

Métis Hunting Rights in the Juridical Field: Keeping up Appearances

by

Jeremy Patzer

A Thesis submitted to the Faculty of Graduate Studies of

The University of Manitoba

in partial fulfilment of the requirements of the degree of

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Department of Sociology

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ABSTRACT

This paper presents a critical relational analysis of the legal pursuit for Métis hunting rights, and Aboriginal rights in general, by examining the role of the Canadian juridical field in terms of its symbolic power as it determines the rights accorded to Aboriginal groups. The juridical field not only affects how Aboriginal rights are seen, but also how *it* is seen in and through Aboriginal rights disputes. It affects how it is seen by virtue of the fact that the very process of legal determination of Aboriginal rights serves as a symbolic mask that obfuscates the originary violence of the colonial act, as well as the violence inherent in the continued legal maintenance of colonial relations. It does this while simultaneously disguising and safeguarding the arbitrary foundations for judicial power itself. Lastly, the juridical field affects how Aboriginal rights are seen through the recently begun consolidation of a cultural rights discourse of Aboriginality that restricts Aboriginal rights claimants to the colonial gaze's exotic image of a traditional and authentic Aboriginal *Other*. While monumental cases for Aboriginal rights have been won under the judiciary's most recent approach, this discursive consolidation still does not eliminate the elasticity inherent in judicial interpretation that allows for the arbitrary exercise of power with a daunting finality. This therefore calls for Aboriginal groups to reflect further on their "investment in the game" of pursuing Aboriginal rights before the Canadian judiciary.

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INTRODUCTION¹

Aboriginal rights and title disputes show us that today, after so many years of colonisation, state formation, and continuing state maintenance, the most fundamental issues of legitimate sovereignty in Canada remain unresolved. Disagreement over *who* holds sovereignty, and whether that sovereignty is *legitimate*, opens up a territory in which violence is operative. This is so because, despite the fact that these questions have not been adequately addressed for everyone involved, sovereignty has been, and is still, asserted by the Canadian state. Yet, at the same time, historical moments where conflicts between Aboriginal groups and the state become acute and physical, such as in Oka and Ipperwash, can be considered *comparatively* rare, just as are those moments when prominent voices in the common Canadian discourse question the foundations of state legitimacy. The question then becomes eminently sociological, for one must now ask wherein the violence lies when the “illegal” barricades are not up, when politicians and civic leaders have not called in the military, and when law enforcement agents are not carrying Aboriginal rights protesters by their arms and legs to the back of a detainment vehicle. Indeed, the invocation of these images portray a conceptualisation of violence limited to physical force, whereas critically-minded and avant-garde sociological theories allow one to open up vast territories of analysis in which violence also occurs in what can be broadly termed the realm of the *symbolic*.

Symbolic power is the “power of constituting the given through utterances, of making people see and believe, or confirming or transforming the vision of the world and, thereby, action on the world and thus the world itself” (Bourdieu 1991:170). It thus allows the dominant to wield and deploy *symbolic violence* over the dominated, for the influence one can exact upon socially

¹ The author wishes to thank the Social Sciences and Humanities Research Council of Canada and the Province of Manitoba for their generous support.

received visions of the world “enables one to obtain the equivalent of what is obtained through force (whether physical or economic)” (Bourdieu 1991:170). In *Masculine Domination* (2001), Pierre Bourdieu analyses the gender role, one of the most pervasive examples of symbolic violence. In essence, the variability in what is received as acceptably masculine and acceptably feminine throughout the world betrays gender roles as socio-culturally arbitrary – there is no natural and universal role for men or for women. Yet, gender roles *are* naturalised and normalised. Thus, in Canadian culture, as in many other cultures, the received gender role for women makes it such that they are condemned to do more work for less status, prestige, or reward. This then serves as one of the most cogent examples of symbolic violence: to suffer under masculine domination is to suffer under a disadvantageous social vision of reality, or under the arbitrary as reified and naturalised.

What I will present is a theoretical analysis of the legal pursuit for Métis hunting rights, and Aboriginal rights in general, in this manner, examining the role of the Canadian judiciary in terms of its symbolic power and symbolic production in the determination of the Aboriginal hunting rights accorded to the Métis. The analysis will proceed from the non-essentialist ontological beginnings to which I have already alluded: the arbitrary, the contingent, and the accidental are cornerstones in the foundations of social life, but (ortho)doxic symbolic arrangements adorn these with a façade of truth, inevitability, and naturalness that more often than not goes unquestioned. This is true for the most reified of phenomena, such as the state itself in many highly differentiated societies.

The physical force deployed throughout the recent history of the struggle for Métis hunting rights can be summed up with several arrests and fines, along with a dead moose and a dead duck. However, the violence that permeates the ideational in Aboriginal rights, that

produces symbolically constructed visions of reality which serve the interests of one group over another, or that simultaneously produces and constrains what can be seen as truth and justice in a situation, can be seen as a critical force in this drama with roots that can be traced back centuries. Many contemporary disputes between the state and indigenous groups show that symbolic and discursive deployments still form an integral part of the effort to curb Aboriginal political aspirations. This can be seen in state efforts to have Aboriginal rights disputes seen through discursive frameworks that help induce unfavourable reactions in the public. New Zealand's use of anti-terrorism legislation to arrest Maori activists (BBC News 2007), or the unexplained arrest and prolonged detainment of a Sami leader for what a Swedish public prosecutor referred to as *political terrorism*² (Ahl and Tirsén 1999; Borchert 2001), serve as some of the more recent examples of symbolic/discursive violence practised on indigenous peoples in the public arena.

I will ultimately argue that the very process of legal determination of Aboriginal rights can be seen as a symbolic mask that obfuscates the violence of the colonial act as well as the violence inherent in the continued maintenance of colonial relations, while simultaneously disguising and safeguarding the arbitrary foundations for judicial power itself. The judiciary's display and protection of a highly rationalised search for an essentialist "Justice" in these matters provides for an enormous source of tension and ambiguity. At the heart of it is the conflict between its appeal to transcendental essences on the one hand, and its assertion of normative and arbitrary power on the other.

Indeed, it is precisely *because of* the normative and arbitrary nature of its power that the judiciary resorts to a transcendentalisation of norms in claiming a privileged access to the essences of Justice and Truth. It is an effort necessary in order to survive such difficult questions as how there can be Justice when people have not agreed to become indistinct subjects of another

² Two transmission towers had been sabotaged.

sovereign power. To this end, the act of interpretation is essential to the judicial habitus. It masks the violence integral to the assertion of sovereignty over another people, for it implies that “Justice” can be found in the heart of the colonial act. It is an appeal to the transcendental. The very act of interpretation implies that the solution to a question of Justice is an essence that pre-exists the question. It is somewhere out there, waiting to be found by those who know how to find it. In other words, we are meant to believe that it is a simple matter to remedy the removal of sovereignty from a once independent, politically sourced people – without giving that sovereignty back; one needs only the correct formula in order to arrive at it.

Concerning the obfuscation of the nature of its own operation, integral to the juridical field’s recent work concerning Aboriginal rights and title is the creation of an essentialist history of Aboriginal rights that, in its pretence to a logical linear evolution, eliminates the roles of accident, inconsistency, and the arbitrary in the determination of Aboriginal rights. In effect, each judicial judgment at common law formulates its own “history of the present,” for each pivotal decision necessitates a complex and abstruse process of meaning-making from a diffuse and ultimately indeterminate historical body of case law. Simultaneous to this juridical practice that pares away indeterminacy, competing norms, and competing meanings, the judiciary is consolidating a discourse of Aboriginality that restricts Aboriginal rights claimants to the colonial gaze’s exotic image of a traditional and authentic Aboriginal *Other*. While monumental cases for Aboriginal rights have been won under the judiciary’s most recent approach, this discursive consolidation still does not eliminate the elasticity inherent in judicial interpretation that allows for the arbitrary exercise of power. This therefore calls for Aboriginal groups to reflect further on their “investment in the game” of Aboriginal rights claims in the Canadian judiciary.

Defining Aboriginality

To define the term *indigenous*, or the synonymous term *Aboriginal*, is not a simple task. The average Canadian in the first instance might assume the contrary, however, because the existence of First Nations and Inuit in the Americas prior to the arrival of Europeans helps to draw a distinct temporal line of delimitation around the concept of “indigeneity”. Yet controversies, such as the struggle for Métis hunting rights, or the existence of many Aboriginal people in Canada whose status is not officially recognised, beg a certain reflexive engagement of the issue. In fact, the current method of the Métis National Council and its constituent provincial Métis organisations, such as the Manitoba Métis Federation, for defining who is Métis in Canada draws from a decades-old international debate surrounding indigeneity.

The Indigenous and Tribal Populations Convention, 1957 (No. 107), of the International Labour Organisation, marks one of the first working definitions to come out of an international survey of the issue. It states that the Convention applies to:

- (a) members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) members of tribal or semi-tribal populations in independent countries which are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong. (International Labour Organisation 1957)

One of the more recent, and perhaps internationally significant, definitions has come from the ILO’s revision of Convention No. 107 in *The Indigenous and Tribal Peoples Convention, 1989 (No. 169)*. More sensitive to the unique and consistent coercion experienced by indigenous cultures to “modernise” and assimilate to the majority culture(s) of the nation-

state, it reads in such a manner as to allow for recognition of Aboriginality even in those cases where assimilation has taken a toll:

(b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. (International Labour Organisation 1989)

This differs from Convention No. 107 which, indicative of the age in which it was conceived, can be read now as more of a hallmark of Modernisation Theory than a defence of the fundamental human rights of a distinct category of cultural community. As Borchert notes, “no. 107 was essentially based on the assumption that indigenous and tribal peoples (ITPs) are temporary populations en route to full assimilation into modern, “dominant” societies, and was meant to provide protection during their inevitable transition to modernization” (2001:58).

Conducting *The Study on the Problem of Discrimination Against Indigenous Populations* on behalf of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Special Rapporteur Jose R. Martinez Cobo developed between 1972 and 1983 what has now become another oft cited working definition of “indigenous”. Much the same, it indicates that contemporary indigenous communities have a historical continuity with a pre-invasion or pre-colonial society and consider themselves distinct from the larger national majority. These groups currently form “non-dominant” sectors of society and “are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems” (cited in Sanders 1999). Cobo’s definition is more comprehensive in that it goes on to outline some of the relevant factors which indicate historical continuity, as well as how indigeneity is attributed on an individual basis – namely

through the individual's self-identification as indigenous and a reciprocal recognition of the individual by the indigenous group as a whole.

Although Cobo's definition served merely as a "working definition" for his study, one can get a sense of its legacy and influence in recognising the similarity between individual indigeneity and the Métis National Council's definition of a Métis person, which the Supreme Court of Canada accepted in the 2003 *R. v. Powley*³ judgment concerning Métis hunting rights. The Manitoba Métis Federation, in conformity with its umbrella national organisation, the Métis National Council, consequently defines a Métis person in its constitution as "a person who self-identifies as Métis, is of historic Métis Nation Ancestry, is distinct from other Aboriginal Peoples and is accepted by the Métis Nation" (Manitoba Metis Federation 2004:2).

Thus, while the International Labour Organisation has encouraged the U.N. to include references to *tribal peoples* when making reference to issues concerning indigenous or Aboriginal peoples, much of the current criteria proposed, cited, and used internationally looks more to characteristics such as prior occupation, invasion, colonisation and *vulnerability*, as opposed to social organisation. In fact, even the World Bank developed a definition in its policy statement concerning "Tribal People in Bank-financed Projects," referring to this particular type of cultural minority as being "vulnerable to being disadvantaged in the development process" (cited in Sanders 1999).

The *Working Group on Indigenous Populations*, which began under the same U.N. *Sub-Commission on Prevention of Discrimination and Protection of Minorities* in 1982, has reflected, through its practices and through its membership, part of this evolution of the concept of "indigenous peoples". Self-identification as indigenous being accepted as qualifying a particular group for membership in the working group, representatives from states (such as Bangladesh,

³ *R. v. Powley*, [2003] 2 S.C.R. 207

India, Indonesia and Japan) that did not even acknowledge the existence of indigenous populations within their borders began attending. The acknowledgement of Finland, Norway and Sweden by 1982 that the Sami living within their borders were an indigenous people then “established a precedent for the recognition of a group as indigenous where the majority population in the state as a whole was indigenous or very old” (Sanders 1999).

The complicated task of defining the indigenous foreshadows certain elements of controversy and critique that will be examined later. Needless to say, the abovementioned reactions of states such as Bangladesh, India, Indonesia, and Japan show that many indigenous populations are denied the basic political right, by the colonial nation-states in which they find themselves, to assert and determine their own identity. There is also the tendency to classify this category of human population in purely cultural terms. While definitions of indigeneity may be largely cultural, this does not mean that the collective rights of such polities should be contingent on the dominant society’s impressions of its culture. This is problematic for a number of reasons, the first of which is that culture is mutable, not static. And while “indigenous” represents a largely cultural category, the rights of a people and the quest for their recognition are always inherently *political* issues.

Aboriginal Canadians

As the Royal Commission on Aboriginal Peoples (*RCAP*) indicates, “the term Aboriginal obscures the distinctiveness of the First Peoples of Canada – Inuit, Métis and First Nations” (*RCAP* 1996:11). Linguistically, there are more than 50 distinct groups of *First Nations*, the current term for those who have been historically referred to as Indians, categorised into approximately eleven tribal/linguistic groupings. The other two categories of Aboriginal peoples

in Canada, namely the Inuit and the Métis, do not have as various a demography as this, but they nonetheless do have within them particular linguistic and geographic groupings spread over vast regions of Canada (RCAP 1996). With so many groups that are culturally distinct from each other, it is not surprising that Canada's indigenous peoples traditionally depended on a variety of staple foods, living by a variety of means such as hunting, gathering, fishing, trapping, and some forms of agriculture. While estimates of the earliest human habitation of North America go as early as 40,000 BCE, the Royal Commission on Aboriginal Peoples (RCAP) cites Olive Dickason as stating that:

By about 11,000 [years ago] humans were inhabiting the length and breadth of the Americas, with the greatest concentration of population being along the Pacific coast of the two continents. ...About 5,000-8,000 years ago, when climate, sea levels and land stabilized into configurations that approximate those of today, humans crossed a population and cultural threshold, if one is to judge by the increase in numbers and complexity of archaeological sites. (cited in RCAP 1996:11)

In following the debate over estimates of pre-contact North American demography, one can find estimates of a total population that range from 221,000 to over 2 million inhabitants (RCAP 1996). It is difficult to know exactly, since the historical record left by explorers and early settlers is far from complete, and not necessarily accurate. Contact with the various groups took place over an extended period of time, and the diseases which were brought through this process sometimes travelled faster than the explorers themselves. One of the more accepted estimates is that of 500,000 inhabitants, although even this is meant to be a conservative one (RCAP 1996). While an exact pre-contact population figure cannot be known, what is incontestable is the fact that through a colonial history of disease, armed conflict and starvation, this number fell significantly in several hundred years. In the case of some groups, disease alone killed up to 93 per cent of the population (RCAP 1996).

The Métis Nation, for its part, has a somewhat unique history as an Aboriginal people. It came into existence during the time of the fur trade in the 17th century. Born of the cultural and biological intermixing of new European arrivals and First Nations, what is now called a nation actually finds its origins in multiple traditions of miscegenation: that of French “coureurs des bois” and British – most often Scottish – employees of the Hudson’s Bay Company marrying First Nations women of primarily Cree and Ojibwa origins. There were common terms to refer to these groups and their hybrid nature in both French and English, such as *Sang-mêlés* or *Métis* in the former or half-breeds and mixed-bloods in the latter.

While miscegenation of one form or another might be expected to occur as soon as one finds the proximate coexistence of different ethnic groups, the process of construction of a singular and separate identity with distinct ways of living – *ethnogenesis*, as some term it (Shore 2001) – is somewhat rare. In the 16th century many settlers in New France married local First Nations women, in large part because such intermarriage facilitated trade relations with local Aboriginal groups and also because the skills, experience, and knowledge of the wives greatly improved the quality of life and survival of the European husband. These unions were encouraged by the governing elite of New France. The ultimate goal was therefore not to favour the emergence of a new culture, but rather to ensure French supremacy in this area of the New World by favouring the growth of the colony (RCAP 1996). At the beginning of the 18th century, however, intermarriage between French men and First Nations women was no longer encouraged because it was observed that the young French men would too often adopt the “freer” lifestyle of their spouses rather than converting the latter to a more European and Catholic lifestyle. A desire to remain outside of the colony’s locus of control, as well as the arrival of large numbers of Europeans in the Great Lakes region during the 1820s, therefore led many of these first Métis to

settle further west. Indeed, while still in contact with European colonial powers, for they helped supply furs for the European market, Red River settlers were sufficiently distanced from central Canada that they could look to their own survival and administration. It was here, then, that many economic and social practices borrowed from First Nations were practised, such as the bison hunt, and that the encounter with the other stream of Métis largely associated with the Hudson's Bay Company would become inevitable:

Historians have not reached consensus on how much the two streams of migration – the French 'Métis' and the English 'half-breeds' – merged into one population over the next several decades. They do agree, however, that many paths led to Red River, and what developed there between 1820 and 1870 represented a florescence of distinct culture in which both streams participated. The new nation was not simply a population that happened to be of mixed European/Aboriginal ancestry; the Métis Nation was a population with its own language, Michif (though many dialects), a distinctive mode of dress, cuisine, vehicles of transport, modes of celebration in music and dance, and a completely democratic though quasi-military political organization, complete with national flag, bardic tradition and vibrant folklore of national history. (RCAP 1996:151)

By the time a young, expansionist Canada was on the threshold of taking the region of the Red River Colony for itself, Riel had established a second provisional government that accorded an equal amount of seats to those who could be nominally regarded as “anglophone” and “francophone⁴.” The entrance of Manitoba into Confederation was negotiated and brought about with the *Manitoba Act* of 1870, with Riel securing the equality of French and English and the setting aside of 1.4 million acres of land for the children of the half-breeds (Stanley 1961:119). Not long into Manitoba's history, the official bilingualism that was meant to be constitutionally entrenched and protected was repealed. The 1.4 million acres meant to be set aside for the descendants of the half-breeds also remains mired in much controversy to this day, and is in fact the subject of current litigation between the Manitoba Métis Federation and the federal government. Beyond the failure to observe its constitutional engagements toward the Métis of

⁴ I say “nominally” because much of the political history written today betrays a certain Eurocentrism and seems to do away with key aspects of Métis aboriginality. This includes the need to categorise the Métis according to European descent, as well as overlooking the vast numbers who spoke Aboriginal languages such as *Saulteaux*.

Manitoba, the federal government also did little to prevent the influx of its Northwest Mounted Police and European settlers from creating, at the end of the 19th and beginning of the 20th centuries, what some historians refer to as a “reign of terror” (Shore 2001:72). The combined immigration of European settlers and emigration of dispossessed Métis was sufficient to cause a complete shift in demographic balance. While Lieutenant-Governor A.G. Archibald’s 1870 census showed the Métis as comprising 83% of Manitoba’s population, by 1886 this was reduced to a mere 7% (De Trémaudan 1984:250).

The fate of those Métis who left Manitoba would not prove to be any better than that which awaited those who remained. After Manitoba’s entry into Confederation, the Canadian government began encouraging settlement in the Northwest Territories – which comprised at that time all of the territories to the north and west of Manitoba. The Métis who had settled there therefore found themselves in the same situation as before, and in 1884 took up armed resistance under the leadership of Louis Riel, just as they had done in Manitoba. The Métis and their First Nations allies were defeated, and, in reaction to the Northwest Resistance, Sir John A. MacDonal, Canada’s first prime minister and father of Confederation, wrote that “should these miserable half-breeds not disband, they must be put down... These impulsive half-breeds have got spoiled by this emeute and must be kept down by a strong hand until they are swamped by the influx of settlers” (Morisset 1983:282). Riel was executed for treason.

After Riel’s hanging, Sir John A. MacDonal declared that the Métis no longer existed and that Canada contained only *Indians* and *whites*. The mixed-bloods, for their part, were to get on side with the whites (Martin and Patzer 2003). As will be seen below, this essentially characterises federal policy toward the Métis for at least a century, with the *Royal Commission on Aboriginal Peoples* affirming that “Canada’s belated recognition in 1992 of Louis Riel as a

father of Confederation for his role in the Manitoba provisional government of 1869-1870 is a significant but small admission of a larger pattern of grievances that calls for more substantive remedies in the future” (RCAP 1996:155).

Aboriginal Policy in Canada

The Constitution Act, 1867 (*British North America Act*) which brought Canada into existence only mentions “Indians, and Lands reserved for the Indians” as being under the legislative power of the British Crown through the federal government, as opposed to the provinces. Currently, there are over six hundred Indian bands recognised under the Indian Act (Chartrand 2002), yet not all peoples whose existence predates European colonisation are recognised as Aboriginal or Indian by the federal government⁵.

A 1939 decision by the Supreme Court of Canada, however, interpreted the constitutional term *Indian* as applying also to the Inuit. The Canadian government has therefore tended to recognise, “in policy and practice, its jurisdictional responsibilities in respect to an Inuit population exceeding thirty thousand persons in northern communities. New land claims agreements and treaties are also providing a new legislative framework of recognition outside of the scheme of the *Indian Act*” (Chartrand 2002:15). Amongst these, and of international significance, we find the creation of the Nunavut Territory in 1999. Nevertheless, from the period in which the first treaties were signed until the development of contemporary constitutional arrangements, there is much controversial history.

Some of this history deserves mention to the extent that it relates to the state’s desire (or lack thereof) to recognise the Aboriginal status of its Aboriginal peoples, and thus their special

⁵ When speaking of the Métis, of course, one speaks of an indigeneity that predates European *control* over historical homelands.

relationship with the land and the rights which are intimately tied to that land. In addition to forced relocations⁶, the end of the 19th and the first half of the 20th century saw the federal prohibition of traditional Aboriginal cultural practices, most notably the Sundance and the potlatch. The law that criminalised these cultural practices was repealed in 1951 (Kulchyski 1992). Indeed, many such laws and practices fell within a period of government policy that demonstrated amongst the most unadulterated attempts to remove Aboriginal status and rights from those who possessed them.

Amendments to the Indian Act that significantly tightened and centralised control of Indian band expenditures were introduced between 1910 and 1930. What little autonomy had been granted to the band in handling its regular expenses was quickly eroded, such that approval in writing from federal officials was often required for what would be considered mundane administrative tasks today (Neu and Therrien 2003). The structural impoverishment of *Indian Bands* unsurprisingly created a situation in which band leaders were reluctant to have more people granted status and placed on their band rolls – a convenient situation for a federal government that sought to limit and even reduce the number of status Indians in Canada. In this way, politicians and bureaucrats were able to claim that it was the will of the Indians themselves (Neu and Therrien 2003).

New provisions restricting the recognition of Indians in Canada were put into place many times over a century of Canada's history (Giokas and Groves 2002). In 1919, another amendment to the Indian Act was introduced, mandating the compulsory enfranchisement – the removal of Indian status and all the accompanying rights in return for voting privileges – of any status woman who married a non-status man. Children from such exogamous marriages were

⁶ For a detailed examination of Inuit relocation in the eastern Arctic, see: Tester, Frank J. and Peter Keith Kulchyski. 1994. *Tammarniit (Mistakes): Inuit Relocation in the Eastern Arctic, 1939-63*. Vancouver: UBC Press.

also not granted Indian status, whereas this was not the case for Aboriginal men marrying non-Aboriginal women. This echoed similar legislation passed in 1851 and 1869, and foreshadowed the even stricter enfranchisement policies to come in 1951. Bill 14 was then introduced in March 1920, and its object was to grant the power of enfranchisement to the Superintendent General of the Department of Indian Affairs. The Superintendent General of the time, Duncan Campbell Scott, stated openly before the House of Commons when it was considering Bill 14:

I want to get rid of the Indian problem. I do not think as a matter of fact, that this country ought to continuously protect a class of people who are able to stand alone. That is my whole point. Our objective 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 and that is the whole object of this Bill. (cited in Titley 1986:50)

Change did not come until Bill C-31, An Act to Amend the Indian Act, was passed in 1985 in order to have the Indian Act conform to the Canadian Charter of Rights and Freedoms. Through C-31 the government of Canada sought to make several key amendments:

- repeal discriminatory provisions of the *Act*, such as those related to gender, marriage and enfranchisement
- restore status and membership to persons who lost their status under previous legislation
- give First Nations the option of assuming control of their membership (Indian and Northern Affairs Canada 1999:3).

There have been many problems with Bill C-31 though, and (re)integration onto a band roll can be made all the more difficult or unlikely in situations where registered status was lost or remains unclaimed by both parents.

Circumstances for Canada's Indigenous peoples have nevertheless seen some important changes over the past quarter of a century. Section 35 of the Constitution Act, 1982 now affirms the existence and recognition of three categories of Aboriginal Peoples in Canada: Indian, Inuit, and Métis, as well as their "existing Aboriginal and treaty rights." What these existing Aboriginal and treaty rights entail is not always clear. What is clear is the government's insistence that status Indians under the Indian Act are entitled to those rights which are detailed

in the Act and their specific treaty, an assertion which does make for a more predictable observance of Aboriginal rights, within this particular group, to hunting and fishing for subsistence purposes.

But while section 91(24) of the Constitution Act, 1867 affirms the federal government's jurisdiction over *Indians and Lands reserved for the Indians*, this group of "constitutional Indians" is thought to be distinct from the narrower group of "legal Indians" as defined and recognised under the Indian Act. To add to the confusion, the discrepancies between the Constitution Act, 1867 and the Constitution Act, 1982 provide for some uncertainty as to the recognition of other Aboriginal peoples in Canada. As previously mentioned, a 1939 court decision obliged the federal government to have the term *Indian* as found in the Constitution Act, 1867 (but not in the Indian Act regime) pertain to the Inuit, yet a similar recognition has not been extended to the Métis (Giokas and Groves 2002).

