Religion, Land and Democracy in Canadian Indigenous-State Relations

by

Nicholas Shrubsole

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AUTHOR'S DECLARATION

I hereby declare that I am the sole author of this thesis. This is a true copy of the thesis, including any required final revisions, as accepted by my examiners.

I understand that my thesis may be made electronically available to the public.

Abstract

Many indigenous communities perceive an intimate connection between land and religion, and land has, and continues to remain, at the heart of indigenous-state relations. This dissertation examines how philosophies of land and religion in correlation with histories of dispossession and differentiation contribute to socio-political structures that threaten the religious freedom of Aboriginal peoples and the very existence of indigenous religious traditions, cultures, and sacred sites in Canada today. Through a political-philosophical approach to ethical concerns of justice as fairness, national minorities' rights, and religious freedom, I examine court decisions, legislation, and official protocols that shape contemporary indigenous-state relations. I identify philosophical and structural issues preventing Canada from protecting the fundamental rights guaranteed to indigenous peoples and all Canadians.

More specifically, I examine the historical manifestations of concepts of land and religion in philosophies of colonization, emphasizing their effects in contemporary indigenous-state relations. I analyze the impacts of secularization, socio-economic expansion, and the dispossession of Aboriginal traditional lands on the protection of indigenous cultural rights and off-reserve sacred sites. Based on this analysis, I discuss communicative democratic theory and the potential benefits and limitations of the "Duty to Consult and Accommodate"—the most recent framework for indigenous-state relations—for the protection of indigenous religious traditions and the importance of the inclusion of indigenous peoples in administrative and decision-making processes. Finally, I explore indigenous representation, religious revitalization and the politics of authenticity, authority, diversity and cultural change.

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I would like to begin by thanking my supervisor, Scott Kline. His guidance, support, and critical engagement of my work encouraged and challenged me to think, write, and re-write in more complex and innovative ways. Without him, this dissertation would not have been possible. I would like to thank David Seljak for his guidance and advice that helped to bring clarity and context to this research. David's editorial skills and expertise were invaluable in bringing this dissertation into focus. I would also like to extend my gratitude to P. Whitney Lackenbauer. Whitney's expertise and unbridled enthusiasm was inspiring and insightful, and his guidance and support went beyond my expectations. Collectively, Scott, David, and Whitney, provided me with the necessary tools to complete this dissertation and, at times, financial support to develop my ideas in print and at academic conferences.

Although this dissertation was primarily theory based, I did conduct an interview with the 1995 Gustafsen Lake Sun Dance leader, Splitting the Sky. While he commands only a small portion of this dissertation, I am indebted to him for sharing with me and teaching me about his experiences. I cannot adequately articulate the amount of knowledge I gained from my meetings with him. With his passing shortly before the submission of this dissertation, I hope that I have demonstrated respect for the intimate stories he communicated to me.

I would also like to thank my colleagues in the joint Laurier-Waterloo doctoral program who always provided an ear, an eye, or company when needed. To the members of my cohort, thank you for your intellectual stimuli and companionship in the early stages of doctoral life. In particular, I would like to thank W.R. Dickson and Lauren Price for your advice in research, writing and editing. To the rest of the joint program, many of whom I know well, thank you for providing an energetic and engaged community within which I was fortunate enough to conduct my work and spend my time.

I would like to thank my parents for their continued support throughout this process. In particular, my mother, Anne Shrubsole, who painstakingly proofread much of my early work until she finally conceded to the fact that she was unsure whether the few commas she had suggested were necessary or even correct. Finally, I would like to thank Katie Green for her friendship, support, and second set of eyes on work throughout my dissertation.

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Chapter 1

Introduction

1.1 The "Odd Story" of Indigenous-State Relations

> One day a white man approached an Indian, as he was sitting on the
> end of a log.
> "Sit over," said the white man; "surely there is room for us both on
> the log."
> Politely the Indian allowed the white man to take a seat beside him.
> Soon the white man began to complain of being crowded and shoved
> the Indian over.
> Again the Indian moved, and the white man took his place. Then the
> white man shoved again, and kept on shoving until at last the Indian
> was at the other end of the log.
> "I am still crowded," complained the white man; "I must have more
> room."
> By his next move he pushed the Indian clean off the log.
> "Now it's all mine," he said, with satisfaction.

In 1923, Canadian historian Mabel Burkholder wrote a book of "Indian legends and stories" entitled *Before the White Man Came*. The above "legend" appears in her chapter of general legends common to all indigenous peoples, under the title "How the White Man Treats the Indian." To conclude the legend, Burkholder writes, "This is an odd story among the Indians, for they all think it represents fairly the attitude of the white man toward his Indian neighbor" (309).

   Burkholder's book begins, "The Indian has had his home in all parts of Canada. On the shores of both oceans, through the mountains, across the prairies, along all the rivers and lakes of this broad land, he has left his mark." She continues, "For every mysterious manifestation of nature he has invented a story. Whenever he was impressed by a curiously shaped rock, by a lonely lake, by a crashing waterfall, he tried to explain the wonder according to his religious belief" (7). The important connection between religion and place fascinated Burkholder, who asserted that the aim of the book was "to collect the most attractive and important legends cherished among the Indians, especially those told in connection with well-known places" (7–8). The purpose of this task was the

entertainment of the non-indigenous traveler, who, "visiting for the first time a new part of the country, will find his interest quickened and his pleasure increased by reading the ancient stories the Red Man wove about lake, forest, or mountain, and which have been handed down from generation to generation since the world was young" (8). Burkholder calls many indigenous "legends" foolish, unimportant, and even "repulsive, bestial, and hideous" (7). She also expresses her concern for the oral tradition of indigenous peoples and the impossibility of understanding "the pure legend in its original form" (8). While it should come as no surprise to those familiar with the dominant colonial, Euro-Canadian perspective of indigenous peoples at this time, Burkholder's tone is overtly racist, denigrating to indigenous peoples and their cultural practices, and yet nostalgic, like Hesiod looking back upon the Golden Age.

It is tempting to use postcolonial and liberal theory to highlight the injustice inherent in Burkholder's portrayal of indigenous peoples. However, an analysis of Burkholder's book through the lenses of postcolonial and liberal theory would be a frivolous enterprise, similar to building a straw person, only to tear it down with ease. One can explain, not justify, her views as characteristic of an older Canada, seeking to assimilate, civilize and, yet, save the memory of indigenous peoples. Nevertheless, one can discern a number of important trends in Burkholder's work. She acknowledges Canada as the indigenous homeland in her use of the present perfect tense, but glosses over that fact as she conveys her interest in entertaining the Canadian traveler with stories of an ancient, mysterious world. She acknowledges the important connection between space and religion for indigenous communities, but seems confused by indigenous perspectives of Euro-Canadian territorial seizure and expansion. She almost praises indigenous religious difference, only to insult it. She acknowledges that these perspectives continue among indigenous peoples and that they even change over time, but labels them as "ancient" and challenges the authenticity of modern beliefs. These points are important not because they depict injustices of the early twentieth century, but rather because many of these perspectives on indigenous religious traditions, their connection to space, and the politics surrounding land, continue to upset indigenous-state relations into the twenty-first century.

For a long period of Canadian history, the state actively sought to destroy indigenous cultures and religions while simultaneously displacing indigenous peoples and appropriating their traditional homelands. This coordinated, public-policy effort to civilize indigenous peoples began to fade with the state's embrace of liberal democratic principles. Indigenous suffrage and the Bill of Rights in 1960, the reassessment of Aboriginal title and the institution of modern land claims negotiations in

the early 1970s, the recognition of group-specific rights for indigenous peoples in the *Constitution Act* in 1982, the removal of assimilationist policies in 1985, a royal commission on Aboriginal peoples in the mid-1990s, and an official embrace of the duty to consult in the first decade of the twenty-first century, have been important steps in demonstrating, to some degree, Canada's commitment to the pursuit of a just society. In addition, the embrace of self-government as an Aboriginal right, protected under section 35 of the Constitution, demonstrates, to some degree, the state's interest in shedding the imperialism of their colonial legacy. Despite these steps, the assertion that Canada is an "unjust society," continues to echo in the writings of indigenous and non-indigenous academics, lawyers, and leaders.

For indigenous communities who practice indigenous religions, land, belief and practice remain intimately connected. At the same time, land lies at the heart of the indigenous-state relationship and remains one of its most contentious subjects. For this reason, one should not separate the subject of the protection of indigenous religious traditions, ceremonies, and beliefs, from contemporary political debates regarding indigenous peoples and the Canadian state. With the recognition of Aboriginal rights, indigenous peoples occupy the ambiguous place of "citizens plus" in the Canadian political landscape.[1] The state understands them as different, but equal; dependent, yet independent; and simultaneously, subjects and partners.

