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A COLONIAL READING OF RECENT JURISPRUDENCE: *SPARROW, DELGAMUUKW* AND *HAIDA NATION*

Gordon Christie*

Throughout Canada's long colonial relationship with Aboriginal nations, the Crown and the judiciary have worked in tandem. Historically, executive and legislative arms of government developed and implemented dispossessive and oppressive colonial policies and legal regimes, while the courts consciously developed conceptual frameworks meant to justify the taking of lands and the denial of Aboriginal sovereignty. This essay explores judicial attempts to justify the taking of lands and the denial of Aboriginal sovereignty, with the focus on how doctrinal law has conceived the transition from a world in which collective understandings of Aboriginal nations define the nature of their land interests to a world in which Crown sovereignty is asserted over Aboriginal peoples and their lands. A jurisprudential colonial narrative is thereby illuminated. This colonial narrative is then traced through the trajectory of recent Supreme Court of Canada decisions (moving from Calder to Delgamuukw, and culminating in the recent decision in Haida Nation concerning the Crown's duty to consult). The key question is whether these decisions demonstrate a shift away from the colonial mentality, which the Court has fostered and worked within for so many years.

In unpacking recent choices the Supreme Court has made, maintenance of a steady colonial course is revealed. To fully appreciate what it means to say that contemporary jurisprudence is essentially colonial in nature (and thereby to begin to envision paths toward a post-colonial existence), attention must be fixed upon the manner in which the judiciary is revealed as playing a central role in formulating visions of lands, peoples, and their interrelationships. The Supreme Court continues to privilege non-Aboriginal visions of land and land use. In doing so it denies Aboriginal sovereignty, as Aboriginal nations find themselves forced to welcome the opportunity to be consulted about how their own lands will be exploited. In choosing thereby to write another chapter in the colonial narrative, the Court continues the project of constructing a national identity, one that

* Associate Professor, Faculty of Law, University of British Columbia. I would like to thank the anonymous referees for their many helpful comments – one comment in particular pointed out an especially egregious error on my part. All remaining errors and shortcomings are entirely my responsibility. I would also like to acknowledge the helpful and gracious assistance of the staff of the Yearbook.

has as its core a central vision of Canada as a colonial state. A post-colonial world will only be realized if Canadian courts rethink the role they play in defining Canada's colonial identity.

Tout au long de la longue relation coloniale entre le Canada et les nations autochtones, la Couronne et l'organisation judiciaire ont travaillé de pair. Historiquement, les branches exécutive et législative du gouvernement ont développé et mis en vigueur des politiques coloniales et des régimes juridiques frustrants et oppressifs, alors que les cours ont sciemment développé des cadres conceptuels visant à justifier la prise de terres et le déni de la souveraineté autochtone. Cet article explore les tentatives judiciaires pour justifier la prise de terres et le déni de la souveraineté autochtone, concentrant sur la façon dont le droit doctrinal a conçu la transition d'un monde où la pensée collective des nations autochtones définit la nature de leurs intérêts agraires à un monde où est affirmée la souveraineté de la Couronne sur les peuples autochtones et sur leurs terres. Un récit colonial jurisprudentiel est ainsi mis en lumière. Puis ce récit colonial est suivi au long du trajectoire de décisions récentes de la Cour Suprême du Canada (passant de Calder *à* Delgamuukw *et culminant en la récente décision* Haida Nation *concernant le devoir de la Couronne de consulter). La question-clé est à savoir si ces décisions manifestent un départ de la mentalité coloniale que la Cour a encouragée et qui a orienté son travail pendant tant d'années.*

Décortiquer les choix récents faits par la Cour Suprême révèle le maintien d'une ligne de conduite coloniale constante. Pour bien apprécier ce que l'on signifie en disant que la jurisprudence contemporaine est essentiellement de nature coloniale (et ainsi commencer à prévoir des chemins vers une existence post-coloniale), il faut fixer son attention sur la façon dont est révélé que l'organisation judiciaire joue un rôle central dans la formulation de visions de terres, de peuples et des relations entre eux. La Cour Suprême continue de privilégier des visions non-autochtones des terres et de leur utilisation. Ainsi, elle dénie la souveraineté autochtone pendant que forcément les nations autochtones se trouvent contentes de l'occasion d'être consultées au sujet de la façon dont leurs propres terres seront exploitées. En choisissant d'écrire ainsi un nouveau chapitre du récit colonial, la Cour continue le projet de construction d'une identité nationale au coeur de laquelle se trouve une vision centrale du Canada comme état colonial. Un monde post-colonial ne sera réalisé que si les cours canadiennes repensent le rôle qu'elles jouent dans la définition de l'identité coloniale du Canada.

I. INTRODUCTION

Any historical narrative of the early period of contact between European powers and Aboriginal peoples in Canada would chronicle tension between the French

and British as they contested over the lands and wealth laid out before them. This narrative, however, would generally describe fairly peaceful and respectful relations between the two Crowns and Aboriginal nations, evidenced by treaties of peace and friendship and mutually beneficial, economically driven, patterns of behaviour.[1] Over time, though, as the military, economic and political presence of first the French and then the British advanced to stages wherein alliances with Aboriginal nations were no longer necessary for success in the struggle against other European powers (and the developing threat to the south), the political and economic dynamic between Aboriginal peoples and the Crown – by this time the British Imperial Crown – became marked as essentially colonial, driven by a powerful expansionist agenda. By the time the new Dominion of Canada emerged in 1867, Aboriginal peoples were faced with a massive program of land-dispossession and regulatory control.

While policies and programs came and went over the next century or so, their emphasis was consistently the same – the intent was clearly to (a) effect the removal of Aboriginal peoples from their lands, and to (b) either ignore their continued physical existence on postage-stamp reserves, to promote an active program of assimilation, or to hope to solve the 'Indian problem' through the removal of the 'Indian' from the person.[2] Here we clearly see in unambiguous events the unfolding and expansion of an essentially colonial agenda – the taking of lands from indigenous inhabitants, and attempts to whitewash this taking either by ignoring and undercutting the remonstrations of the colonized[3] or by working to eliminate their presence, in hopes they might through time disappear.

What of the 'rights' of the Aboriginal peoples of Canada during this overtly colonial period?[4] This sort of question is best prised into two distinct queries.

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1 Canada, *Report of the Royal Commission on Aboriginal Peoples, Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply & Services Canada, 1996). Naturally, if an Aboriginal nation allied itself with one of the two European powers then its relations with the other were less than friendly. It should also be noted that relations between colonial settlers and Aboriginal peoples were often less than respectful, as many settlers saw opportunities for financial and political advancement through the perpetuation of various 'frauds' and 'abuses' upon Aboriginal people. One motivation for the issuance of the *Royal Proclamation of 1763* [*Royal Proclamation, 1763*, R.S.C. 1985, App. II, No. 1] was to put an end to these abuses by both (a) requiring settlers to remove themselves from lands not yet purchased by or ceded to the Crown and (b) making Aboriginal title inalienable to all by the Crown (at 116–17).

2 See *e.g.* the words of Duncan Campbell Scott, Superintendent of Indian Affairs, in describing the aim of the policies in the early part of the 20th century: "Our object is to continue until there is not a single Indian in Canada that has not been absorbed into the body politic and there is no Indian question, and no Indian department" (debating amendments to the *Indian Act* (R.S.C. 1985, c. I-5) before parliament in 1920, cited in Canada, John Leslie & Ron Maguire, eds., *The Historical Development of the Indian Act*, (Ottawa: Treaties and Historical Research Centre, Research Branch, Corporate Policy, Department of Indian and Northern Affairs, 1979) at 114.

3 Claims against the government were consistently ignored. When they became difficult to ignore – as when Aboriginal representatives went to the Imperial Crown in efforts to have someone acknowledge the takings and injustices – the government would respond with such tactics as the 1924 amendments to the *Indian Act*, *ibid.*, which made it illegal to raise funds to pursue claims against the government.

4 In this context the expression 'rights' is used to denote valid interests held by Aboriginal nations, without ascribing conceptual content to the instruments used to protect these interests. The query here is about the status of valid claims Aboriginal nations ought to be able to make against external agents.

On the one hand, this question can be asked from perspectives outside the colonial narrative itself: how can the colonial narrative be acceptable, given that it is a story of the apparently unjustifiable taking of lands and resources and the apparently unjustifiable undercutting of Aboriginal jurisdictional authority? From what possible external perspectives (moral or legal) could one justify the usurpation of the collective rights of the Aboriginal peoples of Canada?[5] On the other hand, this question can be asked from within the colonial narrative – in particular, from the perspective of the legal regime that played such a central role in the process of colonization. That is, how can the denial of the claims of Aboriginal peoples be *understood* from within Imperial and/or domestic Canadian law?

The intent in the main body of this essay is to remain within, and thereby to focus upon, the colonial narrative. The first section of this paper examines colonial jurisprudential attempts at justifying the taking of Aboriginal lands and the arrogation of jurisdictional authority from Aboriginal nations. The second section is an exploration into contemporary jurisprudence concerning Aboriginal 'rights',[6] the question being the extent to which the Supreme Court of Canada has deviated from the path and direction laid out by earlier colonial courts. In particular, the investigation leads to an examination of the emergence of a duty to consult which may fall upon the Crown when it acts in such a way as to substantially interfere with Aboriginal and treaty rights recognized and affirmed in section 35 of the *Constitution Act, 1982*.[7]

The analytic core of this essay remains focused within an internal perspective of the colonial narrative in order that we might be able to clearly delineate the path down which the Supreme Court of Canada is taking the common law on Aboriginal rights. The direction in which the Court is currently moving the law is clearly revealed through this exploration of the trajectory of jurisprudential reasoning about the colonial project in Canada: the Court is maintaining a steady

5 This question is addressed in B. Slattery, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34:1 Osgoode Hall L. J. 101 ["The Organic Constitution"], and "Aboriginal Sovereignty and Imperial Claims: Reconstructing North American History" (1991) 29:4 Osgoode Hall L.J. 101; Michael Macdonald, "Aboriginal Rights" in William Shea & John King-Farlow, eds., *Contemporary Issues in Political Philosophy* (New York: Academic Pub. Inc., 1976), 27; Michael Asch, "Aboriginal Self-Government and the Construction of Canadian Constitutional Identity" (1992) 30:2 Alta. L. Rev. 465; and "First Nations and the Derivation of Canada's Underlying Title: Comparing Perspectives on Legal Ideology" in Curtis Cook & Juan D. Lindau, eds., *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (Montreal: McGill-Queen's University Press, 2000) at 148; and Michael Asch & Patrick Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on R. v. Sparrow" (1991) 29:2 Alta L.R. 498.

An interesting question is the extent to which these explorations are actually 'external' to the colonial enterprise. Since the grounding points for such discussions are such Western liberal notions as 'rights', it is unclear how distanced these discussions are from the colonial framework.

6 The notion that we are faced with 'rights' in this context must be queried, as will be made evident in the discussion of contemporary jurisprudence.

7 The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. Section 35 (1) states: The existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed.

colonial course from which the Court does not show any signs of deviating, and to which the Court is unquestionably committed in a principled manner.

In conducting this investigation into the reasoning of the Supreme Court (revealing the Court's continuing commitment to a colonial agenda *vis-à-vis* Aboriginal 'rights'), it is not sufficient to examine particular determinations made by the Court in relation to particular legal disputes. Nor is it sufficient to examine the tests and principles the Court develops to guide future lower courts in consistently making the same sorts of determinations. Rather, the focus must be on jurisprudential attempts at constructing a conceptual framework that can *explain* the nature of the actions taken (a conceptual framework that explains both why particular determinations were made, and why the tests and principles they employed to deal with legal issues before them were developed). Insofar as these explanations provide *reasons* for the direction the Court is laying out for the law as it relates to Aboriginal peoples, these explanations are also meant to *justify* the taking of these actions.

In the second section of this essay, it will become clear that contemporary jurisprudence not only borrows from colonial justifications developed and maintained during Canada's overtly colonial period, but actually sanctions, affirms and strengthens this colonial conceptual framework. Given this result, one cannot say that the colonial narrative survives as a matter of jurisprudential inertia, as if, for example, the Court were struggling to deal with limits imposed by such common law notions as *stare decisis*. In employing – and *strengthening* – the same justificatory framework developed in Canada's dark colonial history, the Court has to consciously decide to speak from a colonial perspective as it goes about writing new chapters in what is essentially an ongoing – and deepening – colonial narrative. The Court has had to think about the principles that served to justify the takings and injustices of the past, and they have to consciously accept that these principles will continue to drive the law in a certain direction today. The Court has to consciously act as a modern day agent of colonization.