Aboriginal Rights and Title

It is therefore important to clarify a small portion of the complex legality resting behind the rights of various Aboriginal groups to various activities and lands. For Aboriginal rights to be already defined and guaranteed in ink before one goes out to hunt, they must first be codified into formal, written law. This can also be known as statute, or statutory law. This is the case for those Aboriginal groups in Canada who have signed treaties with the Crown which are recognised under the Indian Act. Their right to reserve lands and traditional practices such as hunting and fishing is thereby positively and constitutionally regulated in statute. For status Indians in Manitoba, there is meant to be an additional layer of statutory law guaranteeing

hunting and fishing rights in the Natural Resources Transfer Agreement, 1930, although its use in practice has been mired in much controversy.

In the absence of such codification, such as with those Aboriginal groups who do not fall under the purview of a treaty recognised in statute, they may have recourse to the common law to argue for Aboriginal rights or title. This is also known as customary rights and customary title in some Commonwealth jurisdictions. The common law itself is a form of law from the British tradition. It is also known as case law or judge-made law, since it relies on the discretion of the judiciary in consultation with a body of jurisprudence, a history of past cases, and perhaps a set of pertinent statutes. The finer points of the common law in these matters make such issues more complex and less predictable, although a certain predictability is ensured by the fact that the common law, not based on written law, relies on tradition, custom, and precedent. Past decisions in related cases are examined for guidance, and this “guidance” is largely obligatory if the precedent comes from a higher court.

Douglas Graham, in assessing what he sees to be the implications of Commonwealth jurisprudence for Maori rights claims in New Zealand, describes Aboriginal rights and title claims in terms of a spectrum:

At one end there are customary activities relating to personal relationships such as adoption practices, the recognition of marriage and divorce, and rules on inheritance. Further along the continuum there are customary activities such as hunting, fishing or other types of food gathering, which of necessity are linked to land, rivers, lakes, foreshores and other natural features. These activities do not however necessitate an actual interest in the land or its natural features. The rights are similar in nature to rights to take (*profit a prendre*) or rights of access or passage. They are sometimes called ‘non-territorial rights’.

Towards its furthest point of the continuum, customary activity is critically dependent on the land or natural feature... Here the interest is in a tangible permanent feature of the landscape, rather than in conducting an activity on or over it. It is distinctly territorial, the customary right being to possession and occupancy in order to continue the customary usage of resources (Graham 2001:6).

The basic distinction to be made, then, since both types of legal cases have had consequences for each other and both terms will be discussed, is that hunting, fishing, or trapping

would be termed Aboriginal *rights*, whereas having exclusive access to a particular territory in which an Aboriginal group can hunt, fish, trap, or do *almost* any other activity, would be termed Aboriginal *title*. Early legal scholarship in Canada assumed largely that Aboriginal rights derive from Aboriginal title. However, Aboriginal title, while obviously considered “greater” than the simple right to hunt, has been categorised by the Supreme Court of Canada as a subset of Aboriginal rights that deals solely with claims of rights to land.⁷

There is thus a certain methodology for deciding Aboriginal title that Commonwealth courts have developed over many years, and the inclusion of the Métis as an Aboriginal people in the Constitution Act, 1982 gives this group legal grounds to pursue the recognition of Aboriginal rights at common law. As will be seen later, the most current “test” to establish a contemporary Aboriginal right such as hunting or fishing is that the practice be rooted in a time prior to European contact, and be *integral to the distinctive Aboriginal culture* of the individual in question.⁸ Métis hunting rights are now poised to be assessed according to this “Van der Peet test” with the amendment that the pre-contact era be replaced with the time just prior to European sovereignty and effective control of the region in question⁹. As for the latest definition of the content of Aboriginal *title*, although this is not the question at issue when discussing Métis hunting *rights*, Chief Justice Lamer defines it thus in the Supreme Court decision in *Delgamuukw v. British Columbia*¹⁰:

Although the courts have been less than forthcoming, I have arrived at the conclusion that the content of aboriginal title can be summarized by two propositions: first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal

⁷ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 320.

⁸ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289

⁹ *R. v. Powley*, [2003] 2 S.C.R. 207

¹⁰ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.¹¹

Aboriginal title is therefore a *sui generis* right in land often defined as something between *fee simple* proprietary ownership and a personal and usufructuary right in land. The *Delgamuukw* decision, though, tries to make clear that Aboriginal title can compete on an equal footing with proprietary interests, but is *sui generis* in that it is held communally, it can only be alienated to the Crown, and, as mentioned above, is limited to practices that are not irreconcilable with the special relationship the Aboriginal group has to the land.

Yet one can add to the confusion of definitions of rights and title the reluctance of federal and provincial governments to respect the Aboriginal rights of the Métis (as would seem to be guaranteed under the Constitution Act, 1982) and the many Aboriginal Canadians relegated to the category of non-status Indian – Chartrand's (2002) figures show that the two groups together count for several hundred thousand people out of over one million persons in Canada who identify themselves as Aboriginal persons – and one can see that Canada's relationship with Aboriginal Peoples has been characterised by differential and largely unfavourable treatment, a situation which seems slow to change. As will be seen in the proposed survey of pertinent judicial history in Canada, the Métis have recently found a significant victory in *R. v. Powley*¹², but many provinces are reticent to enact legislation and regulation that would see a robust and secure form of Aboriginal rights to hunting and fishing generalised to this Aboriginal people.

It is clear that there remains much to be resolved in Canada's policy toward Aboriginal peoples. While Canada is signatory to neither the *Indigenous and Tribal Populations Convention, 1957 (No. 107)* nor the *Indigenous and Tribal Populations Convention, 1989 (No.*

¹¹ *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at p. 1083

¹² *R. v. Powley*, [2003] 2 S.C.R. 207

169) of the International Labour Organisation¹³, both the Royal Commission on Aboriginal Peoples and current federal policy recognise an inherent Aboriginal right of self-government (Chartrand 2002). Still, this provides no blanket resolution to the small portion of problems related here. Chartrand therefore observes that, after an era of the failure of several constitutional accords and direct political discussion of Aboriginal constitutional reform, “these significant issues will be resolved by incremental legislative reform, initiated in reaction to case-by-case decisions of the Supreme Court of Canada” (2002:17).

¹³ More significantly, subsequent to the writing of this section, Canada chose to not endorse and sign on to the U.N. Declaration on the Rights of Indigenous Peoples.

THEORY AND METHODOLOGY

The Mutual Imbrication of Theory and Methodology

Even if one wishes to ignore the fact, a sociologist cannot engage with a substantive topic without also operating from a logically prior ontological perspective that carries with it weighty assumptions about the very nature of being. As Colin Hay (2006:83-84) explains it, “ontology relates to the nature of the social and political world, epistemology to what we can know about it, and methodology to how we might go about acquiring that knowledge,” and these three things are irreducible, yet closely related in a directionally dependent fashion:

Consequently, however tempting it might well be to leave ontology to others, that option may not be available to us. The principal aim of the present chapter is to explain why this is so. The argument is, in essence, simple. Ontological assumptions (relating to the nature of the political reality that is the focus of our analytical attentions) are logically antecedent to the epistemological and methodological choices more usually identified as the source of paradigmatic divergence in political science. Two points almost immediately follow from this. First, often unacknowledged ontological choices underpin major theoretical disputes within political analysis. Second, whilst such disagreements are likely to be manifest in epistemological and methodological choices, these are merely epiphenomena of more ultimately determinate ontological assumptions. Accordingly, they cannot be fully appreciated in the absence of sustained ontological reflection and debate. (Hay 2006:78-79) (78-79)

Ontology should therefore limit one’s epistemological options, just as one’s epistemological convictions should limit and direct methodology.

“Theory,” rooted in the Ancient Greek word for *viewing* or *to view*, is a word that therefore carries with it and implies more conviction than many realise. To a sociologist, theory represents both an ontological position-taking on the nature of reality, as well as an assertion of one’s belief about the nature of the social world. It is therefore chosen neither lightly nor arbitrarily, for it is akin to “a skin, not a sweater” (Marsh and Furlong 2002:17). Yet, given what Hay (2006) affirms about the directional dependency and mutual imbrication of ontology, epistemology, and methodology – or even *theory and methodology* – neither should

methodology be arbitrarily chosen. Certain methods lend themselves to certain ontological position-takings.

From sociology's positivist origins, methodology as a ritualised incantation of "valid" and "reliable" tests takes on an air of claiming universal truth. In effect, these origins are modelled on science's philosophical precepts that view Nature as ordered and following a finite and linear logic of causation. By this logic, all of Nature is eminently knowable so long as one uses the approved method or test. The traditional sociologist claims to adopt the same precepts and positivist philosophy in interpreting social phenomena. This brings with it a conception of methodology as a canonical tool kit of received scientific techniques for arriving at universal knowledge of the social world that is somehow entirely independent of the social world. If one follows Hay's (2006) suggestion and brings this debate into the arena in which it truly belongs – the ontological – then it becomes clear that such a view of the world is a hallmark of positivist, essentialist, and modernist thinking. Scientific knowledge is meant to be universal and timeless, constantly bringing humanity to a better and better future.

The theory I will use in this thesis is not positivist. Although these labels are not a necessary contradiction of positivism¹⁴, it would most likely be categorised as relational, non-essentialist, or anti-essentialist. It is also loosely associated by the external imposition of the label "post-structuralist," although none of the theorists examined readily affix this label themselves. The three major thinkers that I draw from each offer complex and groundbreaking theories and philosophies that are different in character from one another, yet share key ontological underpinnings that allow me to use their differing foci in a complementary fashion.

The mutual imbrication of theory and methodology is therefore doubly important in this case: not only because there are important differences in the ontological positions of positivist

¹⁴ Classical theorists such as Durkheim could fall into both categories.

and relational theories, but also because much of the intellectual battle waged by non-essentialist theorists is in the ontological and epistemological arenas. Arguing about which test provides for the most valid and reliable data would therefore necessitate a certain intolerable surrender because it accepts as given a prior foundationalist, or essentialist, ontology. Theory and method from many non-essentialist perspectives become somewhat indistinguishable, for a primary “method” of many post-structuralist thinkers has in fact been to exorcise essentialist world views and ways of thinking. An important method, in other words, is to go back and correct prior essentialist errors at the level of the ontological and epistemological. Therefore, with the implicit premise that a proper *view* provides the correct analytical tools, they go to great length to depart with the conceptual errors that have consistently plagued Western thought in the past. They are steeped in humanity’s social existence from their very ontological beginnings, departing with the errors of positivist philosophy even before one arrives at a chapter called “methodology” as it has traditionally been known. It is therefore my worry that abiding by traditional positivist sociology would present an exaggerated independence of method and theory. The proper *view* provides the correct analytical tools, the right method. My primary methodology therefore consists in endeavouring not to fall victim to improper tools of analysis.

Bourdieu (1998:2) makes reference to his sociology as one in which “the theoretical and the empirical are inseparable,” and this thesis is conceived in much the same vein. What I am presenting is *a theoretical analysis*, but not without any reference to an empirical reality. The common perception that theory is somehow removed from lived social reality is unfounded, for in reality the two are inseparable. In fact, there is an inherent difficulty in dividing such a project between sections based upon the traditional categories of “theory,” “data,” and “analysis” – a practice again inculcated by traditional sociology, and one that might prove taxing for the reader

in this case. It was, without a doubt, taxing for the writer to untangle the vast empirical reality under the scope of this thesis and repackage it in such discrete, abstracted sections. I will therefore let the fact that it was unpleasant to do be a testament to the fact that it was done purely out of a sense of obligation (by a student inculcated with the tenets of traditional sociology).

The Relational, the Non-Essentialist

It can be said that an essence is that which exists, or would exist, outside of history and society. Concepts such as “truth,” “justice,” “natural law,” or even “human rights” are often held in such esteem as to be considered essences. A relational sociology, on the other hand, is sceptical of the assertion that such concepts can have meaning that positively refers to a realm outside of social relations, and so treats these concepts as all too human.

This is uneasy ground for many, to be sure. Accusations of nihilism would be unfounded, however, for if one is to accept concepts such as truth, meaning, and power as being grounded in the domain of the social *and* thus really existing, then one is merely dealing with essentialist reactions to an unfamiliar relational territory. The logic of such a criticism is then that of an all-or-nothing binary: if a relational sociologist claims that truth does not exist immutable, outside of history and society – in other words, in the essentialist sense – then that sociologist is taken to be claiming that it does not exist at all.

In his small treatise on *Structuralism and Semiotics*, Hawkes begins his description of structuralism in the most innocuous and mundane of terms for the common student of sociology, identifying it as “fundamentally a way of thinking about the world which is predominantly concerned with the perception and description of structures” (Hawkes 1977:17). He immediately goes on, however, to describe structuralism in purely relational terms:

A wholly objective perception of individual entities is therefore not possible: any observer is bound to *create* something of what he observes. Accordingly, the *relationship* between observer and observed achieves a kind of primacy. It becomes the only thing that *can* be observed. It becomes the stuff of reality itself. Moreover the principle involved must invest the whole of reality. In consequence, the true nature of things may be said to lie not in things themselves, but in the relationships which we construct, and then perceive, *between* them.

This new concept, that the world is made up of relationships rather than things, constitutes the first principle of that way of thinking which can properly be called 'structuralist'. At its simplest, it claims that the nature of every element in any given situation has no significance by itself, and in fact is determined by its relationship to all the other elements involved in that situation. In short, the full significance of any entity or experience cannot be perceived unless and until it is integrated into the *structure* of which it forms a part (Hawkes 1977:17-18).

Indeed, with Saussurean structural linguistics we find entirely relational claims at the heart of meaning-making. The development of semiotics (*semiology* in Saussure's term) as the study of signs expands our concept of textuality, and therefore we can no longer just talk about *words* and their meaning. Traffic lights, physical gestures, and works of art can also be signs (Belsey 2002). Each of these signs consists of a signifier and its signified (Hawkes 1977). In the case of the word *dog*, the spoken or written word serves as the signifier which refers to the signified – the entirety of our concept of a furry, four-legged animal known by many as “man's best friend”. Signs are arbitrary in that there is no inherent connection between the signifier and the signified – something else other than the word “dog” could just as easily have been the signifier for this same animal; there is no positive referential meaning between the two:

Yet it is also clear that what makes any single item 'meaningful' is not its own particular individual quality, but the *difference* between this quality and that of other sounds. In fact, the differences are systematized into 'oppositions' which are linked in crucial relationships. Thus, in English, the established *difference* between the initial sound of *tin* and the initial sound of *kin* is what enables a different 'meaning' to be given to each word. This is to say that the meaning of each word resides in a structural sense in the difference between its own sounds and those of other words (Hawkes 1977:22).

From this perspective, meaning is wholly relational: it is found in the relation between an arbitrary signifier and a definite signified, as well as within a network of differences between signs – in essence, in the *difference* between one signifier and all others that exist. This latter is

called the signifier – signifier basis for the production of meaning, as opposed to the signifier – signified, and is a basis of much post-structuralist thought.

If it is unclear, though, how these observations are significant to the *social* world and a *social* science, one need only look to one of the most influential names in history. Throughout Marx's writing there are indications of his anti-essentialist standpoint. To begin with, Marx (2000) refutes Karl Heinzen's claim that a *true socialist* such as he should recognise the need for a Republic based on "humanity," one of the most common essences in progressive Western thought. Heinzen's vision of all classes melting away "before the solemn idea of 'humanity'" is dismissed outright as pure naïveté:

If he believes that entire classes, which are based upon economic conditions independent of their will, and are set by these conditions in a relation of mutual antagonism, can break away from their real relations, by virtue of the quality of 'humanity' which is inherent in all men, how easy it should be for a prince to raise himself above his 'princedom', above his 'princely handicraft' by virtue of 'humanity'? (Marx 2000:234)

Indeed, Marx's writings do not make earnest appeals, such as that made by Heinzen, to traditional essentialist (and humanist) notions such as morality or humanity.

In response to the question of a possible "Marxian ethic", Ollman (1971) rereads Marx, looking first to the concept of historical materialism. This foundational Marxist concept would clearly seem to indicate that even phenomena such as morality and humanity are really just "definite forms of social consciousness" corresponding to, and rising from, the economic structure of society (Marx 1978:4). In other words, it is difficult to conceive of Marx as an essentialist when any number of contentious concepts can be put through the historical materialist formula: there is no truth or morality that exists outside of history and society when the economic structure of society determines the consciousness of "men" [*sic*]. In a capitalist society, morality is a capitalist morality. Therefore, with fodder such as this, one can certainly

see the reason behind Ollman's claim that an essentialist "'Marxian ethics' is clearly a misnomer" (1971:43). This is also clearly in line with Marx and Engels's oft overlooked claim in *The Communist Manifesto* that "the theoretical conclusions of the Communists are in no way based on ideas or principles that have been invented, or discovered, by this or that would-be *universal reformer*" (2005:44, emphasis added). Thus even postcolonialism's early tricontinentalist strains would not stray too far from its Marxist roots in sceptically questioning how an appeal to humanity can help the plight of the colonised when the colonisers themselves have a tendency to use these very concepts in *their own* service.

And use it they did. In the context of Britain's colonisation of North America, John Locke was implicated in both its theoretical underpinnings, and in its administration. A key figure in the development of classical liberalism, Locke conceived of an essential *state of nature* in which humans enjoy life, health, liberty and *possessions* unencumbered by others (Knuttila and Kubik 2000). The inclusion of possessions in his theory is not inconsequential either, for it is in mixing their labour with nature, that is, in Locke's culturally specific agrarian perception of labour, that humans add a portion of nature to their private property – which initially only consisted of their person (Knuttila and Kubik 2000). The individualism conceived of as *natural* by Locke, and to which philosophical liberalism subsequently helped give rise, is manifest in his conception of the universally pre-existing *laws of nature*, to which all were subject:

The state of nature has a law of nature to govern it, which obliges every one; and reason, which is that law teaches all mankind who will but consult it that, being all equal and independent, no one ought to harm another in his life, health, liberty or possessions (cited in Knuttila and Kubik 2000:24).

Although Locke does not agree with Hobbes's view of humanity's state of nature as being a state of war, he does agree that difficulties develop concerning each individual's rights to life, health, liberty and possessions – hence the need for people to establish a common superior power

(Knuttila and Kubik 2000). But there are two key points which Knuttila and Kubik emphasise as Locke goes on to develop his philosophical conception of liberal democracy: that private property comes from working the land in a purely agrarian fashion, and that those who participate in Locke's liberal democracy are those who belong to the propertied class (2000).

Yet this English philosopher who, by many, continues to be championed as one of democracy's "forefathers" is further recontextualised by Barbara Arneil (1996), who insists that Locke's theories be interpreted not only through his position as secretary to Lord Shaftesbury in English politics, but also in light of his work as a colonial administrator for the Lord's Proprietors of Carolina, the Council of Trade, and the Board of Trade and Plantations. Indeed, theories such as Locke's are wholly consistent with concepts such as *terra nullius*, and Arneil cites his direct influence in the colonial justification of appropriation of land from the Aboriginal peoples of North America, whom he saw as still living in the "state of nature":

The mythological dichotomy between civil and natural man has thus come full circle. Beginning with the assumptions made by explorers to the new world in their travel books, translated by Locke in his philosophical treatise into a powerful political doctrine of civil conversion, the *Indian* has found himself, and will continue to be, for the next three centuries, a distorted inversion of civil society, and the ultimate victim of such myths. (Arneil 1996:44)

Discourses of the state of nature are themselves rooted in an essentialist, abstracted, and mythological vision of human nature. It is a philosophical tradition that begins at least as far back as Hobbes, and is later utilised in the writing of both Locke and Rousseau – although in Rousseau to ends that differ from Locke and Hobbes. As with any discourse, it also evolves. Arneil thus notes that, in the work of thinkers such as Grotius and Locke, when their respective countries of the Netherlands and Britain had much at stake in colonial interests, the state of nature finds profound transformation:

Beginning with Grotius, and followed shortly by John Locke, the state of nature as it has developed in political and Christian thought from Cicero to Aquinas is, with the seventeenth-century thinkers, wholly grafted on to the European notion of America and

its aboriginal population. Christianity and legal theory are fused and become, through natural law, the singular viewpoint for understanding the new world and its inhabitants. The colonial ambitions of the Dutch and English provide the underlying reason for this use of the Amerindian as natural man. For, in colonizing the new world, theories to justify war and the appropriation of land legitimize the actions taken by European settlers towards their aboriginal counterparts. (Arneil 1996:49)

Locke saw equality of opportunity where there was actual inequality, for in his estimation the Aboriginal peoples could also enclose land for themselves, should they emerge from the state of nature as “rational” beings and join civil society (Arneil 1996). Thus it is clear that Locke’s Enlightenment-inspired view of the human being as being by nature rational and, in this, destined to establish civil society through taking up private property, is both socially evolutionist and essentialist. This is not to say that all colonialist thinking is essentialist, or vice versa. Nevertheless, Locke’s philosophy marks an important appeal to an ideal that purportedly exists outside of history and society, but which is in fact culturally bound and discursively biased in favour of the dominant over the dominated. Similar criticism exists today in the context of neo-colonialism in the developing world, especially concerning the West’s use of human rights discourse (see Bartholomew and Breakspear 2003; Esteva and Prakash 1998).

As will be seen in the remainder of this thesis, colonial powers have repeatedly taken recourse to interpretations of indigenous social organisation in justifying colonisation. The latest manifestation of the social organisation argument effectively exalts the “authentic quaintness” of pre-contact Aboriginal social organisation as the *essence of Aboriginality*.

Bourdieu

Perhaps the greatest difference between Pierre Bourdieu and other poststructuralist thinkers such as Michel Foucault and Jacques Derrida is that Bourdieu does attempt a form of theorising that encompasses society and aspires to universal validity. Foucault and Derrida, on

the other hand, are comfortable with making no such attempt. A key aspect of Bourdieu's work, then, is the development of a number of abstract concepts for describing social space that can accommodate different collective histories, such that the approach he uses to describe French social space in the 1970s is just as valid for describing French or Canadian society today.

The researcher... seeks to apprehend the structures and mechanisms that are overlooked – although for different reasons – by the native and the foreigner alike, such as the principles of construction of social space or the mechanisms of reproduction of that space, and that the researcher seeks to represent in a model aspiring to a *universal validity*. In that way it is possible to register the real differences that separate both structures and dispositions (*habitus*), the principle of which must be sought not in the peculiarities of some national character – or 'soul' – but in the particularities of different *collective histories*. (Bourdieu 1998:3)

For Bourdieu, the assertion that *the real is relational* is a reminder that, "at every moment of each society, one has to deal with a set of social positions which is bound by a relation of homology to a set of activities... or of goods... that are themselves characterised relationally" (1998:4-5). Something such as hunting, therefore, cannot be interpreted in a substantialist mode of thought that would treat the activities and preferences specific to a certain group at a certain moment "as if they were substantial properties, inscribed once and for all in a sort of biological or cultural *essence*" (Bourdieu 1998:4). Misrecognising hunting as substantially the same phenomenon, when practised by marginalised Canadians of Aboriginal ancestry and by the nobility in Britain, is therefore a substantialist way of thinking. It represents a poor sociological comparison that cannot aspire to any universal validity. Even social phenomena have no positive referential meaning, and so one must be wary when comparing from social system to social system, or even from one historical context to another within the same society. Meaning is found in difference, and so in the British context hunting can be seen as a sign of refinement and nobility that *distinguishes* its practitioners from the lower classes. This is not the case for Aboriginal hunters in Canada. Bourdieu states that the very title of his book *Distinction* (1984)

“serves as a reminder that what is commonly called distinction, that is, a certain quality of bearing and manners, most often considered innate..., is nothing other than *difference*, a gap, a distinctive feature, in short, a *relational* property existing only in and through its relation with other properties” (1998:6). The relational notion of difference, then, is at the basis of Bourdieu’s conception of social space. Positions in social space have no intrinsic meanings in and of themselves, but rather find their meanings through their mutual exteriority in a network of differences. To occupy a point in social space is to differ, to be different, but the network of differences from which this meaning is derived represents a shared (and sometimes contested) sociocultural code:

... a difference, a distinctive property... only becomes a visible, perceptible, non-indifferent, socially *pertinent* difference if it is perceived by someone who is capable of *making the distinction* – because, being inscribed in the space in question, he or she is not *indifferent* and is endowed with categories of perception, with classificatory schemata, with a certain *taste*, which permits her to make differences, to discern, to distinguish... Difference becomes a sign and a sign of distinction (or vulgarity) only if a principle of vision and division is applied to it which, being the product of the incorporation of the structure of objective differences (for example, the structure of the distribution in the social space of the piano or the accordion or those who prefer one or the other), is present among all the agents, piano owners or accordion lovers, and structures the perceptions of owners or lovers of pianos or accordions. (Bourdieu 1998:9)

Whereas linguistic structuralism reveals to us the processes by which we make meaning from networks of differences among arbitrary textual symbols, Bourdieu seeks to do this for all of social life. Social phenomena are arbitrary symbols. And this very sociocultural code, these categories of perception and classificatory schemata, are hierarchical and often serve vested interests. The often unquestioned normalisation of such schemata is symbolic violence, according to which the arbitrary is naturalised (Bourdieu 2001) and “dominated lifestyles are almost always perceived, even by those who live them, from the destructive and reductive point of view of the dominant aesthetic” (Bourdieu 1998:9). Definitions of symbolic violence are broad, varied, and numerous, and so it can also be seen as a constructed vision of reality that

serves the interests of one sector of society over another. Its tendency to naturalise therefore alludes to vast territories of received categories of thought, perception, and truth that, while contestable, often are not contested.