Scholars, indigenous-and non-indigenous alike, continue to make an argument already well articulated in the literature on indigenous-state relations: justice remains elusive for indigenous peoples in Canada.[2] My dissertation contributes to this general argument through a focus on the subject of religious freedom and the protection of culture, the former a constitutionally protected right and, the latter, one of the most important facets of liberal theory. In making this general argument, I develop a number of arguments specific to the relationship between indigenous religion, land, and the state. For instance, I argue that philosophical concepts of religion and land in correlation with histories of dispossession, assimilation, subordination, and even liberal democratization, contribute to complex socio-political structures that threaten the existence and persistence of indigenous religious traditions and sacred sites today. I make the case that Canada can overcome these inequalities in some form through more deliberative democratic approaches to governance, the inclusion of indigenous

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[1] See Alan Cairns' *Citizens Plus* (2000).
[2] Some examples include Harold Cardinal's *The Unjust Society* (1969), the *Report of the Royal Commission on Aboriginal Peoples* (1996), and, more recently, James Youngblood Henderson's *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (2006).

peoples in decision-making processes, and the institution of a partnership between indigenous peoples and the Canadian state. With some regret, I also concede to the fact that Canada may simply never overcome some of these structural issues.

In many ways, this dissertation begins where Aboriginal rights lawyer, Michael Ross, leaves us in his foundational work *First Nations Sacred Sites in Canada's Courts* (2005). Ross' legal overview and analysis of indigenous peoples' attempts to protect their sacred sites in Canada's courts is an excellent introduction to the importance of sacred sites for indigenous communities, and the relatively little success they have found in protecting those spaces. Ross identifies a serious problem for indigenous religious traditions. Although he provides some rudimentary answers as to why this problem exists, the purpose of his book is the identification of *how* First Nations approach the subject of sacred sites in the courts, and not the reasons behind why those sites are under threat. Ross' work is unable to provide any adequate answers to the important question, which I focus on in this dissertation: *Why* are Aboriginal religious traditions under threat in Canada?

I build upon Ross' largely descriptive work to provide an explanation that stretches far beyond the courtroom. I expand the foci to include history, legislation, treaties, and the modern processes of indigenous-state relations. I unpack Ross' claim that secularization may have something to do with the unfavourable court decisions First Nations communities have encountered. Moreover, I go beyond Ross' work to address the effects of religious diversity among Aboriginal communities, and the diachronic nature of those traditions on the protection of indigenous religious traditions and their sacred sites.

1.2 Theoretical Frameworks

This dissertation examines the case of religion, land, and democracy in Canadian indigenous-state relations under the framework of postcolonialism and liberal democratic theory. There is both a tension and compatibility between liberalism and postcolonial thought. In many ways, postcolonial analysis seeks to liberate liberalism from the contingencies of power that dictate its classical form. In *Postcolonial Liberalism* (2002), political philosopher Duncan Ivison writes, "The simultaneous invocation of the inadequacy and yet the indispensability of liberal values and concepts such as justice, equality and freedom seem to lie at the heart of the postcolonial project" (31).

What is post-colonialism? Political philosopher Iris Marion Young (2000b) explains:

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Anyone interested in justice today must face the project of undoing the legacies of colonialism. Understood as a project, postcoloniality does not name an epoch at which we have arrived, one where colonialism is in the past. On the contrary, precisely because the legacies of colonialism persist, progressive intellectuals and activists should take on the task of undoing their effects. The postcolonial project has an interpretive and institutional aspect. Institutionally, postcoloniality entails creating systems of global democratic governance that can meet the demands of the world's indigenous peoples for self-determination. Because the existing international system of nation-states cannot meet those demands, commitment to justice for indigenous peoples entails calling those state-systems into question (237–38).

The identification of inequality, imbalances of power, the exclusion of minority perspectives, and the domination of particular groups, helps to bring attention to fundamental problems with contemporary liberal democratic states, through the very expectations of justice that rest at the foundation of liberalism.

A number of themes characterize postcolonial analysis. Ivison (2002) identifies many of these themes as "the Postcolonial Challenge." Philosophically, postcolonialism is concerned with power, agency-subjectivity, and "complex identification" as they relate to the essentialist nature of the colonial project. Ivison writes, "The postcolonial subject always starts from within a set of relations of power ... including the discursive, normative, and institutional practices of western domination" (40). He explains, "One of the central claims of postcolonial critics ... has been that the universalizing ethos of 'Enlightenment liberalism' included a justification of imperialism and colonialism" (43). This universalizing ethos relates, in part, to what anthropologist Talal Asad calls the "subsuming act" of mobility and its relation to power. Asad writes, "For it is by means of geographical and psychological movement that modern power inserts itself into pre-existing structures. *That* process is necessary to defining existing identities and motives as superfluous, and to constructing others in their place. Meanings are thus not only created, they are also redirected or subverted" (1993, 11). As I discuss in chapter 2, we can identify the connection between liberalism and colonialism through the most influential of the liberal thinkers, most notably John Locke, whose universalizing concepts

explicitly contrasted non-European philosophies and cultural practices.[3] Postcolonial analysis seeks to identify and redress the imbalance of power and domination of particular European perspectives that helped to both identify and develop the modern structures of liberal democratic states.

In postcolonial theory, subjects of power and agency-subjectivity are intimately connected. Ivison (2002) writes, "Gaining political or legal recognition from the state ... entails organizing yourself in light of certain regulative norms enforceable by the state" (43). As I argue in chapters 3 and 4, these requirements act to regulate the manner by which non-Western communities can develop as self-determining communities. Asad (1993, 12) maintains that even with participation in political society, non-western actors are still subject to the structures of the colonial project. Asad asks, "Whose improvised story do these agents construct? Who is its author, and who its subject?" In these structures, it becomes far easier for the dominant group to subvert, dismiss or reject the perspectives of non-western communities. Political philosopher Bhikhu Parekh (2000) criticizes what he calls "the monism of classical liberalism" for failing to recognize minority cultures and perspectives under the banner of universalized principles of liberal democratic rights.

I address themes of power, agency-subjectivity, and essentialism throughout the dissertation, but the subject of "complex identification" (or hybridity) is particularly prevalent in chapter 5. Ivison (2002) defines "complex identification" as "the diverse way in which individuals and groups identify themselves culturally, socially and politically." He goes on, "Some theorists claim that liberal political theory is incapable of capturing the complex, overlapping and ambivalent mode of subaltern agency" (41). Speaking of hybridity, postcolonial theorist, Homi K. Bhabha (2001) writes:

> Minorities are too frequently imaged as the abject "subjects" of their
> cultures of their origin, huddled in the gazebo of group rights,
> preserving the orthodoxy of their distinctive cultures in the midst of
> the great storm of Western progress. When this becomes the
> dominant opinion in the liberal public sphere ... then minorities are
> regarded as virtual citizens, never quite "here and now," relegated to
> a distanced sense of belonging elsewhere, to a "there and then" (46).

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[3] The connection between liberalism and colonialism is one thoroughly discussed by a number of scholars. See, for example, Arneil (1996), Ivison (2002), Parekh (1995), and Tully (1994, 1995).

Bhabha (2000, 6) asks the question, "What freedom is denied in the designation of the collective culture of the group?" According to Bhabha, we should understand culture as a performative act characterized by hybridity and diversity rather than an historical fact characterized by static homogeneity (Bhabha 2001). Understanding the multiple and diverse ways that members of minority communities organize and identify themselves is functionally both a descriptive and normative task (Ivison 2002).

Through the postcolonial lens, we can identify illiberal structures and practices deeply embedded within liberalism itself. However, my premise in this dissertation is that the postcolonial identification of illiberal aspects within liberal theory does not render liberal theory irreconcilably damaged and thus inappropriate as a critical framework of analysis. Especially since John Rawls' groundbreaking work on liberalism, *A Theory of Justice* (1971), it is evident that liberalism can change in order to meet the challenges of its critics, and make strides toward its foundational promise of justice.

In claiming that post-Rawlsian liberal theory can be a useful critical framework of analysis, I am by no means contending that contemporary theories of liberalism are perfect or void of problems.[4] Rather, I am recognizing that modern shifts in liberal thought demonstrate a commitment to a liberal political theory capable of addressing claims of injustice. In particular, Rawls' shift from "equality" to "fairness" as the definition of justice provided a place in liberal theory for disadvantaged and traditionally excluded groups. Rawls argues for two foundational principles of justice: (1) "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others," and (2) "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all" (1971, 60). The structure of society "favors some starting places over others in the division of the benefits of social cooperation. It is these inequalities which the two principles are to regulate" (96). For this reason, Rawls contends that justice ought to operate on a principle of difference, where special considerations are provided to disadvantaged groups. I have used the passive voice in the previous sentence intentionally, because the subject of exactly *who* provides special rights and

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[4] For example, in chapter 4, I identify the Canadian indigenous critique of contemporary forms of liberal practice that speaks to many common issues characteristic of postcolonial analysis.

considerations for disadvantaged groups is a matter of debate central to this dissertation.[5] Ideally, Rawls suggests:

> We are to imagine that those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation character of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust (11–12).

