*, (Canada: Theytus Books, 2003) at 156.

The people of Burnt Church experienced first hand the futility of section 35 and court rulings on it. Burnt Church was the community most affected in the aftermath of the *Marshall* decision. When the *Marshall* decision came down and the Mi'kmaq began to fish they were subjected to violence and arrests. The community of Burnt Church was attacked directly by the non-Indigenous lobster fishermen. Indigenous-owned lobster traps were destroyed and pictures of the Department of Fisheries (DFO) boats chasing, and often attacking, Mi'kmaq were a fixture on news reports. In the end however, it was the Mi'kmaq who faced charges of exceeding their legal limit of lobster catches, a limit imposed by the colonizer. Mi'kmaq Commander of the East Coast Warrior Society James Ward, when speaking of the ensuing criminal trials stated, "No one here has any faith in the judicial system. There's animosity between ourselves and the judge himself and obviously between the fisheries officers present. This is a system that gives (a police) officer two years less a day of community service for shooting a native man in Ipperwash. Why should we have any faith in the judicial system doing anything for us?"<sup>48</sup>

Even the cases that have been described as “wins”, however dubious that claim might be, have not resulted in any actual positive impact within communities. The people who brought the *Delgamuukw* case, the Gitksan and Wet'suwet'en, still do not have title within their territory. Although they could bring the issue back to trial the economic cost is enormous, not to mention the cost in time, effort, etc. Furthermore, bringing issues to court further legitimates the very system most Indigenous peoples are trying to break free from. Legal battles also impact the way community members relate to each other vis-à-

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<sup>48</sup> Assembly of First Nations, online: <[http://www.afn.ca/Burnt%20Church/burnt\\_church\\_natives\\_appear\\_in\\_c.htm](http://www.afn.ca/Burnt%20Church/burnt_church_natives_appear_in_c.htm)> (last modified: 2 December 2003).

vis oral traditions, ceremonial life, livelihoods etc. Legal battles further divide communities into factions, those who support the legal fight, and those that do not and further reduce traditions, particularly oral traditions, into being valued only insofar as they contribute to legal recognition by the colonizer. Regrettably, section 35 has been framed in such a way as to make the courts the final arbiters of the scope of Aboriginal rights. Nlaka'pamux woman and legal scholar Ardith Walkem notes, "Seeking to advance these aspirations through the Canadian courts and s. 35(1) has required that Indigenous Peoples transform our aspirations for protection and preservation of our distinct existence as peoples, into a quest for legal (and hence political) recognition of Aboriginal Title, Rights and Treaty Rights".<sup>49</sup>

Cree woman and Provincial Court Judge Mary Ellen Turpel asks, "Why should Aboriginal peoples have to or want to fit their aspirations into the dominant and imposed Constitutional framework of the Charter or s. 35 of Part II of the Constitution?"<sup>50</sup> She further expresses her concerns, "By placing this before the court, and by accepting the substantive jurisdiction of the court over a dispute or claim, cultural differences may be seen as simply racial differences to be managed within legal discourse and not as cultural differences".<sup>51</sup>

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<sup>49</sup> Ardith Walkem, "Constructing the Constitutional Box: The Supreme Court's Section 35(1) Reasoning" in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35*, (Canada: Theytus Books, 2003) at 198.

<sup>50</sup> Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in Richard F. Devlin, *Canadian Perspectives on Legal Theory*, (Toronto: Edmund Montgomery, 1991) at 512.

<sup>51</sup> *Ibid* at 514.

James Youngblood Henderson, has a more positive outlook on section 35, stating, “Through our self-determination, self-consciousness and self-realization, we have formally emancipated ourselves from colonial domination and oppression. At least on paper”.<sup>52</sup> This analysis is troubling; attributing emancipation to a colonial document such as the Constitution is dangerous. Furthermore, emancipation “on paper” is utterly meaningless; as Sharon H. Venne points out,

This continent has not entered a ‘postcolonial era’. Native North America remains occupied by invaders from abroad, settlers who have appropriated our land and resources for their own benefit. Indigenous people who conducted themselves as sovereign nations since time immemorial continue to be forcibly subordinated to the self-assigned ‘governing authority’ of recently established settler states both north and south of an arbitrary boundary separating the United States and Canada. It is thus patently obvious that we, the indigenous nations of North America, have not been decolonized.<sup>53</sup>

Henderson goes on to argue that section 35 “conceived a new Canadian society”<sup>54</sup>, which begs one to ask, conceived by whom and for whom? Clearly even if a new society were being created, it would not have been an Indigenous creation, especially when Indigenous peoples were not even in the room at its conception. One of the more problematic aspects of James Youngblood Henderson’s analysis is his own admission that, “The rule of law has operated as a mere word game, behind which lay total manipulation of Aboriginal and treaty promises, human rights and state obligations. It seems to make sense that the law cannot be the doctor if it is the disease”.<sup>55</sup> Henderson goes on to note, “ Indigenous lawyers and peoples should never forget that the judiciary

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<sup>52</sup> James Youngblood Henderson, “Postcolonial Ledger Drawing” in Marie Battiste, ed., *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press, 2000) at 165.

<sup>53</sup> *Supra* note 6 at xiii.

<sup>54</sup> James Youngblood Henderson, “Empowering Treaty Federalism” (1994) 58 *Saskatchewan Law Review* 242.

<sup>55</sup> James Youngblood Henderson, “Postcolonial Indigenous Legal Consciousness” (2002) 1 *Indigenous Law Journal* 26-27.

created our imprisonment”.<sup>56</sup> Despite this, Henderson, still purports to believe that, since the entrenchment of section 35, the courts have worked for true change in Indigenous/settler state relations. He states, “The court has affirmed when the British sovereignty asserted any jurisdiction over Aboriginal territory, the assertion protected and vested the pre-existing Aboriginal order in British imperial Constitutional law”.<sup>57</sup> Henderson’s belief is naïve at best, with his analysis problematic on many levels. Henderson does not question this so-called assertion of British sovereignty, how it came about, or who recognizes it. Arguably, many Indigenous nations would question any British sovereignty. Furthermore, do Indigenous peoples want to be an addendum to British Constitutional law (or Canadian Constitutional law for that matter)? Henderson’s analysis provides a glimpse of the politics of distraction in full operation. Instead of looking at section 35 for what it really is, Henderson represents it for something it is not. As Russell Diabo points out, section 35 is not a tool of emancipation, it is a tool of oppression, and the real effect of section 35 was to sideline issues.<sup>58</sup> ‘Kanien’kehaka’ writer and professor, Taiaiake Alfred describes the internalized oppression to which it seems Henderson has succumbed, “The same set of factors that creates internalized oppression, blinding people to the true source of their pain and hostility, allows them to accept, even to defend, the continuation of an unjust power relationship”.<sup>59</sup> This has been the ultimate power of section 35; it has given many the impression that the state does want to act within Indigenous people’s best interests. As Eric Robinson and Henry Bird Quinney note, “Unfortunately, too many Indian People and leaders are craving so

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<sup>56</sup> *Ibid* at 37.

<sup>57</sup> *Ibid* at 33.

<sup>58</sup> *Supra* note 5.

<sup>59</sup> Taiaiake Alfred, *Peace Power Righteousness: An Indigenous Manifesto* (New York: Oxford University Press, 1999) at 70.

desperately for political recognition of any type from Canada, that they are willing to accept the deluding warmth of the Constitutional blanket”.<sup>60</sup>

Much of the analysis of section 35 has been a sort of blame game, with legal scholars alternately blaming the state for not legislating change or the courts, for not properly interpreting section 35. It seems that no one wants to question the legitimacy or the aims of section 35. It is accepted as being inherently a positive force, leading many Indigenous peoples to simply accept working within the Canadian legal forum. Such a position is fraught with inconsistency, as Taiaiake Alfred states, “Not having been forced to accept domination by a foreign power, most outside observers would no doubt recognize the contradiction inherent in asserting nationhood rights within a colonial legal framework”.<sup>61</sup>

Vuntut Gwichin woman and scholar Mildred C. Poplar notes, “Section 35 is not what Our People really wanted. It is really just a small part of what we were fighting for. We only fought for that provision because we thought it would protect the fiduciary duty that the Crown owed our people.”<sup>62</sup> Unfortunately, the fiduciary duty of which Poplar speaks has been embraced by the courts in cases like *Sparrow* but that very duty has been used against Indigenous peoples, to constrict their rights. The government has interpreted their fiduciary duty as a mere continuation of the paternalism that has been inflicted by the government on Indigenous peoples, so much so that many do not know who the real

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<sup>60</sup> *Supra* note 26 at xxi.

<sup>61</sup> *Ibid* at 71.

<sup>62</sup> Mildred C. Poplar, “We Were Fighting for Nationhood Not Section 35” in Ardith Walkem and Halie Bruce, eds., *Box of Treasures or Empty Box? Twenty Years of Section 35*, (Canada: Theytus Books, 2003) at 26.

enemy is anymore. After all, the definition of a fiduciary relationship is “of a trust...held or given in trust”.<sup>63</sup> The notion of the government holding Indigenous rights and title “in trust” has led to the erosion of the very autonomy that Indigenous peoples have fought for.

Poplar notes that after the entrenchment of section 35 there was a new era with, “a new national Indigenous leadership who began to shift the federal agenda, and began working with Canada to define our rights under s. 35, and not to fight for them”.<sup>64</sup> She goes on to note the division that has arisen within Indigenous communities since the entrenchment of section 35,

There are those who take a sovereign position, for whom s.35 is neither here nor there, because they know that our fight is to rebuild our Nations from within, and to have our national and international jurisdiction recognized. There are other leaders now who are more entrepreneurial, who believe that cooperating with the federal government and the provinces to define our rights under modern treaties will make Canada kinder to us.<sup>65</sup>

Perhaps this is the most damaging aspect of section 35, the fact that it has acted to further erode relations within Indigenous communities. In this respect, section 35 is merely a continuation of the divide and conquer policies carried out by the colonial government since colonization first began.

In his book *A Way of Life that Does Not Exist*, Colin Samson talks of the ways that the schools in Labrador, imposing an entirely foreign curriculum, have tried to incorporate Innu ways of life. He states,

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<sup>63</sup> *The Oxford Dictionary of Current English*, s.v. “fiduciary”.

<sup>64</sup> *Supra* note 62 at 27.

<sup>65</sup> *Ibid.*

The school is rife with conjured symbols of incorporation that have been made to appear as affinity. The caribou bone scrapers, the drum, the skins, the moccasins are in their glass case to mark the association, to designate that they are part of a heritage that is now entrusted to the school to pass on. The objects in the glass are now unused, dead, static. The school display helps the children connect with an imagined people of the past. This is like preserving ‘the family bibles without any longer believing in their content, but because of a certain poetic quality they possessed.’ The power and the sense of connection of the objects themselves are now safely encased.<sup>66</sup>

This is what section 35 truly accomplishes. By assimilating Indigenous rights into the mainstream Canadian polity through the Constitution, rights are taken out of communities, out of the hands of those who practice them, and placed into the hands of a judiciary who act as the gatekeepers of a culture. Section 35, and the cases resulting from it, have effectively sealed Indigenous rights in a glass case, where they can be viewed as abstract notions, to be debated by lawyers and academics. Their true nature however, is contained, “safely encased”.<sup>67</sup>

## **Conclusion**

Most reserves in Canada still live in abysmal poverty, with life expectancy and infant mortality rates far out of line with that of the Canadian mainstream. Further, land claims are still unsettled in many areas, with the government still acting in vigorous opposition to settling claims in a fair or just manner. Section 35 has not changed this. The stand-off at Oka took place eight years after the entrenchment of section 35. Clearly, people who have been “emancipated” do not feel the need to form blockades against their oppressors. Section 35 acts as a case study in the politics of distraction, to embrace it is to embrace colonization.

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<sup>66</sup> Colin Samson, *A Way of Life that Does Not Exist*, (St. John’s: ISER Publications, 2003) at 187.

<sup>67</sup> *Ibid.*

## Chapter 2: The New Case Law: The More Things Change the More They Stay the Same

*“The conquest of the earth is not a pretty thing when you look into it too much.”*

*-Robert Williams, Jr.*

Indigenous people trying to resist colonial encroachment, or at least defend their territory in the courts is not a new or recent phenomenon. In 1823 Chief Justice Marshall made his ruling in the case of *Johnson v. McIntosh*<sup>68</sup>. Johnson was essentially a case asking whether Indigenous peoples had the authority to grant title, so it asked whether the Indigenous in question were in possession of the lands in question. In his ruling Chief Justice Marshall articulated the doctrine of discovery and legitimized it,

However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear; if the principle has been asserted in the first instance, and afterwards sustained; if a country has been acquired and held under it; if the property of the great mass of the community originates in it, it becomes the law of the land, and cannot be questioned.<sup>69</sup>

Chief Justice Marshall’s words reflected “1000 years of European racism and colonialism directed against non-Western peoples. White society’s exercise of power over Indian tribes received the sanction of the Rule of Law”.<sup>70</sup>

Chief Justice Marshall has since become a part of the legal myth, two hundred years later it seems most remember his oratories expressing his colonial guilt better than his racist pronouncements. In *Worcester v. Georgia*<sup>71</sup> Marshall states,

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<sup>68</sup> *Johnson v. McIntosh*, (1823) 21 U.S. (8 Wheat.) 543 [hereinafter *Johnson*].