Suffering from a similar blindness to the antagonistic aspects of social life, functionalist approaches to the state look to it as an expression of the moral consensus of society (see Durkheim 1983). Many sociologists, however, have been reticent to consider society as consensus and so look more to a concentration of force relations. Bourdieu categorises together, by virtue of this latter commonality, the working definitions of the state “from the Marxist models which tend to treat the state as a mere organ of coercion to Max Weber’s classical definition, or from Norbert Elias’s to Charles Tilly’s formulations” (1998:42). Yet Bourdieu himself sees the state as so much more, something incarnate and reified in both objectivity and subjectivity: in objectivity because it can be descriptively portrayed through the advent and evolution of specific organisational structures and mechanisms, and in subjectivity because it is naturalised in social and mental structures such that citizens forget that it stems from a series of acts of institution (Bourdieu 1998). Making use of his multiple concepts of capital, Bourdieu therefore adapts the concentration of force definition to offer this explanation of the state:

The state is the *culmination of a process of concentration of different species of capital*: capital of physical force or instruments of coercion (army, police), economic capital, cultural or (better) informational capital, and symbolic capital. It is this concentration as such which constitutes the state as the holder of a sort of metacapital granting power over other species of capital and over their holders. Concentration of the different species of capital (which proceeds hand in hand with the construction of the corresponding fields) leads indeed to the *emergence* of a specific, properly statist capital (*capital étatique*) which enables the state to exercise power over the different fields and over the different particular species of capital, and especially over the rates of conversion between them (and thereby over the relations of force between their respective holders). (Bourdieu 1998:41-42)

This development of *corresponding fields* is something particular to highly differentiated societies which find themselves under the modern state. A *field* is “an area of structured, socially patterned activity or ‘practice’” (Terdiman 1987:805). Bourdieu gives the following definition:

In analytic terms, a field may be defined as a network, or a configuration, of objective relations between positions. These positions are objectively defined, in their existence and in the determinations they impose upon their occupants, agents or institutions, by their present and potential situation (*situs*) in the structure of the distribution of species of power (or capital) whose possession commands access to the specific profits that are at stake in the field, as well as by their objective relation to other positions (domination, subordination, homology, etc.). (Bourdieu and Wacquant 1992:97)

When speaking of the Métis pursuit for the recognition of Aboriginal hunting rights, Chartrand’s (2002) observations concerning the available channels for the advancement of Aboriginal rights and title become critical. The Aboriginal rights of the Métis have not been spelled out in statutory law, such as is the case – if even indirectly – for those groups with treaty promises to hunting, fishing, and trapping rights recognised under the Indian Act regime. Yet, Section 35 of the Constitution Act, 1982, recognises and affirms the Métis as one of Canada’s three Aboriginal peoples, along with their “existing” Aboriginal rights. The reticence of elected officials in the legislative branch of the Canadian government to proactively inscribe in statute what these rights are, however, makes it such that the power to determine Métis rights is funnelled to the *juridical field*. Organised “around a body of internal protocols and assumptions, characteristic behaviours and self-sustaining values – what we might informally term a ‘legal culture’” (Terdiman 1987:807), the juridical field can be defined as “the site of a competition for monopoly of the right to determine the law” (Bourdieu 1987:817). This right to determine the law embodies a form of juridical capital that is endowed with much symbolic power, such that the field provides for a competition “among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognised capacity to *interpret* a

corpus of texts sanctifying a correct or legitimised vision of the social world” (Bourdieu 1987:817).

Given his arrival at a concept of field as a partially closed competition according to established rules or regularities, it is perhaps not surprising that Bourdieu (Bourdieu and Wacquant 1992) has also taken to describing the operation of fields in terms of a metaphor of the game. While it is not a game that is the product of a deliberate act of creation, it does involve players who demonstrate *illusio*, or, an investment in the game. This simply means that what is at stake matters, and “players agree, by the mere fact of playing... that the game is worth playing” (Bourdieu and Wacquant 1992:98). Given the particular stakes in the game – increasing and conserving juridical capital in order to legitimise one’s vision of the social world – it is therefore clear that the judiciary in Canada now plays a critical role in constructing visions of reality surrounding perceptions of Aboriginality and the “rights” flowing from it.

While the juridical field, by its very nature as a field, benefits from a relative autonomy from other fields, Bourdieu affirms that there is a symbolic effect of “miscognition” in the commonly held illusion that the law has absolute autonomy in relation to external pressures (1987). The competition amongst agents in the field for control and access to legal resources helps to foster a continual process of rationalisation that produces an increasingly complex division of juridical labour, thereby creating more and more of a cleavage between those who are deemed technically competent in the field, and those who are not:

Such a process is ideal for constantly increasing the separation between judgments based upon the law and naive intuitions of fairness. The result of this separation is that the system of juridical norms seems (both to those who impose them and even to those upon whom they are imposed) *totally independent* of the power relations which such a system sustains and legitimises. (Bourdieu 1987:817)

The symbolic power of “Justice,” or rather the misrecognition of juridical practices as an essence called “Justice,” is increased by the necessity of checking one’s *naïve intuitions of*

fairness at the door. It is a necessity that offers a seal of protection to the juridical field.

Homologous to this is the academic study of law that abides by a purely formalist jurisprudence, because it requires one to see “the law as an autonomous and closed system whose development can be understood solely in terms of its ‘internal dynamic’” (Bourdieu 1987:814). Yet, for Bourdieu, there are limitations to the juridical field’s autonomy, for the practice of interpreting legal texts is not entirely akin to the activity of interpretation practised by the literary critic or the philosopher: judicial decisions are aimed at practical objects and create practical effects.

Divergence between authorised interpreters is therefore limited such that the field does not have to deal with a plurality of juridical norms in competition with each other (Bourdieu 1987). The common law’s reverence for precedent and for decisions from courts higher in the judicial hierarchy is testament to this. This is all necessary to the judiciary’s appropriation of symbolic power:

Reading is one way of appropriating the symbolic power which is potentially contained within the text. Thus, as with religious, philosophical, or literary texts, control of the legal text is the prize to be won in interpretive struggles. Even though jurists may argue with each other concerning texts whose meaning never imposes itself with absolute necessity, they nevertheless function within a body strongly organised in hierarchical levels capable of resolving conflicts between interpreters and interpretations. Furthermore, competition between interpreters is limited by the fact that judicial decisions can be distinguished from naked exercises of power only to the extent that they can be presented as the necessary result of a principled interpretation of unanimously accepted texts. (Bourdieu 1987:818)

The fact that the law centres itself on the interpretation of texts “whose meaning never imposes itself with absolute necessity” is critical¹⁵ (Bourdieu 1987:818), and it opens up common ground with another poststructural theorist who would most often be considered antipathetic to the likes of Bourdieu.

¹⁵ This will especially be seen in our examination of legal texts, such as the Royal Proclamation of 1763, that play a role in the juridical determination of Aboriginal rights and title.

Derrida

Jacques Derrida's deconstruction, arguably one of the most famous processes or techniques in poststructural theory, works off of the same conception of relational meaning through difference (Belsey 2002). It also echoes linguistic and anthropological structuralism in its recognition of the prevalence of binary oppositions, such as good and evil, civilised and savage, as structuring principles in Western thought (Lévi-Strauss 1955; Lévi-Strauss 1983). In fact, deconstruction argues that Western culture *depends* on such binary oppositions, and that they are always hierarchic (Belsey 2002:75). And yet, to further relationalise our concept of meaning, we have the notion of *trace*. Each of the terms in a binary opposition can alone "never sustain the antithesis on which they depend. The meaning of each depends on the trace of the other that inhabits its definition" (Belsey 2002:75). Meaning itself, therefore, "is always the effect of the *trace*, paradoxically, of the other in the selfsame" (Belsey 2002:83).

Thus, the nature of the signifier and the meaning we find from it makes it such that it "*differs* from another signifier," and "also *defers* the meaning it produces" (Belsey 2002:83). The signifier supplants the signified, and any idea we have of an "imagined presence of the meaning as pure idea is deferred, pushed away and postponed, relegated by the signifier, which is all we can bring before us, or isolate for inspection" (Belsey 2002:83). *Différance*, a French play on the words *to differ* and *to defer*, is then neither a signifier nor a signified, yet it is the only origin of meaning. "Not *full* (of an idea), nor *empty* (since it is intelligible), not foundational, since it cannot be appealed to as a guarantee of truth, *différance* is, all the same, what enables us to understand each other – to the degree that we do" (Belsey 2002:84). Yet *différance* also shows us that meaning is always ultimately deferred and that all things from which we make meaning, which can be considered text, are indeterminate. The relational territory opened up by

poststructural deconstruction is certainly unfamiliar, as textual meaning is pushed towards undecidability and indeterminacy, language is democratised, and binary oppositions are laid open “to deconstruction, leaving no pure or absolute concepts that can be taken as foundational. Meanings... are not individual, personal, or subjective, since they emanate from language. But they are not given in nature or guaranteed by any existing authority either” (Belsey 2002:87). What meaning *is* made from text, then, is inarguably and indelibly steeped in the social and the political. But what is lost, or ignored, by so many critics are these political implications of deconstruction:

At the same time, meanings are lived. Art fetches high prices, democracy is invoked to justify wars, and terrorists are hunted down. Human rights are a utopian aspiration and not, in most parts of the world, a reality. But they motivate legally binding decisions.

If meanings are not given or guaranteed, but lived all the same, it follows that they can be challenged and changed. And this is so not just for authority figures. If meaning is a matter of social convention, it concerns and involves all of us (Belsey 2002:88).

Thus White, in referencing Michael Ryan’s deconstructivist examination of Hobbes, indicates “how the use of deconstruction has an almost intrinsically political character,” for it “always takes what is claimed to be authoritative, logical, and universal and breaks those claims down, exposing arbitrariness, ambiguity, and conventionality – in short, exposing a power phenomenon where it was claimed only reason existed” (1988:188). Derrida himself formulates deconstruction in terms of power relations as expressed through the hierarchical binary opposition. “In a traditional philosophical opposition we have not a peaceful coexistence of facing terms but a violent hierarchy. One of the terms dominates the other (axiologically, logically, etc.), occupies the commanding position. To deconstruct the opposition is above all, at a particular moment, to reverse the hierarchy” (cited in Culler 1982:85).

Applied specifically to the juridical field, deconstruction is therefore “understood to rip away law’s pretension to be other than politics. Deconstruction, in other words, supposedly exposes the nakedness of power struggles and, indeed, of violence masqueraded as the rule of law” (Cornell 1990:1047). In considering the force of law, Derrida muses over Walter Benjamin’s (1986) “Critique of Violence,” noting that the German word for violence, *Gewalt*, signifies not only violence but legitimate power, justified authority, or public force. Confronting the reader with this ambiguity, Derrida poses the question: “How are we to distinguish between the force of law of a legitimate power and the supposedly originary violence that must have established this authority and that could not itself have been authorised by any anterior legitimacy, so that, in this initial moment, it is neither legal nor illegal – or, others would quickly say, neither just nor unjust” (1990:927)? Indeed, when Aboriginal practices find Aboriginal defendants in a Canadian court, the search for the legitimacy of that court does bring one back to an originary moment of violence, that of the coloniser’s assumption of sovereignty. Between the court and the Aboriginal hunter, then, two different languages of justice are spoken, and Derrida affirms that “the violence of an injustice has begun when all the members of a community do not share the same idiom throughout” (1986:15). Playing on the distinction that is often implied between two justices – that which is right, and that which is represented by the law – Derrida explains:

To address oneself to the other in the language of the other is, it seems, the condition of all possible justice, but apparently, in all rigor, it is not only impossible (since I cannot speak the language of the other except to the extent that I appropriate it and assimilate it according to the law of an implicit third) but even excluded by justice as law (*droit*), inasmuch as justice as right seems to imply an element of universality, the appeal to a third party who suspends the unilaterality or singularity of the idioms. (Derrida 1990:949)

Yet the justice that is law (*droit*) is characterised more by following rules than free decisions that in reality would require the suspension of the rule in each and every case. The arbitrary, the

strictly calculated: the rule by nature does not do justice when it is applied to so many different cases (Derrida 1990). What one finds, then, is *aporia*: the impassable instability in the relation between justice and the law. The two concepts are irreconcilable, undecideable, despite millennia of normalisation and stabilisation in essentialist, metaphysical Western thought.

But, as Belsey (2002) claims, meanings are made and meanings are lived, and the meaning of justice is no exception. Colonial justice does not take in earnest to learning the language of its indigenous *Others*, however. What is therefore of so much importance to this study is the power and inequality in the act of making meaning when one side of the binary is hierarchically dominated by the other:

The point here is more than that common language is a precondition of justice; language itself already has justice buried within it... But, again, Derrida's point has a much broader significance; language and idiom in this context speak to the politics of form, the language or conceptual knowledge of material and social structures that allows one to know, for example, that one is in a court of law. Aboriginal languages and Aboriginal forms have rarely been "addressed" by the courts; Aboriginal people have painstakingly had to learn the process of addressing the courts in order to begin to be heard. (Kulchyski 1994:2)

It would therefore seem that Bourdieu and Derrida would not disagree over the idea that the juridical field sees itself as operating from its own singular transcendental foundation of justice – one language of justice – and that those with juridical authority are in a relation of power that allows them to project conceptual constraints and visions of reality on to the world:

Legal scholars thus have an easy time convincing themselves that the law provides its own foundation, that it is based on a fundamental norm, a 'norm of norms' such as the Constitution, from which all lower ranked norms are in turn deduced. The *communis opinio doctorum* (the general opinion of professionals), rooted in the social cohesion of the body of legal interpreters, thus tends to confer the appearance of a transcendental basis on the historical forms of legal reason and on the belief in the ordered vision of the social whole that they produce.

The tendency to conceive of the shared vision of a specific historical community as the universal experience of a transcendental subject can be observed in every field of cultural production. Such fields appear as sites in which universal reason actualises itself, owing nothing to the social conditions under which it is manifested. (Bourdieu 1987:819)

In striking resonance with Bourdieu's concept of symbolic violence, Derrida also affirms that "the law is bound up with the silence of its own force, and is self-preserving" (Buonamano 1998)¹⁶. One should not speak of law in the service of force, or force in the service of law, but rather "law is always an authorized force, a force that justifies itself or is justified in applying itself" (Derrida 1990:925). This is the "mystical foundation of authority," a founding act of violence beyond justness and legitimacy: "here the discourse comes up against its limit: in itself, in its performative power itself. It is what I here propose to call the mystical. Here a silence is walled up in the violent structure of the founding act. Walled up, walled in because silence is not exterior to language" (Derrida 1990:943).

Foucault

Although not often discussed as such, Bourdieu's concept of symbolic violence has much in common with Foucault's concept of discourse in terms of its *limits on truth and the thinkable*. Foucault looks at the criminalised, medicalised, or sexualised subject as a discursively normalised and contingent event, rather than "a Platonic essence, free-thinking individual, or sociological agency," and seeks to "elucidate specific domains of language (discourses) that produce the normalcy of these subjects that their users claim only to describe," while understanding "the subject as a location where competing powers have always sought to inscribe their preferred narrations" (Dumont 1998:222).

These preferred narrations around sexuality, criminality, and madness are naturalised, and thus Taylor sees *unmasking* as an essential element of Foucault's work. Modern systems of power are more insidious than in the pre-modern, and this "strength lies partly in the fact that it is not seen as power but as science or fulfilment, even liberation" (Taylor 1984:152). It is a non-

¹⁶ p.68

essentialist, relational definition of power that gives this sense of “insidiousness”. As Foucault states, “power is not a substance. Neither is it a mysterious property whose origin must be delved into. Power is only a certain type of relation between individuals” (Foucault 2000:324). Power does not exist as an essence outside of social relations. Power is as ubiquitous as social relationships, and neither knowledge nor truth can be isolated from it. Power can facilitate knowledge, and knowledge can facilitate power. The power that criminal justice institutions hold over prisoners allows us to gain much knowledge of them, for “it is as a convict, as a point of application for punitive mechanisms, that the offender is constituted himself as the object of possible knowledge” (Foucault 1984:219). And there is a form of power and a form of knowledge that will go hand in hand, such that what we learn about prisoners is not necessarily wrong, but it is definitely known within the context of the power relations of the situation. For Foucault, then, there is a triangle of power, right, and truth, these things all being conceived of in a relational sense:

...in a society such as ours, but basically in any society, there are manifold relations of power which permeate, characterise and constitute the social body and these relations of power cannot themselves be established, consolidated nor implemented without the production, accumulation, circulation and functioning of a discourse. There can be no possible exercise of power without a certain economy of discourses of truth which operates through and on the basis of this association. We are subjected to the production of truth through power and we cannot exercise power except through the production of truth. (Foucault 1980:93)

The inseparability of truth and knowledge from power is not lost on Edward Saïd. In *Orientalism* (1979), a touchstone work of poststructuralist inspired postcolonial theory, Saïd draws heavily and explicitly on Foucauldian theory:

My contention is that without examining Orientalism as a discourse one cannot possibly understand the enormously systematic discipline by which European culture was able to manage – and even produce – the Orient politically, sociologically, militarily, ideologically, scientifically, and imaginatively during the post-Enlightenment period. Moreover, so authoritative a position did Orientalism have that I believe no one writing, thinking, or acting on the Orient could do so without taking account of the limitations on thought and action imposed by Orientalism (Saïd 1979:3).

Said's Orientalism, then, just as Foucault's conceptualisation of discourse, is simultaneously productive and constraining.

This deeply relational nature of Foucault's work is difficult for many academics to accommodate. The journal *Political Theory* thus published a series of articles and responses between academics, debating the politics of Foucauldian work. In his initial article, Taylor is compelled to indict Foucault for a Nietzschean moral inertia:

You would think that implicit in all this was the notion of two goods that need rescuing and that the analyses help to rescue: freedom and truth – two goods that would be linked deeply granted the fact that the negation of one (domination) makes essential use of the negation of the other (disguise). We would be back on familiar terrain with an old Enlightenment-inspired combination. But Foucault seems to repudiate both. (1984:152)

Connolly, in his response to Taylor, sympathises to a certain extent with the latter's interpretation of Foucault, noting that Foucault seemingly "severs the moral nerve of collective efforts to improve the modern condition," and thus "seems to depreciate a politics of social improvement" (1985:365). Ultimately, though, Connolly believes that Foucault's historical analyses are designed "to support an ontological thesis with political implications" (1985:365). Gutting goes so far as to attempt to delineate an ethical project behind all of Foucault's complex body of work, albeit a vast and multifaceted one. He identifies it as "the liberation of human beings from contingent conceptual constraints masked as unsurpassable a priori limits and the adumbration of alternative forms of existence" (Gutting 1999:321).

Foucault himself speaks of ethical projects and struggles in several instances, including his discussion of the insurrection of subjugated knowledges and genealogy in "Two Lectures," with the concept of genealogy referring to "the union of erudite knowledge and local memories which allows us to establish a historical knowledge of struggles and to make use of this knowledge tactically today" (1980:83). Such emerging genealogies, Foucault argues, could not

have been possible without work such as his against discourses of power, seeking the elimination of “the tyranny of globalising discourses with their hierarchy and all their privileges of a theoretical *avant-garde*” (1980:83). He therefore sees in his work theoretical techniques which can be used by those who are disempowered, with the full and necessary recognition that the relations of power within which they find themselves do not exist in isolation from regimes of truth, the production of knowledge, or the establishment of that which is right.

Foucault also suggests resistances and political implications to stem from the most radical project of denaturalisation – that of liberation from contingent hallmarks of modern life such as the roots of political rationality, reason of state, and technologies of power. In his essay “*Omnes et Singulatim*,” Foucault characterises the modern state, through its own particular type of rationality, as both individualising and totalitarian (2000). Pastoral technologies of power, which have been in development since primitive Christianity, showed concern to exercise control over each individual within the flock and have helped to secure a certain kind of *mortification* of the citizenry, such that each is disposed to show a renunciation of oneself and this world (Foucault 2000).

With the advent of the modern state, a doctrine of *reason of state* saw an art of governing whose aim is to reinforce the state itself. For this it makes use of historically rooted rationalities such as the pastoral, as well as the distinctly modern concept of *police*. Foucault conceptualises police broadly, affirming that it is “not an institution or mechanism functioning within the state but a governmental technology peculiar to the state – domains, techniques, targets where the state intervenes” (Foucault 2000:317). Police coincides with *population*, a notion that took on importance in the eighteenth century. Thus while the aim of the modern art of government, or state rationality, is “to develop those elements constitutive of individuals’ lives in such a way

that their development also fosters the strength of the state” (Foucault 2000:322), the art or science of policing – Foucault uses Von Justi’s term *Polizeiwissenschaft* – “is at once an art of government and a method for the analysis of a population living on a territory” (Foucault 2000:323). The modern state therefore seeks pastoral power over individual citizens, while paradoxically conceiving of the citizenry as a *population* to be managed. It is in this way that the state is both individualising and totalitarian.

For the Métis hunter, the state’s compulsion to reinforce itself and manage the citizenry as a population is easily felt. The essence of the dispute in the Powley case is not so much whether Métis individuals such as Steve or Roddy Powley can hunt or not. Rather, what is at stake is whether Roddy Powley is entitled to hunt *without a licence*. This sums up much about the contemporary Aboriginal right to hunt in Canada: it is a relative, though not absolute, liberation from state regulatory regimes which envisage the management of both populations of hunters and the hunted through knowledge of the individual and control through rationalisation. Those without an Aboriginal right to hunt in Canada *have to be known to be hunting* specific species or categories of species through the purchase of yearly licences, and this during a particular, often relatively brief, period of time. Those with an Aboriginal right to hunt, although it is defined as merely a usufructuary burden on the Crown’s title, are nonetheless perceived by the state as a weak point in its sovereignty over both territory and population.

Foucault’s Historiography

Although this study is intended to engage the present of Métis hunting rights, the previous sections allude to the fact that one cannot do so without also engaging a certain history of Aboriginal rights and title. The very nature of the common law, and its reverence for

precedent, show that it makes meaning from the history it generates within its own internal dynamic.

Bourdieu (Bourdieu and Wacquant 1992), for his part, states that his field theory can represent struggles, and therefore has an element of historicity that is lacking in other theories to which his is often compared. Yet, while Bourdieu's concept of field tells us much about the operation of the juridical field, the very alienation of Aboriginal Canadians from the legal and justice system in Canada would seem to impoverish an attempt at an *historical* interpretation of Aboriginal rights in terms of the concept of field. The definition of the juridical field, namely the site of the competition for the monopoly to determine the law, would seem to indicate that, while Aboriginal groups are participating in this competition from time to time when their right to a practice is challenged, they still approach it only occasionally as outsiders with a singular objective. They do not make their careers of it, as do lawyers and judges. There *is* a history, however. For the purposes envisioned in this project, though, it is better approached as a history of meaning-making on the part of the judiciary. A more fruitful analysis, then, would delve into the historiography and meaning-making employed in the juridical field, and so theoretical tools that make use of non-essentialist historiography and meaning-making are in order. Thus Foucault and Derrida both have a role to play in this.

What is most striking, and indeed most challenging, about Foucault's concept of *effective history* is that it refuses essentialism where so much theory and philosophy have failed to even identify it. Effective history is an historical analysis without constants, and such an effort can be destabilising to say the least.

Firstly, effective history opposes itself to the search for origins, of which the distillation of *linear evolutions* of meaning is a clear manifestation. In Foucault's estimation, then, "Paul

Ree was wrong to follow the English tendency in describing the history of morality in terms of a linear development,” for “he assumed that words had kept their meaning, that desires still pointed in a single direction, and that ideas retained their logic; and he ignored the fact that the world of speech and desires has known invasions, struggles, plundering, disguises, ploys” (1977:139). The search for origins then is a search for essence, a unity of reason for the advent or existence of something that embraces an essentialist destiny and logic while omitting accident, disparity, and dispersal of meaning from the events of our past:

...it is an attempt to capture the exact essence of things, their purest possibilities, and their carefully protected identities, because this search assumes the existence of immobile forms that precede the external world of accident and succession. This search is directed to ‘that which was already there,’ the image of a primordial truth fully adequate to its nature, and it necessitates the removal of every mask to ultimately disclose an original identity. However, if the genealogist refuses to extend his faith in metaphysics, if he listens to history, he finds that there is ‘something altogether different’ behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated in a piecemeal fashion from alien forms. Examining the history of reason, he learns that it was born in an altogether ‘reasonable’ fashion – from chance; devotion to truth and the precision of scientific methods arose from the passion of scholars, their reciprocal hatred, their fanatical and unending discussions, and their spirit of competition – the personal conflicts that slowly forged the weapons of reason. Further, genealogical analysis shows that the concept of liberty is an ‘invention of the ruling classes’ and not fundamental to man’s nature or at the root of his attachment to being and truth. What is found at the historical beginning of things is not the inviolable identity of their origin; it is the dissension of other things. It is disparity. (Foucault 1977:142)

And so to follow the complex course of descent into history is “to maintain passing events in their proper dispersion; it is to identify the accidents, the minute deviations – or conversely, the complete reversals – the errors, the false appraisals, and the faulty calculations that gave birth to those things that continue to exist and have value for us” (Foucault 1977:146). Ultimately, “it is to discover that truth or being do not lie at the root of what we know and what we are, but the exteriority of accidents” (Foucault 1977:146). And just as it is wrong to move back in history searching for descent in an uninterrupted continuity, neither should we gaze upon the forward movement of history as though all *emergences* were culminations, the final teleological terms of

a grand historical development. Rather, they are “merely the current episodes in a series of subjugations” (Foucault 1977:148).

In addition to unseating the common narrative sensibilities of traditional history, Foucault also corrects in it one of its most persistent essentialist weaknesses: that of our concept of the individual, the human, the subject. Historical meaning becomes a dimension of effective history, he claims, “to the extent that it places within a process of development everything considered immortal in man¹⁷” (Foucault 1977:153). To this effect, his conceptualisation of subjectification is that power creates the subject, and as such he eliminates the last transcendental essence of the subject by refusing anything conceived of as immortal or indelible within him or her. Nothing in “man,” according to Foucault – “not even his body – is sufficiently stable to serve as the basis for self-recognition or for understanding other men” (Foucault 1977:153). As Thiele describes it, “Foucault's analyses did not reveal Man, the transcendental subject, who remains unchanged beneath thick webs of power. Rather, Foucault brought to light the constitution of Man himself, a historical product of the mechanisms of power” (Thiele 1986:251). Yet Foucault does not argue for power as totalisation, or the unified, prohibitive, and internalised domination of a sovereign. Rather, for Foucault, power is productive and comes from below, forming “an omnipresent web of relations, and the individuals who support this web are as much the producers and transmitters of power as they are its objects” (Thiele 1986:248).