Liberalism ought to be participatory, if not directly then representatively. As demonstrated throughout this dissertation, the application of special rights *for*, as opposed to *by*, indigenous peoples is a common concern of indigenous political thinkers. The concern speaks to subjects of power and agency-subjectivity in contemporary liberal theory.[6] Nevertheless, the theory itself provides an opportunity for the inclusion of disadvantaged groups in decision-making, public policies, and state practice. In some cases, while certainly not in all, the practical application of liberal principles is problematic even though the underlying theory appeals to even the most disadvantaged groups. [7]

Can post-Rawlsian liberalism adequately deal with cultural diversity, minority communities and, in particular, national minorities such as indigenous communities? Canadian political philosopher Will Kymlicka and his works *Liberalism, Community and Culture* (1989) and *Multicultural Citizenship* (1995), provide an answer to this important question. In his defense and revision of Rawls' brand of

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[5] Discussed more thoroughly in chapter 4, Dale Turner's *This is Not a Peace Pipe* (2006) criticizes Will Kymlicka for his theory of minority rights that subtly advocates for the institution of minority rights *for* indigenous peoples *by* non-indigenous peoples.

[6] In particular, I address this subject in chapter 4 through the liberal theorist Iris Marion Young (2000b) and her theory of communicative democracy. Young's theory provides an analysis of exclusion, domination and oppression, stressing the importance of inclusion and participation in a just society.

[7] Bhikhu Parekh (1995) argues that it is a fallacy to think of the problems associated with liberalism as the faulty application of impervious ideals. Rather, liberalism has at its core a contradictory nature that can be useful in explaining the fact that, for example, early liberal thinkers "justified colonialism with a clear conscience" (80).

liberalism, Kymlicka contends that there is an intimate connection between cultural structures and the ability for one to choose the "good life" central to normative liberal political principles.[8] He argues, "Liberals should be concerned with the fate of cultural structures, not because they have some moral status of their own, but because it's only through having a rich and secure cultural structure that people can become aware, in a vivid way, of the options available to them, and intelligently examine their value" (1989, 165–66). Since culture is so important in liberalism, Kymlicka extends Rawls' argument regarding the "original position"[9] and the inviolability of self-respect to include the protection of cultural membership. He writes, "Cultural membership affects our very sense of personal identity and capacity" (175).

Liberal theory is not concerned with protecting culture *per se*, but rather cultural context and the ability to choose. This is a noteworthy distinction. Kymlicka (1989) writes, "Protecting people from changes in the character of the culture can't be viewed as protecting their ability to choose. On the contrary, it would be a limitation on their ability to choose. Concern for the cultural structure as a context of choice, on the other hand, accords with, rather than conflicts with, the liberal concern for our ability and freedom to judge the value of our life-plans" (167). This is a particularly important point when speaking about the postcolonial concern of complex identification. Nevertheless, culture and the protection of cultural contexts, are important values in normative liberal theory.

In diverse liberal states, special rights for minority communities may be necessary for the protection of cultural contexts. Following Rawls, one should understand such accommodations as *fair* rather than *unequal*. In reference to the special status of indigenous peoples in Canada, Kymlicka (1989) writes:

> To give every Canadian equal citizenship rights without regard to
> race or ethnicity, given the vulnerability of aboriginal communities

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[8] Kymlicka (1989, 10) writes, "Our essential interest is in leading a good life, in having those things that a good life contains." Determining value helps us to determine what we choose for our own good life, and one derives those values from culture. For this reason, the preservation of culture is a central facet of normative liberal democratic theory. Kymlicka references adolescence among the Inuit, who, without "adequate role models," have become despondent and prone to escapism. He writes, "The cultural structure they need and value is being undermined, and the Inuit have been unable to protect it" (166).

[9] In Rawls' theory (1971), members of a social contract ought to make decisions behind a veil of ignorance where individuals decide on matters of importance without the knowledge of their specific social location. In this position, according to Kymlicka (1989), participants would protect cultural membership, given its importance in pursuing the good life, and its connection to self-respect.

to the decisions of the non-aboriginal majority, does not seem to treat Indians and Inuit with equal respect. For it ignores a potentially devastating problem faced by aboriginal people, but not by English-Canadians—the loss of cultural membership. To insist that this problem be recognized and fairly dealt with hardly sounds like an insistence on racial or ethnic privilege (151).

National minorities warrant particular attention in liberal democratic states. Kymlicka defines national minorities as "previously self-governing, territorially concentrated cultures [subsumed] into a larger state ... [who] typically wish to maintain themselves as distinct societies alongside the majority culture, and demand various forms of autonomy or self-government to ensure their survival as distinct societies" (1995, 10). In part, national minorities require special treatment in a state because it helps to rectify "unchosen inequalities" (109). Unlike in the case of immigrants, the location of national minorities as minorities within particular legal-political systems is non-voluntary, the product of colonization or military defeat. Depending on the situation of particular national minorities, they may require more or less protection. He explains, "In North America, indigenous groups are more vulnerable to majority decisions than the Québécois or Puerto Ricans, and so their external protections will be more extensive" (110). In addition, the acceptance of national minority rights acknowledges that the notion that "the government could be neutral with respect to ethnic and national groups is patently false" (111).

The protection of culture, cultural membership, and group-specific rights are integral components of the normative ideals of liberalism. Liberal theory provides the foundational principles of justice for a society, and postcolonial theory helps to identify when those principles have been limited or ignored. Although Kymlicka has his critics among indigenous political thinkers (e.g., Turner 2006), Kymlicka's emphasis on the importance of culture, community, and minority rights, are important developments in liberal theory that attempt to address some of the injustices identified through the postcolonial lens.

1.3 Method

My primary focus is the state. I understand the state as government and law, the administrative nucleus of authority legitimated through the public sphere. Just as with the public sphere—that is, the spaces in which legitimate power ought to be generated by the people in a liberal democracy—it is a

location "necessarily … articulated by power" (Asad 2003, 184). By "power," Asad refers to the ability for some to control the parameters of conversation and make ultimate decisions, which renders others, as mentioned above, "dependent on the good will of others" (184). Complicating matters is the fact that the government, the central fixture of the administrative nucleus, can and often does enter into discussions in the public sphere as an interested party, such as in recent cases involving resource development projects on traditional indigenous lands. Consequently, I am interested in the contemporary parameters and procedures as determined by the government and the courts on matters of religion and land in indigenous-state relations. My task here is to examine the subject of power as it relates to the treatment of indigenous sacred sites and, more generally, indigenous religious traditions. In sum, I am concerned with the state's development of a political-philosophical framework that has come to define the modern indigenous-state relationship.

My analysis of this political-philosophical framework highlights ethical concerns central to a modern liberal democratic state—namely, justice as fairness, justice for national minorities, and religious freedom. Before I decided to engage in a philosophical-ethical approach, I considered a number of other methods to address the subject of religion, land and democracy in Canadian indigenous-state relations. First, historical context is extraordinarily important for understanding contemporary indigenous-state relations; however, a primarily historical approach to the subject would not have allowed me to focus on contemporary challenges and opportunities to establish a more just indigenous-state relationship. For this reason, this work does not yield a history of Canadian indigenous-state relations, even though I do provide historical context on subjects that contribute to contemporary concerns of injustice regarding indigenous religious traditions and sacred sites. Second, since I focus on a number of court decisions throughout this dissertation, I considered a legal-theoretical approach while conducting my research. Legal theory typically uses methods that facilitate a study of the law, including normative jurisprudence, the policy implications of the law, and critical theories of the law. But because my concern is broader than the law—namely, the communicative process between indigenous peoples and the Canadian state (as ruled on by the courts but determined by indigenous-state engagements)—my discussion of justice is more properly understood as a philosophical-ethical approach rather than a legal one. Third, I also considered an ethnographic approach for this dissertation. While I do include the writings of many indigenous communities, academics, politicians, and religious leaders, the focus here is on the state. Finally, I considered a focused case study approach. However, I chose not to embark on a systematic study of the specific cases discussed throughout this dissertation because I wanted to pursue a more general

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line of argumentation. Simply put, to make that argument while fully treating each case study would have made this work unmanageably large and, I ultimately recognized, unnecessary. Instead, I chose to engage specific cases as illustrations of the ethical-philosophical framework that structures this study.

To accomplish my task, I examine court decisions at both the federal and provincial level that have ruled on the communicative processes of decision-making and authority in matters of land in the indigenous-state relationship. I also examine official government guidelines on decision-making related to indigenous land issues and supplementary reports put forth by indigenous communities entered into public deliberations on particular matters of land and consultation. Many of the court cases discussed in chapters 2, 3 and 4 are widely accepted as integral to defining the parameters of the modern indigenous-state relationship. These cases tend to address the subjects of title, sovereignty, Aboriginal rights, and the duty to consult. I introduce these cases as such, and an examination of power within indigenous-state relations would be deficient without them. Since this dissertation is also concerned with freedom of religion, I provide an overview of key decisions on Canadian religious freedom in chapter 3. These cases include *Big M* (1985), *Jones* (1986), and *Amselem* (2004). This is not an exhaustive examination of case law on religious freedom in Canada as demonstrated by my reference to a number of other cases, but it does provide an overview of how the court understands religion, freedom, and violations of freedom.