<sup>69</sup> *Ibid.*

<sup>70</sup> Robert Williams, Jr., *The American Indian in Western Legal Thought* (New York: Oxford University Press, 1990) at 317.

<sup>71</sup> *Worcester v. Georgia*, (1832) 31 U.S. (6 Pet.) 515 [hereinafter *Worcester*].

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.<sup>72</sup>

Some legal scholars hold out Marshall's ruling in *Worcester* as evidence of an ability on the part of the judiciary to see past their own colonialism, to know that the doctrine of discovery is flawed. And perhaps Chief Justice Marshall did recognize this (although it is doubtful given his other references to Indigenous peoples as "fierce savages"<sup>73</sup>), but even if he did, Chief Justice Marshall simply did not have the political or popular support to deny continuing colonial power. After the decision in *Worcester* then president Andrew Jackson allegedly stated, "John Marshall has made his decision; now let him enforce it".<sup>74</sup> Andrew Jackson went ahead and enforced the removal of thousands of Indigenous peoples, from their homelands, an act that the judiciary seemed to be against, this ended in the deaths of thousands, and would later be called the Trail of Tears

Sadly, since Chief Justice Marshall's time little has changed and today the "actual state of things"<sup>75</sup> is much the same as it was in 1832. Since the inception of the colonized Americas the courts have been complicit, and even key, in shaping and asserting the sovereignty of foreign invaders, as Tony Hall states, "The weapons of those who sought to expand the empire of possessive individualism through the quick extinguishtments of

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Supra* note 68.

<sup>74</sup> David H. Getches, Charles F. Wilkinson and Robert A. Williams, Jr., *Federal Indian Law* (St. Paul: West Group, 1998) at 123.

<sup>75</sup> *Supra* note 71.

the rights of Indigenous peoples were as likely to be legal paper and court rulings as guns and ammunition”.<sup>76</sup>

In Canada the legal rulings involving Indigenous rights in the early years of colonization are sparse to say the least. Some cases involved the rights of Indigenous peoples but those cases were usually argued between provincial and federal entities, and not by the Indigenous peoples themselves.<sup>77</sup> Other cases involved disputes that had little impact on any tangible right or benefit for Indigenous peoples, such as *Connolly v. Woolrich and Johnson*<sup>78</sup>, a case involving the marriage of a Caucasian man to a Cree woman, according to a customary Cree marriage. From its beginnings the Canadian courts, in carrying on the traditions of their British predecessors, have denied not just Indigenous rights and title claims, but have denied even an Indigenous existence. To find in favour of an Indigenous claim to title demands in some sense that colonial title is disavowed, or at the very least, diminished. It would imply a sharing of resources, and a restructuring of the status quo, an unlikely choice for those profiting from the status quo. As Patricia Monture-Angus points out, “Courts owe their creation to the fact of Canadian sovereignty. They cannot question that sovereignty because to find it wanting would in fact dis-establish their own legitimacy. Without legitimate claim and control over their territory, the international definition of sovereignty collapses”.<sup>79</sup>

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<sup>76</sup> *Supra* note 4 at 28.

<sup>77</sup> see *St. Catherine's Milling and Lumber Company v. R.* (1887), 2. C.N.L.C. 441.

<sup>78</sup> *Connolly v. Woolrich and Johnson et al.* (1867), 17 RJRQ 75.

<sup>79</sup> *Supra* note 1 at 65.

The main reason why the Indigenous people residing in Canada did not bring cases into the Canadian courts until recently is because they were outlawed from doing so under the *Indian Act*<sup>80</sup>. According to the 1927 *Indian Act*:

141. Any person who without the consent of the Superintendent General expressed in writing received, obtains, solicits or requests from any Indian any payment or contribution, or promise of any payment or contribution, for the purpose of raising a fund or providing money for the prosecution of any claim, which, the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have, for the recovery of any claim or money for the benefit of said tribe or band, shall be guilty of an offence and liable upon summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars, or to imprisonment for any term not exceeding two months<sup>81</sup>

Indigenous peoples were not allowed to bring claims into court until the Indian Act was amended in 1951 and in 1973 the *Calder* decision came down from the Supreme Court. Of course, as noted in the previous chapter the *Calder* decision and section 35 of the Constitution spawned a new era of Aboriginal litigation, and, concomitantly a new era of lawyers and lawmakers profiting from genocide.

### **The New Case Law: The Devil is in the Details**

The “big cases” of the 1990’s have been critiqued and analyzed by many, so this paper does not attempt to provide an in depth analysis of any of these earlier cases. That said, in order to more fully comprehend the case law that takes place after the “big cases” of the 1990’s it is important to fully understand what happened in those cases, so, in the interests of brevity, and because many of the cases were touched on in the preceding

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<sup>80</sup> *Indian Act*, R.S.C. 1985, c. I-5.

<sup>81</sup> *Indian Act*, amended 1927.

chapter, the following will serve as a compendium of what were considered some of the more important cases of the early to mid 1990's: *R. v. Sparrow*, *R. v. Van der Peet*, *R. v. Gladstone*<sup>82</sup>, *Delgamuukw v. British Columbia* and *R v. Marshall*.

*Sparrow* involved a fishing dispute, specifically, regarding the size of net being used by a Musqueam man. The court deemed that Indigenous peoples had a right to a food fishery. In other words, Indigenous peoples had a right to fish for food and ceremonial purposes, but the court ensured that, given the right of the Crown to regulate the Indigenous fishery, there would be no impact on the status quo, or on the continued over fishing by non-Indigenous fishers. Again, however, most legal scholars characterized the decision in *Sparrow* as a victory for Indigenous peoples; even Patricia Monture-Angus called the decision "brave and bold"<sup>83</sup>. In order to see a case as a victory however, one must look to the tangible result, in the communities, on the ground. *Sparrow* basically resulted in the courts affirming a right to fish for food and ceremonial purposes. This right would be highly regulated and at the behest of the Crown. As Taiaiake Alfred states,

Given Canada's shameful history, defining Aboriginal rights in terms of, for example, a right to fish for food and traditional purposes is better than nothing. But to what extent does that state regulated 'right' to food fish represent justice for people who have been fishing on their rivers and seas since time began?<sup>84</sup>

In summation, *Sparrow* leaves Indigenous peoples with a right to fish for food or ceremonial purposes, the food fishery and ceremonial fishery is based on numbers based

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<sup>82</sup> *R. v. Gladstone*, [1996] 2 S.C.R. 723 [hereinafter referred to as *Gladstone*].

<sup>83</sup> *Supra* note 1 at 61.

<sup>84</sup> *Supra* note 59 at 58.

on membership, a membership base which the colonial government has effectively reduced through outright genocide, disease and legal shape shifting. Furthermore, the courts in *Sparrow* noted that the right to fish could be violated by government provided that violation is justifiable. This justification only has to be made to the courts, another state entity. So *Sparrow* essentially concludes by setting out a condition of “you scratch my back, I will scratch yours” on a grand scale.

Finally, *Sparrow* creates a legal landscape whereby Indigenous peoples must argue rights on a right-by-right, case-by-case basis, which leaves Indigenous peoples with a future that could be entirely constructed by a foreign law. Patricia Monture-Angus notes this, and states,

In *Sparrow*, the delineation of rights is consistently narrowed in such a fashion that valuable Aboriginal time and energy must be repeatedly expended to secure narrow victory upon narrow victory with the great consequence of failure looming around every judicial corner.<sup>85</sup>

In 1996 the Supreme Court released its decision in *Van der Peet*, another Indigenous fishing case. This decision elaborated on *Sparrow* and further confined Indigenous rights to a thing of the past, not relevant in the present. According to the court in *Van der Peet* only those practices that were part of an Indigenous practice prior to the arrival of Europeans are deemed worthy of protection, and not coincidentally, those are the very practices which threaten settler society the least. Specifically the courts states “the practices, customs and traditions which constitute aboriginal rights are those which have continuity with the practices, customs and traditions that existed prior to contact

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<sup>85</sup> *Supra* note 1 at 105.

with European society”<sup>86</sup>. In effect, the court was reproducing what we have already seen in the media and popular culture; the image of the Indigenous as noble savage/primitive whose culture is clearly inferior, but worthy of the same sort of protection we might afford a museum piece. The court fails to recognize that Indigenous cultures, as all cultures, adapt over time, and that what may not have existed one hundred years ago, may now be an integral part of a culture. Patricia Monture-Angus speaks of the idea of freezing Aboriginal rights in the past:

The idea that Aboriginal people must connect their present rights to the far distant past creates the likelihood that Aboriginal Peoples and cultures are being denied one of the fundamental characteristics of self-determination. Cultures and peoples do change over time...the idea that Aboriginal rights must arise pre-contact turns the reality of contact, that is the sharing of diverse cultures formerly separated by an ocean, into a story only about the impact Europeans had on Aboriginal people.<sup>87</sup>

The court in *Van der Peet* determined that it is not only appropriate, but also necessary for the judiciary to determine what is authentically Indigenous and that this can be done through a series of tests, tests that will provide a template for future courts to determine whether an Indigenous practice is worthy of protection. Furthermore, as Russel Barsh and James Youngblood Henderson, point out, even when a practice is deemed worthy of protection “the right nonetheless exists only to the extent that the Justices deem it to be compatible with Anglo-Canadian law as a whole”.<sup>88</sup>

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<sup>86</sup> *Supra* note 35 at 59.

<sup>87</sup> *Supra* note 1 at 101.

<sup>88</sup> Russel Barsh and James Youngblood Henderson, “The Supreme Court’s *Van der Peet* Trilogy: Native Imperialism and Ropes of Sand” (1997) 42 *McGill Law Journal* 994.

The court in *Van der Peet* also notes that Aboriginal rights must be “adjudicated on a specific rather than general basis”.<sup>89</sup> Effectively the court is damning Indigenous peoples to millennia in litigation, as Patricia Monture-Angus articulates, “This incremental case-by-case approach to resolution of Aboriginal claims fates Aboriginal people to generation upon generation of legal challenge”.<sup>90</sup> Even on the surface this appears threatening, but when one digs deeper, it is easy to see that the court is forcing Indigenous peoples to spend more and more time in litigation, which leaves less and less time to actually live out the very practices that are being fought for. Evidence of the increase in Indigenous litigation is the existence of law firms that are involved in Indigenous litigation exclusively, something unheard of 30 years ago.

In summation, *Van der Peet* leaves us with the following; first “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”.<sup>91</sup> This proposition poses some obvious evidentiary problems; first, what constitutes evidence of an ancient practice? The court speaks of continuity, that is, an activity practiced today may indicate a practice of pre-colonial times<sup>92</sup> At this point it might have been appropriate for the court to acknowledge that it is the law in Canada that has most often been responsible for the discontinuation of the very activity the Indigenous community is faced with providing proof of. To know this one only needs to look at the actions of Canada, where under the *Indian Act* of 1884 the Sundance, Potlatches and other ceremonies were outlawed.

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<sup>89</sup> *Supra* note 35 at 69.

<sup>90</sup> *Supra* note 1 at 65.

<sup>91</sup> *Supra* note 35 at 46.

<sup>92</sup> *Supra* note 35 at 63.

Having established that a practice is a continuation of a pre-colonial practice, the courts then set out to define what is integral to the Aboriginal culture in question, a task that is impossible at best. The judiciary is entirely immersed within its *own* culture, and would likely have a difficult time identifying what is integral even to their own culture, never mind one with which they have no relationship with or knowledge of. And, given the court's seeming interest in seeing Indigenous cultures immersed in a cycle of litigation eventually, if Indigenous peoples followed the courts, the only thing of continuation in Indigenous societies will be just that: litigation.

Unfortunately, in order to be “integral” to an Indigenous culture, the practice must fit into convenient boxes neatly defined and set out by the courts. Part of the criteria is that the practice is not to have arisen solely as a result of European contact. In this the court has missed the point of the last 500 years. Surely the courts recognize that many of the practices of “American” or “Canadian” culture have arisen entirely as a result of Indigenous culture. For one, there is the very land on which these new nation states sit, but even beyond that, an entire culture has arisen out of *this* place, contact with the people already living on this continent, no one living in Canada would deny that Canada differs from its European roots. But the courts, for obvious reasons, have a great deal of difficulty in turning the mirror on themselves.