It is only when we have in hand a clear vision of the colonial mentality through which the Court makes decisions about how Aboriginal peoples will be able to relate to their lands that comments can be usefully made from an external perspective. The last section of this essay contains a few comments about lessons learned from this investigation, and some thoughts about where to go from here.

II. THE COLONIAL NARRATIVE

Actions of the historical colonial state included both (i) policies and regulatory structures created and implemented by the Crown, and (ii) actions of the courts in supporting these policies and regulatory structures. It is not necessary to delve into speculations about fundamental motives lying behind these state actions[8] when trying to arrive at colonial justifications. Rather, colonial justifica-

8 We do not need to ask, for example, about what moral or philosophical notions might possibly have functioned in the minds of successive Superintendents of Indian Affairs to assure these bureaucrats that they were 'doing the right thing' in respect of Aboriginal people. The last section contains some thoughts about what might be motivating the Supreme Court in contemporary times.

tions can be arrived at by way of an investigation into *reasons* advanced in the jurisprudence itself for the stance the Court took to the historical sweep of events unfolding before its gaze. Domestic courts, and the Privy Council, the highest 'domestic' court in relation to civil matters until 1949, acted in concert with other arms of the state to carry out the taking of Aboriginal lands and the undercutting of the jurisdictional authority of Aboriginal nations.

The judiciary primarily played its role in this grand narrative of large-scale taking by removing itself from questions about the justice or fairness of the colonial project. Occasionally, however, we can see in the jurisprudence itself attempts at making sense of the exercise of unbridled colonial power. Any such attempt to make sense of this exercise of state power simultaneously functioned to *justify* the exercise of this power, given the nature and role of the courts in a liberal democracy. If one can bring to light the various sorts of judicial reasoned attempts at making sense of the colonial project, such attempts provide jurisprudential colonial justifications.

An exploration into colonial jurisprudence initially requires an examination of general statements of Imperial policy, statements that reveal the emergence of an overtly colonial mentality. The *Royal Proclamation of 1763* is the central document in this group.[9] While some have spoken of this document as an Indian 'Magna Carta' or Bill of Rights insofar as it seems to confirm in an official Crown document recognition of Aboriginal claims to lands and ways of living,[10] it is simultaneously a profound and forceful articulation of early colonial manoeuvrings. It proclaims Crown sovereignty and ownership over vast reaches of Aboriginal territory (including lands into which at that time no European had ventured!), and is an early introduction of a central colonial notion, that of the 'protection' of Aboriginal peoples.[11] There seems to be no other way to approach the *Royal Proclamation* than as a document meant to achieve conflicting aims. On the one hand, it seems to acknowledge the pre-existing rights of Aboriginal nations while, on the other hand, it seeks to undercut the most fundamental of these rights, as it seeks to unilaterally undercut Aboriginal sovereignty (enveloping Aboriginal nationhood within Crown sovereignty).[12]

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9 *Royal Proclamation, 1763*, *supra* note 1.

10 For example, Gwynne J., writing in dissent in the Supreme Court of Canada decision in *St. Catherine's Milling & Lumber Co. v. The Queen* [1887], 13 S.C.R. 577, described the *Royal Proclamation* as the "Indian Bill of Rights" (at 652). In *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313 [hereinafter *Calder*], Hall J., in dissent, drew an analogy between the *Royal Proclamation* and the *Magna Carta* on other grounds, arguing (at 395) that its "force as a statute is analogous to the status of *Magna Carta* which has always been considered to be the law throughout the Empire."

11 Brian Slattery uses the term 'suzerainty' to capture this notion. See "The Organic Constitution", *supra* note 5 at 108–9, 111. The Royal Commission on Aboriginal Peoples also understood the *Royal Proclamation* in this manner, though the Commissioners highlighted the manner by which the Crown addressed Aboriginal peoples as "... 'Nations' connected to the Crown by way of treaty and alliance." *Supra* note 1 at 116.

12 That Crown policy was entering a period during which it attempted to encompass conflicting goals is made clear through other activity intimately connected to the issuance of this *Proclamation*. The following year representatives of the Crown and representatives of what was likely the largest assemblage of Aboriginal nations in history signed the *Treaty of Niagara*. This Treaty,

From larger non-colonial or external perspectives, these above mentioned manoeuvrings are most certainly difficult to justify.[13] The focus in this study, however, is the colonial perspective itself. From this internal perspective the *Royal Proclamation* is an expression of what can be termed a 'colonial mentality'. While itself an act of the Crown, the *Proclamation* simultaneously reveals beliefs, values and principles that animate and give meaning to colonial actions. The *Proclamation* may seem devoid of any attempt at articulating an internal colonial justification for the assertion of Crown sovereignty and title over vast reaches of North America. Appearances, however, are deceptive – in fact, the *Proclamation* presents just this sort of internal justification. We find that from within the colonial project unfolding in British North America the mere assertion of Crown sovereignty and title is deemed sufficient to establish Crown sovereignty and title, regardless of the presence of pre-existing Aboriginal nations living in and through deep and sacred relationships to the very lands over which the *Proclamation* purportedly applies.[14] The justification for this notion lies in

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while negotiated on the basis of the wording of the *Royal Proclamation*, interpreted this wording through the lens of the *Covenant Chain* and the *Two-Row Wampum*. Patricia Monture-Angus generally described the *Two-Row Wampum* (or 'gus-wen-qah') in *Journeying Forward: dreaming First Nation's independence* (Halifax: Fernwood Publishing, 1999) at 37. It is two rows of purple shells imbedded in a sea of white. One of the two purple paths signifies the European things – their laws, languages, institutions and forms of government. The other path is the Mohawk canoe and in it are all the Mohawk things – our laws, institutions and forms of government. For the entire length of that wampum, these two paths are separated by three white beads. Never do the two paths become one. They remain an equal distance apart. And those three white beads represent 'friendship, good minds, and everlasting peace'. It is by these three things that Aboriginal Peoples and the settler nations agreed to govern all of their future relationships. The effect was to read into such expressions in the *Royal Proclamation* as "... the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed" a vision of two general independent sovereign powers. John Borrows has persuasively argued that the *Royal Proclamation* should itself be read and understood in light of these subsequent Crown activities ["Wampum at Niagara: The Royal Proclamation, Canadian Legal History and Self-Government", in M. Asch (ed.), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997) at 155]. As Leonard Rotman notes in "Taking Aim at the Canons of Treaty Interpretation in Canadian Aboriginal Rights Jurisprudence" (1997) 46 U.N.B.L.J. 11, around this period British negotiators were well aware of the stand of Aboriginal peoples, and that they would never willingly succumb to being subjects of the Crown, but yet proceeded to craft treaties which contained language of subjugation. Rotman quotes from a letter from William Johnson, British Superintendent-General of Indian Affairs, to the Lord of Trade (at 14) "... by the present Treary [one signed at Detroit between the Huron, Ottawa and Mississauga and General Gage] I find, they make expressions of subjection, which must either have arisen from the ignorance of the interpreter, or from some other mistake; for I am well convinced, they never mean or intend, any thing like it, and that they can not be brought under our Laws, for some Centuries, neither have they any word which can convey the most distant idea of subjection ... I am i[m]patient to hear the exact particulars of the whole transaction, and I dread its consequences, as I recollect that some attempts towards Sovereignty not long ago, was one of the principal causes of all our troubles."

13 See the articles referenced in *supra* note 5.

14 John Borrows has referred to this as the 'magic' of Crown sovereignty. See his "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37:3 Osgoode Hall L.J. 537 at 562.

the assumption by colonial powers that no clearly articulated justification – in relation to Aboriginal interests – is required.[15]

The Canadian judiciary historically played scant attention to the plight of Aboriginal peoples increasingly pressed upon by the heavy weight of colonialism. This is illustrated by the paradigmatic case of *St. Catherine's Milling and Lumber Co. v. The Queen*.[16] The issue before the courts concerned the effects of certain sections of the *British North America Act, 1867*[17] (as well as certain understandings which paralleled the content of these sections). Under section 91(24) of the *BNA, 1867*, the Federal Crown was charged with exclusive jurisdiction over 'Indians and Lands Reserved for Indians'. This went hand-in-hand with the notion that only the Federal Crown, as the successor to the Imperial Crown in national affairs in the new Dominion, could enter into treaties with Indians. Under section 109 of the *BNA, 1867*, however, lands and resources within provincial boundaries could arguably be said to be provincial Crown lands, over which the provincial government would enjoy both title and jurisdictional authority. In *St. Catherine's Milling* this was found to be the case for surrendered treaty lands, the result being that the grant of a license by the federal Crown to St. Catherine's Milling Company to harvest timber in an area of north-western Ontario over which a treaty had recently been entered into was found to be null and void, as post-treaty-making the land was not federal land, over which the federal Crown could issue licenses. Upon surrender by the treaty nations, this land became provincial land.

The treaty nations, and their plight, were but background elements in similar disputes concerning the 'division of powers'. That the *St. Catherine's Milling* case had a vitally important subtext – one outcome of the *St. Catherine's Milling* determination being the lack of any legally enforceable obligation on the provincial Crown to release land to fulfill treaty promises for reserve lands made by the Federal negotiators – was not satisfactorily addressed by the learned courts. This contributed immensely to ongoing difficulties faced by treaty nations in those post-treaty areas where the surrender of land was said to 'perfect' Crown title held by a Provincial instantiation of the Crown uninterested in keeping promises made by the Federal Crown.

Besides illustrating the degree of disregard the courts historically displayed toward Aboriginal peoples, *St. Catherine's Milling* also laid out lines of colonial text, consistent with – indeed underscoring – the dominant narrative that emerged from colonial Crown policy.[18] The colonial courts consistently worked

15 At the same time British policy, following the dictates of the *Royal Proclamation*, established an ongoing treaty process, whereby un-ceded lands had to be surrendered to the Crown, at an appropriate gathering called for that intent, in order for that land to be released of Aboriginal interests. It is conceptually confusing to find the Crown convinced it can unilaterally assert sovereignty over Aboriginal lands and peoples while it simultaneously recognizes the need to enter agreements with these very same peoples before its own claims are free and clean.

16 *St. Catherine's Milling & Lumber Co.v. The Queen*, [1888] 14 App. Cas. 46 (J.C.P.C.).

17 *British North America Act, 1867*. It is now cited as *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

18 The theme of the dominant colonial narrative running alongside marginalized narratives (that suggest either non-colonial alternatives, or at least alternatives that would be less disrespectful to

in concert with the state in bringing about colonial ends. In this instance, the Privy Council described the land interests of the treaty nations' pre-surrender as 'personal and usufructory,' and inalienable to all but the Crown.[19] This sort of depiction of non-proprietary interests is consistent with the vague and ambiguous wording of the *Royal Proclamation*.[20] The Court interpreted the wording of the *Royal Proclamation* not as signalling *recognition* of pre-existing claims, but rather as establishing a *granting* of rights to pre-treaty Indians to use and occupy lands reserved for them by the Crown where the act of reserving lands was itself understood to be nothing more than a gracious extension of the good will of the Crown.

While this depiction of the nature of Aboriginal land interests is revealing in itself (and extremely problematic), the vision it entails of what transpires on the surrender of land goes far in further uncovering the heart of jurisprudential reasoning in relation to the colonial agenda. The vision presupposed in the surrender of land is the 'perfection' of underlying Crown title, a vision that requires several connected sub-visions. It requires that one imagine that pre-treaty, the Crown already holds Aboriginal lands. It also requires that one imagine that the interests Aboriginal nations have in these lands *after* the assertion of Crown sovereignty, *but pre-treaty*, are but a 'burden' on Crown title, an encumbrance to be removed through treaty-making. It further requires that one imagine that this burden has no independent existence, that one imagine that by themselves these interests could not have any *legal* effect on the actions of the state.

To appreciate the fundamental colonial nature of this vision it is essential that it be contrasted with alternative conceptions of (a) the nature of Aboriginal land interests pre-treaty, and (b) the transition from a point in time prior to the assertion of Crown sovereignty to a time immediately after. Inclusive of the con-

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Aboriginal nations and their interests) is a theme running through Crown policy (and indeed Canadian jurisprudence). The *Royal Proclamation*, as was noted in a discussion in *supra* note 12, is deeply ambiguous, with one plausible reading pointing to a vision of sovereign parity not unlike that captured in the *Two-Row Wampum* (see discussion, *supra* note 12). The dominant interpretation, however, has been that which sees the *Proclamation* as establishing fundamental Crown sovereignty and title over vast reaches of what henceforth came to be British North America.