A number of important questions related to power, indigenous religious beliefs, and decision-making processes structure my reading of the many legal decisions discussed throughout this dissertation. Broadly, I am interested in ascertaining (1) what the court defined as the standards and requirements of decision-making on matters of land, (2) the extent to which the court incorporated indigenous perspectives into the rulings, (3) the role, if any, indigenous peoples played in administrative processes (as opposed to simply deliberative processes) and (4), more specifically, the requirements articulated to indigenous communities when seeking the protection and control of particular tracks of land. In the cases where indigenous communities communicated the religious significance of space to the court, I sought to discover (1) whether the court acknowledged and understood the claims of those communities, (2) the extent to which those perspectives factored in the ruling, (3) the way in which the court interpreted indigenous religions, and (4) the effect of the decision on the site with respect to the concerns presented to the court.[10]

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[10] The legal strategy behind the decisions by indigenous communities to enter information into the court or negotiations is a subject discussed at length by Aboriginal Rights lawyer, Michael Ross in

In chapter 3, I examine a lesser-known court case in the British Columbia Supreme Court, *Cameron v. Ministry of Energy and Mines* (1998), to illustrate the state's treatment of indigenous peoples and their sacred sites. I have chosen this case because it is one of only two court decisions to deal explicitly with indigenous religious freedom in Canada. Unlike in the case of *Jack and Charlie v. The Queen* (1985)—a case regarding indigenous hunting and fishing rights and religion (Beaman, 2006)—the "Twin Sisters" case examines the indigenous spiritual connection to land. It provides what might be the only opportunity to discuss religion, land and decision-making in the context of the constitutional protection of freedom of religion and conscience. In my reading of this case, I employed the same questions discussed in the previous paragraph.

In this dissertation, I focus primarily on the relationship between Canada and indigenous peoples over the past 30 years—that is, the period following the repatriation of the Constitution, the establishment of Aboriginal rights, and the embedding of the freedom of religion and conscience. A portion of my argument, especially surrounding the subject of title, relates to the persistence of the exclusion of indigenous perspectives on land. In other words, I understand the past 30 years as belonging to a long, mostly continuous history of indigenous-state interactions. To help make that case, I briefly illustrate in chapter 2 the treatment of indigenous perspectives and their exclusion from both decision-making and administrative processes. This illustration takes place in two historical areas: the initial period of colonization (i.e., the seventeenth century) and the most aggressive period of Canadian assimilationist policies, 1830 to 1951. This task is largely descriptive given the obvious and already well-articulated historical exclusion faced by indigenous peoples. I review the writings of John Locke on indigenous peoples and property, which dismissed indigenous perspectives on land as a signifier of their primitive nature. Locke was especially influential in the settlement of North America, as demonstrated in the secondary sources engaged during this chapter.

I then examine the *Indian Act* and related legislation from 1876 to 1985. In my reading of the *Indian Act* and secondary sources on "Indian" policy, I seek to identify federal policy that connected a particular land-person relationship with civility. As "uncivilized" peoples, indigenous communities were unable to participate in the political structures that affected their lives. Just as in my overview of Locke, I focus on how non-indigenous authorities thought indigenous peoples ought to interact with the land (particularly through policies related to agriculture and civility). I describe how the

First Nations Sacred Sites in Canada's Courts (2005). This dissertation does not address the legal strategy behind the way indigenous communities approach the subject of sacred sites because (1) Ross' book discusses the subject at length, and (2) such an analysis would draw the attention of this dissertation away from the State.

government sought to dictate the indigenous-land relationship through "Indian" policy.[11] I follow this contextual portion of the chapter with an examination of more recent federal policy attempts to subvert indigenous perspectives on land and participation in decision-making processes, namely through a discussion of indigenous suffrage, the *White Paper* (1969), and the growing indigenous political movement, before arriving at the temporal focus of this dissertation.

In addition to my examination of court cases on Aboriginal title in chapter 2, I also look briefly at the Report of the Royal Commission on Aboriginal Peoples (1996). The Report, commissioned by the federal government, as I mention in chapter 2 and chapter 4, has had little effect on indigenous-state relations. The government shelved the report without much attention following its completion. However, this extensive report is an excellent insight into indigenous-state relations. The portions I focus on from the document emphasize the importance of indigenous religious perspectives on the land. The Report, my discussion of Aboriginal title in the courts, and the historical legacy of exclusion since first contact, establishes a foundational set of facts related to the broader claim of the dissertation: the exclusion of indigenous perspectives on land in socio-political structures is tied to the broader exclusion of indigenous religions.

The court, however, is not the location of public deliberation. It is the location where decisions are made regarding the fairness and legality of communicative processes that take place in the public arena. For this reason, court decisions are an important focus of this dissertation, but not the extent of my analysis. At the end of chapter 4, I examine the Voisey's Bay mining project negotiations in Labrador. As with the B.C. court case at the conclusion of chapter 2, Voisey's Bay helps to illustrate my broader claim toward the state's treatment of indigenous perspectives on land, and more specific claims regarding the importance of communicative democratic engagement. In particular, my discussion of the modern framework for indigenous-state relations, the "Duty to Consult and Accommodate," and the Voisey's Bay negotiation illustrate the relevance, potential benefits, and possible concerns in the application of a more communicative democratic process as outlined by Iris Marion Young (2000a). I chose Voisey's Bay as an illustration because it is an important case in

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[11] Agriculture is, by no means, the only method by which the Canadian government imposed a particular kind of land-person relationship. Ken Coates, in *Best Left as Indians* (1991), explains that the assimilationist agenda of the federal government was placed on hold in the North during the first half of the twentieth century. Indigenous communities were encouraged to continue hunting in a region where the fur trade was still active. However, an important note is that the federal government sought to keep indigenous peoples away from the extensive mining projects emerging in the region. Limiting one's relationship with the land can be equally as devastating as forcing someone to change their relationship with the land. Both acts limit the self-determination of indigenous peoples.

terms of the inclusion of indigenous perspectives at the levels of both decision-making and administrative power. The Memorandum of Understanding (MOU) signed by the Innu Nation, the Labrador Inuit Association, and the provincial and federal governments was a first in the history of consultation and accommodation. In this example, I focused on the parameters of decision-making established in the MOU and the product of those negotiations, the Environmental Impact Statement report. The set of questions I used to conduct my analysis is similar to that of my examination of legal decisions that I use to structure my assessment of these important documents.

While many deliberations take place in the courts or at the negotiating table (the ideal locale), some conversations take place in the media and at the barricades. The mediation of the public sphere is one of the responsibilities of the state. Chapter 5 examines the complexity of religious diversity and the problems of stereotype. Following the structure of my dissertation, chapter 5 begins with a broad theoretical analysis of minority cultures and the challenges of representation in the public and political arenas. In particular, I engage the important postcolonial work of Homi Bhabha (1994) and secondary literature on the complexity (and dismissal of such complexity) of indigenous religious traditions. As discussed above, minorities are often homogenized, "huddled into the gazebo of group rights" (Bhabha 2001, 46). This characterization can lead to exclusion and discrimination in public and political arenas. I illustrate this point through a discussion of the development of pan-indigenous (or intertribal) religious communities related to the Sun Dance, and the Gustafsen Lake Sun Dance, standoff, and an interview with their leader.

Both Gustafsen Lake and Splitting the Sky, the Gustafsen Lake Sun Dance leader, help to illustrate the broader claims drawn from the theory and secondary literature presented in the first half of the chapter. I conducted a two-hour interview with Splitting the Sky, at the University of Waterloo on 31 March 2011. I initially sought further clarification from Splitting the Sky regarding the Gustafsen Lake Sun Dance, but found that he had communicated much of what he had to say in his 2001 autobiography. What I found most interesting in our conversation was how his introduction to the Sun Dance helped to illustrate and provide a human face to many of the complexities of religious revitalization and change in a post-official-assimilationist period. I transcribed the interview from a digital audio recording and gave Splitting the Sky the opportunity to add to or correct any of his statements following the completion of the transcription. I engaged the interview descriptively in order to illustrate the broader claims of the chapter. The first question—"how did you first get introduced to the Sun Dance?"—took up more than an hour of the interview. I asked him clarification questions regarding the Sun Dance and his personal views on political action and the ceremony. After

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reviewing some of the details of the Gustafsen Lake Sun Dance and standoff, he provided some clarification on the reasons behind his choices for mediators in the conflict, which speaks to the broader subject of just relations and cultural complexity that undergirds chapter 5.