In effect, Foucault’s desire to encourage political thought and analysis to transcend conceptions of power that are sourced from a central, overarching and prohibitive sovereign remains one of his hallmark contributions. It is, for him, an important correction to a blind spot in much theory and philosophy:

¹⁷ I will avoid gender specific language when the topic does not merit it, but will be obliged to use it in certain quotes and, as an occasional consequence, in order to preserve grammatical continuity with those quotes.

At bottom, despite the differences in epochs and objectives, the representation of power has remained under the spell of monarchy. In political thought and analysis, we still have not cut off the head of the king. Hence the importance that the theory of power gives to the problem of right and violence, law and illegality, freedom and will, and especially the state and sovereignty (even if the latter is questioned insofar as it is personified in a collective being and no longer a sovereign individual). (Foucault 1990:88)

In proving his point, Foucault portrays two strains of critical political thought directed at power from European history. The first sort of criticism was found in eighteenth century France, and was directed at a monarchy that “continuously overstepped the legal framework and set itself above the laws” (1990:88).

Political criticism availed itself, therefore, of all the juridical thinking that had accompanied the development of the monarchy, in order to condemn the latter; but it did not challenge the principle which held that law had to be the very form of power, and that power always had to be exercised in the form of the law. (Foucault 1990:88)

Without questioning the law, then, this strain of criticism merely wanted the sovereign to obey it as everyone else was compelled to obey it.

The second form of criticism, this one from the nineteenth century, was more radical in that “it was concerned to show not only that real power escaped the rules of jurisprudence, but that the legal system itself was merely a way of exerting violence, of appropriating that violence for the benefit of the few, and of exploiting the dissymmetries and injustices of domination under cover of general law” (Foucault 1990:88). For Foucault, though, this criticism is still inadequate in that it is “still carried out on the assumption that, ideally and by nature, power must be exercised in accordance with a fundamental lawfulness” (1990:88).

However, setting aside debate over the historical details of eighteenth and nineteenth century Europe, for his portrayal of the claims of critics and philosophers of the time may very well be accurate, this last statement given by Foucault does not follow from the premises given: to assert that law is a form of violence for the benefit of the few is *not* to claim that there still exists a fundamental and just form of lawfulness to which we should aspire. Indeed, academics

such as Bourdieu recognise that the foundations of social life in every culture are essentially arbitrary but naturalised. With law being a naturalised legal-rational manifestation of culturally bound norms, it would be contradictory to assert that there would still exist a form of law that is truly based upon and directs humanity to a transcendental Justice. And so this brings about the need for a certain caveat concerning Foucault's preferred conception of power and the sovereign.

As I mentioned previously, there is an element of the *disciplinary* – the ubiquitous, subjectifying, and individually productive yet controlling power from below – in the issue of Aboriginal hunting rights. The contentious heart of the dispute in the Powley case is not so much whether Métis individuals such as Steve or Roddy Powley can hunt or not. Rather, what is at stake is whether Steve and Roddy Powley are entitled to hunt outside of the provincial government's licensing regime. This sums up much about the contemporary Aboriginal right to hunt in Canada: it is a relative, though not absolute, liberation from state regulatory regimes which envisage the management of both populations of hunters and the hunted through knowledge of the individual and control through rationalisation. Those without an Aboriginal right to hunt in Canada *have to be known to be hunting* specific species or categories of species through the purchase of yearly licences, and this during a particular, often relatively brief, period of time. What is also at stake from the Foucauldian perspective is the constitution of subjectivity itself: both the Aboriginal and non-Aboriginal are known and constituted – in a way inseparable from relations of power – by the pieces of paper they are required to produce to establish their own particular fashion of hunting privilege. In this sense, Foucault can help to denaturalise the very legal-rational categories with which we have constituted Aboriginality in Canadian society: the pervasive and subjectifying nature of the process by which people have come to be known as

status or non-status, legal or constitutional, Indian or Inuit¹⁸, is attested to by the fact that these labels are just as often mobilised by the very people to whom they apply.

That said, we must not confuse the ubiquitous and capillary conception of power with one that is non-differential. Power is everywhere, power is constitutive of knowledge and of the subject, but power is still a type of relation characterised by imbalance and inequality. The sovereign still exists, whether it is characterised as a concentration of power or the strategies and tactics that embody power, for the advent of the state over the past centuries and the normalisation of its power against all other collective entities within its territory is unquestionable. But for Foucault this is an easy find, a discovery already made. His research interests thus demonstrate a clear heuristic preference for those topics that lend themselves to a portrait of power that *is* capillary. In discussing the *History of Sexuality* (1990), Thiele affirms that, not unlike the topics of surveillance, discipline, and punishment, “sexuality was chosen by Foucault as a topic for investigation because it marked a definite point where power touched the individual” (1986:249). His intellectual career therefore seems driven by the desire to reveal what has been long unrecognised: the microscopic, capillary, subjectifying aspects of power from below.

Nevertheless, those with an Aboriginal right to hunt, although it is defined as merely a usufructuary burden on the Crown’s title, are perceived as a weak point in state *sovereignty* over both territory and population. The judiciary states clearly in numerous judgments that *Aboriginal rights must be reconciled with the sovereignty of the Crown*, and the very names of the cases discussed show Aboriginal rights claimants as adversaries to a sovereign: *Regina v. Powley*. And so to look further into Foucault’s conception of power, its ubiquity, is to see that we are merely

¹⁸ Both names being misnomers in their own way: “Indian” is commonly known to be incorrect, while “Inuit,” meaning “people” in Inuktitut, assumed an ethnic qualification after colonisation.

at a point far along a typical Foucauldian analysis. That which he describes in his later work as an *apparatus* – the sovereignty of the State, the forms of law, “the terminal forms power takes” (1990:92) – already exists, and Aboriginal rights are contending with it, cycling through it. From the statist perspective, such rights represent a potentially dangerous destabilisation that demand normalising.

ABORIGINAL LEGAL RIGHTS: CONTACT TO 1996

Prior to the Sovereignty of the Crown

In looking to the legal dimensions of the European “discovery” and settlement of North America, some of the earliest legal and policy expressions concerning the appropriation of land can be found in a series of papal bulls on the side of the Portuguese and the Spanish, and royal commissions and charters granted to explorers on the side of the French and the English (Slattery 2005). Brian Slattery (2005) explores these early instruments in order to determine which of two common legal accounts of Aboriginal dispossession is historically accurate. The first, based on the concept of *terra nullius*, is well known:

According to this common account (which we will call the doctrine of a legal vacuum), the fact that most of the land was occupied by indigenous nations was brushed aside. As ‘pagan and uncivilized’ peoples, Native Americans were not considered capable of holding territorial title, property rights, or jurisdiction over their countries, so when the French and British Crowns assumed sovereignty over an American territory, they asserted full title to the soil and complete jurisdiction, just as in a vacant country. The original rights held by the Native peoples were ignored; henceforth, their only rights were those granted or confirmed by the incoming sovereigns. Although this doctrine concedes that the British Crown (but not the French) made a practice of entering into treaties with the Indians for the purpose of ‘purchasing’ lands, it treats this as a mere policy, born of prudence and benevolence, that did not involve recognition of their land rights (50).

The other account examined by Slattery finds its way into Canadian common law jurisprudence via several pivotal American decisions written in the nineteenth century by Chief Justice John Marshall of the United States Supreme Court. The Marshall decisions offer a historical outline of a more organic process of colonisation, one which broadens its view sufficiently to accommodate – or gloss over, depending upon one’s perspective – the variation in the policy and practices of the different European colonial powers toward indigenous peoples. During the first of four stages envisaged by Marshall’s interpretation, the Aboriginal peoples of North America were independent nations with full title and jurisdiction over their territories – “North America was not *territorium nullius*” (Slattery 2005:51). Slattery thus cites Marshall:

Given this fact, the chief justice remarks, 'it is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered which annulled the pre-existing rights of its ancient possessors.' Europeans could not appropriate America by mere discovery any more than Native Americans could appropriate Europe. As we shall see shortly, however, Marshall assigned discovery a different role. (Slattery 2005:51)

That different role assigned to discovery comes with the second stage, when Europeans began arriving on the shores of North America. According to Marshall, European colonial powers adopted a regulatory principle whereby discovery accorded a title *that had yet to be perfected by possession and that operated vis-à-vis other European nations*. This was done by European nations in order to avoid conflict and war over the new territories. As such, a "discovering nation had the exclusive right among European states to enter into relations with the Native peoples, to acquire lands from them, and to establish settlements. No other European state might interfere in the discovering state's exclusive sphere of activity" (Slattery 2005:51). This practice of non-interference meant that the principle of discovery did not dictate how a European state should deal with the Aboriginal populations within their exclusive sphere of activity: "whether it maintained peaceful relations with these peoples or waged war on them, whether it acknowledged their independence or tried to subject them was an open matter" (Slattery 2005:52).

The third stage came about with the establishment of permanent colonies and enduring relations with indigenous nations in North America. Here Slattery warns that Marshall generalises about the practices of the major colonising states of Europe, but nonetheless focuses his account on the practices of Britain and then the United States (2005). At this stage the English Crown issued charters to a number of groups and individuals. These charters conferred to the grantees, prior to their actual possession and successful colonisation of the regions in

question, governmental rights and title over certain New World territories. These exclusive rights of colonisation were enforceable in British courts against other British subjects. They may perhaps have also been enforceable against rival European states to the extent that they were supported by a supposedly commonly held right of discovery, and to the extent that enforcement could be ensured through either diplomacy or war (Slattery 2005). At this point, according to Marshall, none of these charters had any effect on the rights of the Aboriginal peoples. Slattery explains, in citing Marshall:

The Crown could not grant rights it did not itself possess (*nemo dat quod non habet*), and at this stage it only had a right of discovery that was good among European states. The grants ‘asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned.’ In particular, the charters did not authorize the colonial authorities to govern Indian nations or seize their lands. (Slattery 2005:52)

During the fourth stage, however, greater control and influence over indigenous nations was achieved by a variety of means. This was sometimes done by degrees, through attrition, accommodation, and settlement. In other instances it was a rapid process driven by war or treaty:

Either way, Indian peoples increasingly assumed the status of domestic nations living under the Crown’s protection. During this stage, the Crown gained rights that were directly enforceable against Native American peoples and affected their independence and land rights. In Marshall’s view, the move from the third to the fourth stage involved the conversion of a right of discovery into a right of conquest, or, as he puts it elsewhere, the transformation of a merely dormant right into a right in fact. (Slattery 2005:53)

At this stage Aboriginal peoples within the territory of the United States are considered to be *domestic dependent nations* who are subject to restrictions on their relations to other European states. They have retained internal autonomy, but are completely under the autonomy and sovereignty of the United States. Marshall therefore came to a conclusion that would reverberate throughout Commonwealth jurisprudence: the state held complete and ultimate title to the land, burdened with a Native land title that was a legal right of possession and use. Their power “to sell or otherwise transfer their land,” however, “was now limited to a right of alienation to the Crown” (Slattery 2005:54). This legal conception of a limited right of alienation derives from the

influence of the Royal Proclamation of 1763 on Justice Marshall, a document whose pertinent aspects I will examine in the next section.

In keeping with his goal of determining which legal account of history is more accurate, terra nullius or Marshall's theory of legal symbiosis, Slattery (2005) examines the early legal instruments used by the Spanish, Portuguese, French, and English in their exploratory ventures. From early on, it was Spain and Portugal that claimed exclusive rights to much of the New World, justified variously by discovery, settlement, conquest, and even, with the aid of the Catholic Church, a series of papal bulls that purport to grant certain rights with the obligation to bring infidels to the Catholic faith:

...most of the bulls do not make outright grants of territory, as is often assumed. Instead, they extend recognition to past conquests and confer the faculty to make future ones. Moreover, the bulls do not treat infidel lands as *terra nullius*, acquirable by mere discovery or occupation. While presuming that Christians may justly make war on infidels (or at least some of them) and also appropriate their territories, the bulls generally recognize that such territories can only be acquired by conquest or some other method of achieving factual control. (Slattery 2005:54)

The papal bull *Dum diversas* of 1452, forty years prior to Columbus's discovery of the Americas, "grants to the King of Portugal the faculty to invade, search out, capture, vanquish, and subdue all Saracens, pagans, and other enemies of Christ whatsoever, and their dominions" (Slattery 2005:54). The bull *Romanus pontifex* of 1455 confirms the previous bull and expands its geographical specificity, by making mention, for example, of several regions of coastal Africa. This right of conquest and exclusive trade is said to be exclusive to the King of Portugal, but "the text stipulates that acquisitions made under the present 'letters of faculty' shall pertain to the King 'after they shall have been acquired,' distinguishing between the *authority to acquire* conferred in the bull and the *process of acquisition proper*" (Slattery 2005:55).

Spain's sponsorship of Columbus's first voyage to the America's in 1492 was then subject to Portugal's accusations that Spain was in violation of Portugal's exclusive sphere. The

Spanish monarchs then secured the papal bull *Inter caetera* in 1493 which “grants Spain dominion over all past and future acquisitions located beyond a meridian one hundred leagues west of the Azores or the Cape Verde Islands and exclusive rights of trade and travel there, while safeguarding rights acquired by Christian princes in ‘actual possession’” (Slattery 2005:55). It is stated that the grant is made so that the Spanish monarchs can bring under their sway the residents of these regions and bring them to the Catholic faith. Later that year the bull *Dudum siquidem* issued to Spain confirms the bull *Inter caetera* and gives Spain full power to take eternal possession of the lands within its scope. Possession of any territory could only be taken, however, under the condition that another Christian monarch had not already done so under the auspices of a previous papal bull. The bull also indicates, however, that having a grantee or its envoy sail through a particular area does not entail possession. According to Slattery, “this clause clearly indicates that the papal grants took effect only when the grantee assumed ‘actual and real possession.’ Mere casual discovery or exploration was not enough to bring them into effect” (2005:55).

These Spanish and Portuguese claims were distinctive in their exclusivity. They desired to assert “a total monopoly, as against the rest of Christendom, on access, trade, exploration, colonization, conquest, conversion, and indeed all other activities within their notional spheres” (Slattery 2005:56):

In effect, Portugal and Spain asserted an exclusive right among European powers to exploit certain maritime routes they had pioneered, and to engage in trade and conquests in regions they were the first Europeans to visit. To claim that the papal bulls had granted Spain and Portugal complete title to vast and populous territories they had neither settled nor conquered was to invite the sort of derision that France and England later poured on such claims. But to argue that the Pope had given Spain and Portugal sole admittance among Christian states to the newly encountered regions was to take more defensible ground. (Slattery 2005:56)

Royal commissions granted by the French Crown have not been discovered for Jacques Cartier's first voyages to the New World, but in 1540 one was written which grants him captainship of an expedition to the lands of Canada, Ochelaga, and Saguenay if able to reach there (Slattery 2005). The purpose of the voyage simply seems to be to penetrate further into the New World, engage with the indigenous peoples there, and promote the Catholic Church. The commission "does not assert pre-existing French rights to the countries named or explicitly authorize Cartier to acquire lands there for France. Much less does it grant him any lands, even *in futuro*. Iberian claims in America are not mentioned, and the territories are portrayed as possessed in part by indigenous peoples" (Slattery 2005:57).

The tone changed in 1541 when Jean Francois de La Rocque, Sieur de Roberval, was issued a commission to take precedence over Cartier's commission. In it, Roberval is mandated "to pass across and pass across again, to go and come from the said foreign countries, to land there, make entry, and put them in our hands, whether by amiable means or friendly agreements, if that can be done, or by force of arms, *main forte* and all other warlike means" (cited in Slattery 2005:57). As Slattery notes, this instrument essentially envisages two means of acquisition of American territories: cession or conquest. It does not refer to "acquisition by discovery, symbolic acts, or similar methods suited to *terra nullius*. Other passages make it clear that the Crown envisages no less than the reduction of the inhabitants to French control, the imposition of French law, and the founding of settlements, forts, and missions" (Slattery 2005:57). Indeed, the commission specifically disallows the taking of lands actually *held* and *occupied* by allies such as the Spanish Emperor and the King of Portugal, a "friendly" gesture which actually serves as an implicit rejection of Iberian claims of exclusive access and suggests that only occupation, possession, and control bring title. More commissions were to follow, and with them disputes

concerning rights of acquisition between France and its fellow European nations. From his survey of the history Slattery concludes:

In the material reviewed, there is little to show that the French Crown viewed North America as *terra nullius*, vacant land appropriable by discovery or token occupation. The Crown recognized that most American territories were occupied by independent indigenous peoples. These peoples had the capacity to enter into peaceful relations with France on a basis of juridical equality. The Crown explicitly envisaged treaties of alliance, along with treaties of peace, friendship, and commerce.

Nevertheless, the Crown held that it might also justifiably seek to bring indigenous peoples under its rule, using peaceful means wherever possible but also force if necessary, citing mainly the need to bring infidel nations to the true knowledge of God. The Crown saw only two methods of acquiring sovereignty over indigenous peoples: peaceful agreement or war. Acts of discovery and token occupation were not considered applicable in this context. (2005:64-65)

English claims were more similar to those of France than to those of Portugal or Spain. John Cabot and his sons were issued letters of patent in 1496, soon after Columbus's trip to the Americas. They are authorised to erect royal banners and ensigns in any place found by them, and also to conquer and possess such territories in order to acquire dominion, title and jurisdiction for the Crown (Slattery 2005:65). Slattery's interpretation of this is that "discovery is mentioned merely as the prelude to acts of conquest, occupation, and possession, by which dominion and title shall be acquired." In addition, "the patent does not cover specific lands or embody territorial claims," it merely "grants a general *faculty* to conquer new territories" (Slattery 2005:65).

Letters patent issued to others in 1501 and 1502 implicitly reject Spanish and Portuguese claims of exclusive rights to the New World in the same way as the French commissions: by only excluding from the instrument those lands of which the other European princes are *actually in possession*. This continued through the 16th century such that, by 1580, Elizabeth I was rebuffing and dismissing the complaints of Spain. By 1606, however, and perhaps in response to a similar French commission given in 1603, the royal charter for Virginia was the first English charter to delineate definite geographical limits to such an enterprise. The exclusive territorial

rights that it confers, though, are dependent on the founding of a settlement (Slattery 2005). In it the Crown expresses the hope that colonists may bring the true knowledge of God to the infidels and savages of the specified region, leading them “to human Civility, and to a settled and quiet Government” (cited in Slattery 2005:67).

The Virginia charter issued to the London Company in 1603 was superseded by another three years later. The Virginia charter of 1609 is somewhat bolder, describing vast swaths of North America “slated for colonization as *either* pertaining to the Crown *or* not actually possessed by any Christian prince or people” (Slattery 2005:68). Given that this grant speaks of lands that are not settled by the British, but are nonetheless *pertaining* to the Crown, it provokes the question of whether it is in the same vein as past instruments issued by the French and English Crowns, or is an annexation and grant of territory of immediate effect in the style of Spain and Portugal. Slattery claims that the answer is somewhere in between:

On balance, the charter is best understood not as claiming an existing territorial title but as asserting exclusive rights of colonization, trade, and territorial expansion within a certain area vis-à-vis other Christian states. In reaction to the monopolistic pretensions of other European powers, England carves out an exclusive sphere of its own in the New World. However, it stops short of claiming a complete existing title to the lands described. The right to acquire such a title is one of the exclusive privileges claimed against the rest of Christendom, and the responsibility for implementing this project is entrusted to the company. (2005:69)

In 1621, King James I granted the barony of Nova Scotia to Sir William Alexander. This accounted for a territory that encompassed present-day Nova Scotia, New Brunswick, and Prince Edward Island, as well as part of Quebec. In this grant, the Crown recognised that the region’s Aboriginal inhabitants “possess an autonomous status under their own rulers and the capacity to conclude treaties” (Slattery 2005:71). While it does assert “the right to reduce them to order if they violate the treaties,” Slattery still sees its principal objective as being “to live in peace with the Indians, not to drive them away or seize their lands” (Slattery 2005:71).

Slattery (2005) concludes, then, that French and English perspectives on the New World and its indigenous inhabitants were complex and sometimes contradictory, and they had a tendency to change as circumstances and ambitions in colonial geopolitics changed. There was, however, a certain coherence and continuity *in the initial period of contact and colonisation*. Slattery (2005) sums up these themes with several propositions.

The first of these is that the French and English Crowns did not look to indigenous territories in the New World as *terra nullius* as many critical scholars and historians would like to claim. Rather, they recognised that indigenous peoples possessed North America, and that this possession had juridical dimensions. Secondly, while the French and English Crowns denied the legitimacy of papal bulls as emphasised by the Portuguese and Spanish, they did espouse the view that Christian powers were entitled to secure the submission of non-Christian peoples by peaceful or non-peaceful means with the aim of bringing them to true knowledge of the Christian God. Lastly, while they rejected the monopolistic claims of Spain and Portugal, France and England “eventually began playing a similar game, claiming exclusive spheres of operation in the New World as against other European powers” (Slattery 2005:72). This last proposition, for Slattery, is the grain of truth in Marshall’s version of colonial history, although for the author neither the doctrine of a legal vacuum nor Marshall’s doctrine of legal symbiosis render a “completely satisfactory account of official French and English attitudes to indigenous territories in North America” (2005:73).

However, as will be seen with further analysis throughout this thesis, legal scholars such as Slattery who rely on formalist jurisprudence for an account of colonial endeavours will never be completely satisfied. Justice is treated as an essence, an anchor for meaning, rather than something contingent on power relations and colonialist motives. A theory of law that accepts

the latter has no difficulty rendering a satisfactory account of a history in which the coloniser's sense and logic of justice changes in mid-game. And change it does – repeatedly.

The question must also be asked, however, as to whether Slattery is searching for *terra nullius* in the proper form and place. Rather than an account of historical events, the concept of *terra nullius* should be conceived of as a *justificatory ideal* that takes multiple, related forms. This embodies a significant difference between Marshall's legal theory and the concept of *terra nullius*: the former is meant to be an account of the history of colonisation, albeit a flawed one, while the latter is a category of argument employed when justification for the dispossession of indigenous lands is needed. Such a justificatory ideal would only be necessary lacking any other justification, and as Slattery himself explains, religious grounds offered sufficient impunity for the early colonial endeavours of Spain, France, Portugal, and England. However, as has already been noted, not long after the period examined in Slattery's (2005) "Paper Empires," John Locke employed philosophical arguments akin to *terra nullius* that had the effect of justifying colonial dispossession. Indeed, it is of more use to continue searching for such justificatory ideals elsewhere: where the conflicts stemming from dispossession and title disputes became more and more intractable, and where religion did not provide an easy stamp of impunity. The case law of the juridical field is just such a place.

Sovereignty Assumed

The Royal Proclamation of 1763 was an outcome of the Seven Years War between the British and the French. Following the Treaty of Paris, in which the French Crown ceded North American and Caribbean possessions to the British Crown, the Proclamation was meant to

establish boundaries and administrations for the new possessions. It thus creates four distinct and separate governments for Quebec, East Florida, West Florida, and Grenada (1996).

Having benefited from alliances with Aboriginal groups in North America, the Royal Proclamation also seeks to offer an assurance that “the several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds” (1996:723). The Proclamation then forbids the governments of Quebec, East Florida, and West Florida “to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantick Ocean from the West and North-West, or upon any Lands whatever, which, not having been ceded to, or purchased by Us as aforesaid, are reserved to the said Indians, or any of them” (1996:723). In addition:

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; and We do hereby strictly forbid, on Pain of Our Displeasure, all Our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without Our especial Leave and Licence for that Purpose first obtained. (1996:723-724)

Lastly, in response to the fact that great “Frauds and Abuses” had been committed “to the great Dissatisfaction of the said Indians,” and “to the End that the Indians may be convinced of Our Justice,” the Proclamation requires that all lands willingly disposed of by Aboriginal groups be alienated solely to the Crown at a public meeting or assembly held for that purpose (1996:724). Despite the apparent clarity, however, it will be seen later that certain ambiguities in the Royal Proclamation of 1763 posed problems for the courts presiding over Aboriginal rights disputes.

In 1867, Canada was formed via the British North America Act. Now known as the Constitution Act, 1867, the B.N.A. Act lists areas of responsibility for the federal government at section 91. Line 24 of that section contains the oft repeated words “Indians and Lands Reserved for the Indians” (1867).

The admixture of these two constitutional statutes with a legal question pertaining to Aboriginal title came not long after 1867. In 1873 a treaty was signed by an Ojibway group in Ontario. The treaty was seen to surrender title over the lands to the government of the Dominion for the Crown – lands that the Royal Proclamation had previously reserved for its Aboriginal inhabitants. The government’s acquisition, however, was “subject to a certain qualified privilege of hunting and fishing” for the Ojibway¹⁹.

*St. Catherine’s Milling and Lumber v. The Queen*²⁰ is particular, though, in that the Aboriginal group in question was not a party in the legal dispute. Rather, the plaintiff was the Attorney-General for Ontario, and the defendant was the St. Catherine’s Milling and Lumber Company, with the Attorney-General for the Dominion of Canada intervening on behalf of the defendant. The circumstances were that, after the treaty of 1873 was signed, the Dominion of Canada held that absolute title to the land in question had been ceded to it by its Aboriginal inhabitants – this despite the fact that the Constitution Act, 1867 states under section 109 that “All Lands, Mines, Minerals, and Royalties... shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same” (1867). The Dominion consequently granted to St. Catherine’s Milling and Lumber Company a licence to remove lumber from the area in question. The nature of what was then known as

¹⁹ *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46, at p. 46 (P.C.)

²⁰ *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.)

“Indian title” is at the heart of the issue precisely because it determined what happened to title over the land through the Constitution Act, 1867 and the treaty of 1873. The province and the Dominion both felt that the legal effect of extinguishing the Indian title had been “to transmit to itself the entire beneficial interest of the lands, as now vested in the Crown, freed from incumbrance of any kind, save the qualified privilege of hunting and fishing mentioned in the treaty”²¹. An interpretation of the Royal Proclamation of 1763 helped to resolve the issue.