19 Lord Watson stated in *St. Catherine's Milling*, *supra* note 16 at 58–59 that "Had its Indian inhabitants been the owners in fee simple of the territory which they surrendered by the treaty of 1873, *Attorney-General of Ontario v. Mercer* might have been an authority for holding that the Province of Ontario could derive no benefit from the cession, in respect that the land was not vested in the Crown at the time of the union. But that was not the character of the Indian interest. The Crown has had all along a present proprietary estate in the land, upon which the Indian title was a mere burden. The ceded territory was at the time of the union, land vested in the Crown, subject to "an interest other than that of the Province in the same," within the meaning of sect. 109; and must now belong to Ontario in terms of that clause, unless its rights have been taken away by some provision of the Act of 1867 other than those already noticed."

20 *Supra* note 1: "And we do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the limits of Our said Three new governments, or within the limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid."

ception articulated in *St. Catherine's Milling*, there were at least nine ways open for the judiciary to spell out how they were going to understand the interaction between Aboriginal interests and Crown interests.

To describe the above alternative conceptions, at least one prior point of appreciation is needed. While the nature of Aboriginal land interests can be left open, one needs a generalized notion of Aboriginal 'sovereignty' before one can go on to imagine ways of conceptualizing the transition from (1) worlds within which pre-existing interests define Aboriginal nations' relationships to their lands to (2) a state in which the Crown asserts sovereignty over these very same lands.[21] The nature of Aboriginal land interests can be left under-described, as the inquiry is focused on the treatment of these interests after the assertion of Crown sovereignty. But the nature of Aboriginal control over these same land interests must be fleshed out, if only on an abstract level, as the key task for colonial courts engaged in explaining colonial activities is to provide a vision of the interaction between the newly asserted sovereignty of the Crown, on the one hand, and the 'sovereignty' resting in the hands of Aboriginal nations living on lands over which the Crown comes to assert dominion on the other.[22]

This is not an exercise in describing the particular sorts of control various Aboriginal nations may have enjoyed (unencumbered) over their territories. What is required at this point, rather, is a general sense by which it can be understood that prior to the assertion of Crown sovereignty there were other nations living in a connected fashion on 'their' territories. The need is for language that captures the notion of relationships that speaks of the identification of particular tracts of land with particular peoples. This does not require that particular notions of 'ownership' or 'control' be described, for the essential relationship to be described does not need to extend into any particular way of understanding how a people could identify with their lands. Many Aboriginal nations, for example, would be hesitant to say that at the time of the assertion of Crown sovereignty they understood themselves as being 'owners' of their territories. Nevertheless, all Aboriginal nations were intimately and fundamentally connected to 'their' lands, lands with which they identified.

The appropriate definition of Aboriginal sovereignty, then, must aspire to capture the essential notion of linkages between political (i.e., decision-making) communities and discrete tracts of land. For the purposes of this project 'Aboriginal sovereignty' can describe (a) the ability of an Aboriginal nation to *control and exercise* the processes that go into the ongoing project of establishing and maintaining a collective identity,[23] and (b) the ability of this nation to *use*

21 Taiaiake Alfred has noted the conceptual baggage that comes with such essentially Western notions as 'sovereignty'. See *Peace, Power, Righteousness: An Indigenous Manifesto* (Don Mills, Ontario: Oxford University Press Canada, 1999) at 55–60. The definitional manoeuvrings at this point are meant to suggest one way to work around this problem.

22 In a certain sense this form of discussion is artificial or forced, as historically, by and large, Aboriginal nations did not compartmentalize notions of 'land control' and 'land ownership'.

23 To the degree that outside forces controlled the mechanisms and institutions that propel the formation, maintenance and strengthening of national identities, a people would be less than fully sovereign. While many would immediately understand the imposition of band council governments on Aboriginal nations as an essentially political move, the forced education of generations

this collective self-identity to make decisions regarding how its people, collectively and individually,[24] relate to its territory.

III. POSSIBLE MODELS OF THE TRANSITION FROM PRE-EXISTING ABORIGINAL LAND INTERESTS TO CROWN SOVEREIGNTY

A wide spectrum of options was open to colonial courts as they went about the business of working with colonial governments in making fundamental decisions surrounding issues of land ownership and jurisdiction.[25] This spectrum can be reduced to a number of models of how colonial courts might have understood the interaction between Aboriginal interests and the materialization of Crown sovereignty. The following list of models is not meant to be exhaustive, but does attempt to canvass the available range of the spectrum. Further gradations within this spectrum are undoubtedly possible.

A ladder of respect can be constructed, moving roughly downward from respectful to disrespectful conceptions. Within this ladder we find three regions: (1) a region within which the judiciary would imagine either Aboriginal sovereign paramountcy or pariry between sovereign Aboriginal nations and the Crown; (2) a region within which the judiciary would (i) entertain the notion that Aboriginal land interests were rooted in the pre-existence of Aboriginal peoples on their traditional territories and (ii) allow for the possibility that a measure of Aboriginal sovereignty (manifest, for example, in pre-existing land tenure systems) might play a role in fleshing out how these pre-existing interests would function under dominant Crown sovereignty; and (3) a region within which the judiciary would (i) deny that pre-existence played any role in accounting for interests which might be protected within the common law, and (ii) deny any measure of continuing Aboriginal sovereignty. Bearing in mind that this ladder is not meant to be complete, the version sketched out here has nine rungs:

1. **Aboriginal Sovereign Paramountcy**. The judiciary might have imagined that the assertion of Crown sovereignty had to be accommodated within the pre-existing regimes of Aboriginal sovereignty. To the extent that Aboriginal

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of Aboriginal children in residential schools was no less a political manoeuvre. In *Journeying Forward, supra* note 12, Patricia Monture-Angus provides a Mohawk perspective: "We have a Mohawk word that better describes what we mean by sovereignty and that word is 'tewatatha:wi'. It best translates to 'we carry ourselves' [Marlyn Kane & Sylvia Maracle, "Our World" (1989) 10:2 and 10:3 Canadian Woman Studies 7]. This Aboriginal definition of sovereignty is a definition which is about responsibilities. ... What sovereignty means to me is a responsibility. It is the responsibility to carry ourselves; collectively as nations, as clans, as families as well as individually, individual Mohawk citizens, in a good way. ... You must have individuals who understand who they are and how to carry themselves."

24 'Individually' here refers to various possible sub-units of the general collective – the person, family, clan, etc.

25 That the judiciary had a range of options open is clear from *St. Catherine's Milling* itself. The Privy Council, for example, comments on arguments raised by counsel for the Dominion that the Treaty nations had fee simple title in their lands before surrender to the Crown. *St. Catherine's Milling, supra* note 16 at 59–60.

nations were willing to share some measure of their jurisdictional authority *vis-à-vis* the lands to which they were connected, the Crown could have taken up the space thereby graciously offered. The visions of collective identity manifest in Aboriginal sovereign powers would have continued to determine not only the choices made about how land was to be approached and treated, but also the framework for decision-making within which these choices came to be made. The exercise of Crown sovereignty, then, would have been contingent on agreements with Aboriginal nations to the extent of Crown authority, and this exercise of sovereign power would have had to fit within the conceptual parameters established by Aboriginal visions of land and appropriate land use.

2. **Two Equal Sovereign Powers**. The judiciary might have imagined that the Crown asserted sovereignty in such a way as to recognize that it was sharing lands with other sovereign powers. This, in fact, is the model signalled by the Crown in its early interactions with Aboriginal peoples. In the seventeenth century, for example, the Crown clearly signalled to the Iroquois Confederacy that they had the intent of forming a respectful and appropriate relationship. The *Two-Row Wampum* speaks of an arrangement whereby the two worlds, those of the British and the Confederacy, were to co-exist in a relationship of equals marked by peace, friendship and respect.[26] In particular, this model of interaction specified that each governing structure was to avoid any movement toward the usurpation of the authority of the other – they were to live together as separate and independent sovereign powers, sharing a common territory.

Under this model the assertion of Crown sovereignty would have had a minimal effect on the land interests or jurisdictional authority of Aboriginal nations. One imagines a single territory within which two separate orders of government would coordinate powers in concert, working out issues of ownership and usage. Most likely over time land issues would have been resolved in favour of more or less distinct land-holding patterns, with core lands reserved for separate communities of British settlers and Aboriginal peoples, and with the remaining areas jointly managed. With two separate and independent sovereign orders of government there would be (a) two sorts of normative systems regulating inter-societal affairs (a single system – increasingly rights-based – governing the lives and property of British settlers, and multiple systems – based on Aboriginal understandings of how to regulate interactions – functioning within the diverse Aboriginal societies), and (b) an overarching mutually agreeable intra-societal regime, regulating interaction between the settler society and the various Aboriginal nations.

3. **Embedded Sovereign Systems**. The judiciary might have understood the original assertion of Crown sovereignty as pulling Aboriginal peoples and their lands under the control of the Crown, but in such a manner as to permit recognition of a diminished – though still significant – measure of inherent Aboriginal sovereignty. Within this third model Aboriginal land interests would still have been protected by Aboriginal governing structures, themselves embedded within the one dominant system, with the embedded systems protected from

26 See discussion, *supra* note 12.

encroachment by the larger dominant system. Recognition of the legitimacy of the Aboriginal systems within the dominant Crown system would have functioned both to legitimize these systems within the common law and to lead to the production of a mechanism within the common law that subsequently upheld and protected these systems of land-holdings and the particular interests they functioned to protect.

While Aboriginal sovereignty would be diminished under such a model, the model would rest on the notion of a unified legal system encompassing Aboriginal sub-systems, within which would be defined the original land interests of Aboriginal peoples. The over-arching colonial system would guarantee the Aboriginal systems within which these interests are defined, ensuring that these interests would be respected and maintained (as *legal* interests). Critical to the notion that a *significant* measure of Aboriginal sovereignty would be maintained within this model is the fact that with entire sub-systems, protected Aboriginal nations would still be in control of the processes of self-definition and the use of collective notions of identity in making decisions about how they would relate to their lands.

How this model might have been (or could be) instantiated does not need to be worked out for this project. Most likely, however, some form of distinct territorial system would have to be imagined, though in this context as part of a tri-partite federal system. Within this model, then, Aboriginal land holdings would be similar in nature to provincial territories (both in encompassing discrete areas, and in terms of the jurisdictional powers exercised over them), with the Federal government linked to both as the national government.

4. **Protecting Pre-existing Interests as Vital Interests.** The judiciary might have understood the original assertion of Crown sovereignty as pulling Aboriginal peoples and their lands under the control of the Crown, but in such a manner as to permit recognition of (i) a diminished measure of inherent Aboriginal sovereignty and (ii) the existence of pre-existing Aboriginal land interests. Diminished Aboriginal sovereignty within this fourth model would have functioned to protect land interests during a period of transition, as the movement would be toward a gradual translation of these land interests (defined within Aboriginal legal systems) into *appropriately* formed 'rights', amenable to satisfactory protection within the common law.

This model presupposes that such a process of translation would be possible, a presupposition left unexplored in this essay. The notion would be that at the end of this process the common law would contain legal instruments capable of *satisfactorily protecting* the vital interests Aboriginal peoples aimed to protect in the systems in which they lived prior to the assertion of Crown sovereignty. At the end of this process one unified system which protected land rights would exist within which would be protected original Aboriginal land interests, now understood as 'rights' held by Aboriginal peoples within the dominant system.

That this model would envision a reduction in Aboriginal sovereignty flows from the fact that once Aboriginal land interests were translated into 'rights', Aboriginal nations would be removed from the ability to make the most fundamental decisions about how they would relate to their lands based on their self-understandings (which are essentially linked back to a power to control the process of arriving at self-understandings). For example, an Aboriginal nation with

'rights' protecting its vital interests would, under this model, lack the ability to unilaterally alter its vision of what it considers to be vital interests (or rather, it could alter this vision, but the new vision would not easily translate into newly formed 'rights', as the authority to decide how Aboriginal people – now citizens of Canada – fundamentally interact with their lands would be in the hands of the Crown).