My analysis of the Gustafsen Lake Sun Dance is one of the few instances, outside of those dealing with burial sites, where violence has erupted between the state and indigenous peoples based, in part, on the violation of religious freedom. Building on the only extensive academic work on Gustafsen Lake and the media by Susan Lambertus (2004), popular news media, alternative media, and primary source material collected by the grassroots solidarity community, Settlers in Support of Indigenous Sovereignty, and Splitting the Sky (2001), I explore the exclusion of the Sun Dancers perspectives in the media, an action largely predicated upon RCMP policy. As in the case of Splitting the Sky, this analysis helps to bring attention to my political-philosophical interest in justice and, in this chapter, cultural complexity.

1.4 "Indigenous Peoples," "Religion" and "Spirituality"

Although my primary interest lies in the state, I also focus on "indigenous peoples." This term requires some clarification. Can we or should we even talk about "indigenous peoples" in the singular? The term risks the homogenization of the multiple and diverse communities of indigenous populations in North America. Iris Marion Young (2000a) provides a discussion of group difference that is helpful in answering this question. She explains that structures of power may contribute to the creation of social groups, which one should understand relationally. She elaborates:

> Before the British began to conquer the islands now called New Zealand, for example, there was no group anyone thought of as Maori. The people who lived on those islands saw themselves as belonging to dozens or hundreds of groups with different lineage and relation to natural resources. Encounter with the English, however, gradually changed their perceptions of their differences; the English saw them as similar to each other in comparison to the English, and they found the English more different from them than they felt from one another (90).

Following Young's example of the Maori, I think we can speak about the collective experience and structural treatment of the diverse communities of indigenous populations who now live completely

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or partially within the borders of Canada. While particular experiences may be different, indigenous peoples who live, or have lived in, in colonial situations share many common experiences. In another example, the United Nations has declared that no universal definition of indigenous peoples is necessary, but one is generally accepted:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present 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 system (United Nations 2004, par. 2).

Young (2000a) notes, however, "Group members may differ in many ways, including how strongly they bear affinity with others of the group. A relational approach, moreover, does not designate clear conceptual and practical borders that distinguish all members of one group decisively from members of others" (90). For this reason, I use the term indigenous peoples in reference to the broader implications for policies related to indigenous peoples. When speaking about particular communities, I do so by their community name when applicable.

Two other terms require some attention: religion and spirituality. Peter Berger (1967) appropriately notes, "Definitions cannot, by their very nature, be either 'true' or 'false,' only more useful or less so" (175). Regardless of this observation, the definition of terms can have serious political and legal implications. I have chosen to identify indigenous religious traditions, belief in sacred sites, and ceremonial practices as "religion" as opposed to "spirituality" or "spiritualities." Although the politics surrounding semantics can be very important, they are beyond the scope of this dissertation. I have chosen "religion" because it holds legal-political value as a protected right in the Canadian *Charter of Rights and Freedoms*. Quite simply, the *Charter* protects "freedom of religion and conscience" and not "spirituality." If Aboriginal peoples seek the protection of their sacred sites, "religion" will be the category of discussion within which it occurs.

This does not mean that one cannot understand spirituality within the rubrics of a less regimented definition of religion. After all, there are correlations between religion and spirituality. This important discussion also falls outside the scope of this dissertation; however, it requires some commentary. Enzo Pace, an Italian sociologist and author of *Religion as Communication* (2011a)*,* describes the differences and similarities between religion and spirituality in these terms:

> Spirituality is the exceeding meanings and senses produced by individuals in the socio-religious environment – that is, in tension with a system of belief. Therefore the relation between a religious system and its socioreligious environment could be studied as the tension between power (of communication and meanings for the system) and empowerment (the relatively friendly chain of communication created by individuals) in spirituality's realm. In the case of an organized system of religious belief the empowerment is constantly scrutinized, directed in an orderly way according to the power of communication exercised by authority, specialists in holy matters and holy doctrine. The aim is to avoid not only any deviation from orthodoxy, but also to affirm the existence of the border between religion and magic, the purely symbolic and objective order of communication, on one hand, and the individual, changeable and unpredictable set of meanings that individuals could subjectively attribute to the same event or symbol treated by the former (2011b, 24).

For better or worse, the Canadian state has not defined "religion," and for this reason, whether one terms indigenous spiritual practices and beliefs as "spiritual" or "religious" is of little consequence for the Constitution and past legal interpretations of it. For example, *Syndicat Northcrest v. Amselem* (2004) explicitly identifies sincerity and not authenticity, religious affiliation, institutional recognition, or any other qualifier, as the means by which a claim to violations of religious freedom ought to begin. In short, I use the term "religion" to avoid the politics of semantics in the legal realm and not to avoid the conversation in the theoretical arena.

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1.5 Overview of Chapters

The four body chapters examine a particular aspect of the problem facing indigenous religious traditions and sacred sites in contemporary Canada. These aspects are (1) philosophies of property, (2) secularization and religious freedom, (3) the ambiguous nature of indigenous-state relations, and (4) the diversity of contemporary indigenous religious traditions, practices and ceremonies. In the second chapter, I examine the pervasive and powerful land-person relationship that travelled with Europeans to North America in the seventeenth century and permeated "Indian" assimilationist policies. In both cases, a popular European philosophy of the land contributed to the dispossession of indigenous lands and the exclusion of indigenous peoples from decision-making and administrative processes. Europeans, following the influential thought of John Locke, understood their particular land-person relationship as a universal benchmark of civility. When they sought settlement, the popular philosophy allowed Europeans to view North America as empty, uninhabited space, despite hundreds of indigenous nations on the continent. When indigenous peoples lost their economic and military value following the War of 1812 and the decline of the fur trade, the colonial and, later, Canadian government with support from mainstream Christian churches, embedded their particular conception of property in the laws governing the indigenous-state relationship (the *Indian Act*) and residential school curricula. Through this conception of property and land-person relationship, the state actively sought to destroy indigenous holistic and spiritual perspectives of land. Although the state officially abandoned its assimilationist agenda in 1985, indigenous religious perspectives of land continue to face exclusion in indigenous-state relations despite their importance for indigenous identity and culture.

Chapter 3 examines the effects of secularization and dispossession for the protection of First Nations off-reserve sacred sites. Using the work of sociologist José Casanova (1994), I examine secularization theory and explain how the separation of religion from the state and the privatization of religion are intricately connected, particularly in Canada. I argue that religion's relegation to a private sphere does not necessarily dictate its permanent location. Rather, the processes of differentiation and privatization contribute to the construction of conditions for religion wishing to enter the public arena. These conditions of deprivatization for religions wishing to enter the public arena require that they conform to the dominant, largely liberal conditions placed on public relationships. These conditions are particularly problematic for indigenous communities and their sacred sites for two reasons. First, the state's control over most of the traditional lands of First Nations and growing socio-economic

expansion, forces First Nations into the public arena to seek the protection of their sacred sites. Second, unlike with many other religious communities entering the public sphere to address morally relevant questions, there is an intimate connection between indigenous religious beliefs and land, the topic of public debate. In all manners by which First Nations have sought the protection of their sacred sites in Canada's courts, the state has asked them to conform to the conditions of public religion.

In chapters 2 and 3, I explore how the state has excluded indigenous perspectives since first contact. In chapter 4, I address how the state may make strides toward its foundational principles of liberal democratic justice for, not simply indigenous people, but all people in Canada. The chapter examines the themes of perspective and power in the "Duty to Consult and Accommodate," a doctrine that represents the new indigenous-state relationship. In particular, I examine the potential of the consultation doctrine for bringing indigenous perspectives on land and religion into the conversations on land usage, and the administrative processes that inevitably decide the fate of particular tracts of land. In addition, I analyze the limits of the doctrine for its potential to exclude indigenous peoples from such administrative processes. The state ambiguously defines itself as both a partner with and an authority over indigenous peoples. In order to facilitate this examination, I explore Iris Marion Young's (2000a) political theory of communicative democracy, and the role the state may play in fostering justice in a society. I argue that the theory of communicative democracy helps to illustrate both the potential benefits and limitations of the consultation doctrine. After exploring how the ambiguous role of the state may exclude indigenous perspectives, in general, and spiritual perspectives, specifically, I introduce a case in which the state successfully included indigenous perspectives in both the communicative and administrative processes that affected the land.

In chapter 5, I examine the complexity of indigenous religious traditions and the challenges they present the state for the protection of indigenous religions and sacred sites. In particular, I frame the argument through Homi Bhabha's discussion of hybridity. Popularly, there is a pervasive stereotype regarding indigenous religious traditions as unchanging, historically located traditions, and this misconception manifests in both social and political life. To counter this stereotype, I examine the emergence of pan-indigenous (or intertribal) religious movements in the latter half of the twentieth century as an example of the adaptive nature, diversity and controversy surrounding some modern forms of indigenous religions. The purpose of this chapter is to make a specific contribution to a

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common theme that runs throughout the dissertation; namely, the importance of including and understanding indigenous perspectives. Given the large number of ceremonies, traditions, beliefs, and communities, that the category of "indigenous religions" includes, the chapter focuses on one example, the Sun Dance ceremony and its pan-indigenous manifestation in the interior of British Columbia in 1995. My brief examination of the Sun Dance ceremony and its diverse forms in addition to an investigation of how the tradition is learned and re-learned in a period of indigenous spiritual revitalization, help to demonstrate the dangers of using history to measure the authenticity of a spiritual practice. Finally, the Gustafsen Lake Sun Dance, occupation, and standoff, provide insight as to the potential positive or negative role the state can play in either broadening or limiting the social knowledge of indigenous religious traditions.