Ontario argued that the Royal Proclamation established that ultimate title for the lands in question was with the Crown since 1763, and that the Indian title was merely a burden of usage on the Crown’s absolute title. As such, the land was included in the lands whose beneficial interest was passed to the provinces at Confederation with the Constitution Act, 1867. The Dominion argued that Indian title was equivalent to full and absolute title, as owners in fee simple, and as such the lands did not pass to the province at Confederation. Consequently, when it negotiated the treaty with the Ojibway inhabitants in 1873, full title simply passed to the Dominion, thereby temporally circumventing the Constitution Act’s passage of lands to the provinces. Kulchyski (1994) notes this as one of the notorious ambiguities of the Royal Proclamation of 1763: was the King recognising pre-existing Aboriginal rights that exist independent of his authority, or was he merely creating something subject to his authority and at his own discretion?

The case escalated to the Supreme Court of Canada, and then beyond to the Judicial Committee of the Privy Council in London – a body that still had ultimate authority over the Canadian judiciary at that point in history. Ultimately, the Privy Council found in favour of the province of Ontario:

²¹ *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46, at p. 52 (P.C.)

Held, that by force of the proclamation the tenure of the Indians was a personal and usufructuary right dependent upon the goodwill of the Crown; that the lands were thereby, and at the time of the union, vested in the Crown, subject to the Indian title, which was ‘an interest other than that of the Province in the same,’ within the meaning of sect. 109.

Held also, that by force of the said surrender the entire beneficial interest in the lands subject to the privilege was transmitted to the Province in terms of sect. 109. The Dominion power of legislation over lands reserved for the Indians is not inconsistent with the beneficial interest of the Province therein.²²

The Privy Council acknowledges in the decision that, had the Ojibway been owners in fee simple of the lands, the outcome would have been different. Its decision rested on, however, terms of the Royal Proclamation which referred to the lands outside of the four 1763 colonies as “Parts of Our Dominions and Territories,” reserved and protected for use as Aboriginal hunting grounds “for the present, and until Our further Pleasure be known” (1996:723). Perhaps because the nature of Aboriginal title was simply a means to deliberating on an altogether different dispute, the decision delivered by Lord Watson states that “there was a great deal of learned discussion at the Bar with respect to the precise quality of the Indian right, but their Lordships do not consider it necessary to express any opinion upon the point”²³. Nevertheless, the little that was said would be of monumental importance to Canada and Aboriginal Canadians. Being reduced to a personal and usufructuary right dependent on the good will of the Sovereign, the nature of the title that Aboriginal groups could legally pursue in Canada would thereafter be “drastically circumscribed” (Kulchyski 1994:22).

Given the Judicial Committee of the Privy Council’s jurisdiction over numerous British colonies, it heard another influential case in 1919 concerning Aboriginal title that would later circulate throughout Commonwealth jurisprudence – this time in the colonial era African region of Southern Rhodesia. *In re Southern Rhodesia*²⁴, like the St. Catherine’s Milling case, actually

²² *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46, at p. 46 (P.C.)

²³ *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46, at p. 55 (P.C.)

²⁴ *In re Southern Rhodesia* (1919) A.C. 210 (P.C.)

revolved around a dispute between two bodies other than the indigenous inhabitants of the land in question. Southern Rhodesia was a territory in Southern Africa conquered by the British South Africa Company on behalf of the Crown. While colonial affairs were managed and regulated by the company, a legislative council was also brought into existence. The Legislative Council of Southern Rhodesia passed several resolutions pertaining to issues related to title, ownership, and the administration of the colony, the most significant being the first:

That the ownership of the unalienated land in Southern Rhodesia is not vested in, and has never been acquired by, the British South Africa Company as their commercial or private property, and that such powers of taking possession of, dealing with or disposing of land in Southern Rhodesia as have been or are possessed by the British South Africa Company have been created by virtue of authority conferred by Her Majesty the Queen in Council and her successors upon the Company, as the governing body charged for the time being by Her Majesty in Council and her successors with the general administration of affairs within the said territory and responsible for the maintenance of law, order, and good governance therein.²⁵

The several claims of the Legislative Council of Southern Rhodesia were contested by the British South Africa Company, and the issue was brought before the Privy Council. The Privy Council agreed with the above resolution, but during the process legal representatives on behalf of the indigenous inhabitants of the region were heard. It seems that it was not without a certain amount of derision that the Privy Council entertained their assertion of Aboriginal title. In the decision, it is stated that “by the disinterested liberality of persons in the country their Lordships had the advantage of hearing the case for the natives who were themselves incapable of urging, and perhaps unconscious of possessing, any case at all. Undoubtedly this inquiry has thereby been rendered more complete”²⁶.

The problems the Privy Council find with the case for the natives largely revolve around the themes of indeterminacy and translatability. Due to war and instability in the region, the decision states, the evidence presented in their favour is somewhat “slender”. Because of

²⁵ *In re Southern Rhodesia* (1919) A.C. 210, at p. 229-230 (P.C.)

²⁶ *In re Southern Rhodesia* (1919) A.C. 210, at p. 232 (P.C.)

migration and the fact that the region encompassed the territory of more than one group, the council felt that “it was really matter of conjecture to say what the rights of the original ‘natives’ were and who the present ‘natives’ are, who claim to be their successors in those rights”²⁷.

Uneasy with what the concept of tribal or communal ownership means, the council stated that the argument of the representatives of the indigenous inhabitants must show “that the rights, whatever they exactly were, belonged to the category of rights of private property, such that upon a conquest it is to be presumed, in the absence of express confiscation or of subsequent expropriatory legislation, that the conqueror has respected them and forborne to diminish or modify them”²⁸. The Privy Council was somewhat reticent to accept the possibility that their pre-contact rights could be translated into anything that resembled property rights under English law:

The estimation of the rights of aboriginal tribes is always inherently difficult. Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them. In the present case it would make each and every person by a fictional inheritance a landed proprietor ‘richer than all his tribe.’ On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law. Between the two there is a wide tract of much ethnological interest, but the position of the natives of Southern Rhodesia within it is very uncertain; clearly they approximate rather to the lower than to the higher limit.²⁹

The above passage, and even its colonial evolutionist logic, did resurface in Commonwealth cases on numerous occasions.

In the end, though, the Privy Council used an argument that presented a no-win situation for the indigenous inhabitants of Southern Rhodesia, and thereby rendered unnecessary “further

²⁷ *In re Southern Rhodesia* (1919) A.C. 210, at p. 233 (P.C.)

²⁸ *In re Southern Rhodesia* (1919) A.C. 210, at p. 233 (P.C.)

²⁹ *In re Southern Rhodesia* (1919) A.C. 210, at p. 233-234 (P.C.)

inquiry into the nature of the native rights”³⁰. Representatives for the indigenous peoples were insistent that rights translatable to private property had existed prior to colonisation, for the King Lobengula was so territorial that no one, without permission, could travel through or settle in the region without committing a trespass. The Privy Council’s response presented two bleak possibilities. If the natives were located on the lower end of the scale of social organisation previously mentioned, then they did not have any rights that could be conceived of as title under English law. On the other hand, if they were indeed as high on the scale of social organisation as they had insisted, then “the maintenance of their rights was fatally inconsistent with white settlement of the country” such that this only proved “that the aboriginal system gave place to another prescribed by the Order in Council”³¹. In essence, the Crown, in exercising jurisdiction over the territory in its regular activities, proved an extinguishment of title through conquest precisely because the purported “advanced nature” of the old indigenous order would not have permitted it. The council therefore found that “by the will of the Crown and in exercise of its rights the old state of things, whatever its exact nature, as it was before 1893, has passed away and another and, as their Lordships do not doubt, a better has been established in lieu of it. Whoever now owns the unalienated lands, the natives do not”³².

While matters concerning Aboriginal rights and title were discussed and cases were no doubt heard over the next fifty years in Canada, my choices of cases to examine are guided by the very process of meaning-making employed by the juridical field itself. It was therefore over half a century before the next important precedent was established. The *Calder v. Attorney-General of B.C.*³³ case marks a monumental shift in Aboriginal title jurisprudence in Canada.

³⁰ *In re Southern Rhodesia* (1919) A.C. 210, at p. 234 (P.C.)

³¹ *In re Southern Rhodesia* (1919) A.C. 210, at p. 234 (P.C.)

³² *In re Southern Rhodesia* (1919) A.C. 210, at p. 235 (P.C.)

³³ *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313

The Nishga Tribal Council and its four constituent First Nations bands brought an action against the Attorney-General of British Columbia to “claim a declaration that the aboriginal title, otherwise known as the Indian title, of the Plaintiffs to their ancient tribal territory... has never been lawfully extinguished”³⁴. Indeed, “there was no treaty, no agreement with the Nishga surrendering their title and no explicit federal or provincial legislation that said their title was extinguished” (Kulchyski 1994:61).

The opinions of the Justices of the Supreme Court of Canada for and against the Nishga were evenly split, until Justice Pigeon found against them due to a technicality: while most of the provinces had no longer required a fiat from the Lieutenant-Governor which granted permission to bring suit against the province in question, British Columbia had not yet officially removed this requirement. Justice Pigeon therefore found that, in the absence of such a fiat, the province had sovereign immunity from suit and the Court had no jurisdiction.

Justice Judson wrote the deciding opinion on behalf of himself, Justice Martland, and Justice Ritchie. While the Nishga claimed that the Royal Proclamation of October 7, 1763 applied to the Nishga territory and therefore granted them its protection, the Justices asserted that “the Nass Valley, and, indeed, the whole of the Province could not possibly be within the terms of the Proclamation... The Nishga bands, therefore, were not any of the several nations or tribes of Indians who lived under British protection in 1763 and they were outside the scope of the Proclamation”³⁵. The decision also relied on precedents from, among others, the Marshall decisions and *In re Southern Rhodesia*³⁶. Judson uses the Marshall decisions, and their influence on *St. Catherine’s Milling and Lumber Company v. The Queen*³⁷, to reiterate the nature of

³⁴ *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 at p. 345

³⁵ *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 at p. 314

³⁶ *In re Southern Rhodesia* (1919) A.C. 210 (P.C.)

³⁷ *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.)

Aboriginal title as being a usufructuary right dependent on the good will of the sovereign – an absolute Aboriginal title is therefore incompatible with the absolute sovereignty of the Crown. Both the Marshall decisions and *In re Southern Rhodesia* are then used to establish that the very exercise of Crown sovereignty in British Columbia was sufficient to prove extinguishment of any Aboriginal title. In effect, a series of proclamations by Governor Douglas between 1858 and 1863 and ordinances enacted between 1856 and 1870 “revealed a unity of intention to exercise, and the legislative exercising, of absolute sovereignty over all the lands of British Columbia, a sovereignty inconsistent with any conflicting interest, including one as to ‘aboriginal title’”³⁸.

The pivotal moment in the decision, however, comes out of Judson’s opinion concerning the Royal Proclamation of 1763 as the source of Aboriginal title. Judson states that there is no doubt that, in *St. Catherine’s Milling and Lumber Company v. The Queen*³⁹, the Privy Council found that the Proclamation was the source of “Indian title,” but that he does not “take these reasons to mean that the Proclamation was the exclusive source of Indian title”⁴⁰. Its other source, then, arises simply from prior occupation:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, 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 of this problem to call it a ‘personal or 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.⁴¹

The opinions of the dissenting Justices were in agreement on the fact that Aboriginal title could exist purely at common law, outside of the specific and geographically limited protections of the Royal Proclamation of 1763. In essence, in stating this, the *Calder* case *created* a concept of Aboriginal title to be claimed at Canadian common law irrespective of the protection offered

³⁸ *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 at p. 314

³⁹ *St. Catherine’s Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.)

⁴⁰ *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 at p. 322

⁴¹ *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 at p. 328

or not offered by an antiquated and indeterminate Royal Proclamation. Six of the seven justices asserted a common law right to Aboriginal title, with the seventh not expressing an opinion on the question. The Calder case is therefore somewhat particular in that what amounted to a loss for the Nishga of British Columbia actually provided an enormous opening for the aspirations of many Aboriginal groups in Canada.

As alluded to above, these key assertions in Calder were bolstered by the fact that, despite the differences on the substantive issue at hand, all of the Justices with the exception of Pigeon (who expressed no opinion on the matter) were in agreement. Hall's dissenting opinion then reads like a blow by blow account that not only underscores the existence of Aboriginal title outside of the Proclamation, but finds in favour of the Nishga on all of the substantive issues surrounding their particular claim of title:

The proposition accepted by the Courts below that after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer was wholly wrong. There is a wealth of jurisprudence affirming common law recognition of aboriginal rights to possession and enjoyment of lands of aboriginees precisely analogous to the Nishga situation.

Paralleling and supporting the claim of the Nishgas that they have a certain right or title to the lands in question was the guarantee of Indian rights contained in the Royal Proclamation of 1763. The wording of the Proclamation indicated that it was intended to include the lands west of the Rocky Mountains.

Once aboriginal title is established, it is presumed to continue until the contrary is proven. When the Nishga people came under British sovereignty they were entitled to assert, as a legal right, their Indian title. It being a legal right, it could not thereafter be extinguished except by surrender to the Crown or by competent legislative authority, and then only by specific legislation. There was no surrender by the Nishgas and neither the Colony of British Columbia nor the Province, after Confederation, enacted legislation specifically purporting to extinguish the Indian title nor did the Parliament of Canada.⁴²

In essence, the dissenting opinion in Calder asserts that not only did Aboriginal title exist at common law alone, but that the Nishga were also protected by the Royal Proclamation. As well, Hall feels that the Crown bears the burden of proof of specific legislation demonstrating a *clear*

⁴² *Calder v. Attorney-General of British Columbia* [1973] S.C.R. 313 at p. 315-316

and plain indication of extinguishment of Aboriginal title, and in the case of the Nishga the ordinances and proclamations cited from the Colony of British Columbia do not suffice.

Seventeen years later, Reginald Sparrow found his case before the Supreme Court of Canada after being charged with fishing with a drift net longer than was allowed under his band's food fishing licence. A critical statutory change between the time of Calder and Sparrow is that section 35 of the Constitution Act, 1982 had affirmed the existence and recognition of three categories of Aboriginal Peoples in Canada: Indian, Inuit, and Métis, as well as their "existing Aboriginal and treaty rights" (1982). Reginald Sparrow therefore "admitted that the facts alleged constitute the offence, but defended the charge on the basis that he was exercising an existing aboriginal right to fish and that the net length restriction contained in the Band's licence was invalid in that it was inconsistent with s. 35(1) of the Constitution Act, 1982"⁴³. The unanimous Supreme Court of Canada decision in *R. v. Sparrow*⁴⁴ did even more to put wind into the sails of Aboriginal rights litigants, despite the fact that the Court did not expressly find in favour of Reginald Sparrow and the Musqueam Band in British Columbia. Rather, it ordered that a new trial be held under the terms that it had worked out in its decision. What was held to be so positive was actually a number of judicial interpretations and assertions arising out of the new dynamic of having a pre-existing legal doctrine of Aboriginal title elevated to constitutional status. As the judgment delivered by Chief Justice Dickson and Justice La Forest explains it, the appeal required the Court "to explore for the first time the scope of s. 35(1) of the *Constitution Act, 1982*, and to indicate its strength as a promise to the aboriginal peoples of Canada"⁴⁵.

Much of the Court's analysis hinged on interpreting the terms "existing" and "recognized and affirmed" as they were used in section 35 of the Constitution Act, 1982. Its interpretation of

⁴³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1076

⁴⁴ *R. v. Sparrow*, [1990] 1 S.C.R. 1075

⁴⁵ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1082-1083

“existing” was that section 35 applies to rights that were in existence when the Constitution Act, 1982 came into existence, and that it does not revive Aboriginal rights that had been extinguished prior to this – such as, for example, rights that had been extinguished by treaty in the distant past. Rights that existed in 1982, however, are now constitutionally guaranteed and cannot be extinguished, but rather can only be infringed upon and regulated in a justifiable manner. Further, the term “existing” is not to be read “so as to incorporate the specific manner in which it was regulated before 1982. The notion of freezing existing rights would incorporate into the Constitution a crazy patchwork of regulations”⁴⁶. The judgment considers such an approach untenable in its complexity and arbitrariness, given the complex and changing nature of federal regulation over Canada’s fishing industry. A striking yet subtle aspect of this finding is the inspiration it overtly takes from academia, citing one of Professor Brian Slattery’s articles on the same issue of interpreting section 35 rights:

This approach reads into the Constitution the myriad of regulations affecting the exercise of aboriginal rights, regulations that differed considerably from place to place across the country. It does not permit differentiation between regulations of long-term significance and those enacted to deal with temporary conditions, or between reasonable and unreasonable restrictions. Moreover, it might require that a constitutional amendment be enacted to implement regulations more stringent than those in existence on 17 April 1982. This solution seems unsatisfactory. (Slattery 1987:781-782)

Consequently, and still taking inspiration from Slattery, the Sparrow judgment affirms that “existing aboriginal rights” must be interpreted flexibly so as to permit their evolution over time. A “frozen rights” approach, then, is said to be rejected.

Making use of a concept of extinguishment found in Calder, *In re Southern Rhodesia*, and as far back as St. Catherine’s Milling and the Marshall decisions, the Crown’s argument had also relied on regulation as proof of extinguishment *prior to 1982* in the sense that progressive restriction and detailed regulation of the fisheries were exercises of sovereign authority

⁴⁶ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1091

“‘necessarily inconsistent’ with the continued enjoyment of aboriginal rights”⁴⁷. The Supreme Court refused this interpretation, saying that regulation must not be confused with extinguishment. The judgment allows that, prior to 1982, one *could have argued* the premise that a common law right such as an Aboriginal right could be abridged or abrogated if it were simply *inconsistent* with a statute. It even explains this as the deciding factor in the Calder case, only to then cite Justice Hall’s dissenting opinion in Calder to the effect that the intention to extinguish Aboriginal title must be *clear and plain*. Remarkably, the unanimous decision in *R. v. Sparrow* vindicates Hall’s opinion in stating that “the test of extinguishment to be adopted, in our opinion, is that the Sovereign’s intention must be clear and plain if it is to extinguish an aboriginal right”⁴⁸.

Not surprisingly, then, the judgment in *R. v. Sparrow* interprets the phrase “recognized and affirmed” as meaning that section 35 of the Constitution Act, 1982, is to be “construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm aboriginal rights”⁴⁹. The decision even goes so far as to offer a critical history of Aboriginal rights in Canada, stating that “for many years, the rights of the Indians to their aboriginal lands – certainly as legal rights – were virtually ignored”⁵⁰. The Supreme Court Justices then cite Professor Noel Lyon, another legal scholar and academic:

. . . the context of 1982 is surely enough to tell us that this is not just a codification of the case law on aboriginal rights that had accumulated by 1982. Section 35 calls for a just settlement for aboriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown. (Lyon 1988:100)

The purposive reading of section 35 is therefore guided in large part by the fiduciary obligation the Crown has to Aboriginal Canadians, as was affirmed by the prior case of *Guerin v. The*

⁴⁷ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1097

⁴⁸ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1099

⁴⁹ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1077

⁵⁰ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1103

*Queen*⁵¹. The relationship between the Government and Aboriginal Canadians “is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship”⁵². The Supreme Court of Canada therefore affirms that “federal power must be reconciled with federal duty and the best way to achieve that reconciliation is to demand the justification of any government regulation that infringes upon or denies aboriginal rights”⁵³. There must therefore be a valid legislative objective in infringing upon the rights of Aboriginal Canadians – one which preserves the honour of the Crown in its relationship with Aboriginal groups. Arguments for infringement such as *the public interest* are criticised as too vague to provide any meaningful guidance, while conservation and resource management are accepted as uncontroversial reasons. Indeed, Supreme Court judgments views proper conservation and resource management policy as consistent with Aboriginal beliefs and practices, as well as protective of the Aboriginal rights of future generations. After valid conservation measures have been met, though, the Court concedes that top priority must be given to Aboriginal rights. This is to say that Aboriginal rights to hunting and fishing are given ethical priority to non-Aboriginal commercial and sports harvesting of the same resources.

⁵¹ *Guerin v. The Queen*, [1984] 2 S.C.R. 335

⁵² *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1108

⁵³ *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1109

CULTURAL RIGHTS: THE VAN DER PEET AND POWLEY CASES

*R. v. Van der Peet*⁵⁴ made its way to the Supreme Court of Canada by 1996, with the substance of the charges being that Dorothy Van der Peet, a member of the Sto:lo First Nation, had sold 10 fish caught under the authority of an Indian food fish licence. These facts were not contested by Van der Peet. Rather, her defence was based on the assertion that she was exercising an existing Aboriginal right to sell fish toward a moderate livelihood. The judgment delivered by Chief Justice Lamer outlines the framework for analysing section 35 claims arrived at in *Sparrow*, and thereby reveals the lacuna that the Van der Peet decision is now meant to resolve:

First, a court must determine whether an applicant has demonstrated that he or she was acting pursuant to an aboriginal right. Second, a court must determine whether that right has been extinguished. Third, a court must determine whether that right has been infringed. Finally, a court must determine whether the infringement is justified. In *Sparrow*, however, it was not seriously disputed that the Musqueam had an aboriginal right to fish for food, with the result that it was unnecessary for the Court to answer the question of how the rights recognized and affirmed by s. 35(1) are to be defined. It is this question and, in particular, the question of whether s. 35(1) recognizes and affirms the right of the Sto:lo to sell fish, which must now be answered by this Court.⁵⁵

To this end, the Supreme Court of Canada came up with the “integral to a distinctive culture” test in order to reconcile the distinctive practices and prior occupation of Aboriginal peoples with the sovereignty of the Crown. Its position, echoing the broad base of justification sought for the *Sparrow* decision, was that this approach to defining Aboriginal rights is supported by jurisprudence in Canada, the United States, and Australia, as well as by the French version of the Constitution Act, 1982, academic commentators, and legal literature. The Van der Peet test marks a return to the assessment of pre-contact Aboriginal social organisation in deciding Aboriginal rights, albeit with some significant changes in its methodology. This reassertion and retooling of an old concept is deemed necessary, according to the Supreme Court, because

⁵⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289

⁵⁵ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 294

“aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land”⁵⁶.

Simply put, the Van der Peet judgment states that “to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right”⁵⁷. The perspective of Aboriginal peoples concerning their practices, customs, and traditions is to be taken into account when the Court defines Aboriginal rights with this test, but, in keeping with the age old concerns of cultural translatability, that Aboriginal perspective “must be framed in terms cognizable to the Canadian legal and constitutional structure”⁵⁸. The test is thus explained:

To recognize and affirm the prior occupation of Canada by distinctive aboriginal societies it is *to what makes those societies distinctive* that the court must look in identifying aboriginal rights. The court cannot look at those aspects of the aboriginal society that are true of every human society (e.g., eating to survive), nor can it look at those aspects of the aboriginal society that are only incidental or occasional to that society; the court must look instead to the defining and central attributes of the aboriginal society in question. It is only by focusing on the aspects of the aboriginal society that make that society distinctive that the definition of aboriginal rights will accomplish the purpose underlying s. 35(1).⁵⁹

In explaining the terms of the test, the Van der Peet decision emphasises that “distinctive” is not to be confused with “distinct.” While the term “distinct” connotes that a practice is *unique*, and very few practices can be qualified as unique when comparing the vast array of cultures across the human community, the term “distinctive” implies that a practice is of central significance and is a defining characteristic of one’s culture. For the Supreme Court of Canada, defining characteristics of Aboriginal society can only come from their *pre-contact* nature. Aboriginal rights therefore consist of those practices, customs, and traditions that have continuity with those that existed prior to contact with European society.

⁵⁶ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 320

⁵⁷ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 310

⁵⁸ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 312

⁵⁹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 314 (emphasis in original)

The Court is explicit that continuity of contemporary practices with the practices that existed *prior to contact* is necessary, and not prior to Crown sovereignty, for “it is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed *prior to the arrival of Europeans in North America*”⁶⁰. The concept of continuity itself is defined such that it is meant to fulfil the obligation set by Sparrow that the phrase “existing aboriginal rights” be interpreted flexibly so as to permit their evolution over time. It is, therefore, the means by which the Court claims to be able to avoid a “frozen rights” approach to the interpretation of Aboriginal rights stemming from section 35 of the Constitution Act, 1982. The decision then offers the reassurance:

I would note that the concept of continuity does not require aboriginal groups to provide evidence of an unbroken chain of continuity between their current practices, customs and traditions, and those which existed prior to contact. It may be that for a period of time an aboriginal group, for some reason, ceased to engage in a practice, custom or tradition which existed prior to contact, but then resumed the practice, custom or tradition at a later date. Such an interruption will not preclude the establishment of an aboriginal right. Trial judges should adopt the same flexibility regarding the establishment of continuity that, as is discussed, *infra*, they are to adopt with regards to the evidence presented to establish the prior-to-contact practices, customs and traditions of the aboriginal group making the claim to an aboriginal right.⁶¹

The issue of continuity discussed in the *Van der Peet* decision provoked many questions surrounding the recognition and affirmation of the Aboriginal rights of the Métis, one of the three Aboriginal peoples mentioned in the Constitution Act, 1982. This is because the very existence of the Métis is due to a specific history of miscegenation: the intermarriage of mainly European men with Aboriginal women and the ethnogenesis of a distinctive culture and identity that arose from it. The *Van der Peet* decision acknowledges this, but does not attempt to define Métis rights. It leaves this issue for another time when the courts are presented with a Métis claim to an Aboriginal right, but it does emphasise an underlying policy of non-generalisability

⁶⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 315 (emphasis in original)

⁶¹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 316-317

that is manifest in the judgment. Indeed, according to the *Van der Peet* decision rights cannot be bundled together or “piggybacked” one on the other. A right to hunt moose does not inevitably imply a right to fish. By extension, the fact that one Aboriginal group gains the recognition of the right to a practice does not necessarily mean that a neighbouring group also has that right. There is no universal package of Aboriginal rights, and so the case of the Métis will have to be heard on its own merits:

Although s. 35 includes the Métis within its definition of ‘aboriginal peoples of Canada’, and thus seems to link their claims to those of other aboriginal peoples under the general heading of ‘aboriginal rights’, the history of the Métis, and the reasons underlying their inclusion in the protection given by s. 35, are quite distinct from those of other aboriginal peoples in Canada. As such, the manner in which the aboriginal rights of other aboriginal peoples are defined is not necessarily determinative of the manner in which the aboriginal rights of the Métis are defined. At the time when this Court is presented with a Métis claim under s. 35 it will then, with the benefit of the arguments of counsel, a factual context and a specific Métis claim, be able to explore the question of the purposes underlying s. 35's protection of the aboriginal rights of Métis people, and answer the question of the kinds of claims which fall within s. 35(1)'s scope when the claimants are Métis. The fact that, for other aboriginal peoples, the protection granted by s. 35 goes to the practices, customs and traditions of aboriginal peoples prior to contact, is not necessarily relevant to the answer which will be given to that question. It may, or it may not, be the case that the claims of the Métis are determined on the basis of the pre-contact practices, customs and traditions of their aboriginal ancestors; whether that is so must await determination in a case in which the issue arises.⁶²

That case was *R. v. Powley*⁶³, and it came before the Supreme Court of Canada in 2003.