While Aboriginal sovereignty would be seriously diminished, nonetheless this model includes the notion that a system operating under Crown sovereignty could satisfactorily protect the vital interests of Aboriginal nations. This model would likely require, then, some sort of firewall between those Aboriginal land interests protected by the state and those external forces that would attempt to encroach upon the enjoyment of these interests. In other words, we would imagine under this model the judiciary envisioning the expansion of non-Aboriginal society as having to be accommodated to the reality of protected Aboriginal rights.

5. **Translating Vital Interests Into Aboriginal Rights**. The judiciary might have understood the original assertion of Crown sovereignty as pulling Aboriginal peoples and their lands under the control of the Crown in such a manner as to (i) essentially remove Aboriginal sovereignty from the scene while (ii) simultaneously translating the pre-existing vital interests of Aboriginal nations into rights which could be embedded into a single landscape of rights and interests over which the Crown exercises dominion. This model would differ from model four in that it would contemplate a world after the assertion of Crown sovereignty in which Aboriginal land interests were constantly subject to diminishment in the face of increasing pressures from non-Aboriginal forces. Over time, then, as the non-Aboriginal world expanded and Aboriginal nations came under increasing pressures, government would – in 'balancing' competing Aboriginal and non-Aboriginal interests and in weighing the relative strengths of claims tied to increasingly disproportionate populations – increasingly authorize further intrusions into the lives and lands of Aboriginal nations.

6. **Recognizing Pre-existing Interests as Property Rights**. The judiciary might have understood the original assertion of Crown sovereignty as pulling Aboriginal peoples and their lands under the control of the Crown, with any significant measure of Aboriginal sovereignty removed from the scene at that colonial moment, and with pre-existing Aboriginal land interests recognized as grounding valid claims which must be accommodated within the new land tenure and general rights-granting system. These interests would have had to be translated at that time into an order of property rights within the newly dominant common law system of land regulation. Translated into rights within the common law, such interests could be potentially offered the same measure of protection other property interests would enjoy.

Under this sixth model, then, we see an outcome similar to that envisioned under the fifth. The key difference is that within this sixth model we are imagining that the judiciary would not have contemplated any interest in recognizing the *vital interests* Aboriginal peoples wished to protect within their own tenure systems. Rather, the aim within this model would be not to protect those sorts of interests, but rather to work out some way in which pre-existing Aboriginal land interests could be replaced with property rights that would allow Aboriginal peo-

ples to protect the sorts of interests non-Aboriginal property owners are able to protect within the common law.

7. **Recognizing Pre-Existing Interests as Non-Proprietary Interests**. The judiciary might have understood the original assertion of Crown sovereignty as pulling Aboriginal peoples and their lands under the control of the Crown, with any significant measure of Aboriginal sovereignty removed from the scene at that colonial moment. Any pre-existing Aboriginal land interests acknowledged at that point would be translated into an order of non-proprietary legal interests protected within the common law. For example, under this model, the judiciary might have understood the common interest Aboriginal peoples expressed in being able to continue living as their ancestors had always lived as generating rights to use and occupy traditional territories. These rights to use and occupy lands would not include any sort of beneficial interests – amounting to a minimal property interest – in the lands and resources in question.

8. **Granting Non-Proprietary Interests**. At this stage we arrive at a conception suggested in the *Royal Proclamation*, and then fully articulated in *St. Catherine's Milling*. The judiciary understood the original assertion of Crown sovereignty as pulling Aboriginal peoples and their lands under the control of the Crown, and saw this event as eradicating the sovereign status of Aboriginal nations. Not only were sovereign claims thereby set aside, but also pre-existing land interests were either pushed to the background or conspicuously absent from their judgments. In the latter situation, pre-existing land rights were replaced with rights to use and occupy those lands graciously reserved by the Crown for the use of Aboriginal peoples. The notion was not that pre-existing Aboriginal land interests were translated into these rights to use and occupy certain territories, but that the former land tenure systems (and the larger sovereign political entities of which these systems would have been essential components) were simply no more, with rights to use and occupation emerging from nothing other than the largess of the Crown. Furthermore, as these rights were restricted to mere use and occupation of lands, and did not include true beneficial interests, they did not warrant their being labelled as 'property' rights.

9. **Ignoring Aboriginal Peoples**. Finally, the judiciary might have understood the original assertion of Crown sovereignty as pulling Aboriginal peoples and their lands under the control of the Crown, with the simultaneous denial of all measures of Aboriginal sovereignty and any form of recognized land interests, either pre-existing or granted by the Crown. While the Privy Council in *St. Catherine's Milling* did not go this far (in that the Privy Council did confer *some* content to Aboriginal land interests after the assertion of Crown sovereignty), Aboriginal land interests were effectively ignored for much of the colonial history of Canada, suggesting that many in the colonial regime understood the transition to Crown sovereignty as having the character of model nine.

IV. THE EMERGENCE AND DEVELOPMENT OF A COLONIAL JURISPRUDENTIAL MENTALITY

Clearly, then, the judiciary in *St. Catherine's Milling* were faced with numerous paths down which they could have carried the common law in Canada. In choosing the penultimate vision sketched out above, the judiciary chose to actively sup-

port the colonial agenda in Canada. The judiciary also revealed a peculiar jurisprudential mentality that functioned to give 'reason' to this agenda.

It was, by any measure, an unusual understanding by which the judiciary proceeded to overlay the actions of the Crown. The colonial courts either reasoned that the sovereign powers of Aboriginal peoples were eliminated through the primal event of the assertion of Crown sovereignty, or they viewed these sovereign powers as unworthy of any serious judicial consideration. Similarly, pre-existing Aboriginal land interests were either seen as removed through the assertion of Crown sovereignty, or as unworthy of serious judicial consideration. Aboriginal land interests that came into existence at that primal colonial moment were seen as born from political desires of the colonial powers, desires most likely grounded in an interest the Crown had in maintaining good relations with peoples capable of either furthering or retarding expansionist dreams. These land interests, however, were not tied to the land itself. Rather, the land interests were conceptualized as rights to use and occupy territories formerly occupied. Furthermore, these non-beneficial interests in using and occupying lands were understood to constitute nothing more than burdens on the Crown's underlying absolute title, the radical title acquired at the primal colonial moment.

If instead of advancing this radical colonial mentality the courts had imagined that Aboriginal land interests had some measure of independence from the Crown, in that Aboriginal land interests could at least be understood as constituting legal interests founded in the pre-existence of Aboriginal peoples on lands now falling under Crown sovereignty, the vision of treaty-making offered by the Privy Council in *St. Catherine's Milling* would have been significantly different.[27] Rather than imagine that the surrender of land interests led to nothing more than a perfection of underlying Crown title (which happened to be Provincial title), the courts would have had to consider the possibility that treaty nations were transferring an actual legal interest to the Crown upon surrender. Post treaty-making, the Federal Crown would arguably have been in possession of this interest, a matter which would have led to significant variation in how legal disputes concerning treaties would have come to be understood from the model that we see emerging in *St. Catherine's Milling* (and which is substantially still in force today). Furthermore, one could imagine the replacement of the strange and contorted notion (i) that while pre-treaty Aboriginal land interests were the creation of the Crown, such land interests could only be released through the treaty process (requiring the *consent* of the treaty nation), with the more understandable (though still flawed) notion (ii) that through the treaty process, pre-treaty Aboriginal land interests – grounded in the pre-existence of Aboriginal peoples upon their territories – were consensually transferred to the Crown.

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27 One possible difference is noted in the quote contained at *supra* note 19: if the treaty nations possessed something amounting to fee simple in 1873, then it would have been arguable that the Crown did not have underlying title at that point, which would have meant that it was arguable that section 109 of the *BNA, 1867*, would not have functioned to result in full beneficial title falling to the provincial Crown post-treaty.

V. THE MODERN ERA OPENS: *CALDER* AND PRE-EXISTING INTERESTS

Nearly a century after *St. Catherine's Milling*, a modification of this colonial understanding was suggested in *Calder v. British Columbia*.[28] Six of seven Supreme Court justices accepted the notion that Aboriginal land interests were not merely interests created through grant by the Crown. Rather, such land interests were pre-existing interests rooted in the occupation of traditional territories by Aboriginal peoples before the arrival of the Crown.[29] These interests, the judges held, were *recognized* by the Crown in the *Royal Proclamation*, not created by the Crown in the issuance of that document.

There was scant suggestion by the Supreme Court in 1973, however, that these Aboriginal land interests were significantly different in form and substance from those described in *St. Catherine's Milling*.[30] There was little suggestion that these interests were proprietary in nature – they were still seemingly understood to be nothing more than 'personal and usufructuary' in nature. There was, correspondingly, little suggestion that land surrender accomplished anything other than the perfection of Crown title.[31] Most importantly, there was little suggestion that their being grounded in pre-existing occupation played any substantive role in either defining the nature of the land interests

28 *Calder*, *supra* note 10.

29 *Ibid.* Three of the six judges, led by Judson J., held that Aboriginal land interests tied to prior occupation were extinguished by subsequent acts of the Crown (acknowledgement of interests arising from prior occupancy at 328, conclusion that land interests were extinguished at 338–9), while three others, led by Hall J., held that the test for extinguishment should involve finding 'clear and plain intent' on the part of the Crown, which they found lacking in the circumstances (at 404).

30 *Ibid.* Hall J., speaking for Laskin and Spence JJ., held that "The exact nature and extent of the Indian right or title does not need to be precisely stated in this litigation" (at 352), while Judson J., speaking for Martland and Ritchie JJ., stated that (at 328):... the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means and it does not help one in the solution to this problem to call it a 'personal and usufructuary right'. What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was 'dependent on the goodwill of the Sovereign'. Judson's remarks must be carefully parsed, for they might seem to suggest that he wished to turn the great ship of the common law toward a new direction vis-à-vis Aboriginal land interests. To say, however, that it does not help in the solution to 'this problem' (that of determining whether colonial legislation had met the test for extinguishment of Indian title) to call Indian title 'personal and usufructuary' is to suggest nothing about the narure of this title (this part of his remarks essentially parallels those of Hall). Likewise, to say that Indian title 'means' that Indians occupied the land before the British settlers came is to suggest nothing about the content of this title. Both of these remarks are *consistent with* the perpetuation of the notion that Indian title is personal and usufructuary. Judson's last sentence is the most illuminating, as it perpetuates the notion that Crown sovereignry need not ever be explained or defended – it simply is, and by its mere presence it controls the very existence of Indian title (whatever its content might be).

31 It is understandable that no suggestion along these lines was forthcoming, given that the plaintiffs in *Calder*, the Nisga'a nation, had not at that time entered into treaty making with the Crown.

recognized within Canadian law at that point in time or upholding a notion that Aboriginal legal and political regimes should come to play a role in invigorating and maintaining these interests in the contemporary world.[32]

Nevertheless, in tracing Aboriginal land interests back to the prior occupation of lands (and not the granting of interests by the Crown) the Court was leaving open a certain range of possibilities for future consideration. The modification of the colonial understanding evidenced in *Calder* can be tracked on the spectrum of possible understandings sketched out earlier. The reasoning in *Calder* falls somewhere above the last rung of the list of possibilities grouped together in Section 3 above. The critical notion is that after the assertion of Crown sovereignty, pre-existing Aboriginal land interests could be seen as playing *some role* in the legal situation pre-treaty making, though with Aboriginal sovereignty seemingly still either denied, ignored, or downplayed.

Within this grouping (the fifth to seventh models described above), Aboriginal land interests lead one to protected interests under the common law, with these interests potentially tied to conceptions of some of the 'vital interests' Aboriginal nations have in their lands. In *Calder*, these interests were conceptually tied to ways of living, and so the Court did not move away from a notion of Aboriginal land interests as being essentially rights to use and occupy certain territories. Aboriginal land 'rights' were still being said to be non-proprietary in nature.

Nevertheless, with the recognition of a link to prior occupation of lands and with the possibility that the law might protect those aspects of their relationships to their lands valued by Aboriginal nations, a broad range of possible conceptions of the nature and content of Aboriginal land interests after the assertion of Crown sovereignty opened up. If, for example, the 'vital interests' Aboriginal nations had in the lands they occupied prior to the assertion of Crown sovereignty could be understood in a rich sense, this might demand recognition in contemporary settings as collective or communal proprietary rights. This higher degree of recognition would be required, some might argue, if Aboriginal nations are to enjoy an appropriate measure of protection of their interests in continuing to live as they always have on their lands. It would also be possible to imagine an even richer reading of what constitutes 'vital interests' of Aboriginal nations, such that it would be seen as necessary that in the contemporary setting vital interests include more than property rights protected within the common law. The vital interests would also include rights which transcend the categories defined within this non-Aboriginal system.