The *Van der Peet* case was regarded as a loss for Indigenous peoples by legal scholars, and certainly it was, but just how much of a greater loss it was than its successor *Delgamuukw*, or the cases that preceded it is debatable. One of the greatest misfortunes of

Indigenous law in Canada, and the practice and perpetuation of it within the confines of the Canadian judiciary is summarized nicely by Guujaaw, President of the Haida Nation, “when one tribe wins a case, it only applies to that one tribe, but when one tribe loses a case it applies to everybody”.<sup>93</sup>

The courts decision in *Van der Peet* was brought down on the same day as their decision in the *Gladstone* case. *Gladstone* was another fishing case, this time involving the sale by two Heiltsuk brothers, of herring spawn on kelp. The court in *Gladstone* follows the reasoning of the court in *Sparrow* and *Van der Peet*, entrenching the tests developed in those cases that determine, according to the courts, whether or not an Aboriginal practice is worthy of protection, and whether that right can be sanctioned by Canada. *Gladstone* was regarded as a “win” for Indigenous peoples on some levels because in this case the court at least found that “this Band engaged in inter-tribal trading and barter of herring spawn on kelp”.<sup>94</sup>

In *Gladstone* the court affirmed what was said in *Sparrow*, which was that in order for a right to be extinguished the Crown must show a “clear and plain intent” to extinguish that right.<sup>95</sup> This rule, of course, maintains the power imbalance between Indigenous peoples and the settler state. Here, the settler state decides which rights it is comfortable with, what can stay and what must go. The court allows for further control by the government when it states that the government needs to regulate the herring spawn fishery, and while they must respect the Heiltsuk right to collect herring spawn, the

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<sup>93</sup> *Supra* note 62 at 26.

<sup>94</sup> *Supra* note 82 at 26.

<sup>95</sup> *Ibid* at 31.

government remains the final arbiter of who gets to fish, how much they are allowed to catch and sell, and when they can fish.

In summation, the court in *Gladstone* “allows” for the commercial sale of herring spawn, in so far as earning a “moderate livelihood”<sup>96</sup> and providing that it does not adversely impact herring spawn stocks, which of course will be determined by the federal department of fisheries and oceans. Effectively, the court in *Sparrow*, *Van der Peet* and *Gladstone* is acting to entrench, once and for all, the sovereignty of the settler state, and to force Indigenous peoples into a position whereby they must ask for every right they get.

Sadly, the legal discourse gets worse. The 1997 *Delgamuukw* decision was and continues to be devastating in terms of establishing any kind of Indigenous rights within the Canadian judiciary. Thus far, the case summaries have only included the decision at the Supreme Court of Canada level, but the provincial Supreme Court decision in *Delgamuukw*<sup>97</sup> is so insidious, and yet so illuminates the problems with the Canadian judiciary that it is worth a mention. The case was brought to trial by the Gitksan and Wet'suwet'en, who were asking for recognition of title over their traditional territory. The first thing that is striking about the trial level of the *Delgamuukw* decision is the sheer breadth of it; it took almost two years for the case to be heard, with 374 days of hearings and millions of dollars spent in legal fees, to say nothing of the toll in terms of time and energy. Justice McEachern presided over the trial, and throughout the trial and his

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<sup>96</sup> *Ibid* at 57.

<sup>97</sup> *Supra* note 40.

deposition he made comments that were at the least ignorant, but could easily be described as outright racism. Leslie Pinder notes however, that McEachern is not necessarily a blight on an otherwise functional justice system, but instead is simply a part of the status quo, “I mean no disrespect to Judge McEachern, who heard the case. I don’t think he is unique. In what he says and believes he represents the best of what we have to offer”.<sup>98</sup>

The Delgamuukw case was essentially a land claims trial (although self-government was argued at the trial level), brought by the Gitksan and Wet’suwet’en, who claimed jurisdiction over 22,000 square miles in British Columbia. The case was complex, and involved extensive testimony from elders and members of the community. McEachern however, rejected almost all of this community testimony and in some instances, was even offended by it,

Judge McEachern was embarrassed throughout the trial and he told us that...he was embarrassed by the request that the trial be relocated to Smithers so more Indian people could attend...embarrassed by the length of the trial...embarrassed when Mary Johnson, elder, who wanted to sing her song to him in court during the telling of her adaawk. He stated that he thought he was being “imposed upon and I don’t think should happen in a trial like this.”<sup>99</sup>

McEachern’s final decision was that, although Aboriginal title exists at law, it has been extinguished simply by colonialism. The case was appealed to the Supreme Court of Canada and the decision at that level was released in 1997. The Supreme Court decision was wildly anticipated, with legal scholars anxious for a pronouncement on Aboriginal title. Many hailed the decision, regarding it as another “win” for Indigenous peoples. So

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<sup>98</sup> Leslie Pinder, *The Carriers of No: After the Land Claims Trial* (Vancouver: Lazara Press, 1991) at 4.

<sup>99</sup> *Ibid.*

just what did the court in *Delgamuukw* decide? The central question put to the court was what the content of Aboriginal title is. Justice Lamer stated that Aboriginal title is a “right to the land itself”.<sup>100</sup> That right however, is restricted; for example the land cannot be used in a way that is “irreconcilable with the nature of the attachment to the land which forms the basis of the group’s claim to Aboriginal title”.<sup>101</sup> Lamer provides us with an explanation of what he means when he states,

For example, if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).<sup>102</sup>

In his judgment Lamer assures us that, if Aboriginal land is to be strip mined or turned into a parking lot it will be the settler state that does so, and it will be the settler state that profits from it. While Lamer wants to restrict the uses to which Indigenous peoples put their land, Lamer also finds it perfectly acceptable, in the interests of developing an economy, for the settler state to encroach on Indigenous land for economic and other reasons. He states,

In my opinion, the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims, are the kinds of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.<sup>103</sup>

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<sup>100</sup> *Supra* note 40 at 140.

<sup>101</sup> *Supra* note 40 at 111.

<sup>102</sup> *Supra* note 40 at 128.

<sup>103</sup> *Supra* note 40 at 165.

So while legal scholars and lawyers were busy hailing the Delgamuukw decision as a milestone for the recognition of Aboriginal title, the judiciary was in fact simply creating further justification for the continued occupation and destruction of Indigenous lands. In many ways the Delgamuukw decision is simply the doctrine of discovery, written for a more contemporary audience. In essence, the court recognizes that while Aboriginal title exists, it is an inferior title than that of the settler state, and it is a title that is fragile at best, and will only be continued at the good graces of the colonial population.

In summation, the Delgamuukw decision leaves Indigenous peoples with title that will only be recognized at the whim of the nation state, it will only be respected for so long as the settler society has no need for the land and/or the resources on or under the land. As soon as need for the land grows, the settler state simply rationalizes a taking. The court avoided actually answering anything with respect to the specific title of Gitksan and Wet'suwet'en, instead a new trial was ordered and Lamer left us with the words, "Let us face it, we are all here to stay".<sup>104</sup>

The *Marshall* decision was again a case involving fishing rights, this time the sale of eels on the east coast by Mi'kmaq man Donald Marshall. Marshall relied on a 1752 treaty as evidence that the colonial regime had always recognized the right of the Mi'kmaq to sell fish given the inclusion of a "truckhouse" clause in the treaty. The "truckhouse" clause allowed the Mi'kmaq to bring their catch to be sold at truckhouses (essentially trading posts) in order that they may earn a "moderate livelihood", but the

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<sup>104</sup> *Supra* note 40 at 186.

Mi'kmaq are prevented from an "open-ended accumulation of wealth".<sup>105</sup> This judgment led to an extreme backlash against the Indigenous fishery, and led to violent clashes between Indigenous fishers and the Canadian fishery. The Supreme Court responded to this by releasing its judgment in *Marshall 2*, which curtailed the rights earlier acknowledged by the court. The *Marshall 2* court notes that the Indigenous rights were subject to government regulation. The court in *Marshall* was accused by many of practicing a sort of judicial activism,<sup>106</sup> with many stating that it was indicative of the courts unbridled willingness to grant open-ended rights to the Indigenous. Of course, what was missed in that sort of analysis is the fact that it is not for the court to "grant" a right that already exists, and more frightening still was that the first judgment was already restrained, and yet, as has been proven by the *Marshall* case, this restrained acknowledgment that an Indigenous right exists was fraught with such huge political ramifications that the court was forced to bend.

In summation, the *Marshall* decision leaves Indigenous peoples with the right to fish, and sell their catch, but only within a highly regulated and colonial regime, that is set up, maintained and enforced by the colonial parties such as the Department of Fisheries and Oceans, the courts and the police. The *Marshall* decision is telling, in that it demonstrates the confines under which the judiciary may act, and the extent it will be swayed by popular opinion. Remember, this is the same Canada that locked Indigenous

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<sup>105</sup> *Supra* note 44 at 7.

<sup>106</sup> Leonard Rotman, "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in *Badger* and *Van Der Peet*." (1997) 8 *Constitutional Forum* 40-45 .

children up in residential schools, the same Canada that still thinks it is acceptable when hundreds of Indigenous women go missing from the downtown eastside in Vancouver<sup>107</sup>, and the same Canada that stands by and watches while entire Indigenous communities are subject to disease and poverty of a kind generally only seen in so called “third world” countries. These are hardly the people that should be the gatekeepers of Indigenous rights, and yet the *Marshall* case cements this ability to be the keepers of a culture.

### **After *Delgamuukw*: The Lie and How it was Told**

Lately the media has been relatively silent on any Indigenous court cases. Of course, Indigenous rights and title cases did not stop after *Delgamuukw*, and one would think, given the fact that so many legal scholars sold *Delgamuukw* as a win for Indigenous peoples, that those cases would increase in activity. So where are we now? What did *Delgamuukw* teach us?

To tell that story let us first look at two other recent “winning” cases after *Delgamuukw*; the *Haida Nation v. British Columbia*<sup>108</sup> and *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project*<sup>109</sup>. For the purposes of this work I will focus largely on *Taku River*, but both cases came to essentially the same conclusions. Both decisions were appealed to the Supreme Court of Canada, and their decision came down in late 2004, with the Supreme Court essentially reinforcing what was already stated in the Provincial court decisions. Both cases involved the encroachment onto Indigenous

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<sup>107</sup> Amnesty International, special report, “Canada: Stolen Sisters - A human rights response to discrimination and violence against Indigenous women in Canada” (4 October 2004).

<sup>108</sup> *Haida Nation v. British Columbia (Minster of Forests)* [2002] B.C.J. No. 378 (hereinafter *Haida*).

<sup>109</sup> *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* [2002] B.C.J. No. 155 (hereinafter *Taku River*) and *Taku River Tlingit First Nation v. Tulsequah Chief Mine Project* [2004] SCC 74.

territory of large companies for the purposes of resource extraction (which, as we know from *Delgamuukw*, is a worthy infringement of Indigenous title). In the *Taku River* case a mining company wanted to build a road through Tlingit territory, and the Minister responsible for issuing the permits approved the permit before the Tlingit had an opportunity to fully express their objections. The British Columbia Court of Appeal stated that it is the duty of both the government and companies to consult with Indigenous peoples vis-à-vis encroachment onto Indigenous territory, even if that territory has not been affirmed by a court to in fact be within that particular Nation's jurisdiction. The Supreme Court of Canada decision stated the government must consult with Indigenous peoples, but they do not have to accommodate, so essentially, consultations is meaningless.

Even after the decision, the British Columbia government still issued the permit for the road, despite extensive evidence of the damage it would do to the Tlingit way of life. The only difference was that the province now provided extensive justification for why they were issuing the permit. The only thing holding up the road construction at the time of this writing is the federal environmental review. As we have seen in *Delgamuukw*, economic concerns generally will outweigh Indigenous concerns and on many levels, the Indigenous are simply regarded as an impediment to economic advancement (regardless of the real cost, in terms of environment and lifeways, of that advancement). Effectively, although the courts stated that consultation had to be meaningful, this has not resulted in any tangible gains, or even a modicum of control for the Taku River Tlingit. Yet, despite all of this evidence to the contrary, the lawyer for the

Taku River Tlingit, Louise Mandell, QC, still spoke of the impending Supreme Court decision as “planning for the big win”<sup>110</sup>.

But let us look at the reality for most Indigenous populations; many communities are small and almost all are poor with limited resources. So even if the Supreme Court neatly laid out all the details of what consultation will entail, will it really make a significant difference? Will the Supreme Court ever ask that resources be provided to these communities so that consultation can be meaningful? Not likely, at least not until another future court case demands it. But even if resources were provided, could communities trust external consultants? Given that so many people in British Columbia are totally reliant on the resource industry it is unlikely that many would be willing to sacrifice themselves, their communities and their families to help out an Indigenous community that the government has at times actively smeared and at other times has demeaned and kept at a distance from the mainstream.