The conclusion, chapter 6, summarizes the broader arguments made throughout the dissertation, and looks prospectively at research that may stem from this study. Having identified foundational issues facing contemporary indigenous peoples and the Canadian state, I identify general policy implications for consideration in indigenous-state relations. The purpose of this dissertation is not to provide public policy; however, failure to recognize that there are implications for policy would seem to be an oversight. It is in this spirit that I note those recommendations.

Chapter 2

Philosophies of Land in Canadian Indigenous Policies: an Historical Overview

2.1 Introduction

From the treaties of the past four centuries to modern discussions of Aboriginal title and comprehensive land claim negotiations, the subject of land has remained at the heart of indigenous-state relations. However, land is more than just an *object* of discussion related to political and economic power; it is more than a commodity in a free market society; it is, for many indigenous communities, a means of cultural preservation intimately tied to their religious beliefs. In other words, land is more than an *object* of discussion; land involves a *philosophy* of how one relates to it. Due to differences between indigenous and European conceptions of land, these philosophies require some attention in indigenous-state relations.

In the previous chapter, I asserted that Canada remains a colonial country, and that many of the practices of domination of the Canadian state toward indigenous peoples of the nineteenth and first half of the twentieth century persist in less explicit but equally devastating ways. The dominance of a Euro-Canadian philosophy of land over the holistic and religious perspectives of many indigenous communities is a trend one can find in settlement ideology of the seventeenth century, assimilationist policies of the nineteenth and early-twentieth centuries, and, more recently, in the discussion of indigenous title and sovereignty. Ultimately, the dominance of Euro-Canadian philosophies of land, no matter in what period, provides conceptual support for the dispossession and withholding of land and power over land from indigenous communities. This has serious implications for the protection and preservation of indigenous religious traditions and their sacred spaces.

The two-fold task of this chapter is to provide an historical overview of colonial and Canadian indigenous policies on land and to provide support for the central claim of this chapter regarding power and philosophies of land within indigenous-state relations. To accomplish this task, I have structured this chapter into three historical periods. In the first section, I examine philosophies of land at the time of colonization through the mid-nineteenth century, when explicit assimilationist policies toward indigenous peoples begin to emerge. In the first two parts of this section, I examine indigenous perspectives of land and John Locke's labour theory of property in the seventeenth century. Locke (1632–1704) developed his theory of property in response to the subject of North

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American settlement and in explicit contrast to indigenous peoples. Locke is the prime example of natural law theories—that is, intrinsically universal and observable aspects of human existence—that emerged in the seventeenth century and tied private property to progress and civility. Locke, an English philosopher, politician, colonial landowner, and policy-maker, developed a theory of property that brought cultivation and enclosure (i.e., labour on privately held and defined land) into a natural relationship with property and civility. Those who did not cultivate and enclose land did not own land; and those who did not own land did not (and could not) be members within civil and political society. In the third part of this section, I outline early treaties between indigenous communities and the colonial government for trade and military purposes despite the fact that colonial powers did not recognize indigenous title. I also outline the emergence of assimilationist policies in the 1830s.

The second section examines policies of assimilation from Confederation in 1867 to 1951 as they manifested themselves in the *Indian Act*, Canada's central legislation on indigenous peoples, treaties and residential school curricula. The state equated proper civility with morality, Christianity, agriculture and private ownership. This conception of civility, intimately tied to one's relationship with the land, also led to a half-century ban on indigenous religious practices.

In the final section, I explore events following the *Indian Act* of 1951, which dropped explicit connections between the sedentary life and civility, but maintained an emphasis on private ownership of the land. However, in this period, government efforts to reshape indigenous-state relations continue to assert non-indigenous perspectives of land onto indigenous peoples in matters related to political and economic power. Although the prime example is the *White Paper* (1969), which effectively sought to dissolve "Indian" status and liberate indigenous peoples through private property, contemporary discussions of indigenous title and sovereignty continue to require indigenous peoples to accept a Euro-Canadian perspective on land. The ultimate purpose of this chapter is to lay an already well-articulated historical foundation of the political exclusion of indigenous peoples from colonization through to today. This foundation is integral for the analysis that takes place in the remainder of this dissertation.

2.2 From Settlement to Confederation (1867)

2.2.1 Shared Aspects of the Indigenous Philosophy of Land

The land-person relationship is the most notable difference between Europeans and indigenous peoples at the time of colonization. On the one hand, Europeans defined their land-person relationship

through the Christian creation story that recounts God's command for man to "fill the earth and subdue it; and [to] have dominion … over every living thing …" (Gen 1:28). On the other hand, the various indigenous communities shared a worldview "which saw humans as part of a cosmological order depending on a balance of reciprocating forces to keep the universe functioning in harmony" (Dickason 2009, xii–xiii). In this perspective, all living things are unified and humans hold a privileged position in the cosmos as opposed to a dominant one. Many tribes believed that the continent on which they resided was their origin, and myths provided support and confirmation of their special connection to the land.

North American indigenous communities possessed systems of ownership at the time of contact, but in a different manner than that of their colonizers. Dickason (2009) summarizes the indigenous perspective of the land:

> Native cyclical and holistic ways of viewing the world translate into
> land being held as common property by the tribal nation as a whole.
> Tribal members have an undivided interest in the land; everyone, as
> a member of the group, has a right to the whole. Furthermore, rights
> to the use of land belong not only to the living but to those who have
> gone before as well as to those who will come; neither do they
> belong exclusively to humans, but to other living things as well –
> animals, plants, [and] sometimes (under special circumstances) even
> rocks (328).[12]

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[12] The special land-person relationship of indigenous peoples does not denote that indigenous peoples were adverse to the cultivation of the earth. Even at the period of colonization, sedentary life was a fixture of some indigenous communities. Later, many communities across North America would embrace an agricultural life for its potential benefits to their communities. Some of these communities found early success in farming. The persistent belief in the historiography that indigenous peoples were adverse to farming stems from the European common understanding of the inferiority of indigenous peoples and the overgeneralization of the teachings of Smohalla (c. 1815–1895) of the Nez Perce in the pacific northwest from the Dreamer Religion. This particular view called for a return to traditional ways of life and, in particular, a rejection of farming (Carter 1990). Why agriculture failed among so many indigenous communities is a complicated topic discussed in depth by historians Sarah Carter (1990) and Bruce Dawson (2003).

Although some "utopian" European thinkers such as Thomas More (1478–1535) supported communal ownership, the primary trajectory of western thought on the subject was in contrast to the communal system of ownership in place among indigenous communities.[13]

Related to "ownership," indigenous communities conceived of sovereignty in a different way than that of European settlers. Both settlers and indigenous peoples asserted that a sovereign held ultimate ownership over the land. For indigenous communities that sovereign was spiritual while for Europeans it was temporal (Fonda 2011; Pipes 1999; Loftin 1989). For example, during negotiations of Treaty 3 (1873), Chief Mawedopenais stated, "The Great Spirit has planted us on this ground where we are, as you were where you came from. We think where we are is our property." Later he remarked, "We have a rich country, it is the Great Spirit who gave us this; where we stand upon is the Indians' property" (Morris 1991, 62).

2.2.2 John Locke and the European Philosophy of Land

The seventeenth century resurgence of natural law theory among European political philosophers greatly complicated the indigenous-settler relationship. The natural law tradition first emerged among Stoics and Roman jurists between 300 B.C.E. and 300 C.E., and became "a fundamental postulate of Western thought" (Pipes 1999, 12). At the foundation of this tradition is the belief that "right and wrong are not arbitrary concepts but norms rooted in nature and therefore binding on all mankind; ethical problems are to be solved with reference to the Law of Nature, which is rational and supersedes the positive law (*jus civile*) of individual societies" (Pipes 1999, 12). The "rational, unchanging and unchangeable" Law of Nature that emerged in the seventeenth century included, for the first time in its long tradition, "the inviolability of private property" (Pipes 1999, 29). The dominant belief of private property as natural renders all other perspectives, including holistic ones, to be fundamentally wrong. Seriously complicating the foundations of indigenous-settler relations is the fact that the most influential of these theories was a direct response to the English quandary of settling North America and disposing its inhabitants of their lands.

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[13] This is not to say that all indigenous communities possessed the same concept of ownership or even the exact same perspective on land. As discussed later in this chapter, different communities in different geographical locations had diverse relationships with the land. The purpose here is to identify broad similarities related to the religious component of, according to Dickason (2009) arguably all indigenous communities at the time of contact. These aspects are broadly shared and not the definition of a homogenous perspective on the land.