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32 The quotes from Judson J. presented *supra* note 30 might seem to suggest otherwise, but again they must be carefully parsed. To say that Indians were organized in societies and occupying their lands before British settlement might seem to imply that their modes of organization can play a role in contemporary disputes about the nature of Indian title. Similar (though much more clearly articulated) remarks are made in *Delgamuukw v. British Columbia,* [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*], suggesting that Aboriginal land tenure systems can play a role in (a) proving the existence of, and then (b) seemingly establishing the nature of, Aboriginal title (at para. 148). Judson, however, is only clearly making a remark about the source of Indian title in British Columbia, and is not clearly saying anything about possible links between this source and the content of such title within the common law. The implications of the remarks in *Delgamuukw* are explored in a later section.

Given the nature of the movement from *St. Catherine's Milling* to *Calder*, positioned in relation to the list of possible conceptualizations of the relationship between Aboriginal land interests and the materialization of Crown sovereignty, how are we to understand this moment in the development of judicial reasoning about actions of the colonial state? While many hailed *Calder* as signalling a turning point in domestic jurisprudence concerning Aboriginal issues,[33] the movement from *St. Catherine's Milling* was not so much a change in direction as it was an *opportunity* to move Canadian law away from its entrenched colonial orientation. If the judiciary related this re-conceptualization of Aboriginal land interests to the transition from pre-colonial states to a colonial state, it would become clear that domestic jurisprudence had turned a corner, or retrenched to a colonial mentality.

VI. THE CONTEMPORARY COLONIAL MENTALITY BEGINS TO FORM: *GUERIN* AND FIDUCIARY DOCTRINE

In *Guerin v. R.*[34] the first hints about the direction in which the courts would move were revealed. In the 1950's, in the interest of providing income for their community, the Musqueam Nation decided to lease some of their reserve lands to a golf course developer. In order to do so at that time (under the provisions of the *Indian Act* at that time), the Musqueam had to surrender the lands in question to the Crown, with the Crown then charged with the task of negotiating a leasing arrangement with the golf course developers. After surrender, however, the Crown entered into an agreement that seemed to favour the developers, reducing what had been the perceived benefit to the Musqueam Nation.

Hints about whether the judiciary would attempt a move away from its longstanding colonial mentality emerge from how the Court chose to address this instance of clear contemporary injustice. The Supreme Court began to move toward a conceptualization of Aboriginal land interests that *retrenched* the colonial mentality through the introduction of fiduciary doctrine into the context of land surrender.

Earlier, we noted that in the fundamental vision used to explain (and hence justify) colonial takings of Aboriginal lands, a key role is played by the notion that after the assertion of Crown sovereignty, Aboriginal land interests exist as mere burdens on underlying Crown title. While an opportunity presented itself in *Calder* to move away from this fundamentally colonial notion (to one wherein the fact of prior occupation came to play a more prominent and appropriate role), the Court in *Guerin* reaffirmed this earlier notion. Dickson J. noted that:

> [In *Smith et al. v. The Queen*, [1983] 1 S.C.R. 554] the court held that the Indian right in a reserve, being personal, could not be

33 See *e.g.* Michael Asch, "Calder and the Representation of Indigenous Society in Canadian Jurisprudence," presented at *Let Right Be Done: Calder, Aboriginal Rights and the Treaty Process*, a conference commemorating the 30th anniversary of the Calder decision, University of Victoria, November 13–15, 2003. The paper is accessible at: www.law.uvic.ca/calder/onlinepapers.htm.

34 *Guerin v. R*, [1984] 2 S.C.R. 325 [hereinafter *Guerin*].

> transferred to a grantee, whether an individual or the Crown. Upon surrender the right disappeared 'in the process of release.[35]

Recognizing the existence of debate around the precise nature of Aboriginal interests in reserve land (between the notion that the interest is nothing more than a personal and usufructuary right and the notion that it might amount to a beneficial interest), Dickson J. went on to hold that:

> Indians have a legal right to occupy and possess certain lands, the ultimate title to which is in the Crown. While their interest does not, strictly speaking, amount to beneficial ownership, neither is its nature completely exhausted by the concept of a personal right. It is true that the *sui generis* interest which the Indians have in the land is personal in the sense that it cannot be transferred to a grantee, but it is also true ... that the interest gives rise upon surrender to a distinctive fiduciary obligation on the Crown to deal with the land for the benefit of the surrendering Indians.[36]

Aboriginal land interests, while grounded in the prior occupation of traditional territories by pre-existing Aboriginal nations, continued to be seen by the highest court as being no more than burdens upon the underlying Crown title: burdens which dissolve into the air, or merge into Crown title, upon surrender. These land interests have no existence separate from their being burdens on Crown title – in fact, they seem to have no existence apart from their ability to generate legal obligations on the Crown upon surrender. As such, these interests are not the sorts of instruments required if the law were to actually depart from the colonial mentality that has consistently worked in concert with the state to bring about and legitimize the taking of lands from Aboriginal peoples.

More problematic than the continued assertion that Aboriginal land interests are no more than burdens on Crown title, however, was the introduction of the suggestion that fiduciary doctrine could be the means through which the relationship between the sovereignty of the Crown and Aboriginal nations would be articulated. Fiduciary doctrine was employed in order to support the existence of legal obligations on the Crown, as the majority in the Court was uncomfortable in finding that, upon surrender of a portion of Musqueam reserve lands, an actual trust was generated. Such could have been the case had the Musqueam enjoyed an actual substantial and independent interest in their reserve lands.

A fiduciary relationship arises when one party finds itself in a position of control *vis-à-vis* the legal or practical interests of another, such that through its

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35 *Ibid.* at 179.

36 *Ibid.* In *Opetchesaht Indian Band v. Canada*, [1997] 2 S.C.R. 119, Major J. re-described the effect of surrender without changing the essentially colonial undertones (at para. 39): "When a band surrenders land, or more correctly, its *sui generis* interest in land, to the Crown, the band's interest is said to merge in the fee held by the Crown." Whether the interest disappears or merges the understanding of this interest is the same, as is the ultimate effect of surrender.

discretion the party in control can unilaterally act to positively or negatively affect these interests of the other.[37] In this narrow context, (the surrender of reserve land for economic development), the introduction of fiduciary doctrine may seem innocuous. The end sought was attractive: the aim was to hold the Crown accountable for its less-than-honourable dealings with the golf course developer, and the tool employed achieved this end. The underlying vision, however, is of the Crown in control of the legal and practical interests of the Musqueam. From within this position of control, the Crown acts unilaterally in making decisions about how the arrangement with the golf course developer would be worked out all, purportedly, in the best interests of the Musqueam.

If this approach were to become the means by which the relationship between the Crown and Aboriginal nations were to be generally understood, the underlying vision would be particularly problematic. Under this vision, the Crown would control the bundle of interests recognized within the common law. In addition, in fundamental decisions about how Aboriginal lands and Aboriginal nations are to interrelate, Aboriginal sovereignty could be undercut at the roots.[38]

VII. CRYSTALLIZATION OF THE CONTEMPORARY COLONIAL MENTALITY: *SPARROW*, FIDUCIARY DOCTRINE, AND CONSTITUTIONALLY PROTECTED 'RIGHTS'

This hint of 'things to come' discernible in *Guerin* was actualized in *R. v. Sparrow*.[39] The narrow application of fiduciary doctrine to the context of the

37 See discussion in *Hodginson c. Simms*, [1994] 3 S.C.R. 377; and *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

38 Numerous commentators have attempted to make the most of the application of fiduciary doctrine in the context of Crown-Aboriginal relations, arguing that an appropriate application of basic fiduciary principles should lead to certain beneficial patterns of behaviour on the part of the fiduciary (the Crown) in relation to its beneficiaries (Aboriginal peoples). See *e.g.* Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996). For example, in his article "Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van der Peet" [(1997) 8 Constitutional Reform 40], Rotman argues that recent jurisprudence from the Supreme Court has revealed a failure to do more than introduce fiduciary 'rhetoric'. He goes on to enjoin the Court to enforce its positions in relation to fiduciary principles as they apply to the Crown-Aboriginal relationship. While there is no question that the introduction of this legal tool can have beneficial outcomes (as in the *Guerin* case), these outcomes are essentially remedial in nature, and can play no role in overcoming Canada's colonial situation. Alan Pratt has argued that one danger in introducing fiduciary doctrine is that it invites a world in which Crown-Aboriginal problems are seen as essentially legal in nature, a world in which the far more important political nature of the fundamental problems in this arena is more and more overlooked. In essence, Pratt argues, fiduciary doctrine provides a means by which Canada's colonial practices of asserting or undertaking control over the lives of Aboriginal peoples are turned into acts requiring legal remediation, rather than political attention. See Ptatt, "Aboriginal Self-Government and the Crown's Fiduciary Dury: Squaring the Circle or Completing the Circle?" (1992) 2 *N.J.C.L.* 163. A thesis in this work is that fiduciary doctrine goes beyond diverting attention away from political dialogue and potential solutions, that it must be seen as playing a role in *retrenching the colonial mentality* that has infected state (and court) reasoning in the Crown-Aboriginal context.

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

surrender of reserve land was left behind in *Sparrow*, as the Supreme Court began to articulate a grand narrative centred about fiduciary doctrine. Within this grand narrative, the Crown is charged with the mission of protecting Aboriginal 'rights'. How the Court spells this out, however, clearly retrenches the jurisprudential colonial mentality.

The Court in *Sparrow* was faced with the task of making sense of Aboriginal rights in light of their entrenchment in the Constitution under section 35 of the *Constitution Act, 1982*. These rights, the Court held, are not 'absolute', but rather function to temper the authority of the 'unquestioned sovereignty' of the Crown.[40] That there was in *Sparrow* no movement away from the now long-standing colonial mentality is clear from the context under which questions around Aboriginal rights were understood to arise – enquiry begins in relation to Crown action in regulating the lives and activities of Aboriginal peoples and individuals.

In examining how this contextual structure indicates a colonial mentality, it is instructive to look into how the authority of the Crown is tempered. The basic assumption within which the application of fiduciary doctrine 'makes sense' is that the Crown is the sole sovereign, acting in relation to the legal interests of Aboriginal nations over which it has control. For example, while Aboriginal peoples may fish, hunt, or trade, sovereign power rests in the hands of the Crown, with the authority to regulate those activities. The Court has carefully arranged matters such that the constitutionalization of Aboriginal rights means the exercise of sovereign power by the Canadian state must be tempered, but not so as to challenge the power of the Crown to decide how Aboriginal nations will relate to their lands.

The legal test articulated in *Sparrow*, spelling out how Crown authority is tempered illustrates the extent to which a colonial mentality infects contemporary jurisprudence, and how the duty to consult emerges from an essentially colonial agenda. First, one has to imagine an Aboriginal nation attempting to live in accord with its members' notions of whom they are when fishing, for example, on the Fraser River in south-western British Columbia. The citizens of this nation may find, however, that in doing so they run up against the exercise of Crown power. For example, a net used may be longer than permissible under federal Fisheries law. If the nation in question can establish that it is fishing under an Aboriginal 'right', and that the law dictating acceptable lengths of net seems to interfere with the exercise of this right (what the Court in *Sparrow* terms 'prima facie infringement'), then the onus falls on the Crown to justify this infringement. First, the Crown must demonstrate that it acted under a compelling and substantial objective. Second, the Crown must demonstrate that in acting under such an objective it met its fiduciary obligations to the affected Aboriginal rights-holders. In relation to the second requirement, the

40 Dickson C.J.C. and La Forest J. held in *Sparrow*, *ibid.* at 1103 that: "It is worth recalling that while British policy towards the native population was based on respect for their right to occupy their traditional lands, a proposition to which the *Royal Proclamation of 1763* bears witness, there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown."

Crown may be obligated to demonstrate that it consulted with the potentially affected Aboriginal people.

It is not just the bold assertion by the Court that the sovereignty of the Crown is unquestioned that underlies the colonial commitments of the Court. For behind the test for justifiable Crown infringement of Aboriginal rights, there lies a clear colonial vision of the interrelationship between the prior land interests of Aboriginal nations on the one hand and the Crown on the other. Aboriginal sovereignty is, once again, substantially ignored, indicating that either the sixth or seventh models sketched out earlier, (recognizing either property or non-property rights), constitute the focus of contemplation. Aboriginal land interests seemed destined to emerge post-1982 as either proprietary or non-proprietary rights, *under the control of the Crown*, most likely simply merged helter-skelter into the political and legal landscape structured around other – non-Aboriginal – rights and interests.