In October, 1993, Steve Powley and his son Roddy Powley, both Métis from the Sault Ste. Marie area in Ontario, set about hunting in the area of Goulais Bay and shot a bull moose. Ontario's Ministry of Natural Resources issues Outdoor Cards and validation stickers allowing citizens to hunt calf moose during the appropriate season, and hunters in this particular area must enter a lottery to possibly be awarded a tag which authorises them to hunt and harvest one adult moose for the season. Neither of the Powleys had a valid Outdoor Card, a valid sticker licensing them to

⁶² *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 317

⁶³ *R. v. Powley*, [2003] 2 S.C.R. 207

hunt calf moose, or a valid tag to harvest an adult moose. Just as with many of the other Aboriginal rights cases, though, these facts were not in dispute.

Being charged under the auspices of Ontario's Game and Fish Act, the question at issue was whether the licensing requirements of that act were "of no force or effect with respect to the respondents, being Métis, in the circumstances of this case, by reason of their aboriginal rights under s. 35 of the Constitution Act, 1982"⁶⁴. The Powley judgment, as delivered, also alternatively states the issue independent of the individuals in question, asking whether "members of the Métis community in and around Sault Ste. Marie enjoy a constitutionally protected right to hunt for food under s. 35 of the Constitution Act, 1982"⁶⁵. The judgment unanimously declares that they do.

The task before the Supreme Court had been set out in Sparrow and Van der Peet. According to the Sparrow decision, the Court must determine whether the defendants were acting pursuant to an Aboriginal right, whether that right has been extinguished or not, whether that right has been infringed by the state, and whether that infringement is justified. The Van der Peet decision, providing guidance in answering the first question, had nonetheless to be modified for the question of Métis rights.

The Court's engagement of the first question is prefaced with some discussion of who the Métis are, for *the people*, *the practice*, and *the location* must all be identified as being in accordance with an Aboriginal right. Most notably, "the term 'Métis' in s. 35 does not encompass all individuals with mixed Indian and European heritage; rather, it refers to distinctive peoples who, in addition to their mixed ancestry, developed their own customs, way of life, and recognizable group identity separate from their Indian or Inuit and European

⁶⁴ *R. v. Powley*, [2003] 2 S.C.R. 207 at p. 233-234

⁶⁵ *R. v. Powley*, [2003] 2 S.C.R. 207 at p. 212

forebears”⁶⁶. The mention of Inuit is remarkable in its obvious departure from the most common definitions of the Métis in Canada, which largely speak of the miscegenation of Scottish, French, Cree, and Ojibway peoples in and around the Great Lakes and the Red River Settlement. The Supreme Court has therefore left open the possibility of a plurality of Métis peoples gaining recognition of Aboriginal rights, something which should offer some encouragement to the distinct Labrador Métis:

The Métis of Canada share the common experience of having forged a new culture and a distinctive group identity from their Indian or Inuit and European roots. This enables us to speak in general terms of ‘the Métis’. However, particularly given the vast territory of what is now Canada, we should not be surprised to find that different groups of Métis exhibit their own distinctive traits and traditions. This diversity among groups of Métis may enable us to speak of Métis ‘peoples’, a possibility left open by the language of s. 35(2), which speaks of the ‘Indian, Inuit and Métis peoples of Canada’.

We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis ‘people’, or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.⁶⁷

One of the consequences of the scale of application of this decision, however, is that this monumental decision concerning Métis rights would only apply to the members of the Sault Ste. Marie community, despite the historical connections of these people to the Upper Great Lakes as a whole, and possibly even to the Red River Settlement. In the end, the decision allows that an historic rights-bearing community – with origins in a distinctive Métis community that emerged in the Upper Great Lakes region in the mid-17th century – exists in the Sault Ste. Marie area.

The fact that the Court’s approach to Aboriginal rights is contextual and site-specific, though, may pose a challenge to Aboriginal peoples whose historical relationship with European

⁶⁶ *R. v. Powley*, [2003] 2 S.C.R. 207 at p. 215

⁶⁷ *R. v. Powley*, [2003] 2 S.C.R. 207 at p. 216

society was characterised by dispossession, dispersal, and a “reign of terror” (Shore 2001), as well as over 100 years of a policy of non-recognition. The Powley decision therefore notes that, despite the fact that groups of Métis have often lacked political structures, they must still demonstrate a certain degree of continuity and stability in an area to support a site-specific Aboriginal rights claim. It is therefore not surprising that “the Sault Ste. Marie Métis community was to a large extent an ‘invisible entity’ from the mid-19th century to the 1970s,” but the Court did “not take this to mean that the community ceased to exist or disappeared entirely”⁶⁸. The Powley case, though, benefited from access to a report by Victor Lytwyn that affords some historical account of this in the Sault Ste. Marie area:

The advent of European control over this area thus interfered with, but did not eliminate, the Sault Ste. Marie Métis community and its traditional practices, as evidenced by census data from the 1860s through the 1890s. Dr. Lytwyn concluded from this census data that “[a]lthough the Métis lost much of their traditional land base at Sault Ste. Marie, they continued to live in the region and gain their livelihood from the resources of the land and waters’ (Lytwyn Report, at p. 32). He also noted a tendency for underreporting and lack of information about the Métis during this period because of their ‘removal to the peripheries of the town’, and ‘their own disinclination to be identified as Métis’ in the wake of the Riel rebellions and the turning of Ontario public opinion against Métis rights through government actions and the media.⁶⁹

Verification that the Powleys were actual members of this contemporary Métis rights-bearing community was naturally sought. After urging that membership requirements become more standardised for the various communities, and emphasising that it does not purport to concretise a comprehensive definition of who is Métis in this judgment, the Court accepted and offered three broad factors to indicate membership. These three factors are strongly reminiscent of the definitions from international work previously outlined here: self-identification, ancestral connection, and community acceptance. This formula, it would seem, passed from the

⁶⁸ *R. v. Powley*, [2003] 2 S.C.R. 207 at p. 221-222

⁶⁹ *R. v. Powley*, [2003] 2 S.C.R. 207 at p. 222

international context, to some Métis political organisations across Canada, and finally to acceptance in the Canadian courts.

The major adjustment to the Van der Peet test came with the need to arrive at the relevant time frame for identifying Métis rights. The argument of the defence was that Métis rights should find their origin in the pre-contact practices of the Métis' Aboriginal ancestors – in other words, the relevant First Nations. This would provide for a certain uniform standard of hunting and fishing rights amongst a number of First Nations and Métis groups, but the Court refused this assertion. Rather, in not wanting to “deny to Métis their full status as distinctive rights-bearing peoples whose own integral practices are entitled to constitutional protection under s. 35(1),” the Court decided that Métis history can be accommodated best by focusing “on the period after a particular Métis community arose and before it came under the effective control of European laws and customs”⁷⁰. With this time frame in mind, it was clear to the Court that subsistence hunting and fishing was a practice integral to this Métis community's distinctive culture. In this case, the Court also noted that there was little challenge to the establishment of continuity between the historic practice and the contemporary right being asserted, especially given that simple subsistence hunting does not pose the challenge of having to critically evaluate the evolution and development of a practice over time, because it is altogether consistent in its substantive nature to the original historic practice.

After an exhaustive examination of the first question in the Sparrow formula (which embodies the entire elaboration of the Van der Peet test), the three remaining questions are dealt with succinctly in the Powley judgment. The Crown's argument that the Métis right to hunt was extinguished was based largely on the Robinson-Huron Treaty of 1850, but it was simply observed by the Court that the Métis as a group were explicitly excluded from this treaty. As for

⁷⁰ *R. v. Powley*, [2003] 2 S.C.R. 207 at p. 227

determining whether the now established right to hunt for the Métis of Sault Ste. Marie had been infringed, it was again a simple matter of fact that the province of Ontario did not even recognise a Métis right to hunt for food. For the last question, in seeking to provide a justification for the infringement, the Crown insisted that it was a matter of conservation. The Court decided that this justification is not supported by the record, for, indeed, the First Nations of the area are permitted to hunt moose and if the moose population of the region were threatened, the Métis would still be entitled to a priority allocation just as other Aboriginal rights beneficiaries. The Crown also advanced a subsidiary argument for justification, claiming that the difficulty in identifying the Métis is an impediment to recognising the right to hunt for food. Recalling the three factors of identification discussed earlier, the Court refused this argument but did call for a more systematic method of identifying Métis rights holders.

To this end, the Manitoba Métis Federation established a Métis Harvesting Initiative soon after the Powley decision. With it came a Métis Harvester Identification Card system that stringently requires hunters who are already members of the Federation to prove, as many had to do for their original membership, their ancestral connection to the historic Métis community of Manitoba. In addition to the Métis Harvester Identification Card, which must be renewed each year, the initiative has three other objectives: the establishment of a Métis Conservation Trust Fund, a Métis Management System that would include a harvest recording process, and the Métis Laws of the Harvest. This last objective, a comprehensive delineation of acceptable practices, limitations, and responsibilities for Métis hunters, has already been published.

ANALYSIS

Hidden underneath every culture's orthodoxy is the secret that the enormous cross-cultural variation in human socio-cultural life is indicative of its arbitrariness. It is the symbolic fabric of socio-cultural life, then, that brings meaning, but only at the cost of naturalising, essentialising, and "necessitating" the arbitrary, the accidental, and the contingent. We pull the wool over our own eyes. If much of the structural-functionalist literature has had a tendency to hold in awe the overarching source of all meaning – the symbolic – and see only consensus in it, then many of the disparate strains of what has been retrospectively grouped together as "poststructuralist" theory surely offer a remedy in that they pull apart the myth of society as consensus and build the capacity to contest symbolic arrangements defined by imbalances of power.

The judiciary is endowed with much symbolic power, and in the course of its work concerning Aboriginal rights it simultaneously creates and operates from a symbolic arrangement that does several things: it obfuscates the contingency and arbitrariness at the heart of its own work and its own exercise of power, it projects upon indigenous peoples its own contentious discourse of Aboriginality, and it masks the original and continuing violence of colonial dispossession and the assertion of European sovereignty.

Juridical Historiography: Constructing a Good Narrative

There is a tendency of formalist jurisprudence to see many of the large traditions within its scope as the natural, logical culmination of a body of meaning that follows a linear evolution that approximates an Aristotelian narrative destiny: one may not have been able to predict the turn of events in advance, but in retrospect they make complete sense. This conception of *linear*

should then be distinguished from a merely chronological conception of *linear*. The case history I have examined in previous sections is laid out in chronological fashion, but the essentialist history I seek to disrupt is the fashion of historiography also criticised by Foucault and Nietzsche when they discuss *origins* and *emergence*: the construction of clean and logical storylines, inevitabilities, and evolutions. It is an essentialism that finds clean narrative – void of accident, the arbitrary, and the contingent – in the diffuseness of social life.

If one looks to the work of even those concerned with defending Aboriginal rights within formalist jurisprudence, one finds that the history of precedent and meaning-making that brought us to this present is very much constructed as a linear, logical, and coherent *whole* with definite and meaningful *roots* – although much of these latter tend to be abstracted essences just as much as juridical precedents. Brian Slattery thus gives a recent interpretation of the sources of the common law doctrine of Aboriginal rights:

In a nutshell, the doctrine of aboriginal rights is a body of Canadian common law that defines the constitutional links between aboriginal peoples and the Crown and governs the interplay between indigenous systems of law, rights and government (based on aboriginal customary law) and standard systems of law, rights and government (based on English and French law). The doctrine of aboriginal rights is a form of ‘inter-societal’ law, in the sense that it regulates the relations between aboriginal communities and the other communities that make up Canada and determines the way in which their respective legal institutions interact.

The doctrine of aboriginal rights has two main sources. The first source is a distinctive body of custom generated by the intensive relations between indigenous peoples and the British Crown in the seventeenth and eighteenth centuries. This body of custom coalesced into a branch of British imperial law, as the Crown gradually extended its protective sphere in North America. Upon the emergence of Canada as an independent federation, it became part of the fundamental Canadian common law that underpins the constitution.

The second source of the doctrine of aboriginal rights consists of basic principles of justice. These principles have broad philosophical foundations which do not depend on historical practice or the actual tenor of Crown relations with aboriginal peoples. They provide the doctrine of aboriginal rights with its inner core of values and mitigate the rigours of a strictly positivistic approach to law. (2000:198-199)

What cannot be seen, however, in such an extensive quote is the veritable cascade of footnotes – most of which cite precedents and statutes – that are meant to support and offer proof of

Slattery's unifying vision of the history, the jurisprudence, and the legislation. It is not Slattery's first attempt at bringing unity, coherence, and meaning to this history either. After the passage of the Constitution Act, 1982, and the pivotal case of *Guerin v. The Queen*⁷¹ – a case which presaged much of the coming change that was to be concretised in *R. v. Sparrow* – Slattery published in the *Canadian Bar Review* the article “Understanding Aboriginal Rights” which seeks to develop an overall theory of the subject:

From early colonial days, the doctrine of aboriginal rights has formed part of the basic constitutional structure of Canada. It originated in principles of colonial law that defined the relationship between the British Crown and the native peoples of Canada and the status of their lands, laws, and existing political structures. Some of those principles were articulated in the Royal Proclamation of 1763, and were reflected in treaties concluded between the Crown and particular native groups. At Confederation, they passed into the federal sphere, and formed a body of basic common law principles operating across Canada. In principle, these principles were liable to be overridden by legislation. However, they were protected in part by the provisions of constitutional instruments such as the Proclamation of 1763, and the Constitution Act, 1867. With the enactment of the Constitution Act in 1982, they have become constitutionally entrenched. (1987:782-783)

Kulchyski, however, reigns in Slattery's search for origins, finding something “disingenuous” in the construction of “such a consolidated historical narrative” (1994:6). Much of the problem lies in the fact that such narratives fail to address those periods and instances in which Aboriginal rights were ignored – despite the retrospective insistence that these rights have formed part of the basic constitutional structure of Canada from early on (Kulchyski 1994). Rather, Kulchyski views the same history as “a story of fits and starts, a fragmented narrative of fundamental injustices,” woven together by Slattery “as though it were a seamless narrative that coalesces in a doctrine of Aboriginal rights which have ‘always already existed’ in a ‘hidden constitution’ of Canada” (1994:6):

There is no clear, evolutionary logic in the historical development of Aboriginal rights. In spite of after-the-fact stories that have tried to imply a consistent logic in the approach to Aboriginal rights, there was a basic incoherence, an instability and set of contradictions embodied in the approach of various British and Canadian administrations. Sandwiched

⁷¹ *Guerin v. The Queen*, [1984] 2 S.C.R. 335

between two important moments when those rights were affirmed in limited ways – 1762 and 1982 – was a long period when the rights were sometimes recognized and more often than not ignored outright. The recognition and affirmation of Aboriginal rights cannot be seen as an outcome of a progressive liberalization of society, as the latest step in a process by which every day, in every way, things are getting better and better. It is a history of sustained, often vicious struggle, a history of losses and gains, of shifting terrain, of strategic victories and defeats, a history where the losers often win and the winners often lose, where the rules of the game often change before the players can make their next move, where the players change while the logic remains the same, where the moves imply each other just as often as they cancel each other out. It is a complex history whose end has not been written and whose beginnings are multiple, fragmentary and undecidable. (Kulchyski 1994:9-10)

In effect, with such a complex and fragmentary history of Commonwealth jurisprudence, it becomes evident that the attempt to trace something like the Powley decision back to its ordinary roots is an absurdity from a deconstructionist viewpoint: the mind seizes almost immediately as meaning is quickly dispersed in a “dictionary game” of juridical différance. Indeed, it is a moment where Foucault and Derrida show a striking commonality: the act of reaching back in the search for meaning tends to find dispersal and multiplicity rather than unity. Derrida has been witness to this moment before:

Henceforth, it was necessary to begin thinking that there was no center, that the center could not be thought in the form of a present-being, that the center had no natural site, that it was not a fixed locus but a function, a sort of nonlocus in which an infinite number of sign substitutions came into play. This was the moment when language invaded the universal problematic, the moment when, in the absence of a center or origin, everything became discourse – provided one can agree on this word – that is to say, a system in which the central signified, the original or transcendental signified, is never absolutely present outside a system of differences. The absence of the transcendental signified extends the domain and the play of signification infinitely. (2001:353-354)

In terms of cases cited, the Powley decision states that it “applied” the Van der Peet decision, and “referred” to the Sparrow decision and a past case concerning language rights in Manitoba. As for statutes and regulations cited, it lists the Constitution Act, 1982 and the province of Ontario’s Game and Fish Act, R.S.O. 1990. Yet, stretching back from the Powley decision one can trace lineages of logic, reasons, arguments, ideas, and assertions that ultimately interact to embrace all meanings and all decisions. With reference to only three precedents, the

Powley decision still finds in its lineage every case and statute cited in this thesis, including as far back as the Marshall decisions and the Royal Proclamation of 1763, as well as numerous cases in between. It requires reaching back to only a few precedents in order to encompass references to all of these sources of meaning. Thus we have a continuing history of finding meanings that are always already there, to the detriment *and* to the benefit of Aboriginal rights. Thus the contradiction within a history of case law that guided the Canadian courts to claim that the mere exercise of Crown sovereignty adverse to Aboriginal title was sufficient to demonstrate extinguishment, and then also claim that the intent to extinguish an Aboriginal right must be “clear and plain,” goes unaddressed. The power of discourse, the symbolic, or the “truth” that is really the exteriority of accidents, is “clear and plain” when one considers briefly certain jurisprudential expressions and their legacy. So much of today’s groundbreaking meaning hinges on yesterday’s indeterminate expressions.

The vague, passing phrase “until Our further Pleasure be known” from the Royal Proclamation of 1763 was seen for so long as a declaration of the true nature of Aboriginal title: it was a personal and usufructuary right subject to the Crown’s caprices. As such, colonised hunting and gathering societies could not benefit from a proprietary, fee simple style of collective title – until something that almost approaches this came to be with *Delgamuukw v. British Columbia*⁷². This phrase, along with an admixture of other phrases from other decisions – such as the Marshall decisions from nineteenth century American jurisprudence – provided for an ease of extinguishment of Aboriginal rights and title until the advent of the Constitution Act, 1982, the Calder decision, and the Sparrow decision. Now, for the benefit of Aboriginal Canadians, the “honour of the Crown,” while it could very well have meant that the Crown wanted only to keep original promises such as embodied in the Royal Proclamation, ultimately

⁷² *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010

evolved to mean that the government of Canada has a full and incontrovertible fiduciary-like role toward the Aboriginal peoples of Canada that is linked to fundamental principles of justice (Slattery 2000). More recently, the Constitution Act, 1982 purports to “recognize” and “affirm” the “existing” Aboriginal rights of Canada’s Aboriginal peoples, and these three words in turn generate pages and pages of meaning in the Sparrow decision – at times surprising in its specificity – to the advantage and disadvantage of different categories of Aboriginal rights. It is not surprising then, that in the monumental Calder case, the Supreme Court Justices arrived at essentially three different decisions – for, against, and not justiciable – with all of them encapsulating and citing the same enormous body of precedents and statutes.

For Foucault, effective history requires that everything once considered immortal in the human be seen to be mutable with history, and in this case this would seem best applied to the very faculty of seeking Justice. The Commonwealth judiciary operates as though it has always been bestowed with the faculty to find Justice, and yet this is completely at odds with the very fact of the varying and confused methods used to determine Aboriginal rights and title over the years. Initially, as evidenced in early decisions such as *St. Catherine’s Milling and Lumber Company v. The Queen*⁷³ and *In re Southern Rhodesia*⁷⁴, the outward appearance of fairness and equal consideration toward colonised peoples was less important, and thus what matters is simply identifying the intent of the king. Such a manner of determining title can be construed as at odds with the English history outlined in Slattery’s (2005) “Paper Empires,” whereby the English Crown insisted to its European neighbours that merely passing through and willing oneself sovereign is insufficient. And yes, despite references to the Crown’s “further Pleasure,” the bulk of our history of “extinguishment” policy can also be conceived of as at variance with

⁷³ *St. Catherine's Milling and Lumber Company v. The Queen* (1888), 14 A.C. 46 (P.C.)

⁷⁴ *In re Southern Rhodesia* (1919) A.C. 210 (P.C.)

the assertion in the Royal Proclamation of 1763 that, “to the End that the Indians may be convinced of Our Justice,” Indian lands can only be alienated to the Crown at a public and collective meeting intended for such a purpose: it is a statement that clearly implies a sense of “Justice” that precludes the unilateral dispossession of Indian land by mere declaration.

The *In re Southern Rhodesia* decision, however, posed a particularly vexing problem for the Privy Council in that no express intention of the Crown could be found to indicate who had title over the lands in question:

In matters of business reticences and reserves sooner or later come home to roost. In 1894 a single sentence, either in an Order in Council or in a simple agreement, would have resolved the questions which have for so many years given rise to conflicting opinions in Southern Rhodesia, and all the more easily because at that time the value of the whole of the country was unproved and problematical. Matabeleland and Mashonaland were rich in promise; the right to enjoy the fruition might well have been determined before, and not after, the field was tilled and the harvest began to whiten.⁷⁵

It was in this situation that the Privy Council turned to other means to assess the case for Aboriginal title. As noted previously, it actually alluded to two different means of determining Aboriginal title: assessing pre-contact social organisation to determine whether it was sufficiently “advanced” to have rights translatable into the legal conceptions of civilised society, and looking to whether title would seem to be extinguished by virtue of the Crown’s simple exercise of jurisdiction over the territory in its regular activities. This latter argument prevented the Privy Council from having to follow the prior argument to its final conclusion, but the passage pertaining to the scale of social organisation does indicate that the natives of Southern Rhodesia were to the lower end of the scale of social organisation, and has been cited numerous times in Commonwealth jurisprudence – two of the most noted cases being the *Calder* decision and *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*⁷⁶.

⁷⁵ *In re Southern Rhodesia* (1919) A.C. 210 (P.C.) at p. 248

⁷⁶ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, [1980] 107 D.L.R. (3d) 513.

Precedents such as *In re Southern Rhodesia* and the Marshall decisions in the United States thus helped lead to the method of determining Aboriginal title that required an Aboriginal group to prove that their title had not previously been extinguished through sovereign practice and policy adverse to occupancy. It was with the Calder case, of course, that the Court decided that the Royal Proclamation was not the sole source establishing that a group had Aboriginal title in the first place: suddenly, the common law itself could recognise Aboriginal rights and title. Thus the Federal Court in the Hamlet of Baker Lake case, which followed Calder, knew itself to be in a position to award title at common law alone over lands in the area of Baker Lake. Using *In re Southern Rhodesia* as a rationale, and citing Calder and the Marshall decisions, Justice Mahoney held that the Inuit of Baker Lake were required to prove that they and their ancestors had belonged to *an organised society* that occupied the area to the exclusion of all other societies prior to European sovereignty. Justice Mahoney ultimately awarded title to a portion of the lands claimed, but his findings concerning Inuit social organisation seem less than flattering:

The fact is that the aboriginal Inuit had an organized society. It was not a society with very elaborate institutions but it was a society organized to exploit the resources available on the barrens and essential to sustain human life there. That was about all they could do: hunt and fish and survive. The aboriginal title asserted here encompasses only the right to hunt and fish as their ancestors did.⁷⁷

The anthropologist Michael Asch (2000) would later point out the egregious contradiction in the logic of the Baker Lake decision, for the very concept of society denotes organisation, and there are no societies that are not organised. To this one can add that there is no such thing as people without society.

The apparent path to Justice would change yet again with the series of cases from 1990 on, namely *R. v. Sparrow*, *R. v. Van der Peet*, and *R. v. Powley*. This time, however, the

⁷⁷ *Hamlet of Baker Lake et al. v. Minister of Indian Affairs and Northern Development et al.*, [1980] 107 D.L.R. (3d) 513 at p. 544.

Constitution Act, 1982 provided for a definite and important constitutional change that the courts would have to “interpret.” With the distinction between specific Aboriginal rights and Aboriginal title becoming more definite, the Van der Peet model applied the few words of section 35 of the Constitution Act, 1982 as meaning that Aboriginal rights such as hunting, fishing, and trapping should be determined by looking to the practices integral to the distinctive pre-contact culture of Aboriginal claimants.

Time, Place, and Authenticity: The Juridical Discourse of the Cultural Rights Approach

The very image of dispersal and différance with the backwards search for meaning can be flipped on its head; such an exercise shows the very political nature of meaning-making, as it stems from the arbitrary symbolic arrangements of human social existence. This is to say that all acts of interpretation and meaning-making are inherently political, for they involve assembling elements of the arbitrary, the contingent, and the accidental into a symbolic arrangement of meaning that has consequences in the lives of people – in this case, of those living under the sovereignty of a colonial state power. These juridical/political acts of interpretation and meaning-making therefore denote a certain movement towards unity as one moves forward in time, and this is precisely what is happening with the development of the current cultural rights approach to Aboriginal rights and title: *a discourse is being consolidated*, a discourse of Aboriginality that both produces and constrains the conception of Aboriginality in Canada. Implicit in this process are claims made about culture, change, tradition, and modernity that are open to contestation.