John Locke had political, practical and philosophical interests in the colonization of North America.[14] In addition to being a colonial landholder, he worked as the treasurer and secretary to the Council of Trade and Foreign Plantations from 1673 to 1674. One purpose of this council was to establish agrarian communities in North America that Locke argued would greatly contribute to the prosperity of England. Between 1696 and 1700, Locke served as secretary to the later incarnation of this council, the Council of Trade. Locke spent the years between 1669 and 1675 in Carolina under the employment of the Earl of Shaftesbury where he contributed to the drafting of the early constitution of the colony. His direct role in foreign colonial policy and colonial governance are characteristics that distinguish Locke from other political philosophers until the nineteenth century (Arneil 1996; Armitage 2004).

His political-philosophical interest in developing a theory of property was to provide England with a distinct rationale for settling in North America and dispossessing indigenous peoples of their lands. He sought to distinguish England from the Spanish conquistadors. Additionally, he recognized that Hugo Grotius' theory of first occupancy posed problems for the dispossession of indigenous lands.[15]

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[14] Scholars widely accept Locke's influence on the initial settlement and colonization of North America (Armitage 1998, 2000; Arneil 1996; Pagden 1995; Tully 1993, 1994).

[15] Hugo Grotius was among the first of the Renaissance natural law theorists. Like Greek, Roman, and Catholic thinkers before him Grotius writes in response to the particular dilemmas of colonial expansion experienced by his country. In particular, he responds to the question of sovereignty and the sea. Grotius uses the natural ownership of land as the counterpoint to sovereignty over the water and as the foundation for his theory of first occupancy. In *De Jure Belli ac Pacis* (1625) Grotius explains how the things originally given in common by God transfer to private ownership. In the beginning, private ownership was, like early human societies, quite simplistic. Appropriation of the necessities for life determined ownership. The act of eating meat was an assertion of ownership of that particular piece of meat. Devoid of the knowledge of virtue and vice and existing in a world with a very small population, early humans in a simple state had no reason to assert their natural right to property over tracts of land. As humans pursued knowledge, they became aware of both the potential improvements to life they could make using certain objects (virtuous acts) and the potential pleasure that they could gain with certain things (acts of vice). Differences in pursuits (i.e., how and why to use particular things) and growing populations made the private ownership of land a necessity. He explains how ownership is attained: "This happens not by a mere act of will, for one could not know what things another wished to have, in order to abstain from them or besides several might desire the same thing—but rather by an agreement, either expressed, as by a division, or implied, as by occupation. In fact, as soon as community ownership was abandoned, and as yet no division had been made, it is to be supposed that all agreed, that whatever each one had taken possession of should be his property. Grotius includes only one qualification for ownership. Under the significant influence of Roman jurists, he employs Cicero's theatre seating analogy, which stipulates that if someone were to leave a seat they had claimed in a public arena, that seat would not be returned to the common but would remain the possession of the first occupant (bk. II, c. 2, sec. II).

The answer for Locke was that labour (i.e., cultivation and enclosure) constituted private ownership. Although leaders of the Protestant Reformation praised property and labour, Locke was the first to include the labour of land as part of natural law (Pipes 1999; Arneil 1996). It should be noted that, although farming was not a mainstay of indigenous communities during this period, crops, such as corn (maize), were grown from Ontario to as far south as Chile. The domestication of many plants had taken place in North America thousands of years before the arrival of Europeans. Geography and climate largely determined the dominant lifestyle of each community (Dawson 2003; Dickason 2009).

In his *Second Treatise on Civil Government* (1689), Locke, like philosophers of property since Plato, asserts that all humans initially held land in common. Echoing other colonial voices, Locke refers to Genesis 1:28 where God instructs humankind to "subdue" (or labour upon) the earth, resulting in ownership (dominion).[16] According to Locke, God gave the world to the industrious (par. 34). Locke, like Aristotle (384–322 B.C.E.)[17] and Thomas Aquinas (1225–1274)[18] before him, contends that the appropriation of land provides an opportunity to be good. He writes:

> He who appropriates land to himself by his labour, does not lessen,
> but increase the common stock of mankind: for the provisions
> serving to the support of human life, produced by one acre of

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[16] Roman jurists introduced a concept of absolute private ownership known as *dominium*. Four criteria needed to be satisfied in order to qualify for this type of ownership. Individuals must obtain property lawfully, and the property must be exclusive, absolute and permanent (Pipes 1999).

[17] Aristotle contends that conflict arises more between those who communally own land than those who own land privately. Conflict is inherent to human nature and does not simply arise from debate over "mine" and "not mine." Justice and the eradication of social conflict were ascertainable through enlightenment rather than the abolition of private property. For Aristotle, private property provides the opportunity for individuals to be more generous and, therefore, to attain a higher ethical level (Pipes 1999).

[18] The translation and rediscovery of Aristotle in correlation with academic theological studies began to shift Christian thought away from the Neo-Platonic school that had informed Church teachings through the thirteenth century and back to Aristotle. Thomas Aquinas responds to the question of property in his codification of Church teachings, *Summa Theologica* (1265–1274). In response to the first article of question 66 in the Second Part of the Second Part, he writes, "Man has a natural dominion over external things, because, by his reason and will, he is able to use them for his own profit, as they were made on his account: for the imperfect is always for the sake of the perfect ... Moreover, this natural dominion of man over other creatures, which is competent to man in respect of his reason wherein God's image resides, is shown forth in man's creation ..." (objection 3). Thomas reaffirms an Aristotelian view of property by contending that individual possessions lead to peace and justice. He adds that possessions can also benefit the community through the opportunities that arise for some to provide for others (objection 2). This understanding of property would prove to be significantly influential on later natural law theorists such as John Locke (Tully 1980).

inclosed and cultivated land, are (to speak much within compass) ten

times more than those which are yielded by an acre of land of an

equal richness lying waste in common. And therefore he that incloses

land, and has a greater plenty of the conveniencies of life from ten

acres, than he could have from an hundred left to nature, may truly

be said to give ninety acres to mankind: for his labour now supplies

him with provisions out of ten acres, which were but the product of

an hundred lying in common (par. 37).

Locke and other proponents of North American colonization in the seventeenth century appealed to the argument that the land was *vacuum domicilium*, or empty space (Arneil 1996). Land must be cultivated and not simply appropriated. Locke maintained that the spoiling of natural things was a violation of the natural law. Individuals could not appropriate more land and produce more conveniences than they could possibly use unless their intention was to maintain the land and distribute that common stock for the benefit of all.[19] Following the Aristotelian tradition, Locke believed that private property provided people with the opportunity to achieve a more advanced ethical standing, meaning that the English way of engaging with the land was not only a mark of civility but also a mark of moral superiority.

Locke contrasts English people with his perception of the indigenous person to demonstrate how one owns land. He begins his chapter "Of Property" by citing the application of labour in the hunting of animals by indigenous peoples. Locke contends that indigenous peoples have the right to private property of moveable objects because of the application of labour to the objects (i.e., pursuing and killing an animal). However, when it comes to immovable objects such as land, Locke criticizes the rational and moral character of indigenous peoples. He writes:

Several nations of the Americans are of this, who are rich in land,

and poor in all the comforts of life; whom nature having furnished as

liberally as any other people, with the materials of plenty, i.e. a

fruitful soil, apt to produce in abundance, what might serve for food,

raiment, and delight; yet for want of improving it by labour, have not

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[19] This meant that those involved in international commerce were the only ones able to amass large portions of land. This is another limitation on the ability of indigenous peoples to make large claims even if they did adopt an agrarian lifestyle (Arneil 1996).

one hundredth part of the conveniencies we enjoy: and a king of a

large and fruitful territory there, feeds, lodges, and is clad worse than

a day-labourer in England (par. 41).

Along with the industrious, God also gave the world to the rational (par. 34). In this sense, property and human progress are integrally connected. Attributing indigenous peoples of America to that of primitive humans, Locke contends that the land still lies in common, as it did initially and, therefore, is available for appropriation.[20]

  Early accounts of indigenous peoples in the Americas ranged from the "noble savage" who was blissfully ignorant of shame and property (equating them to humans of the Golden Age) to accounts such as those of English writer Samuel Purchas (c. 1575–1626) who thought of them as inhuman (Pipes 1999). Eventually, the predominant view of European travellers was that indigenous peoples were humans in a primitive state (Dickason 2009). In his work *An Essay Concerning Human Understanding* (1690), Locke explains that indigenous peoples were culturally inferior and simply needed to be educated in the ways of the English so that they could attain the same rational and moral superiority of Europe. Locke argues:

God having endued man with those faculties of knowledge which he

hath, was no more obliged by his goodness to plant those innate

notions in his mind, than that, having given him reason, hands, and

materials, he should build him bridges or houses, which some people

in the world, however of good parts, do either totally want, or are but

ill provided of, as well as others are wholly without ideas of God and

principles of morality, or at least have but very ill ones; the reason in

both cases, being, that they never employed their parts, faculties, and

powers industriously that way, but contented themselves with the

opinions, fashions, and things of their country, as they found them,

without looking any further. Had you or I been born at the Bay of

Soldania, possibly our thoughts and notions had not exceeded those

brutish ones of the Hottentots that inhabit there. And had the

Virginia king Apochancana been educated in England, he had been

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[20] Colonial powers often defended the rights of indigenous peoples to hunt and fish because it did not interfere with the colonial project (Arneil 1996).

perhaps as knowing a divine, and as good a mathematician as any in
it … (bk. 1, c. 4, par. 12).