The only glimmer of hope emerging from *Sparrow* came from the failure of the Court to directly eliminate the possibility that Aboriginal rights might be understood *not* as grounded in analogous interests held by non-Aboriginal people (protected under such legal instruments as 'property rights'), but *rather* rooted in Aboriginal conceptions of their own interests in maintaining relationships with their traditional territories (the fifth model sketched out earlier). This was a slim glimmer of hope, however, for the Court clearly and forcefully closed the door on the possibility that some movement toward post-colonial worlds could be effected through the recognition and affirmation of Aboriginal rights in the *Constitution Act, 1982*. Models one to four might have entertained the latter possibiliry. The glimmer of hope was that the least harmful ('least worst' doesn't make sense) of the colonial models might be teased out of the jurisprudence in *Sparrow*.

VIII. ABORIGINAL LAND 'RIGHTS' IN *DELGAMUUKW*: THE GLIMMER OF HOPE FADES AS FIDUCIARY DOCTRINE MATURES

Anticipation concerning *Delgamuukw v. British Columbia*,[41] the first major post-1982 case dealing with claims to land ownership, centred about questions arising from the nature of 'Aboriginal title'. Would Aboriginal land interests, protected as Aboriginal rights under section 35 of the *Constitution Act, 1982*, be fleshed out as proprietary or non-proprietary in nature? In *Delgamuukw*, the Supreme Court of Canada found that *some* Aboriginal land interests could constitute rights *to* land, insofar as the interests were grounded in exclusive use and occupation of the lands in question at the point in time that Crown sovereignty was asserted over these lands.

It was unfortunate that the anticipation was narrowly restricted to issues around the nature of 'Aboriginal title', a concept that in *Delgamuukw* clearly emerged as nothing more than a construct within Canadian law. The claimants, the Gitksan and Wet'suwet'en nations of British Columbia, had originally

41 *Delgamuukw, supra* note 32.

argued at the trial level for 'ownership' and 'jurisdiction' over their traditional territories. By the time this case had reached the Supreme Court, the question of ownership had been transformed into a claim for 'Aboriginal title'. The broad question of ownership was limited within the confines of this construct within domestic Canadian law, while the Supreme Court failed to directly consider the question of jurisdiction, (now cast in terms of 'self-government').

While many were excited by the elevation of certain Aboriginal land interests to the status of property rights, the Court's firm and resolute commitment to a colonial mentality meant that this excitement either rested on the satisfaction of very small hopes, or that those excited did not realize how the conceptual framework developed in *Delgamuukw* effected a final closure to the 'best-worst' possibility left open in *Sparrow*.

The elevation of certain Aboriginal land interests to the status of property rights within the common law was in no manner a step away from the Court's deep commitment to the colonial framework under which it had worked for so long. As we just noted, all Aboriginal rights – which must include property rights – are not only subject to Crown regulation, but exist separate from Aboriginal sovereignty. That is, in the colonial world constructed in large part by the Supreme Court over the last few decades, Aboriginal rights exist separate from a reality within which Aboriginal nations would be able to (a) control processes of national self-definition, and (b) use senses of collective identity thus established to structure their relationships to the lands to which they have been connected for countless generations. Nowhere is this made more apparent than in the sections in *Delgamuukw* on the justification of Crown infringement of Aboriginal title, and in particular in the text that details how fiduciary obligations on the Crown, (when it is acting to interfere with Aboriginal title rights), can require that the Crown consult with potentially affected Aboriginal nations.

The Court noted three aspects of Aboriginal title that function to structure the particular sorts of fiduciary obligations that may befall the Crown:

> ... [A]boriginal title encompasses the right to exclusive use and occupation of land ... [A]boriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of [A]boriginal peoples; and ... lands held pursuant to [A]boriginal title have an inescapable economic component.[42]

The first aspect is of central import, for it suggests to the Court that Aboriginal title lacks an 'internal limit' to its exercise, the presence of which would force the Crown into a simple pattern of prioritization when confronted with the task of making decisions which involve the intersection of Aboriginal and non-Aboriginal interests. Lacking such an internal limit (due to the 'exclusive' nature of Aboriginal title), this sort of Aboriginal right only requires that the

42 *Ibid.* at para. 166.

Crown balance – in a 'respectful' manner – these sorts of interests with other valid non-Aboriginal claims.[43]

This narrative reveals in stark detail the refusal of the Canadian judiciary to move towards a post-colonial conceptual framework. While it was clear in *Sparrow* that the Court envisioned the 'unquestioned' sovereignty of the Crown ruling over the exercise of all Aboriginal rights, the further addition of a distinction between rights with and without internal limits demonstrated the extent to which the judiciary would protect the holdings of lands and resources taken away from Aboriginal nations. However, this startling development was only one of several that emerged in this seminal decision reflecting the Court's commitment to colonial ways of thinking.

Another reflection of colonial commitments lies hidden in the Court's guidance as to how general fiduciary obligations of the Crown (when it acts to infringe Aboriginal title) develop into particular obligations. This is especially the case in regard to interference with the first and second aspect of Aboriginal title (the exclusivity of title, and the 'right to decide the uses to which land may be put'). These particular obligations share one central defining characteristic – they all work to push and pull Aboriginal title-holders along an assimilative path.[44]

Given the exclusive nature of Aboriginal title, when the Crown infringes title it can do so justifiably when, for example;

> ... governments accommodate the participation of [A]boriginal peoples in the development of the resources of British Columbia... the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of [A]boriginal title lands, and ... economic barriers to [A]boriginal uses of their lands (e.g., licensing fees) be somewhat reduced.[45]

This closes the door on the notion that the fifth model of interaction between Aboriginal land interests and Crown sovereignty might be entertained as a consequence of the constitutionalization of Aboriginal rights. The Supreme Court has considered the historical trajectory of judicial reasoning about the interaction between Aboriginal and Crown sovereignty, and it has firmly committed itself to maintaining this trajectory along its colonial path. Pre-existing Aboriginal land interests – which reflect the power of Aboriginal nations to arrive at their own understandings of who they are, and to apply self-understandings thus developed to questions of land use – have been replaced with

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43 The right claimed in *Sparrow*, to fish for food and ceremonial/social purposes, had such an internal limit, for the exercise of this right would only make sense up to the point where sufficient fish to satisfy food and social purposes had been obtained. The distinction between rights with and rights without internal limits was introduced in *R. v. Gladstone*, [1996] 2 S.C.R. 723, where the Court was faced with a claim for a right to fish for trading purposes. This right, the Court reasoned, had no internal limit, for its exercise would only be satisfied when either the market was satiated or there were no more fish to catch (at para. 57–62).

44 This suggests a return to an old colonial tactic, so eloquently expressed in the quote from Duncan Campbell Scott, *supra* note 2.

45 *Delgamuukw*, *supra* note 32 at para. 167.

'Aboriginal rights' and 'Aboriginal title', constructs which reflect nothing other than the exercise of non-Aboriginal notions about identity, and about how such non-Aboriginal notions lead into visions of land use. Yet again, the Crown has been given legal licence to push ahead with its expansionist agenda, taking Aboriginal lands into the indefinite future, and undercutting Aboriginal sovereignty. The domestic courts of Canada are effectively working in concert with the other arms of the state, continuing the colonial oppression of the original peoples living within Canada's national borders.

The duty to consult must be understood in light of this analysis. When the Crown is obligated to consult with an Aboriginal nation, the consultation does not involve how this nation might see itself in relation to its lands. Nor does the consultation concern how the latter vision might inform how people in general will interact with that land. Rather, the Crown is obligated to consult about how *its* visions of land use will be implemented.

There is never any question in the Court's mind that the Crown has complete authority to determine the broad parameters within which questions about how Aboriginal lands will be used are answered. As the sole sovereign power, the Crown decides what land 'means', to what uses lands may be put, and how people (*including Aboriginal peoples*) will live in relation to lands and resources. This state of mind was set out in *Sparrow*, and the complete consequences of this were articulated in *Delgamuukw*.

The consequences – both the manner by which the sovereign power of the state plays out and the conceptual framework within which this 'makes sense' – are as odd as the colonial picture the Privy Council laid out in *St. Catherine's Milling*. If one's house were being systematically looted, would one rather be pushed into a corner while the pillaging was going on, or would it be preferable to have the looters simultaneously force and cajole one into taking part in the looting? On the one hand the looters make life as difficult as possible, trying to force compliance through violence and deprivation while, on the other hand, they simultaneously whisper into your ear '[w]e are going to take everything – that is a certainty. If you help us strip this house – now 'our house' – of all its goods, we will let you share in some of the wealth we pilfer.' Do Aboriginal nations want to partake in the exploitation of their own lands by a state that thinks of land use with no acceptance of responsibilities to these lands, by a state that lacks deep cultural connections to these lands? Do Aboriginal nations want to be consulted about *how* their lands will be exploited?[46]

IX. THE DUTY TO CONSULT IN *HAIDA NATION*: KINDER AND GENTLER TAKING OF LAND

In *Haida Nation v. British Columbia (Minister of Forests)*[47] the Supreme Court explained how the duty to consult would play out when the Aboriginal

46 In "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46:3 McGill L.J. 615 (hereinafter *Domesticating Doctrines*) John Borrows takes note of the extensive comments made by Aboriginal peoples speaking before the Commission concerning the ongoing intrusions by the government into their lives and their lands (at 619–620).

47 *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R.511 [*Haida Nation*].

interests with which the Crown interferes are not yet established through litigation or by way of negotiation. The decision has been generally understood as essential in working out a means by which Aboriginal nations could protect lands and resources, in the interim, in the direction of reaching modern treaties or agreements. With the demise of interlocutory injunctions in the 1990's and with the failure of Provincial Crowns to enter into serious interim agreements along the way to negotiating treaties, a powerfully fleshed out dury to consult was seen as a legal tool which Aboriginal nations could use in their stead.

The case is quite instructive as well, however, as a link in the continuing chain of colonial jurisprudence. The Provincial Crown argued that no duty to consult fell upon it until such time as the claimed Aboriginal interests – against which it was purportedly acting – were definitively defined and proven. Until that time, the Crown argued, it could not know what rights were there to be respected.[48] The Court acknowledged this argument, but found that the honour of the Crown dictated that from the historical point at which the sovereignty of the Crown was asserted, that is the time and potentially beyond which reconciled this sovereignty with the pre-existence of Aboriginal societies, the Crown must act 'appropriately' in regard to Aboriginal interests.[49] For example, the Crown must be restrained from 'running roughshod' over Aboriginal claims simply because these claims had not yet been established in court or through negotiations.

In this context, fiduciary doctrine slipped from the analysis of Crown-Aboriginal interaction. Aboriginal interests that are merely 'claimed', the Court held, are insufficiently specific to mandate that the Crown act in the best interests of the potentially affected Aboriginal nation, such as the Haida.[50] The honour of the Crown acts as a proxy for fiduciary doctrine, imposing obligations on the Crown when it cannot be said that the Crown is exercising control over legal or practical interests, as these are not, in this context, established.

The honour of the Crown is not a full surrogate, however. For the obligations on the Crown, tied to its honour, lie on a spectrum substantially lower than might befall the Crown when it contemplates infringing an established Aboriginal right.

The array in relation to *established rights* ranges from an obligation to "discuss important decisions that will be taken with respect to lands held pursuant to [a]boriginal title" to an obligation to obtain "full consent" before moving forward.[51] Where on the spectrum the Crown finds itself depends on the seriousness of the breach and the nature of the right in question. In relation to claims that are *not yet established* in court, or through negotiations, the spectrum ranges from a bare obligation to "give notice, disclose information, and discuss any issues raised in response to the notice" up to an obligation that "may entail the opportunity to make submissions for consideration, formal participation in the decision-making process, and provision of written reasons to show that Aborig-

48 *Ibid.* at para. 8.

49 *Ibid.* at para. 17.

50 *Ibid.* at para. 37.

51 *Delgamuukw, supra* note 32 at para. 168.

inal concerns were considered and to reveal the impact they had on the decision."[52] Where on the spectrum the Crown finds itself "is proportionate to a preliminary assessment of the strength of the case supporting the existence of the right or title, and to the seriousness of the potentially adverse effect upon the right or title claimed."[53]

While it is questionable whether there is a significant difference between the bottom ends of the two spectrums, unquestionably there is an enormous difference between the top ends. What can account for the fact that in relation to not-yet-established rights accommodation of these interests is the most that can be expected, while in relation to established title claims full consent may be necessary in some circumstances? Furthermore, how can it be that the intensity of the duty befalling the Crown in relation to not-yet-established claims depends on the strength *of the claim* the Aboriginal nation is able to muster?