Finally, let us look at consultation in operation since the decisions in *Haida* and *Taku River*, remembering that the court in both cases stated that there is a duty to consult when an activity may have an impact in Indigenous territory. Despite this ruling, in July 2004 CN Rail, the American owned private rail company was allowed to buy the shares in Crown owned BC Rail and as well created a long term lease (with clauses that could keep it in effect for almost 1000 years) to operate on BC Rail rail beds. Of course, many of these rail beds directly intersect and/or traverse Indigenous lands As a result of the disregard for Indigenous interests many Indigenous groups are protesting, with some

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<sup>110</sup> Title of lecture at Treaty and Right Alliance Conference, May 20, 2004.

even threatening to shut down the rail line.<sup>111</sup> Chief Stewart Phillip stated, "The province is behaving like a bully in the school yard, assuming all of the power to force its decisions through without any consideration of the Aboriginal Title and Rights of the Aboriginal People who will be directly impacted by this agreement".<sup>112</sup>

Chief Stewart Philip is correct in his analogizing the province to a bully, but unfortunately this is one bully that the courts are not going to be able to restrain, and in cases such as *Marshall* and *Delgamuukw* we have already seen that the real law maker is business and corporate enterprise.

So what of the losses? If many of the preceding cases can be described as wins, what do the cases described as losses look like? A perfect, albeit tragic, example is provided by the *Cheslatta Carrier Nation v. British Columbia*<sup>113</sup> case from 1999. This case did not even make it past a chambers application, so clearly it was neither widely reported, nor well known. The *Cheslatta* lived on the Cheslatta River, which acted as a secondary reservoir to the Nechako River. The government granted the rights of the water flow from Nechako River to Aluminum Company of Canada (ALCAN) in 1952. The *Cheslatta* were then forced to relocate, homes were lost, graves were lost, and all after essentially no negotiations. In 1983 more water was diverted from the Nechako River for ALCAN and now the *Cheslatta* can no longer fish, a huge blow given that the *Cheslatta*

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<sup>111</sup> Union of British Columbia Indian Chiefs News Release "BC Rail/CN Rail Deal: Callous Disregard of Aboriginal Peoples" (14 July 2004), online: UBCIC Homepage <[http://www.ubcic.bc.ca/press\\_release.htm](http://www.ubcic.bc.ca/press_release.htm)> (last modified: 8 October 2004).

<sup>112</sup> *Ibid.*

<sup>113</sup> *Cheslatta Carrier Nation v. British Columbia* (26 November 1999) Victoria 98 4734 (B.C.S.C.) (referred to hereinafter *Cheslatta*).

culture developed as a fishing culture. In 1999, a case was brought forward whereby the Cheslatta sought a declaration that they had an Aboriginal right to fish in a specific lake. The claim was struck down on the ground that it disclosed no cause of action. In other words, there was no specific infringement of a right or a threat of infringement of a right. So, according to the courts, an entire way of life can be robbed and destroyed, but in order to obtain justice one needs to be able to point to something specific that created that situation. It may be, however, that the court simply did not want to open the door to cases like this --- a legitimate fear on the part of a regime that desperately needs to try to maintain its legitimacy. If the court had acknowledged the Cheslatta claim it could have led to all sorts of other claims, how many Indigenous peoples in Canada have been flooded out of their homes? What about the current salmon crisis in British Columbia, not to mention the extermination of the buffalo in the last century? By denying the claims of the Cheslatta the courts were effectively shutting the door to claims by other Indigenous groups.

In another loss for Indigenous peoples, the Kitkatla also took British Columbia to court, with the case going to the Supreme Court of Canada in 2002, as *Kitkatla v. British Columbia*.<sup>114</sup> This case arose after the province granted Interfor a logging license over land which the Kitkatla claimed to have Aboriginal rights, and which contained culturally modified trees (CMT). Included within the license was the right to log and process the CMT's. For the purposes of this paper only the trial court decision<sup>115</sup> will be examined,

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<sup>114</sup> *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* (2002) SCC 31 [hereinafter *Kitkatla*].

<sup>115</sup> *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)* (1999) 118 B.C.A.C. 144.

as the Supreme Court decision only looked at the Constitutionality of certain provisions of the *Heritage Act*. In the trial level the Kitkatla were asking that an interim injunction be issued in order to prevent Interfor from logging the CMT's. The injunction was denied, and once again, that denial is the result of economics. While the court acknowledged that the Kitkatla would "suffer irreparable harm if logging proceeded"<sup>116</sup> the court decided that ultimately Interfor would suffer a greater inconvenience as a result of the expense of having to cut around the CMT's. Again, as in *Delgamuukw*, the court places economic interests over Indigenous interests.

In 2001 the Supreme Court of Canada heard the case of *Mitchell v. M.N.R.*<sup>117</sup>. The case arose after Michael Mitchell, from the Akwesasne reserve in Canada, took goods to another Mohawk reservation in the United States. A claim was brought against Mitchell for unpaid duty on the goods. Mitchell argued an Aboriginal right to trade and refused to pay the duty, the Federal Court of Appeal agreed but Mitchell lost at the Supreme Court of Canada. The case is important because it illuminates the profound lack of knowledge that the courts have vis-à-vis Indigenous peoples. The court affirms what was said in *Van der Peet* and *Delgamuukw*, that while an Aboriginal right may exist, the government can limit that right, provided that limitation is justifiable (again, it only need be justifiable to the courts).

Using the tests set out in *Van der Peet*, the court tried to determine if the Aboriginal right claim does exist, based on historical evidence. While it does find

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<sup>116</sup> *Ibid* at 12.

<sup>117</sup> *Mitchell v. M.N.R.* (2001) SCC 33 [hereinafter *Mitchell*].

evidence that the Mohawk traded, that trade was found to be predominantly east-west, and not north-south, a claim which seems ridiculous given that Mohawk territory extends both east-west and north-south. The court also followed *Van der Peet* in dismissing any Aboriginal claims that do not truly make “the society what it was”.<sup>118</sup> In other words, all that the law in Canada leaves Aboriginal peoples with is what the court deems essential to that culture, ergo a culture cannot thrive, but can only sustain, according to the courts if Canada.

Justice Binnie adds the ultimate insult when he speaks of the two-row wampum, and in a sense uses it to justify the imposition of Canadian laws and mores, stating,

The respondent sued as "GRAND CHIEF MICHAEL MITCHELL also known as KANENTAKERON". He lives with a foot simultaneously in two cultural communities, each with its own framework of legal rights and responsibilities. As Kanentakeron he describes learning from his grandfather the spiritual practices of the People of the Longhouse, whose roots in North America go back perhaps 10,000 years. Yet the name Michael Mitchell announces that he is also part of modern Canada who watches television from time to time and went to high school in Cornwall. As much as anyone else in this country, he is a part of our collective sovereignty.<sup>119</sup>

It is difficult to comprehend that Justice Binnie could have meant this in an other way than to insult Michael Mitchell in particular, as well as Mohawk peoples and Indigenous peoples throughout the Americas. What exactly is he trying to say? That only those who do not watch television can claim a right? That only those who do not take on a Christian name can claim a right? Is Justice Binnie so oblivious to colonization that he does not recognize that these names, the institutions of which he speaks, are all imposed? Justice Binnie speaks much of Canadian sovereignty, and yet, he does not once

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<sup>118</sup> *Supra* note 35 at 60.

<sup>119</sup> *Supra* note 117 at 131.

throughout the case point to where Canadian sovereignty derives from. However, as Leslie Pinder notes of Justice McEachern, Justice Binnie is not unique.

### **Conclusion**

The preceding is not meant as an instructive guide to Aboriginal case law in Canada. It is only meant to illuminate some of the recent cases, to demonstrate that things have not improved since the so-called winning decision in *Delgamuukw*. In legal terms, the Indigenous peoples of today are arguably in a worse position than they were one hundred years ago, because the courts have been invited to shape and define what Indigenous rights are, and Canada gets to be smug in their “granting” of these rights. But Indigenous peoples are subject to more than just strict legal losses when they present their cases to a court, the losses are manifold.

### Chapter 3: The Indigenous Response to the Courts

Leroy Little Bear enunciated precisely why it is Indigenous peoples should not approach the Canadian courts to resolve claims, “No sovereign ever goes into the other’s court”.<sup>120</sup> Little Bear is absolutely correct, in going to court Indigenous peoples are implicitly recognizing the others sovereignty, an action which cannot be undone. Patricia Monture-Angus notes, “By agreeing to the litigation process to resolve a claim, Aboriginal Peoples agree implicitly to the terms on which the non-Aboriginal dispute resolution system is based, regardless of the consequences or biases that process affirms”.<sup>121</sup>

In relying on the Canadian court system to produce answers, Indigenous peoples have to accept those answers. So, while many hailed the Delgamuukw decision as a milestone in that it illuminated the content of Indigenous title, it also defined, and confined the content of that title, and did so according to colonial terms. If Indigenous peoples seek to maintain sovereignty, or even to maintain autonomy, more reliance needs to be made on communities themselves to define (or even deciding if there needs to be a definition) the content of Indigenous title. In giving one’s community over to the colonial legal regime communities are required to participate in one of the greatest frauds of the colonial process; the idea that justice is available to anyone who seeks it and it ignores that colonialism is self-perpetuating. The law becomes the means of that perpetuation. As Taiaiake Alfred notes,

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<sup>120</sup> Interview with Leroy Little Bear (23 September 2004).

<sup>121</sup> *Supra* note 1 at 65.

The need to perpetuate a set of fictive legal premises and fact-denying myths is apparent in every legal act of the state. To justify the establishment of non-indigenous sovereignty, aboriginality in a true sense must necessarily be excluded and denied. Otherwise it would seem ridiculous that the original inhabitants of a place should be forced to justify their existence to a crude horde of refugees from another continent.<sup>122</sup>

The *Marshall* decision made evident just how much the judiciary is influenced by popular opinion, in that the court further restricted the rights it recognized the Mi'kmaq to hold. Unfortunately, this should not be surprising; the judiciary exists as a result of political appointment and to deny this reality is simply naïve. The judiciary is ultimately accountable to the politicians, who are ultimately accountable to the majority, which of course leads to a political landscape geared towards the lowest common denominator, but it is certainly not accountable to the Indigenous population. As Patricia Monture-Angus points out,

The judicial process on which we rely to resolve Indian claims is not accountable to the people whose future it determines. Canada (either federal or provincial governments), on the other hand, can by the authority vested in its legislative powers, circumvent judicial decisions by passing or amending the statutory provisions. This forces courts to at least acknowledge seriously the position the various Canadian legislatures take on certain issues. No such deference to Aboriginal governments exists in the present balance between judicial and legislative powers.<sup>123</sup>

Subjecting one's community to the long arm of the law is a form of co-optation itself. Many subscribe to the idea that if the right case is presented, to the right judge, at the right time, it will grant Indigenous peoples a victory. The idea is that the chance for this great victory lurks around every corner. There are several elements to this belief. First, victory is relative. Indigenous peoples in Canada have for so long been told that

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<sup>122</sup> *Supra* note 59 at 58.

<sup>123</sup> *Supra* note 1 at 71.

something is better than nothing that they believe it, so even if the courts recognize a fraction of their inherent right, that is better than no recognition at all. But this denies that a failure to recognize a right on the part of the Canadian legal system does not deny that right still exists. But in speaking in terms of the rights dialogue that is set up by the judiciary Indigenous peoples are taught to believe they must wait to have their rights “granted” and/or “recognized” by the Canadian judiciary. In doing so Indigenous communities are denying their own power, it is the missionary syndrome all over again. Indigenous peoples must reclaim their own power, their own voice, and that must be done outside of state mechanisms.