In the Van der Peet decision, the key ruling sought was a method of determining whether a particular practice could be considered an Aboriginal right for the purposes of the Constitution

Act, 1982. This method was the missing piece from the formula given in *R. v. Sparrow*, as this particular question was not at issue in that previous case. As both Asch (2000) and Niezen (2003) note, however, this Van der Peet test embodies the opposite application of the Privy Council's same colonial obsession with cultural difference in *In re Southern Rhodesia*. Hence, Niezen explains, whereas British colonial courts would once typically favour a colonised people's claim to distinct rights by virtue of the "advancement" of their social organisation prior to contact, such groups must now demonstrate the opposite: "simple subsistence economies, comparatively simple technologies, rudimentary social organization, in other words, those qualities that make them 'distinct' from the dominant society" (2003:7).

The dissenting opinions offered by Justice McLachlin and Justice L'Heureux-Dubé foreshadow much of the criticism of the Van der Peet test that was to come. Justice McLachlin's opinion criticises Lamer's test for the indeterminate nature of several of its concepts. Referring to the specificity of practices it will require for the purposes of the test, along with the concepts of distinctiveness and centrality to an Aboriginal culture, she writes:

The problem of overbreadth thus brings me to my second concern, the problem of indeterminacy. To the extent that one attempts to narrow the test proposed by the Chief Justice by the addition of concepts of distinctiveness, specificity and centrality, one encounters the problem that different people may entertain different ideas of what is distinctive, specific or central. To use such concepts as the markers of legal rights is to permit the determination of rights to be coloured by the subjective views of the decision-maker rather than objective norms, and to invite uncertainty and dispute as to whether a particular practice constitutes a legal right.⁷⁸

Justice L'Heureux-Dubé's dissenting opinion, while intended to invoke the assertion from the Sparrow decision that the courts must take into account the perspectives of Aboriginal groups themselves, also echoes in its own fashion the condition of all possible justice as outlined by Derrida: speaking the language of the Other. One of her most prescient criticisms is therefore

⁷⁸ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 74

that the common law should not be given equal weight to the perspectives of Aboriginal Canadians in determining Aboriginal rights. Her purposive analysis of the meaning of section 35 of the Constitution Act, 1982, then, does not envisage preserving Aboriginal rights and practices per se, but rather Aboriginal cultures as a whole, and what Aboriginal groups consider integral to their culture is essential in determining this⁷⁹.

Because of the important interplay of time and culture in these matters, one of the most controversial aspects that came out of the “integral to a distinctive culture” test was the time frame chosen. The opinion given in Chief Justice Lamer’s decision was clear and confident, however:

The time period that a court should consider in identifying whether the right claimed meets the standard of being integral to the aboriginal community claiming the right is the period prior to contact between aboriginal and European societies. Because it is the fact that distinctive aboriginal societies lived on the land prior to the arrival of Europeans that underlies the aboriginal rights protected by s. 35(1), it is to that pre-contact period that the courts must look in identifying aboriginal rights.

The fact that the doctrine of aboriginal rights functions to reconcile the existence of pre-existing aboriginal societies with the sovereignty of the Crown does not alter this position. Although it is the sovereignty of the Crown that the pre-existing aboriginal societies are being reconciled with, it is to those pre-existing societies that the court must look in defining aboriginal rights. It is not the fact that aboriginal societies existed prior to Crown sovereignty that is relevant; it is the fact that they existed prior to the arrival of Europeans in North America. As such, the relevant time period is the period prior to the arrival of Europeans, not the period prior to the assertion of sovereignty by the Crown.⁸⁰

This statement from the *Van der Peet* judgment is exhaustively set up and justified in advance by a “purposive analysis” of section 35 of the Constitution Act, 1982. The English and French versions of the section, the jurisprudence from Canada, the United States, and Australia, as well as academic commentators and multiple dictionary entries are all seen as supporting the idea that what is being reconciled is *prior occupation*, and not *prior sovereignty*, with the sovereignty of the Crown. Citing so many past precedents as though they had argued the same

⁷⁹ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289

⁸⁰ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 315

thing is disingenuous in that those arguments did not have for their objective the determination of Aboriginal rights practices for the purposes of the Sparrow test. There are numerous past cases that simply refer to the fact that Aboriginal peoples lived on the continent of North America prior to the arrival of Europeans – this was simply used as justification for the existence of Aboriginal title at common law in Calder. To imply that it also embodies an intent to shape the time frame for determining the character of Aboriginal rights in the future Van der Peet test is an example of meaning-making that confounds the forward motion of time. Nevertheless, the arbitrariness of the test has not gone uncriticised.

Indeed, the Van der Peet judgment itself speaks of not allowing European influence over Aboriginal cultures and practices to diminish the rights carrying capacity of Aboriginal groups. Yet, the arbitrary placement of the line of rights determination as pre-contact does just this. The argument could just as easily be made that the true fulcrum of history lies in the assertion of European sovereignty, for this is when Aboriginal practices ostensibly gained an additional meaning as being “rights” under the occupation of European powers. Setting this as the threshold, the moment at the root of reconciliation of Aboriginal practices and European sovereignty, would not only allow for a uniform type of “test” (although dates would still vary) between the Métis, Inuit, and Indian peoples, but it would also allow for the evolution and adaptation of Aboriginal practices that was necessarily induced because of that European influence and encroachment. Pre-contact is an arbitrary standard that simply ignores the fact that rights were lost, or that we even have to talk about practices in terms of “rights,” because of the *assertion of sovereignty* by an outside power.

While the courts maintain that culture and cultural practices can change over time, decisions such as *R. v. Pamajewon*⁸¹ conjure fears that this is not the case. An Ojibway people sought to hold “high stakes” bingo according to their own by-law as a right inherent to a self-determining nation, but the claim was rejected because the gambling traditional to Ojibway culture was not done on the same scale as it is in the twentieth century. Yet, as Borrows replies, “not many activities in any society, prior to this century, took place on a twentieth-century scale” (cited in Thom 2001:7).

Asch (2000) therefore criticises the shift represented by the cultural rights approach, as do Niezen (2003), Thom (2001) and so many others. While at first glance such an approach seems worthy of praise for its pursuit to preserve the distinct cultures of Canada’s Aboriginal peoples, its tendency to view Aboriginal rights as being frozen in time undoubtedly serves to restrict the access of Aboriginality (embodied in legal claims) to its full place in modernity. Thus some fear that this approach, if carried to the extreme, could “condemn Aboriginal societies to extinction, as cultures which cannot adapt to changing conditions are bound to disappear” (McNeil 1997:151). Cheng is concerned that, if Aboriginal groups can only look forward to “merely continuing rights to discrete practices and customs, the court is in danger of reducing Aboriginality to a package of anthropological curiosities rather than manifestations of an Aboriginal right to occupation, sovereignty and self-government” (cited in Thom 2001:7).

Indeed, much of the literature in the social sciences has discredited such antiquated and static notions of culture for some time. While Amartya Sen maintains that culture is non-homogeneous and non-static (2004), Norbert Elias’s figurational sociology emphasises and underscores the fundamentally changing nature of culture with several strong metaphors: change is so integral to the nature of culture that to conceive of culture as something static is like

⁸¹ *R. v. Pamajewon*, [1996] 2 S.C.R. 821

conceiving of a river as something that does not flow, or of wind as something that does not blow (Elias 1978). This is why many contemporary theorists consider culture more as *process* than as a thing.

With Canadian courts approaching culture as frozen in time, a forced dichotomy, in the modernist tradition, between tradition and modernity is also created. Martin (2003) advances the critique of such a “frozen in time” approach to culture in his discrediting of Modernisation Theory, which treats all societies as passing through a desirable, linear evolution toward a homogeneous, universal state of modernity. In fact, others have studied the idea that each society follows its own distinct path to its own distinct modernity (see Allahar 1989; Bernier 1998; Biaya and Bibeau 1998; Frank 1969; Steward 1953). Martin (2003) affirms that modernity does not lead to the systematic replacement of traditional institutions by modern institutions, but rather they can be maintained and contribute, just as the modern, to contemporary social reality. Our incapacity to recognise this central role of *hybridisation*, claims Martin, is due to what Fabian (1983) terms the imprisonment of the Aboriginal person in the image of a traditional and authentic *Other* in contrast to a modern and deracinated *We*. On the contrary, there is no universal law of social change, and no homogeneous modernity, for traditional institutions do survive both modernity and the development of modern institutions, and in fact contribute to them both (Martin, 2003). Thus, one can conceive of cultures that can adapt, remain creative, and innovate, while remaining *distinctly Aboriginal*.

Indeed, rather than even speaking of the traditional and the modern, Latour (1993) accuses the Western world of founding its self-conception as modern on a misguided purification of the discourses of nature and society. Robert Boyle’s vision of the natural world as something independent of the speaker helped to construct modern experimental science, while Thomas

Hobbes's reciprocal contribution was to theorise social and political order independent of material circumstances and in terms of purely human conflicts and agreements (Pickering 1994). What is distinctive of modernity for Latour, then, is this penchant for eliminating the trace of nature in society and of society in nature. However, there exists no real boundary "between man and machine, between human responsibility and technical inevitability, between the subjective world of politics, culture, and morality and the objective world of science, technology, and nature" (Harbers 1995:271). Indeed, Latour's (1988) brand of sociology is predicated on *mixing humans and nonhumans together*. From his perspective, then, the commonly-held dichotomy between the traditional and the modern is fraudulent in that *we have never been modern* (Latour 1993).

It would seem, then, that there is a fundamental indeterminacy and tension in how we draw the line between tradition and modernity, and this is precisely because this line, this distinction, does not exist outside of our arbitrary cultural logic. The placement of that line, and its consequent performative declaration of Truth and Justice, is therefore an instance of the exercise of symbolic violence rooted in, yet masking, the arbitrary. The very fact that the Van der Peet case was alternately held and dismissed as it was passed along from lower to higher courts perhaps serves as one of the more acute examples of this indeterminacy.

There are further inconsistencies, however, that tie the debate over time frame into comparisons with the standards set for Aboriginal title and for Métis rights. In examining this most recent approach to specific Aboriginal rights, Slattery engages the question of "threshold date" as decided in Van der Peet:

We may observe that the Court's choice of threshold date is somewhat puzzling. In British imperial law, the simple fact of 'contact' between the Crown and indigenous peoples had no legal significance. Contact did not give indigenous peoples any rights in British law; nor did it have any legal impact on indigenous systems of law and rights. Contact was a legally innocent event. It was only when the Crown acquired jurisdiction

over a territory that the issue of the rights of the local inhabitants arose in British law. Only at this point could the doctrine of aboriginal rights come into play. So, while it would not be impossible for the doctrine to recognize only customary rights that existed at some prior date of 'contact', in practice this would be a strange and inconvenient way for the doctrine to operate. It would have made it virtually impossible for British officials on the spot at the time to know which asserted aboriginal rights they should respect, without a battery of historians and anthropologists at their elbows. Not surprisingly, there seems to be no historical evidence that imperial law actually functioned in this manner. (2000:217)

More intriguing yet is Slattery's comparison of the Van der Peet case with the decision for the Delgamuukw case. In Delgamuukw, the Court decided that the threshold date for Aboriginal *title* was the time of Crown sovereignty, as opposed to contact. It did this because, "since aboriginal title was a burden on the Crown's underlying title, it did not make sense to speak of its existence prior to the date of sovereignty" (Slattery 2000:218). However, the Court held the Van der Peet time frame in place, giving rise to an "odd discrepancy":

Suppose that an aboriginal group of hunters moved into a certain area after the date of contact but substantially before the date of Crown sovereignty. Under current law, the group would apparently be precluded from showing an aboriginal right to hunt in the area; however, paradoxically, it might be able to establish aboriginal title there, despite the fact that aboriginal title would include hunting rights. In effect, the test for the lesser right is more onerous than for the greater right. The anomaly is compounded where Group A occupied the area at the time of contact but had been displaced by Group B by the time of sovereignty. Here, Group A could show a specific aboriginal right to hunt in the area but not aboriginal title. By contrast, Group B could show aboriginal title but not a specific right to hunt. (Slattery 2000:217-218)

Slattery's (2000) conclusion is therefore that these complications merit the adoption of a common historical baseline for both Aboriginal title and specific Aboriginal rights such as hunting, fishing, and trapping.

Recalling that the Powley decision adjusted the threshold date to just prior to effective European control for the test of Métis rights, these issues concerning time and Aboriginality bring up some interesting questions. In fact, Steve and Roddy Powley claimed that their Métis rights stem from the pre-contact practices of their First Nations ancestors, but this assertion was dismissed by the Court. One is then left to wonder if the nature of Métis culture just prior to

effective control – which was often characterised by a multiplicity of practices both “Aboriginal” and specifically for trade – can ultimately enable them in the establishment of modern forms of Aboriginal rights to which many First Nations and Inuit groups do not have access. The Métis were amongst the most polyvalent of Aboriginal groups, given their special role in trade between First Nations and Europeans and their tendency to take up local practices. To name a few practices, various communities of Métis have effectively hunted, fished, trapped, farmed, extracted natural resources, and traded in the consequent goods since before the federal government’s effective control of their homeland. This could ultimately serve to define a cross-section of Aboriginal rights often denied to other Aboriginal groups, such as in the *Van der Peet* case. Nevertheless, past experience indicates that there will most likely not be a diverse flood of Aboriginal rights attributed to the Métis, given that there is always an element of the indeterminate and arbitrary in the decision-making power of the judiciary.

One such element now provided by the Supreme Court seems to be geography. Indeed, there is a confusing tension in the *Powley* decision between individual and communal rights, for the liberal tradition has difficulty adapting itself to questions of communal rights for a people dispersed across the Canadian northwest. The judgment asserts that Aboriginal rights are communal, but it is not the Métis community of Sault Ste Marie that is on trial, or at least, not entirely. It is Steve and Roddy Powley who are formally on trial, but the Court goes to great lengths to establish that there must be a continuity from the past to present in the form of a *rights bearing community*, so much so that the question the Court ultimately asks itself is whether *the Métis in and around Sault Ste. Marie* have an Aboriginal right to hunt for food. This raises some questions: will it be within the realm of possibility for a Métis rights case to establish that a particular community has a right to hunt, fish, or trap for food, while the claimant does not? If it

is established that a particular community has an Aboriginal right to hunt for food, does each Métis resident automatically have that right recognised, or could there be further trials just to determine that they have a historical and continuing connection to that community? If the rights recognition is automatic by virtue of residency in a rights-bearing community, what does this mean for Métis who move into such a community despite them and their known ancestors never having lived there previously?

The gaps left in the Powley decision have unfortunately provided some provinces sufficient confidence to withhold recognition and affirmation of hunting rights for many Métis. The Powley decision is clear in its assertion that it is only determining whether hunting rights exist in and around the Sault Ste. Marie community, *and it then points out* questions left unanswered that the province of Manitoba has used to its advantage:

We would not purport to enumerate the various Métis peoples that may exist. Because the Métis are explicitly included in s. 35, it is only necessary for our purposes to verify that the claimants belong to an identifiable Métis community with a sufficient degree of continuity and stability to support a site-specific aboriginal right. A Métis community can be defined as a group of Métis with a distinctive collective identity, living together in the same geographic area and sharing a common way of life. The respondents here claim membership in the Métis community centred in and around Sault Ste. Marie. It is not necessary for us to decide, and we did not receive submissions on, whether this community is also a Métis ‘people’, or whether it forms part of a larger Métis people that extends over a wider area such as the Upper Great Lakes.⁸²

Just as First Nations and Inuit have been condemned to discrete and antiquated threshold dates in the struggle for the recognition of their specific rights, the Métis have thus far been condemned to an antiquated landscape. It is reminiscent of the *In re Southern Rhodesia*⁸³ decision where migration and displacement were seen as eroding any continuity between the indigenous groups of today and those of the past. The fallout of the Powley decision in Manitoba was that the province elected to recognise hunting rights for Métis who live in and around eleven villages and

⁸² *R. v. Powley*, [2003] 2 S.C.R. 207 at p. 216

⁸³ *In re Southern Rhodesia* (1919) A.C. 210 (P.C.)

towns that are *recognised* as having a Métis community that existed prior to Manitoba's entry into Confederation. This is so despite the fact that the entirety of the original province of Manitoba was negotiated into Confederation by its constituent Métis community that formed the overwhelming majority in the area. It is also so despite the "reign of terror," dispossession, and dispersal that occurred in the period following 1870 (Shore 2001).

All of this indicates that the current juridical discourse of Aboriginality carries with it an implicit burden of authenticity that holds Aboriginal Canadians to a standard that is still borne of the image of an authentic, Aboriginal *Other*. Bruce Miller (1998) touches upon something similar and pertinent in his discussion of the attempted defence of an Aboriginal sacred site from development in Washington state. Called upon to testify as an expert witness, Miller observed firsthand the difficulties of invoking the sacred in a North American court. Also an accurate description of the cultural rights approach used in *Van der Peet*, Miller cites Sharp (1996) as observing "that the 'sacred' belongs to a primordial discourse which locks local groups into a particular identity construction which itself builds on the idea of critical differences between Indian and dominant societies" (Miller 1998:88). Indeed, Justice L'Heureux-Dubé criticised a similar effect in the *Van der Peet* test:

[A]n approach based on a dichotomy between aboriginal and non-aboriginal practices, traditions and customs literally amounts to defining aboriginal culture and aboriginal rights as that which is left over after features of non-aboriginal cultures have been taken away. Such a strict construction of constitutionally protected aboriginal rights flies in the face of the generous, large and liberal interpretation of s. 35(1) of the *Constitution Act, 1982* advocated in *Sparrow*.⁸⁴

Miller's observations therefore go beyond just discussion of the sacred in Aboriginal culture – they apply to Aboriginal culture itself, when it is beheld by the courts and dominant society in general. Aboriginal Canadians are held to a vision of difference, and when pursuing recognition

⁸⁴ *R. v. Van der Peet*, [1996] 2 S.C.R. 507, 137 D.L.R. (4th) 289 at p. 342

of their rights it is an exotic vision of difference elected and handed down by the judiciary. This is why rights are apt to be anchored in a time that is immemorial, in a place sacred and rustic in its ancient traditions, and in practices that are quaint and primitive. Failure to live up to this image will only work to the detriment of an Aboriginal group, as one of Miller's observations is of a societal backlash against the use of the sacred in the United States and Canada:

A second response is to regard the discourse as part of a 'faked culture' asserted by, to use Clifton's phrase, 'invented Indians.' This is a view current in right-wing discourse and has culminated in the creation of funds designated to contest Indian efforts to protect cultural sites and protected rights generally. Proponents of this perspective cast doubt on Indian aspirations by attacking their credibility and their authenticity, focusing on variability in Indian phenotype, or on the poverty of documentation of Indian landscape. This issue arose when a Ph.D. holding archaeologist hired by the Tewalets equated the limited cultural documentation with the absence of cultural practice, and when the state TRAX computer system failed to show 'known cultural resources at the Tewalet site.' Further, discontinuity with ancestors is posited because of the adoption of western technology and material culture. This is referred to by some in British Columbia as the 'transistor radio fallacy' because the trial judge in the Delgamuukw case observed that Indians employ modern technology and eat contemporary foods. In this discourse, Indians are culturally contaminated, corrupted descendants of their putatively spiritual ancestors rather than their spiritual heirs. (Miller 1998:89)

Perhaps in the cultural rights approach, the Canadian judiciary has managed to construct a legal logic that simultaneously covers up and responds to politico-colonial needs, such as safeguarding the colonial assertion of sovereignty. In other words, perhaps Fae Korsmo is right in fearing that the more state-like an Aboriginal claim, the greater the likelihood of its failure, while the more 'primitive' the claim, the greater the likelihood of its success (Korsmo 1996).

I would posit that the burden of authenticity in the discourse of Aboriginality will prove particularly acute in the case of the Métis, including in terms of time frame, for they cannot claim the prestige of authenticity that comes from residing on the land as a people since "time immemorial." Indeed, there are so many sources of "inauthenticity" and "cultural contamination" to be found in the Métis by the courts and Canadian society at large: the people on the margins of both Aboriginal and non-Aboriginal societies, the only "half Aboriginal," the people dispersed,

the people not recognised for over a century, the only Aboriginal people not recognised by the Constitution Act, 1867. The people who were made to fade into the background of Canadian society now have to deal with that fact as an incredible challenge to their capacity to claim Aboriginal rights: Does the claimant reside and have recognition in a community with a sufficiently critical mass of Aboriginality? Do the claimant and the claimant's community have continuity with an Aboriginal community that is authentically "historic"? Is the right asserted really integral to a *distinctive* Aboriginal culture?

These types of questions indicate an obsession with establishing an authenticity in Aboriginal claims and claimants – one which might act to the detriment of those who live in remote areas, who have relocated, or who have experienced a certain amount of detachment or lack of continuity because of the particularities of Métis history. It offers nothing in terms of revitalisation of community, identity, and cultural health through the repatriation of institutions either, for indeed, this would be inauthentic. Aboriginal rights claimants must have always already hunted, always already fished, and always already trapped – in a distinctly Aboriginal fashion.

Field and Habitus

The symbolic violence of the judiciary and its discourse of Aboriginality not only help to mask the original and continuing violence of dispossession, but also the contingency and arbitrariness of power with which the determination of "Justice" in this history is replete. The juridical field and certain characteristics of the juridical habitus – that socialised subjectivity particular to the field that marries both the agency of the individual and the structuring structures that act upon him or her – are integral to the obfuscation of both of these.

As noted by Bourdieu (1987), constituents of the field demonstrate a common practice of continuously and fervently dismissing the intuitive notions of fairness of the lay person in the determination of justice. This is perhaps not surprising to find in Supreme Court Justices who have to make decisions with consequences for, and hence that are subject to the scrutiny of, the entire country. Yet curiously, even juridical and academic activists in favour of Aboriginal rights can be seen to do this. In what is seen as a seminal work on Aboriginal rights in Canada, Brian Slattery (1987) purports to address two main issues: did the Crown, in some way or another, gain sovereignty over Aboriginal Canadians, and assuming that it did, how did this affect their legal position in terms of their laws, property rights, and political institutions? As counterintuitive to the lay reader as it may sound, Slattery then goes on to tell the reader that facts alone are not enough in answering these questions:

Most of this article will be taken up with the second of the two issues, which is really a nest of distinct but related questions. The first issue has complex historical and theoretical dimensions that cannot be fully explored here. Both issues are, of course, legal, *and cannot be resolved simply by looking at the facts. Rules are needed to determine which facts are relevant and to assess their significance.* (1987:735, emphasis added)

In effect, what the lay reader is to understand in reading this is that *you cannot decide what is fair and just on your own*. Bourdieu thus notes that it is wrong to attribute consistency and predictability in the law to *stare decisis* (the respect of precedent). Rather, this consistency is due to a legal habitus that reinforces a line of differentiation between the field and the non-field:

...the notion of *stare decisis* should certainly not be conceived of as a kind of rational postulate guaranteeing the consistency and predictability as well as the objectivity of legal decisions by acting as a limit imposed upon the arbitrariness of subjective determinations. The predictability and calculability that Weber imputed to “rational law” doubtless arise more than anything else from the consistency and homogeneity of the legal habitus. Shaped through legal studies and the practice of the legal profession on the basis of a kind of common familial experience, the prevalent dispositions of the legal habitus operate like categories of perception and judgment that structure the perception and judgment of ordinary conflicts, and orient the work which converts them into juridical confrontations. (1987:833)

Thus even an academic sympathetic to the plight of those estranged from the legal system can actively participate in the rationalisation and increasing juridical division of labour in the field that precisely makes its activities less accessible to those outside the field. In this way, all those within the field improve their status in the competition for the monopoly of the means to determine the law.

Just as those outside the field do not know all the rules necessary to pinpoint Justice, wherever it may lie, juridical culture is respectful of a definite and strict hierarchy for the naming of Justice within the field. Despite the fact that the Canadian legal system is styled after an “adversarial” model, true normative conflicts amongst *those who decide what Justice is* would erode the judiciary’s claim to the monopoly of the means of determining Justice. To revisit a statement by Bourdieu:

Reading is one way of appropriating the symbolic power which is potentially contained within the text. Thus, as with religious, philosophical, or literary texts, control of the legal text is the prize to be won in interpretive struggles. Even though jurists may argue with each other concerning texts whose meaning never imposes itself with absolute necessity, they nevertheless function within a body strongly organised in hierarchical levels capable of resolving conflicts between interpreters and interpretations. Furthermore, competition between interpreters is limited by the fact that judicial decisions can be distinguished from naked exercises of power only to the extent that they can be presented as the necessary result of a principled interpretation of unanimously accepted texts. (1987:818)

This statement alludes to a certain socialised practice of the judiciary that is so normalised and integral to its operation that its role in *masking* most often goes unquestioned. The right to determine the law embodies a form of juridical capital that is endowed with much symbolic power, such that the field provides for a competition “among actors possessing a technical competence which is inevitably social and which consists essentially in the socially recognised capacity to interpret a corpus of texts sanctifying a correct or legitimised vision of the social world” (Bourdieu 1987:817). Indeed, if the juridical habitus plays a role in masking both the originary and continuing violence of colonial dispossession and the indeterminacy and

arbitrariness of power upon which the determination of “Justice” is predicated, then it is the very acts of *deliberation* and *interpretation* which are at the heart of this.