The Court suggests that the reason for this discrepancy is nothing other than the settled versus unsettled nature of the claims made. In any particular situation, however, the 'unsettled' claims are most likely only unknown within the dominant colonial system. The 'unsettled' claims would be settled and clear within the legal structure of the Aboriginal nation making the claim. The 'pre-existing interests' the common law identifies as the grounds for these 'unsettled' claims are quite likely well known and 'settled' within the particular Aboriginal nation running up against the exercise of Crown power. The term 'unsettled' must be approached with considerable caution, then, for it must not be seen as indicating an actual unsettled state vis-à-vis Aboriginal interests themselves, but rather as indicating an unsettled state in relation to the space between pre-existing Aboriginal interests and those entities established within the common law that will purportedly correspond to these interests ('Aboriginal rights' and 'Aboriginal title'). What we are faced with in actuality, then, is the transition from (a) a world within which Aboriginal nations exist with conceptions of themselves and their relationships to lands to which they are socially and culturally connected, to (b) a world within which these relationships are replaced by 'rights' and 'title', constructs that exist within the dominant non-Aboriginal legal system.

Quite a few things can be read off this situation, once put in this light. Two aspects need to be highlighted in the context of this exploration into colonial jurisprudence. First, *Haida Nation* illustrates the pressure the judiciary continues to exert on Aboriginal nations (pressure directed toward the generations-old policy of assimilation); and second, the Supreme Court has clearly chosen the sixth model outlined earlier of the transition to Crown sovereignty.

The assimilative pressure appears in several forms. The fundamental and general assimilative pressure was noted earlier – as much as the language of the Court may say otherwise,[54] the duty to consult does not operate to merge or

52 *Haida Nation, supra* note 47, at para. 43–44.

53 *Ibid.* at para. 39.

54 *Ibid.* at para. 16–17. In discussing the source of a duty to consult and accommodate, McLachlin C.J. stated that: The government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at

reconcile self-understood Aboriginal visions of land use in contrast with Crown visions. Rather, the Crown is imagined as working within and through nothing but its vision, with the duty to consult operating to potentially modify the activities that fall under this vision. The consultation process may be directed toward substantially addressing the concerns of potentially affected Aboriginal nations, but the accommodation of Aboriginal interests must be understood within this larger context, as the modification of activities that all flow from the fundamental Crown vision of land use.[55] In seeking to trigger the duty to consult, an Aboriginal nation is acknowledging its lack of alternative recourse, and seeking to bring to bear this inadequate, assimilative tool upon problems generated by the larger colonial context within which its members have lived for many generations.

Besides illustrating the general assimilative pressures the judiciary continues to press upon Aboriginal nations, there also emerges from *Haida Nation* the notion that 'unsettled claims', due to their character as pre-existing interests, are to be treated as of lesser effect in the larger Canadian legal/political landscape. At most, unsettled claims can push the Crown toward 'discussing issues' that might arise from their diminishment through continual encroachment. Generally speaking, Crown sovereignty rules the landscape, and so it is that the Crown ultimately decides how the land is to be thought of, and – following from this conceptualization – how the land is to be 'used' (i.e., exploited). The duty to consult enters the scene in a broad sense to do no more than potentially shift the exploitation into a slightly different form; this is the true nature and extent of 'accommodation'.

The jurisprudence in *Haida Nation*, then, exerts a second form of assimilative pressure. Aboriginal nations potentially affected by Crown actions will come to realize that only if they are willing to transform their 'unsettled claims' into 'rights' and 'title' will they be in a position to realize the fullest measure of protection of their interests under domestic Canadian law. Only when in possession of established Aboriginal rights or title can they ever expect to be in a situation (however rare this might be) wherein their consent might be required before the Crown can act. The duty to consult – an essentially assimilative tool – is revealed then as doubly assimilative, for its general nature speaks of the domination of non-Aboriginal visions of land use, while its use in relation to

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stake in its dealings with Aboriginal peoples: see for example *R. v. Badger*, [1996] 1 S.C.R. 771 at para. 41; *R. v. Marshall*, [1999] 3 S.C.R. 456. It is not a mere incantation, but rather a core precept that finds its application in concrete practices. The historical roots of the principle of the honour of the Crown suggest that it must be understood generously in order to reflect the underlying realities from which it stems. In all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably. Nothing less is required if we are to achieve "the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown": *Delgamuukw*, *supra* note 32 at para. 186 (quoting *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para. 31).

55 To be 'accommodated' these would have to be interests the Aboriginal nation can manage to persuade the Crown could inform their Aboriginal rights, and interests that could manage to be deemed by the Crown to be sufficiently important to warrant modification of the activities licensed by the Crown.

'unsettled claims' speaks of the need to transform these into 'rights' and 'title' existing within the dominant system.

The second aspect of this decision to note in light of the Court's vision of 'unsettled' pre-existing Aboriginal interests, is that the decision evinces a firm resolution to work within the sixth model sketched out earlier of the materialization of Crown sovereignty in relation to Aboriginal nations. While pre-existing Aboriginal interests may be transformed into proprietary, or quasi-proprietary rights, Aboriginal sovereignty is removed from the scene at the point of the assertion of Crown sovereignty (replaced with, at most, the notion of 'self-government' – another construct within domestic Canadian law). The Crown is charged exclusively with the task of deciding how land is to be thought of, and how this translates into how land is used. Vital Aboriginal interests, those which exist today as 'unsettled' claims, are to be replaced with 'rights' and 'title', constructs essentially unrelated to these vital interests, and distanced from Aboriginal sovereignty. These constructs are grounded in non-Aboriginal visions – state visions – of the interests Aboriginal nations might have in their lands, non-Aboriginal visions which are directed toward economic/exploitive ends.[56]

With the Crown enjoying sole sovereign authority, Aboriginal nations are faced with the prospect of never-ending Crown interference with their interests, whether they are established as rights or remain 'insufficiently specific'. 'Establishing' Aboriginal rights or title creates a somewhat stronger check on Crown authority. The check is not a barrier, but rather a speed bump. *Haida Nation* illustrates how the Supreme Court means to think about the pre-existing interests upon which purportedly rest such established rights. The pre-existing interests even lack the legal status that established rights or title enjoy, existing instead in some nebulous form as potential rights, capable only of calling upon the 'honour' of the Crown. In themselves they fail to even trigger fiduciary obligations. The latter is an outcome dictated by the colonial narrative that the judicial arm of the colonial state spins ever tighter around Aboriginal nations. Within the latest chapter of the colonial narrative, the fact these pre-existing interests are not yet 'cognizable' and established within the dominant system spells out into a shad-

56 Pre-existing Aboriginal interests, the Court maintains, are essentially simple interests in using the land in various ways, and it is on this level of 'interests' that the Court goes on to say that they must be, at most, 'accommodated' by the Crown when it goes about acting against these interests. For example, when the Crown moves to remove timber resources from Aboriginal title land it may be required to endeavour to work the affected Aboriginal nation into the exploitation of the land, pulling them into a world structured around a non-Aboriginal vision of land and its use. Furthermore, the Crown may have to consult with the affected Aboriginal nation in relation to this forestry operation, perhaps even having to 'substantially address' concerns voiced by the Aboriginal nation. The colonial *understanding* the Court lays over this situation, however, entails that it is not the Crown's vision of land and land use that must be reconciled with whatever vision the affected Aboriginal nation may voice. In concert with this, the colonial understanding of the Court entails that it is not the Crown's *power* to construct and maintain visions of land and land use that must be reconciled with the power Aboriginal nations have to construct and maintain their distinct visions of land and land use. Rather, the accommodation is on the level of *activities*, with the activity of the Crown going ahead, potentially modified to allow for the ability of the affected Aboriginal nation to continue *using* the land to be worked over.

owy existence. This is a most telling outcome, given that these interests are what remain after generations of colonial oppression marked by the taking of Aboriginal lands and the undercutting of Aboriginal sovereignty.

X. CONCLUDING THOUGHTS: CONTEMPORARY COLONIAL JURISPRUDENCE AND WAYS AHEAD

How can it be that the Crown may continually encroach upon Aboriginal interests, whether they are not yet established in domestic law or negotiations or whether they are now transformed into 'rights' and 'title'? How can it be that the check 'unsettled interests' placed on the exercise of Crown power is measured against the strength of the claim the Aboriginal nation in question is able to present to the Canadian state?

The answer lies in the colonial mentality evinced by the Court's latest jurisprudence. These interests are understood by the Court as either already embedded within the state (as 'rights' whose entire existence is as creatures of domestic law, firmly under the control of the state) or at best capable of being embedded within the state, replaced with 'rights', firmly under the control of the state. The Court is unwilling, then, to make that one small initial anti-colonial step, to acknowledge that not-yet-established interests – the pre-existing interests that pre-date the assertion of Crown sovereignty – should be tied conceptually to Aboriginal sovereignty. This distancing from Aboriginal sovereignty can also be seen in the manner by which the Court imagines that Aboriginal interests (either settled or not) are to be *balanced* by the Crown against 'societal interests'.[57] Not only does this conceptualize the Crown as that entity properly placed to balance Aboriginal and non-Aboriginal interests, it also eliminates Aboriginal sovereignty.

To see how this is so, consider a simple question: in the transition from a time before the assertion of Crown sovereignty to a time after, are pre-existing Aboriginal interests replaced with distinctly different Aboriginal rights and title, or are core elements of these pre-existing interests carried forward in new formal structures, such as 'rights' and 'title' in domestic law? In the last few sections of this essay, the argument has been advanced that the constructs within Canadian law – Aboriginal rights and title (and self-government) – are *complete replacements*, failing to capture in new formal structures the essential elements of the pre-existing interests upon which they are supposed to rest. The argument to this point has focused on the role the Crown plays as sole sovereign authority, but one can also see the denial of Aboriginal sovereignty in how pre-existing

57 *Haida Nation, supra* note 47 at para. 45: Every case must be approached individually. Each must also be approached flexibly, since the level of consultation required may change as the process goes on and new information comes to light. The controlling question in all situations is what is required to maintain the honour of the Crown and to effect reconciliation between the Crown and the Aboriginal peoples with respect to the interests at stake. Pending settlement, the Crown is bound by its honour to balance societal and Aboriginal interests in making decisions that may affect Aboriginal claims. The Crown may be required to make decisions in the face of disagreement as to the adequacy of its response to Aboriginal concerns. Balance and compromise will then be necessary.

Aboriginal interests are conceptualized by the Supreme Court after the assertion of Crown sovereignty.

Consider an example offered by the Court in *Haida Nation* of appropriate 'balancing' of Aboriginal and non-Aboriginal interests: that of the existence of a provincial park and the traditional activities of the Huron within the park boundaries in *R. v. Sioui*.[58]

In *Sioui*, the Court considered whether the park and the Aboriginal and treaty rights of the Huron could be 'balanced'. The notion of balancing, however, received quite an odd interpretation, for the question was asked (to the Crown) whether the Crown could show that the park could not accommodate a 'reasonable exercise' of the rights of the Huron. Since the Crown could not show this, the exercise of the rights of the Huron continued to be protected, even in the context of the existence of a park over the lands they wished to use. The arrangement of this question, however, casts serious doubts on the use of the expressions 'accommodation' and 'balancing' as somehow synonymous or intimately inter-related, and as together somehow capturing a post-colonial sense of reconciliation.[59] What would have been the outcome if the Crown had succeeded in showing that the existence of the park was incompatible with the continued 'reasonable' exercise of the rights of the Huron? Would the park have been removed? No, the rights of the Huron would have been curtailed.

While this itself casts serious doubt on the use of the notion of 'accommodation' in the larger context of the high end of the spectrum that constitutes the range of the duty to consult, the real problem with this notion of balancing of interests is that it happens at a level far removed from that of visions of land use and authority to create such visions – that is, from the level of sovereignty. The provincial park exists under a vision of land as a resource for human use. The bulk of land within the modern capitalist state is conceptualized as properly used for wealth-creation, for pure and unadulterated exploitation. Some land, however, is valued for its recreational use, and so is placed aside, protected from unadulterated exploitation. This land is valued for such things as its aesthetic appeal, its 'pristine' condition, relatively free from the scars of large-scale modern use, its cultural connections, and the like.