Second, most of those who participate in the legal system (and I mean no disrespect in saying this) have, by necessity, been fully absorbed within the legal system. Law school does not necessarily teach you to think critically, nor does it teach you that something else (in terms of the law) may exist. Although there is an emerging discourse among legal scholars, one that is critical of the legal regime, those voices are often not heard in mainstream legal institutions. In order to fully function those who practice the law must in some sense believe in it. Lawyers, and those who participate in the judicial process are forced to subscribe to degrees of colonialism, even if they claim to stand in opposition to it. All those who participate in the legal system in Canada must swear an oath to the Queen, the Queen of a country that is still being occupied illegally. Concomitantly they must honour a system that clings to its colonial roots out of necessity, to loosen its grip is to deny its own legitimacy. Taiaiake Alfred articulates this,

The state has shown great skill in shedding the most onerous responsibilities of its rule while holding fast to the lands and authorities

that are the foundation of its power. Redefining without reforming, it is letting go of the costly and cumbersome minor features of the colonial relationship and further entrenching in law and practice the real bases of its control. It is ensuring continued access to indigenous lands and resources by insidiously promoting a form of neo-colonial self-government in our communities and forcing our integration into the legal mainstream.<sup>124</sup>

Law school and law practices are a perfect microcosm of this. In order to fully function within either one needs to accept the dominant notion that the law is correct, or, at its very base, has flaws which can be corrected from *within*, in striking contrast to the notion that Audre Lorde has expressed, that “The master’s tools will never dismantle the master’s house”. Within the legal regime there is built an elite, and like colonialism, that system is self-perpetuating; those who best tow the line get the best marks which leads to the best jobs, and eventually to the attainment of positions in a judiciary that is unchanging, for the very reason that those who respect and support the status quo are handsomely rewarded. After listening to those actually practicing Aboriginal law it becomes apparent that, while some may have good intentions, all have been fully absorbed into the legal mainstream, with most relying on colonial documents (such as Section 35 of the *Constitution Act*) to support their cases, a condition which is self-evident. Those acting within the system cannot purport to be thinking outside the system. As noted by Colin Samson, the law creates a system whereby people are bound to the story that the colonizer tells, while ignoring anything Indigenous,

In the case of relations with Aboriginal peoples, Canada makes the laws that regulate relations, binds Aboriginal peoples to them, then positions itself outside the laws so that it is impervious to any violations of them by invoking sovereignty.<sup>125</sup>

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<sup>124</sup> *Supra* note 59 at xiii.

<sup>125</sup> *Supra* note 66 at 49.

Furthermore, with each case that is argued before a Canadian court Indigenous peoples further add legitimacy to the very system that they oppose and in turn, delegitimize their own claim to sovereignty or autonomy. It is difficult, and arguably, inauthentic to argue sovereignty after voluntary participation in a foreign court, seeking foreign laws to legitimate one's claims to sovereignty.<sup>126</sup>

The process of law in Canada is adversarial, so even the hopes of educating the colonizer, or coming to a better understanding of one another's position will not be realized within a system that pits people against one another, and forces people to take sides and not hear the other's arguments. The law only concerns itself with the law and with maintaining its own legitimacy; the law is removed from communities, and removed from real lives. Leslie Pinder notes, "As lawyers we don't have to take any responsibility to construct a world. We only have to destroy another's construction. We say no. We are the civilized, well-heeled, comfortable carriers of no. We thrive on it. Other races die".<sup>127</sup>

Simply by taking issues into the court room, Indigenous cultures are being denigrated because they are being removed from their context, forced to conform to the colonial mentality and entirely removed from any sort of Indigenous ownership. In order to litigate over a land claim dispute Indigenous peoples must prepare maps, hundreds of maps, which delineate the area they lay claim to. In the process the genuine connection an Indigenous community may have with the land is slowly be erased and replaced with a

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<sup>126</sup> I do recognize that many Indigenous peoples are forced into a court, through criminal or other charges, and of course, I recognize that it is perfectly reasonable in that situation to use every resource available to argue one's case.

<sup>127</sup> *Supra* note 98 at 12.

Euro-Canadian view of the land a commodity. In speaking of mapping specifically, Colin Samson notes that the process of mapping is “tearing away at pre-existing ways of making sense of the landscape and long established historical connection”.<sup>128</sup>

One of the most obvious, and yet most neglected negative effects of litigation is the simple amount of physical and mental energy expended in the pursuit of litigation. Litigation physically splinters communities in that cases rarely take place close to the community, so any litigation generally involves travel; it requires the participating community members to physically remove themselves from the community, often for great lengths of time, and often at great distances. For example, the Gitksan and Wet'suwet'en had to travel to Vancouver for their trial, while their communities are in northern British Columbia. Furthermore there is the mental energy expended on these cases, which leaves little left for addressing some of the pressing concerns of the community. Also, litigation is expensive and requires much monetary (not to mention emotional and mental) support, so cases are generally taken up by those in the community with the most power, which often times is not representative of the community as a whole. Litigation can act as a distraction from issues at home, and even more so, while issues are busily being litigated lands, cultures and ways of life are being lost.

To carry out litigation one needs evidence, which in Indigenous litigation that means the testimony of elders. Once the stories are told in court are they still a part of the community? For many the answer may be a resounding yes but it cannot be denied that

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<sup>128</sup> *Supra* note 66 at 61.

court exposure has an impact on Indigenous communities. There is a real danger that stories begin to be recited not to pass down culture, to explain taboos, to instruct someone on how to live within that culture, but rather are told as a means of providing “proof” of occupation, rights, etc. for an outside entity. As John Borrows notes,

Since non-Aboriginal judges do not usually share the relationships of Aboriginal peoples, there is an enormous risk of non-recognition and misunderstanding when Aboriginal peoples submit their ‘facts’ to the judiciary for interpretation. This problem is especially acute in litigation because factual determinations are presented in an adversarial environment and those determinations can vary significantly between judicial interpreters according to the judge’s language, cultural orientation and experiences.<sup>129</sup>

The court system simply is not sensitive to Indigenous storytelling. So for example within many communities certain stories can only be told at certain times, but a court does not accommodate that. Furthermore the storytelling must fit into what the court deems to be an appropriate format. While true Indigenous storytelling may not follow a prescribed pattern in the courtroom setting it must suddenly confine itself to examination and cross-examination. Dara Culhane articulates this when she notes, “Law demands that stories be reduced to their simplest form so that a judgment can be made: true or false, guilty or innocent”.<sup>130</sup>

By bringing Indigenous storytelling into the courtroom lawyers and judges are reducing the power of story in the community. This is especially true when the courts reject elders’ testimony, or when it is not seen as legitimate. Many Indigenous peoples tell stories of when smallpox and other diseases brought by colonialism came into their

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<sup>129</sup> *Supra* note 37 at 90.

<sup>130</sup> Dara Culhane, *The Pleasure of the Crown, Anthropology, Law and First Nations* (Burnaby:Talonbooks 1998) at 269.

communities. For the first time the traditional healers in their communities were confronted with diseases they had no experience with so they could not heal the people. As a result many thought they had lost their power; the diseases of colonialism made them appear weak in the eyes of their communities. Law, and the methods used by law can do the same to the traditional storytellers of the communities; these storytellers are not seen as valid enough to stand up to the wall of colonialism. By giving the stories over to the courts these communities are in a very real sense giving up their most powerful weapon to the colonizer; their ability to continue and to create an authentic culture. As John Borrows notes, storytelling is an act of self-determination, to take that to court could in some measure be giving over that bastion of self-determination.<sup>131</sup> Borrows speaks of the strain that testifying in court can have on elders:

While presenting evidence in an adversarial setting is a harrowing experience for most people it can be especially troubling for Elders from certain groups, for whom such treatment is tantamount to discrediting their reputation and standing in the community. Apart from the tremendous strain placed on the individual enduring this experience, the process represents a major challenge to the culture more generally. To directly challenge or question Elders about what they know about the world, and how they know it, 'strains the legal and Constitutional structure' of many Aboriginal communities. To treat Elders in this way is a substantial breach of one of the central protocols within many Aboriginal Nations, a fundamental violation of the legal order somewhat akin to requiring judges to comment on their decision after it is written.<sup>132</sup>

## **Conclusion**

Finally, communities must ask themselves what they hope to achieve through litigation. Is their goal emancipation? Recognition of title? Realistically very little will be achieved through litigation. Even in the best case scenario, even if a court gave a ruling

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<sup>131</sup> *Supra* note 37 at 92.

<sup>132</sup> *Supra* note 37 at 91.

declaring Aboriginal jurisdiction over a certain amount of land, a political will is still needed, both on the part of the Indigenous community, in the form of a desire to truly live their autonomy and also, political will is needed from the settler state government to accept that autonomy. It is highly unlikely that the government, as it currently operates, would be willing to hand over the control of land and resources to an Indigenous nation. The government of British Columbia has been especially opposed to any kind of rights for Indigenous people, as is evidenced by their asking the majority of British Columbians to decide if the treaty process should happen and what it should look like in the referendum of 2002. The governments (federal and provincial) have put up barriers for Indigenous people at every turn, and it is highly unlikely that a ruling on the part of a court would be accommodated by any government, past, present or future without the Indigenous peoples themselves providing an impetus for that accommodation, which could be done without the lengthy litigation process. Therefore, it is imperative that communities begin to look to themselves to provide a mode of change outside of the legal system.

## Chapter 4: If Not Law, What?

*Revolution is not something fixed in ideology, nor is it something fashioned to a particular decade. It is a perpetual process, embedded in the human spirit.*

*Abbie Hoffman*

In the previous three chapters the idea that relying on the law as a means of Indigenous emancipation in fact only further binds Indigenous communities to the same colonial regime that has been bent on their destruction since colonization came to the Americas. So what other avenues are available for Indigenous emancipation? Some might argue for international law forums, but those are likely to be as useless and as set on the continuing advent of colonialism as domestic courts. Leroy Little Bear notes that Indigenous peoples, if they must use courts, should treat all courts as international forums, and request that the judges act accordingly. Janice Switlo notes that if the Canadian courts do not act as international courts with Indigenous cases than, in arguing cases under Canadian domestic courts, many Indigenous communities have already attached themselves to that Canadian domestic law even in the international forum,

By the time that moment of international law comes according to this approach, the representations the lawyers will have made on behalf of their clients in Canadian domestic courts will bind the legal status of their clients as mere domestic ethnic minorities. The exercise in the "international court" will be a mere question of whether Canada is treating a certain ethnic minority person in a fact - specific situation fairly according to the then agreed-to international standard for minorities.<sup>133</sup>

Even if Indigenous peoples do manage to escape the confines of the domestic courts it must be remembered that most of the international forums are operated and

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<sup>133</sup> Janice Switlo, "In the here and now" online:Janice Switlo <<http://www.switlo.com/opinion.php?selected=47>> (last modified 14 January 2004).

controlled by those countries complicit, and active in the oppression of Indigenous peoples. Janice Switlo goes on to say, speaking of the United Nations specifically,

This is what States have focused on, preparing for the conclusion of the international decade of Indigenous people. They have been crafting these standards, protection from abuse by the majority, standards that can and will change with time and the needs of the majority. These are not statements or recognition of the rights of Indigenous peoples. The international community has not even begun to investigate, understand and recommend a fair system of laws to govern relations between Indigenous peoples and states, particularly where the Constitutional base of a State rests on a treaty or treaties with Indigenous peoples. There are currently no proposed models of relevant dispute resolution and treaty enforcement. The international arena as currently structured is but an extension of the domestic arena. It is not truly an international arena vis-à-vis Indigenous peoples. That arena does not yet exist.<sup>134</sup>

Perhaps the best option for Indigenous peoples is to simply take control of their own communities, and own fates, rather than hoping to rely on the pronouncements of a local, or a far off court. John Borrows notes:

Political pressure, economic development, social recovery and grass-roots practices of Aboriginal rights are more effective than ‘the law’ in creating the conditions for liberation. In fact, without this more direct action associated common law gains will not be realized. Aboriginal rights arise from Aboriginal customs and practices they do not originate from a grant of power by the common law.<sup>135</sup>

Indigenous communities have, at least on some level known this all along. In the 500 years since the beginnings of colonization on the North American continent, Indigenous peoples have learned that resistance comes in many forms, from dramatic incidents like the Battle at Little Big Horn, to the quiet resistance that is taking place when communities recount their stories, when ceremony is conducted, when people simply continue their way of life. Analysis of resistance and new social movements tend

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<sup>134</sup> *Ibid.*

<sup>135</sup> John Borrows, “The Sui Generis Nature of Aboriginal Rights” (1997-1998) 36 *Alta Law Rev* 9 at 31.

to focus on the dramatic, short-term events, such as the French Revolution and the protest movements of 1960's America. Sidney Tarrow, however, also notes that large-scale movements eventually lead to burnout and exhaustion.<sup>136</sup> Obviously, due to the fact that colonization has been a force in Indigenous lives for over 500 years now it has been imperative for Indigenous peoples to resist in a variety of ways, allowing for times of what might be called "restful resistance", whereby communities may not actively oppose the state on a grandiose scale, but where resistance occurs in simply living according to one's own culture. Dale Turner speaks of a similar concept when he calls on Indigenous academics to stay rooted in their communities, but to also actively educate the colonizer culture of their Indigenous (whatever Indigenous nation that may be) ways. He notes that Indigenous academics need to, "explain to the dominant culture why our ways of understanding the world ought to remain in our communities, and to assert and protect the sovereignty – nationhood – of our communities".<sup>137</sup>

Turning to the law is simply a perpetuation of the colonial lie; Indigenous communities must actively seek to affirm their own cultures, their own system and to create new realities. In speaking of the myths of the colonial mindset Taiaiake Alfred notes:

Of all those myths, the greatest is the idea that indigenous peoples can find justice within the colonial legal system. People who have studied history know that it teaches a lesson about the law: 'in periods of calm the law may shape reality, in periods of change the law will follow reality and find ways to accommodate and justify it.' The myth is designed to induce tranquility even in the face of blatant injustice. The task is to force

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<sup>136</sup> Sidney Tarrow, *Power in Movement* (New York: Cambridge University Press, 1998) at 147.