Deliberation itself suggests an appeal to transcendental norms. Deliberation is interpretation, and the very act of interpretation implies that the solution to a question of Justice is an essence that pre-exists the question. It is somewhere out there, waiting to be found by those who know how to find it. This is why the juridical field must continuously refer to sources and texts external to the courtroom: constructed histories, infinite precedents, a complex (and contradictory) body of jurisprudence, natural law, basic principles of justice, the desire and intent of the king – all of it indeterminate, all of it suited perfectly to the judiciary’s needs. Judges thereby deliberate and mobilise acts of interpretation in order to express the fact that they are merely interpreters of Justice. They are the normative shamans of modern, liberal democracies, for they – and only they – can remove themselves from a situation and locate the essence of Justice, the pre-existing answer that is waiting to be found. Given all that has been said of the indeterminacy and the arbitrariness at the heart of the operation of the judiciary, this is how the judicial habitus masks it: the judiciary cannot simply state what should be, or unilaterally declare what is and will be. It reveals it. Do not shoot the messenger, for the messenger is only presenting *Justice as it is*.

Yet if the judiciary masks the arbitrary and the indeterminate that lies at the heart of its operation, it also masks the violence of colonisation. The arrival at the current cultural rights approach to Aboriginal rights is a high water mark for the judicial habitus, for it is a judicial interpretation, presented as eminently logical, methodical, and empirical, that implies that “Justice” can be found in the heart of the colonial act. In other words, we are meant to believe that it is a simple matter to remedy the removal of sovereignty from a once independent,

politically sourced people – without giving that sovereignty back – one needs only the correct formula in order to arrive at it.

Complementary to the criticisms of indeterminacy I supply in the previous section, Bourdieu lists in passing the ways in which interpretation provides an infinite elasticity to the law:

Interpretation causes a *historicization of the norm* by adapting sources to new circumstances, by discovering new possibilities within them, and by eliminating what has been superseded or become obsolete. Given the extraordinary elasticity of texts, which can go as far as complete indeterminacy or ambiguity, the hermeneutic operation of the *declaratio* (judgment) benefits from considerable freedom. It is not rare for the law, as a docile, adaptable, supple instrument, to be obliged to the *ex post facto* rationalization of decisions in which it had no part. To varying degrees, jurists and judges have at their disposal the power to exploit the polysemy or the ambiguity of legal formulas by appealing to such rhetorical devices as *restrictio* (narrowing), a procedure necessary to avoid applying a law which, literally understood, ought to be applied; *extensio* (broadening), a procedure which allows application of a law which, taken literally, ought not to be applied; and a whole series of techniques like analogy and the distinction of letter and spirit, which tend to maximize the law's elasticity, and even its contradictions, ambiguities, and lacunae. (1987:826-827)

While a comprehensive examination of the legal body of texts concerning Aboriginal rights for techniques such as these is beyond the scope of the present thesis, it is easy to see their applicability. The narrowing of *restrictio* invokes so many arguments of specificity and non-generalisability, sometimes to the point of absurdity: for one hunting and gathering group to have hunting rights does not necessarily demand the respect of the same rights in another. While the broadening of certain concepts such as the honour and fiduciary role of the Crown has served to benefit Aboriginal groups, looking further back in history will also show that the very travel of precedents such as *St. Catherine's Milling* and *In re Southern Rhodesia* can represent a certain broadening also. Distinction of letter and spirit is a significant technique in Canadian jurisprudence, especially now that section 35 of the Constitution Act, 1982 plays such a critical role in the determination of Aboriginal rights: the "purposive analysis" that the most recent decisions mobilise is testament to this.

Nevertheless, it must be said that there is a special form of speculative *restrictio* that also seems to be integral to the judicial habitus: namely, that of continually leaving some critical decisions unmade and questions unanswered. In *St. Catherine's Milling and In re Southern Rhodesia*, the Privy Council infers aspects of the nature of Aboriginal title while also specifying that it is not required to give a comprehensive definition of it. Sparrow left undetermined what was an authentic Aboriginal right, while *Van der Peet* made a point of not delineating what such a right would be in the case of the Métis. The *Powley* decision now *explicitly showcases* its own lacunae: the judgment only determines whether Métis in and around Sault Ste. Marie have hunting rights, without ruling on the rights of the rest of the *same Métis Nation*. It even mentions, and thus leaves open, the possibility that the rights recognised and affirmed in *Powley* could extend to a larger region such as the Upper Great Lakes.

The judiciary is therefore reticent to render judgments that set broad standards of rights accordance. In other words, comprehensive and definite standards of rights are problematic to the field and the judiciary in that they amount to a loss of control, a sort of surrender of the sovereign exception to the law – for once a law as categorical as hunting rights for all Aboriginal groups is set, the principle of *stare decisis* makes it such that the Court has seriously eroded its own power to determine the law in a potential multiplicity of cases. It therefore can never make the final decision (neither the final of all decisions, nor even just the final decision on Aboriginal rights), for that would rule itself into irrelevancy and collapse the field that is defined by the very pursuit of the monopoly to determine the law. The judiciary needs the law to always need to be determined, and thus operates to the opposite effect. It therefore must pace itself, and generate just as many unanswered questions as it does answered ones.

Normativity and Transcendentalisation

Bourdieu exercises some caution when using the analogy of a “game” in explaining the notion of field. The fundamental similarity lies in that both involve an organised forum for competition according to certain principles of action, excepting the main differences that “a field is not the product of a deliberate act of creation, and it follows rules or, better, regularities, that are not explicit and codified” (Bourdieu and Wacquant 1992:98). In contrast to “rules,” Bourdieu’s choice of the word “regularities” accords better with his analysis of the juridical field and the present survey of judicial practice concerning Aboriginal rights: what one would tend to call rules are actually somewhat indeterminate, and players can participate or invest in order “to transform, partially or completely, the immanent rules of the game” (Bourdieu and Wacquant 1992:99). One of the most brazen examples of rule transformation – although the infinite meaning to be found in Commonwealth case law can probably *extend* some precedent to this effect from somewhere – is probably found in the Calder case. Pigeon’s “technicality” that caused him to not give a decision on the case was that it was not permitted by British Columbia law to carry suit against the Crown without a fiat. Nevertheless, the remaining justices still rendered decisions on the basic principle that justice was important enough to not be withheld in this case. Another prominent example is the fact that in the Calder case six out of seven Supreme Court Justices arrived at the decision, seemingly out of thin air, that Aboriginal title could exist at common law. This new rule essentially paved the way for the flurry of case law that followed.

But if one is to accept that the foundations of the law are indeterminate and arbitrary, it is just as important to note that the judgments rendered are *not* arbitrary in one important sense: as Korsmo (1996) implies in a previous quote where she predicts the types of claims that will likely be accepted or denied, they are not random. The question of normativity thus arises.

Slattery broaches the issue in a most unassuming manner in his discussion of the inconsistencies and difficulties of the threshold date for rights recognised under the Van der Peet test:

Of course, the Court's approach to specific rights in Van der Peet has a plausible explanation. The aboriginal right asserted there involved the exploitation of limited fishing resources - resources that the aboriginal group likely shared with other user groups, including commercial and sports fishers, as well as other aboriginal groups. No doubt, the Court was concerned about the impact of a favourable ruling on other user groups. However, it seems doubtful whether adopting an artificial threshold date is the best way to solve this problem. In the end, the equitable sharing of resources is better attained through governmental regulations that meet the standards of section 35(1), coupled with agreements with the groups concerned. (2000:218)

Of course, perhaps the lack of force and critical indignation in Slattery's reaction to a hidden reasoning is due to a sometimes accepted and normalised role of the "normative" in traditional legal theory – the common law is based, after all, on judges following the lead of other judges. Nonetheless, there is a tension and disingenuousness of self-representation that permeates the legal field – especially within the judiciary – precisely because of an inconsistency concerning the influence of considerations external to jurisprudence and case history on judgments rendered. The Van der Peet decision did not express regret at not being able to grant Dorothy Van der Peet an Aboriginal right to sell fish because of the current political situation concerning the density of disparate and opposing fishing interests in the region. The juridical habitus cannot accommodate such candour.

This seems to indicate the existence of a "sometimes hidden, sometimes not" normativity in the Supreme Court of Canada and the juridical field as a whole. A group of Justices presides and decisions do not have to be unanimous, and in this sense Canada has instituted a normative voting process. They are, in effect, a sample of opinions on justice in Canada – just not a very representative sample. Yet, as mentioned, the institution is replete with tension and ambiguity stemming precisely from its internal contradictions: juridical and symbolic capital is tightly

safeguarded by a juridical habitus that consistently brings questions of justice out of reach of non-judicial Canadians through an increasingly complex process of rationalisation and juridical division of labour, and especially through a *transcendentalising of norms*. The juridical habitus consistently invokes and implies a special relationship to a transcendental form of Justice, despite the fact that this is at odds with the reality of juridical social power in the service of normative considerations. This is why the judiciary's social power must also be symbolic: to give an exteriority of truth where contradiction and inconsistency lie – at the clash of the transcendental and the normative. Justice as law is an impossibility presented as possible by the juridical habitus: the aporia of law is made passable as the instable is outwardly stabilised and the irreconcilable is apparently reconciled. In the moments where that normativity is not so hidden, then the process itself will often be transcendentalised and celebrated as a foundational hallmark of justice in Canadian society. Thus we talk of the historical origins of the institution, the centuries of legal and philosophical thought of learned men that stand behind it, and the hallowed role it plays in Canadian society. The role of external normative influences is therefore disguised at the most strategic of moments, such as the raw exercise of power and the naturalisation of arbitrary justifications of it.

The most recent debate to flow from these underlying issues concerns the acceptable justifications for infringement of Aboriginal rights. In the Van der Peet decision, Justice McLachlin's dissenting opinion held that Chief Justice Lamer's past and current embrace of justifications such as third party interests and economic and regional fairness was a vision of reconciliation and "societal peace" that was *more political than legal*. Kent McNiel agrees with Justice McLachlin, and therefore offers this warning at the end of one of his analyses:

The lesson to be learned from the decisions examined in this article can, I think, be summed up like this: regardless of the strengths of legal arguments in favour of Indigenous peoples, there are limits to how far the courts in Australia and Canada are

willing to go to correct the injustices caused by colonialism and dispossession. Despite what judges may say about maintaining legal principle, at the end of the day what really seems to determine the outcome in these kinds of cases is the extent to which Indigenous rights can be reconciled with the history of British settlement without disturbing the current political and economic power structure. I think this is a reality that Indigenous peoples need to take into account when deciding whether courts are the best places to obtain redress for historical wrongs and recognition of present-day rights. It may be advantageous to formulate strategic approaches that avoid surrendering too much power to the judicial branch of the Australian and Canadian state. (2004:300-301)

If anything is to be learned from this study, however, it is that the distinction between the political and the legal is not so discrete. McNeil is on the threshold of recognising this, but as Foucault would probably suggest, he still believes in a fundamental lawfulness to which a judiciary should aspire. I tend to agree with Derrida that we can endeavour to move in the direction of justice by continually striving to speak in the language of the Other, but this is an heuristic vision of justice that is not reconcilable with the Supreme Court of Canada.

CONCLUSION

Foucault states that “power is tolerable only on condition that it mask a substantial part of itself. Its success is proportional to its ability to hide its own mechanisms. Would power be accepted if it were entirely cynical? For it, secrecy is not in the nature of an abuse; it is indispensable to its operation” (1990:86). Derrida, for his part, sees the law as a force that is always authorised, that always justifies and preserves itself with a silence “walled up in the violent structure of the founding act” (1990:943). These statements bear a striking similarity to Bourdieu’s concept of symbolic violence, for they all have a conception of power and violence as aided and accommodated by a sort of socialised blindness. These similarities are in turn testament to the terminological struggle implicit in this thesis. All three theorists regard human social life as steeped in meaning-making – the symbolic – and engage with it in a manner that accounts for difference, conflict, and power. “Symbolic violence” is not an irreplaceable term, then, given the sizeable amount of common ground it shares with the ideas of other theorists. Yet I have chosen heuristic and differing uses for the terms “symbolic violence” and “discourse,” based on the latter’s seeming affinity for narrative and genitive qualification. There is often a “discourse of:” a story habitually told about, or a conceptual constraint imposed upon, a certain subject. In this case, I have discussed the recent consolidation of a juridical discourse of Aboriginality within the context of a larger critique of the juridical field’s engagement with Aboriginal rights. Symbolic violence, while readily applied to many issues such as gender or race, is more apt to be represented generically as abstract process: the naturalisation of the arbitrary, etc. However, this distinction is far from discrete and impermeable – rather, as previously mentioned, it serves heuristic purposes that accommodate the analysis.

The analysis, in turn, is complex and multifaceted, and for this reason it is difficult to sum up in a simple, single thesis statement. If one in fact seeks to encapsulate this thesis in such a manner, it is perhaps best to bring the summary back to first principles, or ontology. Academic work such as this is of critical importance precisely because symbolic life – something that we all live – is so often anchored in the essentialist. With all human societies so steeped in the symbolic, it would be difficult to find one that does not invoke a conception of justice or morality that is meant to be timeless and universal. Perhaps to draw meaning from something that does not exist is not, in and of itself, entirely problematic. The moment in which it does become problematic, however, is in the domination of one socio-cultural code or one binary over the other. Essentialism thus has definite and real consequences, not only for meaning-making, but also for inter-group relations, social action, and power and inequality. Essences are anchors for meaning-making *and* social action, and they repeatedly prove themselves to operate to the benefit of those that produce them and to the detriment of the *Other* that is subject to them.

In the case of Canadian justice and Canadian colonialism, implicit appeals to the transcendental in the very process of determining Aboriginal rights can be seen as a symbolic mask that obfuscates the originary and continuing violence of colonisation and dispossession, while simultaneously disguising the arbitrary foundations for judicial power itself. Integral to the judiciary's recent work concerning Aboriginal rights and title is the fabrication of an essentialist history of Aboriginal rights and the consequent consolidation of a juridical discourse of Aboriginality.

To a certain degree, circumstances have changed for the Métis since 1982. They have seen the vague constitutional recognition and affirmation of their “existing” Aboriginal rights. Coupled with a group of pivotal decisions concerning Aboriginal rights and title, the Métis

seemed poised to take and have recognised their place as one of Canada's three Aboriginal peoples. But if the cases both lost and won under the cultural rights approach, as well as the fallout of the Powley decision thus far in Manitoba, serve any purpose, it is to remind us that what is being consolidated is only the discourse itself, and that this in no way eliminates indeterminacy and arbitrariness at the root of the symbolic arrangements justifying the imbalance of power. Hence, it would be incorrect, or disingenuous, to say "justice lost, justice found" for the Métis or the other Aboriginal peoples of Canada. As Foucault also noted, emergences in history should never be taken to be final teleological culminations; rather, they are "merely the current episodes in a series of subjugations" (Foucault 1977:148).

Ultimately, what this means is that we have the development of a discourse of Aboriginality fully adorned with the exteriority of Truth and Justice, sourced from the interpretation of a vast, diffuse, disparate, and indeterminate body of meaning that still contains within it elements of the arbitrary. Thus, while elevation to constitutional status means that Aboriginal practices submitted successfully to the doctrine of Aboriginal rights will enjoy a more robust protection, it also means that "Justice" will be able to tell certain Aboriginal groups that they do not have rights to their traditional practices with all the more finality.

The discourse of Aboriginality being developed now, even though it seeks to "play nice" with Aboriginal rights, fulfils the function of symbolic violence as the colonial state's legal interpretation of Aboriginal rights has always sought to do to some extent. In fact it is all the more effective in that the vision of the Aboriginal *Other* mobilised for this legal process has been rehabilitated into something traditional and authentic – a vision that is, despite the judiciary's claims to the contrary, at odds with allowing Aboriginality into the cultural fabric of modernity. The fact that the line we draw between tradition and modernity is imaginary only adds insult to

injury, for Aboriginal Canadians are being told to not cross a line that does not actually exist outside of Western cultural logic, but in a way that has real consequences for their well-being and survival. Because of the particular character of Métis identity and history, it now appears that they may be at risk of suffering some losses in the judiciary's game of authenticity. Thus the stakes have been raised, and the mask Justice wears is all the more docile. It is an invitation to gamble and to offer up an investment in the game.

Illusio and the Game

According to Bourdieu, *illusio* stems from the Ancient Greek and does not carry the same connotation as today's *illusion* – although some may argue that this semantic baggage is nevertheless appropriate. *Illusio* is a sort of *interest*: “it is to be invested, taken in and by the game. To be interested is to accord a given social game that what happens in it matters, that its stakes are important (another word with the same root as interest) and worth pursuing” (Bourdieu and Wacquant 1992:116). Thus if each field in society embodies its own game of sorts, with its own form of capital to be gained and lost, participation in each field also demonstrates a particular investment in that game. In the case of Aboriginal rights and title disputes, this does not mean a firm belief that what is decided by the court is Justice. Nor does it indicate a statement of faith that Truth and Justice will be the outcomes of such a court case. What it means is simply what is indicated: what is at stake matters. Claims of Truth and Justice are symbolic violence, and the fact of having as a sole option to take recourse to the judiciary in the hopes that the judge will see the world your way is demonstrative of coercive power. Power is relational, it is a relationship. Power exists in the very fact of Aboriginal groups choosing to take recourse to a

judiciary bestowed with an indeterminately wielded arbitrary power to declare the truth of a situation. This is a clear justification for a Foucauldian relational conception of truth and justice.

Hay's (2006) description of the directional dependency of ontology, epistemology, and methodology⁸⁵ indicates that, in the social sciences, ontological arguments are arguments of first principles. Although academics often leave such debates implicit, there is no discussion logically prior to it. It thus takes an exhaustive work of sociological analysis that starts at the very beginning – making an ontological claim for the relational and non-essentialist – to realise what has been intuitively plain to Aboriginal Canadians for a long time: namely, that the indigenous is *Other* to the colonial centre of the Canadian symbolic order. This is the greatest implication my study will have for research, and it calls for efforts to denaturalise the essentialist a priori limits and contingent conceptual constraints that are naturalised into processes of meaning-making in Canadian society. This is even true of how meaning is made in the juridical field. Thus, for the otherness of indigeneity and the pursuit of recognition of Aboriginal rights and title, there are wins and there are losses in the courts, but this game is not to be reconciled with any transcendental notion of "Justice." However, Aboriginal groups who seek the recognition of their title might find it difficult to reconcile their practices with such implications. If the government will not talk about or negotiate concerning a group's right to hunt, it is difficult to know what else the group can do other than take recourse to the legal system. Yet, some groups do resort to other means to solve problems where negotiations fail, for Oka and Ipperwash are two examples of an avenue of rights assertion other than the institutional channel of the courts. It does not bode well for Aboriginal Canadians, however, that both disputes resulted not just in symbolic violence being deployed by the state, but also physical force.

⁸⁵ See the section entitled "*The Mutual Imbrication of Theory and Methodology*" in chapter two, Theory and Methodology.

The heavy question remains, however, as to the benefit and cost ratio “investment in the game” represents for Aboriginal Canadians. McNeil’s warning about the “limits to how far the courts... are willing to go to correct the injustices caused by colonialism and dispossession” is an ominous one (2004:300). The very act of struggling to have the law recognise one’s rights constitutes *illusio*, and “players agree, by the mere fact of playing, and not by way of a ‘contract,’ that the game is worth playing... and this collusion is the very basis of their competition” (Bourdieu and Wacquant 1992:98). It is thus for each Aboriginal group faced with this prospect to decide whether the allure of a monumental victory is worth the risk of loss with a certain finality, or even worth legitimating a process they do not see as representing Justice.

Implications: Possibilities of Struggle

The good motives of juridical activists such as Slattery can be seen as disingenuous: they are participating in and playing by the rules of a game characterised by a coercive symbolic violence. At the same time, the advent of comprehensive lists of “authors cited” in recent case law demonstrates that they have found their way into the juridical field as progressive scholars of law, anthropology, and history and that they can exercise some influence. Still, the fact that Brian Slattery expresses the least amount of ontological and epistemological discord with traditional jurisprudence and the legal habitus probably accounts for the fact that he is amongst the most cited by the Supreme Court of Canada. Such a situation therefore has all the appearances of an odd game of the blind leading the blind, in that academics such as Slattery argue for the meaning that they have extracted from an indeterminate body of texts and the Supreme Court of Canada shows more and more signs of actually listening. Ultimately, it cannot be known whether such scholars are in fact “blind,” or whether they are performing a clever ruse

in choosing to publish the meaning they interpret from the indeterminate. Regardless, such arguments can have “enormous tactical value in the legal struggle for Aboriginal rights” (Kulchyski 1994:6). The difficult question that remains to be answered, however, is whether tactical arguments such as these can ultimately help the judiciary and the Canadian state to speak in the language of the *Other*. Bourdieu emphasises that progressive change in the juridical field is less about embracing the *Other* and more about perpetuation of the field:

Like the function of reproducing the juridical field with its internal divisions, and hierarchies, and the principle of vision and division which is at its base, the function of maintaining the symbolic order which the juridical field helps to implement is the result of innumerable actions which do not intend to implement that function and which may even be inspired by contrary objectives. Thus, for example, the subversive efforts of those in the juridical avant garde in the end will contribute to the adaptation of the law and the juridical field to new states of social relations, and thereby insure the legitimation of the established order of such relations. (1987:852)

As far as normative, external influences on the judiciary are concerned, Slattery offers another neat historical narrative that is altogether pertinent:

The Constitution Act, 1982 signifies more than a mere mechanical adjustment in the doctrine of aboriginal rights, protecting it henceforth from legislative inroads. It represents a conscious political act whereby the people of an independent Canada reaffirm the values implicit in the doctrine. In 1969, when the government of Canada issued its famous White Paper on Indian policy, it was possible to view aboriginal rights as the embarrassing relics of a half-forgotten colonial past, to be interred as quickly and decently as possible, and certainly not to be taken as the basis for modern governmental policies. The remarkable reaction of native communities across the country to the White Paper demonstrated that what was mere history for some was a matter of life or death for others. So, when section 35 of the Constitution Act, 1982, recognizes and affirms the existing aboriginal rights of the aboriginal peoples of Canada it constitutes a significant step toward the acceptance of the native point of view. (1987:783)

It is significant to note the role that widespread and collective Aboriginal indignation played in the development of section 35 of the Constitution Act, 1982 – a significant text for Aboriginal rights and title in Canada, as the legacy of the Sparrow case demonstrates. Such an example of the successful exercise of political influence on the legislative body of the state demonstrates the value of making voices heard. However, as Kent McNeil (2004) and Justice McLachlin have

pointed out, recent cases have actually moved toward an easier justification of the infringement of Aboriginal rights for the sake of “societal peace.” It would seem, then, that other voices hostile to Aboriginal rights have also been successful at making themselves heard. Bruce Miller’s (1998) account of the backlash against the use of the sacred in North American courts⁸⁶, the controversies between Aboriginal and non-Aboriginal commercial fishers on Canada’s east coast, as well as general reactions of the Canadian public to Aboriginal civil disobedience in the past are all indicative of this.

Yet, in some situations, the immediate disdain of much of Euro-Canadian society at Aboriginal groups who resort to civil disobedience seems to indicate another major implication: Aboriginal groups need to find ways of fighting these disputes on the level of the symbolic. Discursive paths, founded on the depoliticisation of Aboriginal rights issues and the suppression of difference, already exist to lead people to such anti-Aboriginal conclusions. As mentioned previously, New Zealand’s use of anti-terrorism legislation to arrest Maori activists (BBC News 2007), or a Swedish public prosecutor’s reference to the actions of a Sami leader who is alleged to have sabotaged transmission towers as *political terrorism* (Ahl and Tirsén 1999), serve as some of the more recent examples of symbolic/discursive violence practised on indigenous peoples in the public arena. Therefore, while the role of the judiciary must be reframed, denaturalised, and debated, it would seem that Aboriginal groups must also practise an effective resistance based upon a *symbolic politics* that will counteract colonialist meaning *wherever it is made* – be it in the juridical field, in the political, or in the news.

The Manitoba Métis Federation’s “Are Métis Rights Wrong?” advertisement campaign is a prime example of an Aboriginal group’s concerted effort to resist Eurocentric and statist

⁸⁶ Miller mentions that funds have been created in the United States in order to help contest Indian efforts to protect cultural sites and Indian rights.

frameworks for symbolically representing and interpreting these issues to the public. It plays on the statist desire to conceal and normalise the aporia of justice and law. While Canada would like very much to say that Métis “rights” are “wrong,” the framework implied by the advertisement subtly communicates a sense of responsibility to the *Other* by controlling the meaning of justice, and, more importantly, by creating tension in the reader as she is faced with the irreconcilability of Canadian law and justice. It threatens to expose the aporia and its metaphysical cover-up. Such a process of denaturalisation is an essential precursor to Canadians being able to ask the simplest, yet most profound, questions, such as why the state’s sense of justice in many national jurisdictions is to put limitations on Aboriginal culture that do not exist for any other category of people in the world.

The role of this thesis, however, is not to spell out an exhaustive playbook of practical strategies that will solve the problems of the oppressed. It is to help question the categories in which contemporary issues are framed by reframing the current controversies behind Aboriginal rights issues and problematising the prevailing interpretations. I can never claim to provide the magical cure to all the ills of the colonised. I take solace from this shortcoming in the fact that no sociological knowledge is ever entirely new, for it must by necessity correspond to, and resonate with, lived experiences and social realities. This thesis therefore only provides support for transformations that are already in progress. Just as Derrida said of the academics leading the latest developments in “critical legal studies:”

They respond, it seems to me, to the most radical programs of a deconstruction that would like, in order to be consistent with itself, not to remain enclosed in purely speculative, theoretical, academic discourses but rather (with all due respect to Stanley Fish) to aspire to something more consequential, to *change* (1) things and to intervene in an efficient and responsible though always, of course, very mediated way, not only in the profession but in what one calls the *cit *, the polis and more generally the world. Not, doubtless, to change things in the rather na ve sense of calculated, deliberate and strategically controlled intervention, but in the sense of maximum intensification of a transformation in progress... (Derrida 1990:933)

I therefore hope that those who have experienced and know intuitively the particular oppression exacted by symbolic power – that of being able to establish that which is *given* – will find such an intensification in this work's attempt to merely articulate it through theoretical analysis.

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