58 *R. v. Sioui*, [1990] 1 S.C.R. 1025 [*Sioui*].

59 In a similar vein Borrows argues that the state, and indeed the courts, have not responded adequately to the Report of the Royal Commission on Aboriginal Peoples. The courts, in particular, have not taken an appropriate approach to the task of interpreting and implementing historic treaties in the modern context. Furthermore, the modern treaty process is resulting in agreements that rest on a skewed sense of 'reconciliation'. As Borrows notes in *Domesticating Doctrines, supra* note 46 at 634–635: The notion of reconciliation that underlies and justifies treaties, according to the Commission, is more concerned with reconciling Aboriginal peoples to Canada than it is with reconciling Canada to the existence of different social, cultural, and political indigenous entities within the state. For the most part, therefore, modern treaties require that Aboriginal peoples conform to Canadian values and law, yet they do not demand that Canada simultaneously conform to Aboriginal ideologies and law. The imbalance that is being replicated in contemporary treaty relationships does not bode well for the survival of Aboriginal social and political regimes that differ from those found in the rest of Canada.

Aboriginal visions of land are often, however, of a different order.[60] The vision is of land as a partner in a relationship – if the land is treated properly, with appropriate respect, it provides for people. People accommodate their behaviour to the social fabric built into the land and its spirits, with the understanding that humans are a part of this land and the larger social fabric and are thereby obligated to live according to the principles and rules that maintain the societal order and harmony.

Viewed from the perspective of *vision*, how can a provincial park and the 'rights' of the Huron be balanced? The non-Aboriginal world compartmentalizes the world, choosing to protect tracts of land from any form of natural interaction between the human and the non-human. Under the vision of land as a thing to be used – use being divorced from notions of intimate social orders within which both peoples and lands interact – falls the notion that some land should be used in a manner that minimizes interaction between human and non-human, which prevents the human from *living* within this part of the world.

Differences in vision are not restricted to ways by which Aboriginal and non-Aboriginal societies think of interacting with the land. The dominant Western world-view places value *on* land, the underlying notion being that value emanates from – is ultimately located within – the human being. Land is not seen as lacking a positive value, but as being inherently *valueless*, absent its valuation by humans. One piece of land comes to have economic value, (as it is seen as

60 In *Treaty Making in the Spirit of Co-existence: An Alternative to Extinguishment* (Ottawa: Supply and Services Canada, 1995), the Royal Commission on Aboriginal Peoples wrote (at 1–2): Disagreement between Aboriginal people and the federal government over the merits of the federal extinguishment policy is the tip of a much deeper disagreement concerning the nature of the relationship between human beings and their natural and social environments. As our hearings and research studies have consistently revealed, and as the first chapter of this report illustrates in some detail, Aboriginal systems of land tenure and governance do not find easy expression within traditional Canadian legal terminology. While there are many distinctive Aboriginal perspectives, Aboriginal people in general view land in profoundly spiritual terms. Land is the giver of life. In the words of Venus Walker of the Haudenasaunee Confederacy, "We look to the earth as a sacred mother who holds everything in the palm of her hand to give us things so that every day and every night our families are in good health," Venus Walker, Royaner, Wolf Clan, Oneida, (Presentation before the House of Commons Special Committee on Indian Self-Government, 1 June 1983, Minutes of Proceedings and Evidence of the Special Committee, Issue no. 21 (translated from Oneida)). Spiritual beliefs concerning the earth are not restricted to Aboriginal people who live in Canada. Joy Harjo of the Creek people, located in the United States, captures these unique spiritual beliefs in the following terms: All landscapes have a history, much the same as people exist within cultures, even tribes. There are distinct voices, languages that belong to particular areas. There are voices inside rocks, shallow washes, shifting skies; they are not silent. And there is movement, not always the violent motion of earthquakes associated with the earth's motion or the steady unseen swirl through the heavens, but other motion, subtle, unseen, like breathing. A motion, a sound, that if you allow your inner workings to stop long enough, moves into the places inside you that mirror a similar landscape; you too can see it, feel it, hear it, know it. [Joy Harjo, *Secrets from the Center of the World* (1989)] In this light, Aboriginal peoples tend to see their relationships to land in terms of an overarching collective responsibility to protect, nurture, and cherish the earth as the giver of life. Aboriginal rights with respect to ancestral territory are understood by Aboriginal peoples as particular expressions of this more general and fundamental responsibility to the earth.

potentially capable of generating wealth, for example, through the extraction of lumber from its forests) while another piece of land comes to have recreational value (having pristine rivers for rafting, and the like). Aboriginal peoples, on the other hand, see value *in* the world, and in relationships properly maintained with the land.

How can these visions be reconciled? It is not a simple matter of working out some way by which the Huron could carry out activities within the park boundaries, for we are asking that underlying conceptualizations of the land – and of how the land relates to people linked to the land – may be reconciled. It seems fairly impossible that these conceptualizations can be reconciled. For example, since within the dominant Western vision land itself is seen as having no inherent value, nothing prevents the possibility of the complete destruction of land and its spirits. Should the population of humans in some region of the world expand to the point where all local land must be put to intensive and disrespectful exploitive use, this would be a *natural* and *acceptable* outcome under this vision.

The denial of Aboriginal visions of land, and of relationships to land, constitutes only the skin of the denial of Aboriginal sovereignty. The visions themselves are not simply furniture in the world, but rather exist as products of an underlying dynamic power possessed by communities tied together by common histories, cultures, languages and beliefs. These communities exercise their powers of self-creation and of self-discovery, continually imagining themselves in the world, and generating understandings of themselves and their relationships to the world around about them. These powers of discovery and conceptualization – enjoyed by both Aboriginal and non-Aboriginal societies – account for the various visions of land and land use that must be reconciled in a post-colonial world. For these visions to be reconciled, however, the underlying sovereign authority that generates them must likewise be reconciled.

The colonial jurisprudence examined in this study exists, however, on a different plane from discussions of *visions* of land and land use, and the *creative powers* that account for these visions. The expression 'pre-existing interests of Aboriginal nations' ought to be acknowledged and respected as being shorthand for a combination of (a) visions of land and land use and (b) the authority that creates and informs these visions. The treatment of pre-existing Aboriginal interests in *Haida Nation*, however, clearly reveals the colonial mentality under which the Supreme Court continues to operate.

Tracing the role the judiciary has played in developing, maintaining and strengthening a colonial mentality *vis-à-vis* Aboriginal interests does much more than cast Canadian jurisprudence in a clear (and harsh) light. As much as this sort of examination reveals the Supreme Court's consistent commitment to the taking of Aboriginal lands and the denial of Aboriginal sovereignty, it also lays bare the role the judiciary plays in forming and reinforcing the Canadian vision of land, and of relationships between people and the land. It so happens that the Canadian vision is essentially imperial, as the entire edifice upon which rests Canadian identity has been carefully crafted by both Crown policy and domestic jurisprudence to justify the taking of Aboriginal lands and the denial of Aboriginal sovereignty.

In "What's Law Got to Do With It? The Protection of Aboriginal Title in Canada,"[61] Patrick Macklem lays alongside each other a narrative expressed in the *Report of the Royal Commission on Aboriginal Peoples*[62] and what he terms a 'counter-narrative'. Both narratives acknowledge Aboriginal territorial dispossession, a phenomenon which accelerated through the 19th and 20th centuries, but diverges in the narrative of the events of more recent times. The *Report* claims that "... the judiciary has begun to develop the law of Aboriginal title along its original trajectory of respect and co-existence",[63] while the counter-narrative sees "... the law of Aboriginal title [as forming] a small exception to Canadian law's general unwillingness to acknowledge Aboriginal legal interests with respect to ancestral territories."[64] As the two narratives see current jurisprudence as having quite different flavours, they also disagree about what the law should do about the unjust territorial dispossession of Aboriginal peoples. The *Report* foresees a political solution, marked by negotiations that are (i) controlled by new principles and structures outlined by the *Royal Commission*; and (ii) aimed at providing "... Aboriginal nations with lands that are sufficient in size and quality to foster Aboriginal self-reliance and cultural and political autonomy."[65] The counter-narrative, conversely, calls for Canadian law to "... come to terms with the fact it has been complicit in the colonization of Aboriginal people."[66] Furthermore, "[t]he law must acknowledge that colonization is an issue of distributive justice, and that its distributions of legislative and proprietary power, premised as they are on Aboriginal exclusion, are unjust."[67]

Tellingly, Macklem remarks in passing that he sees the counter-narrative as being "closer to the truth,"[68] but quickly moves to the claim that these two narratives move toward points of convergence. I am not that interested in the convergence, and only tangentially interested in the question of which narrative is 'closer to the truth'. While I have been arguing that, in one sense of the term 'truth', the counter-narrative is in fact 'closer to the truth', making this argument has been of secondary concern in this project.[69] The primary aim in this

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61 Patrick Macklem, "What's Law Got To Do With It? The Protection of Aboriginal Title in Canada" (1997) 35:1 *Osgoode Hall L.J.* 125 [hereinafter "Protection of Aboriginal Title"].

62 Macklem focuses on Volume 2 of the Report. See Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Minister of Supply and Services, 1996).

63 *Ibid.* at 128.

64 *Ibid.* at 133–134.

65 *Ibid.* at 131.

66 *Ibid.* at 134.

67 *Ibid.* at 134.

68 *Ibid.* at 137.

69 This would be a notion of truth as correspondence. It seems difficult to read the historical record in any other way than as showing that in the early stages of Aboriginal/non-Aboriginal interactions a 'sui generis' inter-societal form of law emerged to regulate affairs, but that this was fairly completely supplanted by a colonial structure through the period from roughly the end of the 18th to the middle of the 19th century. The more difficult matter has been to argue that the most plausible reading of what has transpired up to present times has been a continuation – indeed a reinforcement – of this colonial relationship.

essay has been to investigate the manner by which the judiciary, through the choices it has made, has helped *generate* both certain sequences of events (a history of Canada) and a certain Canadian identity. Unquestionably, the colonial courts of Canada have played a key role in the development, maintenance and strengthening of a particular sort of truth-generating narrative, for they have made, and continue to make, essentially important choices that go directly to forming the very identity of the nation-state of which they are an extension. A full appreciation of the role the Courts play in formulating Canadian visions of land and land use, and of the creative powers they exercise in formulating these visions, is necessary if one is to begin to consider how a post-colonial existence could be crafted within the current Canadian state. Macklem argues that both narratives he explores converge around a realization that

> ... Canada must come to terms with the fact that it has for too long refused to fully acknowledge the parallel existence of Aboriginal legal regimes. Viewing the law of Aboriginal title in distributive terms does not mean conceiving of Aboriginal title as a set of rights provided to Aboriginal people by the Canadian state; a just distribution of property rights can and should occur through Canadian legal recognition of Aboriginal systems of land tenure.[70]

It cannot simply be a matter, however, of distributive justice, even when expressed in terms of fully acknowledging legal regimes of Aboriginal peoples, for the form of acknowledgement actually required calls for a fundamental change in the very identity of the state so carefully crafted through colonial jurisprudence. One has to appreciate what it is to say that Canada is an imperial state. One must appreciate how its imperial outlook defines the nation-state itself, not as a matter of external judgement, but as an outcome of internal self-creation. In laying out the role the judiciary has played in making key formative decisions that go directly into developing and reinforcing the national (colonial) identity, this essay has traced one central thread from the various threads that have come together to form the identity of the contemporary Canadian state and society.

Only if matters of distributive justice are supplemented with concerns over competing (and potentially incommensurable) visions of land and land use, and the powers of self-creation that account for these visions, can a post-colonial vista be realized. What, for example, might "Canadian legal recognition of Aboriginal systems of land tenure" amount to? In discussing various models open for consideration by Canadian courts as they contemplated the transition from pre-existing Aboriginal nations to a world in which these nations would have to co-exist with Crown sovereignty, it was noted that Aboriginal systems of land tenure could be 'recognized' under models two through seven. Only models one through three, however, retain an acceptable measure of Aboriginal sovereignty (understood as community's power to define itself, and to apply

70 "Protection of Aboriginal Title", *supra* note 61 at 137.

these self-understandings to questions about land and land use). In moving toward a post-colonial existence the judiciary of Canada's domestic courts must reconsider their commitment to forcing their visions of land and land use, through the imposition of their authority to generate and implement such visions upon Aboriginal peoples.