<sup>137</sup> Dale Turner, "Oral Traditions and the Politics of (Mis)Recognition" in Anne Watters, ed., *American Indian Thought* (Massachusetts: Blackwell Publishing 2004) at 230.

turmoil, force the law to change, create new parameters, and make indigenous goals an integral part of the new reality<sup>138</sup>.

Indigenous communities have thwarted the greatest efforts of colonization simply by surviving. Of course, mere survival cannot and will not be enough, Indigenous peoples must thrive and this might be done simply in the continuation of culture, by remembering who one is, and how one relates to their community and their land. Leroy Little Bear speaks of always knowing he is home when he sees Chief Mountain (Chief Mountain is sacred among the Blackfoot). Little Bear was not simply describing a particular geography, but was speaking of the culture and history that is bound up in that geography. On some levels this recognition, this failure to conform to a Euro-Canadian culture and worldview, is resistance.

For peoples of the salmon, continuing an ancient way of life is resistance, especially when the colonizer has actively attempted to destroy that way of life. The Indigenous fishery has been a form of resistance, both direct and indirect, since the time the colonizers began to compete for the fishery resources. For coastal peoples in North America fishing is a central part of their culture, and almost all coastal peoples have creation stories where sea creatures play a central role, and in some cases the people are thought to descend directly from sea creatures. Vine Deloria, Jr. compares the importance of the salmon to peoples on the west coast with the importance of the buffalo to peoples of the plains.<sup>139</sup> However, Deloria fails to mention one key difference; the salmon is still a part of this earth, not merely confined to parks, protected areas and legends. The salmon

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<sup>138</sup> *Supra* note 59 at 83.

<sup>139</sup> Vine Deloria, Jr., *Indians of the Pacific Northwest* (New York: Doubleday and Company, Inc., 1977) at 8.

can still be saved. This chapter examines the subtle, and not so subtle ways in which coastal (primarily west coast) peoples have acted to resist through their traditional fisheries, and more importantly, how that resistance has been outside of legal forums. Further, it will examine how this resistance can provide a way of asserting rights without resorting to taking issues out of Indigenous communities and into courtrooms.

### **Historical Context of the Indigenous Fishery and Colonial Interference**

Long before the arrival of Europeans on this continent Indigenous people had complex systems governing their fisheries that allowed for sizable catches, as well as conservation. The Pacific coast was highly populated by the time Europeans arrived on its shores. Sadly, European disease often arrived long before the Europeans themselves, and by the time of contact populations may have already been reduced by as much as 90%.<sup>140</sup> Initially the relationship between the Indigenous and Europeans was primarily a trade relationship, whereby the settler society relied heavily on the Indigenous fishery for sustenance. Officials on both sides of the border disregarded the laws that the Indigenous societies operated under, as Douglas Harris states, Indigenous fisheries were “not unregulated. A web of entitlements, prohibitions and sanctions governed the Native fisheries, allowing certain activities, proscribing others. Native fishers were not operating outside the law, as Dominion officials frequently claimed; rather, they were fishing within alternative legal frameworks”.<sup>141</sup> As white encroachment grew, so did colonial laws, displacing the complex Indigenous laws that already existed.

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<sup>140</sup> Douglas C. Harris, *Fish, Law and Colonialism* (Toronto: University of Toronto Press, 2001) at page 25.

<sup>141</sup> *Ibid* at 3.

Beginning in the mid-1800's European settlement occurred rapidly on the west coast, both within Canada and the United States, and on both sides of the border colonial governments set to making treaties with the Indigenous. By the mid-1850's, Washington territory was created in what is now Washington State, and the Hudson's Bay Company had authority over much of British Columbia. Treaties in the United States were created with an aim to making the Indigenous peoples farmers, and on the Canadian side of the border, treaties simply facilitated the encroachment of more and more people, and the extraction of more and more resources. A crucial component to treaties on both sides of the border was that the Indigenous populations would be able to retain their rights to fishing, with treaties in the United States including, "the right of taking fish, at all usual and accustomed grounds and stations...".<sup>142</sup> In Canada the Douglas treaties contained clauses whereby the Indigenous peoples could fish "as formerly".<sup>143</sup> Harris notes that when James Douglas created the treaties on Vancouver Island he understood that rights to fisheries must be recognized and included in the treaties, with Douglas understanding that to do otherwise would result in violent resistance. As Harris points out, "Governor Douglas had heard the strong and consistent Native representations of ownership of their fisheries, repeated since Europeans arrived on the coast, that would have made any other arrangement impossible without armed intervention".<sup>144</sup>

By the late 1800's canneries began to be established along the west coast, which would forever change the Indigenous fishery. The demand for more fish by the canneries meant that settler society could now make a profit from fishing, which they began to take

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<sup>142</sup> *Ibid* at 60.

<sup>143</sup> *Ibid* at 34.

<sup>144</sup> *Ibid*.

up in droves. In Canada, by 1884 the Dominion government required Indigenous peoples to seek permission from the colonial government to fish for food (this, despite the fact that non-Indigenous people did not need a license to food fish) and by 1888 the Indigenous peoples could no longer sell fish without a license.<sup>145</sup> The situation in the United States was similar to that in Canada, by the 1880's severe restrictions were being placed on fishing and the number of canneries on the coast skyrocketed.

The introduction of canneries meant an intense competition for fish grew between Indigenous populations and the non-indigenous. Settler society attempted to portray the Indigenous fishery as wasteful, meanwhile there are many accounts of salmon being left to rot by the non-Indigenous. As early as the 1800's The Department of Fisheries and Oceans (DFO) began to use conservation as a means to restrict the Indigenous fishery. By this point the colonial society set to actively attempt to destroy the Indigenous fishery, regardless of what that might mean for Indigenous cultures. Some Indigenous people actively resisted, and some began to take up fishing for the canneries, but in either case, the fishery "as formerly" was forever altered, and it became increasingly obvious that the treaties were meaningless in the face of colonization and it became increasingly apparent that settler society wanted the Indigenous out of the fishery altogether.

### **Historical Conflicts**

As stated, by the late 1800's competition for fish was intense, and the Indigenous peoples were faced with a very restricted fishery. Some Indigenous peoples actively and consciously resisted the imposition of the new laws, and some just simply resumed

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<sup>145</sup> *Ibid* at 66.

fishing as before. Reef net fishing, which was one of the most important methods of fishing prior to the arrival of Europeans, had been outlawed by the late 1800's and that ban was strictly enforced in most places by the early 1900's. For the Saanich people the reef net fishery was not just a method of fishing, but was a form of government, a vital part of the culture and a way of life.<sup>146</sup> For the Saanich, many resisted by taking their reef net fishery to the San Juan Islands, still traditional territory, but outside the jurisdiction of the Canadian DFO.<sup>147</sup>

In other parts of British Columbia, acts of resistance were more direct. In the early 1900's, fisheries officers, under pressure from cannery owners, took steps to dismantling the weirs of the Ned'u'ten (Lake Babine First Nation). The Ned'u'ten peoples had been using the weir fishery for millennia, and were reliant on it for their food, as part of their ceremonial life, and, like the Saanich, as part of their governance. In 1904 fisheries officers told the Ned'u'ten that their weirs would have to be dismantled. Of course, the Ned'u'ten protested, but the fisheries officers would not listen and threatened them with fines and imprisonment if they did not dismantle the weirs. Eventually, the Ned'u'ten gave in, but insisted they be paid for their labour in disassembling the weirs, and that they be provided with nets for the following fishing season as well as compensation.<sup>148</sup> This first conflict took place in September of 1904, after the peak of the salmon run for the Ned'u'ten, and this probably explains why they were not more resistant to the fisheries officers. The following year the fisheries officers returned, this time before the salmon runs, bringing with them the promised nets, although the nets they brought were old and

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<sup>146</sup> Interview with Nick Claxton (26 March 2004).

<sup>147</sup> *Ibid.*

<sup>148</sup> *Supra* note 140 at 99.

rotting. The Ned'u'ten tried to use the nets, and according to fisheries officers the season was a success. But the Ned'u'ten were starving by spring.<sup>149</sup> The next year fisheries officers went back to the community, this time to bring more nets. But the Ned'u'ten refused the nets and informed the officers they were putting their weirs back in place. The fisheries officers then tried to take the weir down, which led to a violent clash. Hans Helgeson, one of the fisheries officers present, described the scene as a row of women, "armed with clubs" and behind them, "fifty or sixty men in line on bank of river with clubs, all shaking with excitement frothing at the mouth looked like fiends turned loose from Hades".<sup>150</sup>

The Ned'u'ten held fast to their weirs, refusing to take them down, even under the threat of arrest and imprisonment. The fisheries officers wanted a militia sent in to quell the Ned'u'ten, but none was ever mobilized.<sup>151</sup> Eventually, on the urging of local missionaries the Ned'u'ten agreed to take the weirs down and to negotiate with the government. In the end, the Ned'u'ten were given better nets and encouraged to take up farming. While Helgeson's comments were clearly an exaggeration, it is no wonder that the Ned'u'ten reacted so strongly; clearly the government, the fisheries officers, and the church had no understanding of the importance of the fishery, not just in terms of a food supply, but also in terms of governance and culture. Further, given the results of pacifism, the Ned'u'ten were probably right in reacting violently to attempts to take away their

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<sup>149</sup> Douglas Harris, "Babine Fish Weirs and Canadian Law in Early Twentieth Century British Columbia" (1997) online: Canadian Law & Society Association <<http://www.rcds-cjls.uqam.ca/harriswp.htm>> (date accessed: 26 February 2004).

<sup>150</sup> Geoff Meggs, *Salmon: The Decline of the British Columbia Fishery* (Toronto: Douglas & McIntyre, 1991).

<sup>151</sup> *Supra* note 140 at 99.

fishery. The Ned'u'ten case provides a clear example of how profoundly misunderstood the Indigenous fishery was to the settler society, and sadly, the future would bring little in the way of understanding.

The Cowichan people on Vancouver Island also had conflicts with fisheries officials in the early part of the 1900's and continued to actively resist the DFO by using weirs off and on from 1877-1937.<sup>152</sup> The Cowichan actively resisted the encroachment of settlers onto their land, in turn restricting their access to fish, and they also used legal forums to prevent the removal of the weir fishery. The Cowichan also had alternating support from settlers and sports fisherman, depending on the issue in question, and they managed to use that to their advantage. The Cowichan's efforts were impressive, and Harris notes that they "defended their weirs longer than any Native group in the province".<sup>153</sup>

### **The Conflicts of the 1970's**

The continued resistance and defense of fishing rights did not neatly stop in early 1900's. Indigenous peoples all along the pacific coast, in Canada and the United States continued to demand their rights, with the only real change being in how the media characterized the issue, whether it was one demanding attention, or one that could slip to the back pages of the newspaper, or out of the public view entirely.

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<sup>152</sup> *Supra* note 140 at 127.

<sup>153</sup> *Supra* note 140 at 180.

Tarrow notes that the United States was a hotbed of contention in the 1960's and into the 1970's. Anti-war protests, civil rights and the women's movements were all gaining political ground in the United States at that time so it was no wonder that Indigenous groups also started their own contentious movements during this "cycle of contention".<sup>154</sup> As Tarrow notes, "The process of diffusion in cycles of contention is not merely one of contagion though a good deal of contagion occurs. It also results from rational decisions to take advantage of opportunities that have been demonstrated by other groups' actions".<sup>155</sup>

In Canada contention took the form of protest fisheries, like the one established by the Cowichan. In 1973, almost 40 years after the Canadian government thought they had finally got rid of the Cowichan weirs for good, up one went. Fisheries officers, instead of dismantling the weir, merely observed the action.<sup>156</sup> However, members of the Cowichan, like other Indigenous peoples, have been repeatedly charged for fishing within their own traditional waters.

In the United States Indigenous peoples defending their fisheries drew nationwide attention. By the 1960's and 1970's conflicts between fisheries officers and Indigenous peoples were becoming more intense. In 1964 the Nisqually had the first fish-in, with the hope that it would attract media attention and that the state would back down on the

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<sup>154</sup> *Supra* note 136 at page 24.

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

<sup>156</sup> *Supra* note 140 at 183.

injunctions it was handing out against Indigenous fisheries.<sup>157</sup> Not only did the event attract attention, but movie stars began to support the cause, including Marlon Brando.

The clashes between fisheries officers and the Indigenous would continue for years. Increasingly, fisheries officers were using violence against the Indigenous peoples, and the media was picking this up. The public was also being given actual numbers of the Indigenous fishery versus the non-Indigenous fishery, which showed that the commercial fisheries were taking 80% of the salmon.<sup>158</sup> The public began to throw their support behind the Indigenous movement to regain some control over their fishery. Thus, while the Indigenous protests may not have been the result of the contagion of which Tarrow speaks, or even necessarily the result of a rational decision to take advantage of a historic time, the public may very well have been acting on contagion, more likely to support rights in an era of increased liberalism, and in an era where activism and resistance was popular. In any instance, the United States government had to respond in some way. Their response came in the form of *The United States vs. Washington* case, also known as the Boldt decision.<sup>159</sup> In this case the United States was responsible for upholding treaty rights, as against the state, and in this case, those treaty rights were affirmed. The Boldt decision stated that Indigenous peoples should be allocated one half of the available fish, and that they had the duty of both policing the traditional fishing sites, and drawing up a tribal fishing code.<sup>160</sup> In this instance, Indigenous peoples won a right in court, without ever having to subject themselves to the process in the sense of bringing a case on their

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<sup>157</sup> *Supra* note 140 at 161.

<sup>158</sup> *Supra* note 140 at 165.

<sup>159</sup> *The United States vs. Washington*, (1974) 384 F.Supp. 312.

<sup>160</sup> *Supra* note 140 at 171.

own behalf. Therefore, they achieved political recognition without having to accept, either implicitly or explicitly, the authority of the United States to govern their fishing rights. The situation in the United States is far from perfect, and disputes still take place. However, the Indigenous peoples on the American side of the border have made remarkable achievements simply in acting out a way of life that has existed for thousands of years. Certainly the appearance of celebrities like Marlon Brando helped the cause, and perhaps the timing of the actions also aided in bringing about a positive outcome, but in reality, the act that changed reality for Indigenous peoples was that of putting a net in the water, as the Indigenous peoples have done since time immemorial. Certainly this demonstrates that Indigenous peoples do not need to turn to the courts for recognition of a right. Instead the Indigenous peoples in Washington state simply acted on a right they recognized within their own communities and the courts followed suit, but again, by not taking the case themselves, Indigenous peoples were not sacrificing their sovereignty or subjecting it to the rule of a foreign court.

### **Modern Conflicts**

Fishing issues are no less relevant to Indigenous peoples today than they were in the past, and in some aspects they may be more important. Many Indigenous communities are at a crucial point, where languages are being lost, and ways of life are being forgotten. For coastal communities the need to educate young people about the culture necessitates the return of the traditional fishery. Moreover, the ability to conduct traditional ceremonies, to properly govern, and even to pass on the language, is deeply enmeshed with the life of the salmon. Sadly, the world's oceans are becoming more and

more, polluted, and fish stocks are being dramatically depleted. In the area local to Victoria the salmon stock has been dramatically depleted in recent years, to the point where some species of salmon are on the verge of extinction. Settler society has shown an incapability to manage fisheries resources in the face of greed. As the need to protect and better manage stocks becomes an issue, Indigenous peoples will have to tailor their resistance, not simply to defend a right to fish, but in terms of defending a right to protect fish.

The DFO has long used conservation concerns as a means to control, and in many cases, halt the Indigenous fishery. In British Columbia, Indigenous issues are of importance, not just in terms of the fishery, but also in terms of land claims. British Columbia has witnessed a series of racist governments that will use any means to discredit Indigenous peoples and their issues. British Columbia is highly resource dependant, with large lobbies working on behalf of the resource industries. As such, even organizations like the Aboriginal Fishing Strategy (AFS), meant to represent the Aboriginal interest in the fishery, actually acts primarily in the corporate interest.<sup>161</sup> Of course, Indigenous peoples should not be surprised by this, time and time again the government has demonstrated that it is not only incapable of recognizing an Indigenous interest, but it is also incapable of actually working in a co-management capacity. For several Indigenous communities the term “co-management” could easily be replaced with “co-opted”. Sadly, even with cases such as *Sparrow*, which was categorized by many as a win for Indigenous peoples, Indigenous participation in the fishery has actually

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<sup>161</sup> Parnesh Sharma, *Aboriginal Fishing Rights* (Halifax: Fernwood Publishing, 1998) at page 50.

declined.<sup>162</sup> Parnesh Sharma has uncovered some of the disturbing ways in which the DFO pushed Indigenous peoples out of the fishing industry. Sharma details the fishing season of 1995 in which the DFO asked Indigenous peoples to not catch their allocation of fish due to conservation issues.<sup>163</sup> There was no such conservation issue (or if there was the DFO was not actually aware of it). As Sharma notes, “Rather, the DFO, under intense pressure from the commercial lobby, lied to the aboriginal fishers and simply reallocated the aboriginal food fish to the commercial fishery...The decision to violate aboriginal fishing rights and the terms of the AFS agreement apparently occurred with the full knowledge of the Federal Minister of Fisheries Brian Tobin”.<sup>164</sup>

Given the dishonesty by the DFO and by the government in general, it is little wonder that Indigenous peoples occasionally clash with DFO officers and government officials; in fact, it is surprising that it does not happen more. This is especially so given that court actions do little to resolve matters, a fact dating back to the *Worcester* decision wherein Chief Justice Marshall affirmed that the Cherokees were a self-governing peoples prior to the forced removal from their homelands in 1838. As stated in the previous chapter, Andrew Jackson, the president of the United States at the time of the decision in *Worcester*, completely dismissed Chief Justice Marshall’s ruling. As noted in the previous chapter, little has changed in government attitudes towards Indigenous rights and another Marshall, Donald Marshall, would prove this to still be the case in 1999. In 1999 the Supreme Court of Canada determined that the Mi’kmaq had a treaty right to catch and sell fish, as well as to earn a “moderate” livelihood from the sale of fish. The

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<sup>162</sup> *Ibid* at 54.

<sup>163</sup> *Ibid*.

<sup>164</sup> *Ibid*.

ruling, however, was meaningless on the ground, with the Mi'kmaq simply having to take the initiative in the exercise of their rights, regardless of how the government intended to address the situation.

For the Mi'kmaq, the *Marshall* decision did not create a right, the Mi'kmaq already held the right. What the *Marshall* decision did was create a stronger resolve within communities to resume the fishery that had been vital to their communities and culture for thousands of years. By February of 2000 the Mi'kmaq had decided to take the political initiative (partly as a result of a second court ruling in the *Marshall* decision, which restricted the rights accorded to the Mi'kmaq in the first decision) and define their own rights, outside of Canadian courts, outside of colonial legal structures. What resulted was the Esgenoopetitj Fisheries Act and Management Plan. The creation of this came out of a process owned by the community of Esgenoopetitj (Burnt Church), whereby extensive consultation took place.<sup>165</sup>

In August of 2000 the people of Esgenoopetitj began to fish for lobster, which for the community was a living act of self-determination.<sup>166</sup> The DFO responded with violence. The violence that ensued was seen in homes across Canada; pictures of DFO boats ramming those of the Indigenous, non-Indigenous fisherman using violence against the Indigenous, yelling slurs and destroying equipment. While all this was happening the people of Esgenoopetitj continued to fish, all the while feeling an increasing sense of protectiveness for their rights, as well as a renewed sense of pride in their culture. The

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<sup>165</sup> Interview with James Ward (10 March 2004).

<sup>166</sup> *Ibid.*

fight ended when a backroom deal was made between the chief and council of Esgenoopetitj, and the DFO.

Back on the west coast, the Pilalt (Cheam) have always been active resisters to colonial authority, especially with respect to DFO interference in the Pilalt fishery. When DFO decides to implement measures affecting the Pilalt without consulting the Pilalt the Pilalt generally disregard the DFO and continue on in the manner that the community deems appropriate. For example, in 1998 the Pilalt continued to fish for sockeye after the DFO told them to stop. The Pilalt did not make a big issue about it, they simply continued on as they had before, and the DFO were then forced to negotiate.<sup>167</sup>

In the summer of 2003 the media again focused on events within the Pilalt community. Again the Pilalt continued to fish for salmon despite a closure by the DFO. DFO officers came into the community and threatened and abused Pilalt member Sidney Douglas Sr. when he informed them they had no right to be on Pilalt land.<sup>168</sup> Later on that same summer Bill Otway of the Sportfishing Defence Alliance called for military presence because of the belief that the Pilalt were armed.<sup>169</sup> The military was not called in, but the fact that people were even contemplating it demonstrates the uphill battle

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<sup>167</sup> Lori Culbert, "Feds, Native fisherman Reach Deal" The Vancouver Sun (3 July 1998) online: SISIS <<http://sisis.nativeweb.org/clark/jul1398can.html>> (date accessed: 10 March 2004).

<sup>168</sup> Annette Kouri and Beverly Bernardo, "Cheam in Canada Defend fishing rights" (2003) online: The Militant <<http://www.themilitant.com/2003/6727/672751.html>> (date accessed: 15 March 2004).

<sup>169</sup> Mark Hume, "Cheam band alleged to be stockpiling guns" The Globe and Mail (25 July 2003) A6, online: Globe and Mail <[www.globeandmail.com/servlet/ArticleNews/TPStory/LAC/20030725/USALMXI/National/Idx&disp=e&end](http://www.globeandmail.com/servlet/ArticleNews/TPStory/LAC/20030725/USALMXI/National/Idx&disp=e&end)> (date accessed 25 March 2004).

Indigenous people face in terms of communicating the truth to a public that would rather remain ignorant of the true situation.

2003 would prove to be an active year for the DFO. In September of that year they planned to open the Saanich inlet to the commercial fishery. The Saanich communities considered action but were thwarted when members of the Saanich Tribal Fishery decided to make a deal with the DFO.

The Indigenous peoples of both the east and west coasts will face continued resistance to their fishery as commercial interests begin to face restrictions in light of diminishing stocks. Additionally, Indigenous peoples on the west coast may have battles to fight with an increase in farmed salmon, which adversely effect local salmon populations. The above noted incidents served only to give a brief overview of the kinds of resistance that Indigenous peoples are taking against the DFO and governmental control over their fisheries.

### **Analysis**

In July of 2003 Justice Kitchen released his decision in the case of *R. v. Kapp* (“*Kapp*”).<sup>170</sup> *Kapp* was a case involving non-Indigenous fisherman who contravened a close time order by DFO and fished using gillnets. But the real focus of the case was the motion put forward by the defense that the Aboriginal food fishery violated section 15

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<sup>170</sup> *R. v. Kapp* [2003] B.C.J. No. 1772.

(the equality provision) of the *Charter of Rights and Freedoms*.<sup>171</sup> Justice Kitchen found that the Aboriginal food fishery does violate section 15, and called it “racial discrimination”. In making this judgment Justice Kitchen demonstrated a profound lack of understanding of Indigenous issues, cultures, rights, etc. Justice Kitchen totally disregards the fact that the Indigenous fishery is based on prior occupation and the nation-to-nation relationship between Canada and Indigenous peoples. Kenneth Deer notes, “The rights of the first peoples in North America are not based on race. Those rights stem from their existence as peoples and nations. From time immemorial, they have exercised the right to self-determination by developing their own political systems, laws, territory, economy and social structures”.<sup>172</sup>

Many opposed Kitchen’s decision, including many non-Indigenous peoples, the decision smacked of racism and at the end of the day was not even good law (demonstrating that not only does Justice Kitchen not understand Indigenous rights, he does not understand the very law which he is supposed to uphold). But, regardless of the correctness of the decision, the fact is, Kitchen responded to a powerful lobby in the province, and it is a lobby which violates Indigenous rights and title at almost every turn. Therefore, the idea that litigation will ever win the day for Indigenous peoples is patently false. As Parnesh Sharma notes, “the perception or belief that litigating Constitutionally entrenched legal rights encourages social transformation appears to be based almost entirely on theoretical considerations rather than on substantive evidence; that is, most

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<sup>171</sup> *Charter of Human Rights and Freedoms*, R.S.C. c. C-12, s. 15.

<sup>172</sup> Kenneth Deer, “Native rights based on nationhood, not race” *The Montreal Gazette* (5 August 2003) online: Taiaiake.com <[http://www.taiaiake.com/toske/archive.html#Aug05\\_03](http://www.taiaiake.com/toske/archive.html#Aug05_03)> (date accessed 25 March 2004).

arguments on the transformative capacity of the law assume that winning court cases automatically translates into rights. However, social transformation is not that simple”.<sup>173</sup>

Taking issues of Aboriginal rights into courts creates a further danger and a danger far greater than it simply not resulting in change; going to court confines rights to the states interpretation of them. It removes the community from defining for themselves what their rights are, what they look like and how they will be exercised and puts those rights and the definitions of those rights into the hands of the state and *ergo*, it puts the maintenance of a culture into the hands of the state, and the state has repeatedly proven that it’s motive is to at the very least subsume Indigenous culture, if not outright destroy it.

In many of the examples of resistance provided in this paper individuals were put in jail, were taken to court, and in many cases, they lost at trial and were forced to pay fines. When confronting the state with one’s own interpretation of rights there is almost certainly going to be conflict, however, the difference between forced and voluntary litigation is that at least when one is forced into court one is not necessarily conceding to a colonial authority. Further, the onus is shifted onto the Crown to prove its case against the Indigenous accused.

There seems to be a growing recognition amongst Indigenous communities that litigation is not the answer. Instead, as the examples provided have demonstrated, communities are simply acting, whether that acting is in the form of planned resistance,

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<sup>173</sup> *Supra* note 161 at 14.

or simply in the resumption of traditional activities. So what have these acts accomplished? Were gains made for communities as a result of acts of resistance? Obviously communities must decide for themselves whether or not a gain was made through their resistance. In all the modern examples of conflict, community members believed that despite a perceived failure, in terms of not gaining any more control over their own fishery, the actions were still successes because of how they brought communities together. In some cases communities already had a measure of solidarity, but in other cases communities were brought together that were otherwise fragmented. James Ward,<sup>174</sup> of Esgenoopetitj stated that the incidents at Burnt Church in 1999 and 2000 brought together a community that had previously been severely split, not just amongst each other, but also even within families. Ward states that the events have left a lasting impression on the community, with a renewed sense of community and pride. In the case of Esgenoopetitj, the fishery resistance was quelled because of the chief and council signing an agreement with the DFO without the permission or input from the community, but Ward asserts that even this was not necessarily all bad, because this back room dealing served to remind community members how flawed *Indian Act* created governance is. Also, it serves as a reminder of the vigilance that must be maintained in any movement of contention, because governments focus and exploit those cracks that exist in movements, Tarrow states, “By negotiating with some elements among a spectrum of contenders, governments encourage moderation and split off the moderates from their radical allies”.<sup>175</sup> This type of fragmentation is relied on heavily by the DFO. Sharma points to the fact that the DFO actually employs individuals to gather intelligence

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<sup>174</sup> *Supra* note 165.

<sup>175</sup> *Supra* note 136 at 149.

on community members, with an aim to focusing their negotiations on those most likely to concede or to take a personal payout, “the DFO has engaged in intelligence gathering as if the aboriginal peoples are some kind of Cold War enemy”.<sup>176</sup> Nick Claxton,<sup>177</sup> a member of Tsawout, part of the Saanich people, asserts that despite the fact that the resistance was never fully realized within the Saanich community, the community meetings at least led to a discussion amongst community members that otherwise would not have taken place. As scholar Doug McAdam notes, this information sharing is a vital part of the process of contention, “Before collective action can get underway, people must collectively define their situations as unjust”.<sup>178</sup> Nick Claxton said it was heartening to see that traditional modes of communication were used in the community meetings, in that heads of families were speaking on behalf of their families. Further, the reef net fishery was discussed, in real terms, not just as an abstract and remote idea taught in schools. Corky Douglas,<sup>179</sup> of the Pilalt, also talks about how important it is that young people are involved and witness these struggles. He states that within the Pilalt peoples the young people start fishing very early in their life, and learn that it is an important part of their culture, and they learn the importance of protecting their fishery, not just in terms of fishing but also in terms of what it represents to their culture and governance.

Further, these acts of resistance can lead to other acts of resistance, and in the later acts the communities will be better informed as a result of historic conflicts. Nick Claxton does not rule out the possibility of future conflicts on the Saanich Inlet, but

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<sup>176</sup> *Supra* note 161 at 57.

<sup>177</sup> Interview with Nick Claxton (26 March 2004).

<sup>178</sup> *Supra* note 136 at 111.

<sup>179</sup> Interview with Corky Douglas (15 March 2004).

believes that the people will be better prepared to deal with any future issues because they are now giving thought to their rights, their traditions and the importance of the fishery to their community. James Ward notes that resistance is a process, it takes time and patience to create a movement. Sidney Tarrow also notes that contention tends to beget contention in the sense that, “Actions can affect the likelihood of other actions by creating occasions for action, by altering material conditions, by changing a group’s social organization, by altering beliefs, or by adding knowledge”.<sup>180</sup> Sometimes it is just seeing that other communities can, and are standing up to their oppressors is enough to inspire action. When the incidents at Burnt Church were happening in the fall of 2000 even people as far away as the prairies, in cultures as different from the Mi’kmaq as the Blackfoot, still were effected in their own sense of pride in their culture because of witnessing another community stand up, resist, and fight for what is theirs. Tarrow discussed the importance of having media involvement, and the ability to have some sort of control over the media, “movements that wish to communicate with a broader public must either have the internal resources to ‘perform’ protest or use the media in order to do so”.<sup>181</sup> In the case of Indigenous communities, winning over the Canadian public is not likely, regardless of the effort put into it. This is simply because the corporate machine that is the current government has an economic interest in maintaining the status quo, and will stop at nothing to ensure their interests are protected. But, Indigenous people must use their own media, whatever form that might take, in ensuring that their own communities are educated about the issues and the actions of the government and

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<sup>180</sup> *Supra* note 136 at 143.

<sup>181</sup> *Supra* note 136 at 114.

government agencies. This communication will be needed in future actions to prevent the sort of back room deals that have meant the demise of movements in the past.

The fishery conflicts remain an issue in communities and as the situation becomes more dire, contention will increase. Tarrow notes that contention increases when people “are threatened with costs they cannot bear or which outrage their sense of justice”.<sup>182</sup> With respect to the fishery Indigenous peoples are being faced with costs that cannot be borne and as a result they are becoming increasingly active in preserving their rights. Corky Douglas notes that the Pilalt are approaching the issue from all angles; acts of defiance, litigation, education, etc. Corky Douglas believes that in the modern era one approach will not be enough. He does believe however, that it is crucial that communities stop regarding what they are doing as resistance. He states that in classifying their actions as resistance they are suggesting that what they are doing is wrong. Instead he believes that communities must simply regard what they are doing as the exercising of rights.

The knowledge of one’s culture, of one’s traditions is what leads to community unity and community unity is vital if any successful opposition is to be mounted against the DFO or other government agencies. This is no longer simply a fight of might, but is instead a fight that requires solidarity and a sense of values and tradition. A clear example of this is the summer of 1986, when a Gitksan fishing camp was being shut down by DFO officers. The community stood in solidarity against the officers. Not knowing what to do to force the officers away, the community began to throw marshmallows at the

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<sup>182</sup> *Supra* note 136 at 71.

officers. Shocked, the officers simply drove away.<sup>183</sup> The modern conflicts have demonstrated the ability of communities to return to a place of solidarity and that solidarity can create huge changes, even with marshmallows as a weapon. In each movement described there have been moments of community consensus and what has broke each movement has been when the community is fragmented. To see any result from these movements will require patience and strength, but after 500 years of colonization, Indigenous peoples have demonstrated they are not in short supply of either of those factors. Anishnabe scholar Dale Turner describes a need for “word warriors” among Indigenous peoples, these individuals would “concern themselves with the way that words are used, and the way that words form intellectual landscapes”.<sup>184</sup> In essence, these Indigenous thinkers would keep the dominant culture in check and would ensure that their own culture thrives within their own communities. While this vision of academia being the keepers of a culture is problematic, elements of what Turner describes can be utilized by Indigenous people, for example, in the maintenance of a connection with community, even when physically disconnected.

### Conclusion

Resistance, or the exercising of rights, acknowledges what a court room simply cannot; that communities are the sum of all their parts, that issues cannot simply be reduced to one of land, fish, trees. By not simply taking these issues into court Indigenous peoples are maintaining their right to define who they are, what they are and what it

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<sup>183</sup> N.J. Sterritt, “Gitksan and Wet’suwet’en: Unflinching Resistance to an Implacable Invader” as excerpted in Boyce Richardson, ed. *Drum Beat* (Toronto: Summerhill Press, 1990).

<sup>184</sup> *Supra* note 137 at 237.

means to be Indigenous. In a sense, the exercise of rights has become a part of ceremony, the ceremony that is community, solidarity and survival.

## **Conclusion**

In 1884, the Canadian government outlawed Indigenous ceremonies, including the Potlatch and Sundance. Of course, anyone with any knowledge of Indigenous peoples in Canada today knows that those ceremonies are alive and well, and are just as important to the fabric of the culture today as they were hundreds of years ago. Indigenous people have known all along that it is ill advised to ask the colonial powers for permission to exist. Instead, communities have long taken it upon themselves to self perpetuate and to endure. Much is written on the suffering of Indigenous peoples, but very little is written on the resiliency of Indigenous peoples. The legal system has never aided in that resiliency, but has instead only been another forum for colonial attack on Indigenous structures.

The first chapters in this thesis demonstrate the subtle, and not so subtle ways in which the law has acted as a tool of colonization, with the last chapter demonstrating that the law is not the best last resort, and that it may very well be the worst thing that Indigenous peoples can do in response to colonization. This is because the law demands, at least on some level, an acceptance of the legitimacy of colonization. The colonial regime is still seeking, perhaps even more so today, to absorb Indigenous peoples into the body politic and asking Indigenous peoples to adopt and adapt colonial legal institutions is simply a part of this effort. As has been noted, even those acts by the government and courts, such as the addition of section 35 to the Constitution, which appear to be beneficial to Indigenous peoples, have the effect of at the very least co-opting Indigenous peoples into the Canadian mainstream. Going to courts demands an acceptance of

Canadian sovereignty and demands a renunciation of Indigenous sovereignty. As has been noted, sovereigns do not ask other sovereigns for permission to maintain their independence. Resorting to the courts forces Indigenous peoples to reduce their arguments into those recognized by the legal regime and removes any capacity for communities themselves to make decisions. The courts have actively attempted to simply reduce Indigenous cultures to relics of the past; communities must work to perpetuate their cultures into the future. Instead of putting effort into reconciling Indigenous claims with Canadian law it is time for Indigenous communities to actively employ other approaches, approaches which could include some of those outlined in chapter three.

Some of the ways to resist include (but are certainly not limited to):

- Resisting by participation in traditional activities, remaining a part of, and committed to a community, and staying rooted within community;
- Maintaining relationships within, and when possible, between communities;
- Direct action, for example in continuing a traditional practice, even if that practice has been outlawed by the colonial regime;
- Living those cultures the governments (and courts) are actively trying to suppress;
- Relying on one's own community to validate culture and cultural practices, and to avoid looking outside for validation; and
- Educating one's own community about issues, and about dangers in relying on courts.

Obviously, whether or not a community chooses to take its claims to rights and title to a court is the community's choice, but discussion must be generated. It is time for Indigenous peoples to critically examine the impacts of past legal efforts, and determine whether they as a community want to continue to be a part of a system that has actively

denied and repressed Indigenous rights. It must be further acknowledged that the participation of one Indigenous group in any legal forum implicates all, so this dialogue must take on a far-reaching scope. It must be recognized, that under the current regime, legal institutions can only act to shape Indigenous lives and cultures according to a colonial agenda. Communities must be armed with the knowledge of what the potential outcome of legal action is, not just with respect to an individual ruling, but in terms of the great costs involved, not just monetarily, but in terms of the sovereignty so many Indigenous communities still hold dear. Secwepemc man and political visionary George Manuel noted,

When the anthropologists have tired of telling Indian people the proper way to smoke our salmon, dry our meat, or prepare our corn soup, the largest number of our Indian children will still go to bed hungry. When the civil servants have told the politicians for the last time that 90 per cent of our Indian people are below the poverty line drawn across the whole of Canadian society by Senator Croll's Committee on Poverty, we will still be the losing side in the bureaucrat's war on poverty; and the missionaries will still be trying to save our burning souls to the neglect of our frozen bodies.<sup>185</sup>

To this I would add that, when the lawyers are still telling the Indian people that all they need is one big win, one big case, and when Indian communities are still forking out millions in legal fees and time, to the neglect of their own communities, land will still be lost, trees will continue to be cut and the land will continue to be pillaged for profit. Thus, it is imperative that communities do the work of reclaiming their land and their cultures, by resistance, whether that resistance is armed or simply by the living their cultures. It is essential that communities no longer rely on those courts that have been complicit in their genocide to give them their freedom. Adolph Hitler wrote, "The great masses of

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<sup>185</sup> George Manuel, *The Fourth World* (New York: The Free Press, 1974) at 181.

people...will more easily fall victims to a big lie than to a small one".<sup>186</sup> The courts have perpetuated the big lie of emancipation through the Canadian legal system. Indigenous peoples must continue to struggle to deny those lies, that struggle will not be in the courtroom, that struggle will be in the communities, on the land, living the lives the colonizer is determined to deny.

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<sup>186</sup> Adolph Hitler, *Mein Kampf*, (Greenwich: Norman Publishing, 1939).

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