What distinguishes Locke from his contemporaries in this regard is not his perception of indigenous peoples as inferior but rather how integral this view was in constructing a theory of property. The "foundations of property" are natural to humankind, Locke asserts, but awareness of this fact is not present through natural birth (1690, par. 44). Unlike Adam who was born capable of understanding the laws of reason given to humankind by God, Locke writes, "His descendants ... are all born infants, weak and helpless, without knowledge or understanding." Locke contends that the responsibility of those who have achieved such knowledge is to educate these infants not as "their own workmanship, but the workmanship of their own maker, the Almighty" (par. 56).

Locke's theory not only connects human progress and property, it also incorporates the construction of civil and political society. Once individuals possess property (broadened here to include lives, liberties and estates), they enter into compact with others into a society so that it may be protected (par. 123). Those who do not possess property cannot be members of civil society. Although Locke explicitly rejects slavery (par. 23), he invokes the example of slavery in order to establish the qualifications for entering into civil and political society. He writes, "These men having, as I say, forfeited their lives, and with it their liberties, and lost their estates; and being in the state of slavery, not capable of any property, cannot in that state be considered as any part of civil society; the chief end whereof is the preservation of property" (par. 85). For Locke, then, civil society is contingent upon private property.

In summary, Locke's conception of property continued, as it had since the time of Plato, to focus on the attainment of justice for a society. The inclusion of property within the natural law placed a positive moral value on the concept. Once property was inherently "good," those who did not hold the same conception of property became inferior. Locke himself understood indigenous peoples to be capable but primitive; and for him, civility was contingent upon the enclosure and cultivation of private property. His labour theory of property was, therefore, simultaneously a promotion in justice, dispossession, and assimilation.

2.2.3 Changing Relationship before Confederation (1867)

In the first two centuries of contact, European powers concerned themselves with acquiring land, not the manner in which indigenous peoples were using it. They sought economic partners, allies and

legal tenure in the Americas. The colonial perception of indigenous peoples as inferior did not hinder a working relationship in the early years of colonization. First Nations knowledge of the land and ability to hunt made them integral to the fur trade. Their sheer numbers (estimated in the millions at the time of contact) provided additional support for militia in the battles between France, England, Spain and, later, the United States. Peaceful relations made colonial operations far easier (Dickason 2009).

The popular belief that indigenous peoples were not owners of land did not stop colonial powers from entering into compacts with indigenous peoples. Treaties were a legal method of verifying a colonial power's stake in the Americas. Colonial governments conducted early treaties for military (i.e., peace and defence) and settlement purposes. For example, the Covenant Chain between New York and Iroquois Five Nations established peace in the thirteen colonies in the late seventeenth century. The Great Peace of 1701 helped to end nearly a century of warring between English, Iroquois, French, Algonquians and Huron (Dickason 2009).[21]

The *Royal Proclamation of 1763* affirmed Crown sovereignty and perpetuated the popular belief that indigenous peoples did not possess ownership of the land. The Crown never acknowledged indigenous sovereignty but the British Empire established a protection of "Indian title" to use the land (i.e., hunting, fishing, settlement). Ultimately, the Crown maintained authority over all land. The *Proclamation* (1763) reads:

> 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
> (emphasis added).

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[21] See J.R. Miller (2009) for more information regarding these treaties and chapter 3 of this dissertation.

The Crown established themselves as both the sovereign power and the sole negotiator of unceded lands on the continent.[22] Civility was not a priority in 1763 as the international battle of empires (i.e., France, England and Spain, in particular) persisted in North America.[23] Treaties of settlement such as the Between the Lakes Purchase of 1784 continued a trend of treaty making focussed on the acquisition of land rather than an interest in civilization.[24]

The military and economic value of indigenous peoples for settler populations dissipated following the War of 1812 and decline of the fur trade. The colonial government sought to eliminate indigenous culture and identity through the legislature beginning in the 1830s. Canadian policy makers eventually labeled this assimilationist agenda as the policy of the "bible and the plough" (Miller 1991). Civil and political participation for indigenous people in an expanding colonial society was contingent upon their ability to become proprietors of land. This required not only their permanent settlement on individual plots of land but also their improvement of the land and, until the mid-twentieth century, the acceptance of Christianity.

The acquisition of Manitoulin and surrounding islands in 1836 by Sir Francis Bond Head (1793–1875) marked a significant increase in the colonial government's concern regarding the indigenous-land relationship. Bond Head incorporated aid in civilizing into his treaties that included the building of permanent houses and instruction in the cultivation of land. Bond Head sought to settle the indigenous communities of Manitoulin Island into a sedentary life. He was convinced that they were wandering hunters with no permanent residence. Bond Head believed that the manner in which the "real proprietors of [North American] soil" – indigenous peoples – related to the land was "the most sinful story recorded in the history of the human race" (Dickason 2009, 204). Another distinction of

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[22] Discussions of Aboriginal title re-emerged in the decades following Confederation. In 1888, Canada reasserted a definitive claim regarding their sovereignty in *St. Catherine's Milling and Logging Company v. The Queen*. The Judicial Committee of the Privy Council determined that the Crown always held an estate in the land and that (European) occupancy secured title. The state understood Aboriginal title to be extinguished but Aboriginal rights to use and access to the land continued as they had since the *Royal Proclamation*. Historically Aboriginal rights referred to hunting and fishing but has broadened to include practices, customs and traditions related to indigenous cultures.

[23] Arneil (1996) argues that the *Royal Proclamation of 1763* correlated with Lockean notions of the fair distribution of property (in that no one should acquire more than they can use) and in his doctrine of spoilage, that nothing in common should lie in waste or spoiled. The Proclamation ensured that colonial expansion would be efficient.

[24] The text of these treaties did not contain explicit reference to civilizing activities such as stipulations on how indigenous peoples ought to use the land, as later treaties would incorporate.

the Manitoulin Island treaties was that settlement and peace were not the motivators but rather the exploitation of fisheries. The government enacted later treaties such as the Robinson Treaties of 1850 for the purposes of mining in the Canadian Shield. Economic development expanded with industrialization and resource development by the mid-nineteenth century but the state would continue to encourage indigenous peoples to farm.

"Civilization" began with the acquisition of private land.[25] The *Gradual Civilization Act* of 1857 confirmed the policies set forth in the 1830s where private property and civility were synonymous. The act opens:

> Whereas it is desirable to encourage the progress of Civilisation
> among, the Indian Tribes in this Province, and the gradual removal
> of all legal distinctions between them and Her Majesty's other
> Canadian Subjects, and to facilitate the acquisition of property and of
> the rights accompanying it, by such Individual Members of the said
> Tribes as shall be found to desire such encouragement and to have
> deserved it (preamble).

Colonial policy makers understood indigenous peoples as primitive. They believed that with the proper encouragement, indigenous peoples would progress from their traditional lifestyles into the superior English culture. Colonial authorities labeled this process "Enfranchisement." Eradication of the legal distinction of indigenous peoples was the goal of this process, including distinctions such as those of land and its usage outlined in the *Royal Proclamation.*

Christian leaders were in charge of evaluating the fitness of indigenous peoples pursuing enfranchisement. Given the close relationship between church and state in this period (discussed more thoroughly in chapter 3), it is no surprise that European Christian leaders were acting in tandem with the state. If the state deemed an applicant fit, it removed the individual's "Indian" status and rewarded them with a portion of the reserve land set aside in common for the band (sec. III). The land became the absolute property of the enfranchised. The state then required the enfranchised person to

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[25] Civilization, in the nineteenth century, referred to social and moral progress toward Euro-American values. Colonial governments understood the laws that colonial governments enacted, such as the *Gradual Civilization Act*, as a means of protecting indigenous peoples from exploitation in settler society. This meant protecting both person and property of indigenous peoples until they were civil and capable of being part of settler society. Responsible for most of the "propaganda" in North America were protestant groups who tied civility with Christianity (Tobias 1991).

relinquish all claims to the remaining reserve lands (sec. VII). Without "Indians," reserve lands would no longer be necessary. The private ownership of land was the centerpiece of early assimilation policies.

In the first two hundred years of colonization, the necessity of peace and settlement in the North American war of empires dictated early European-indigenous relations. Perceptions of indigenous peoples as inferior manifested themselves in assertions of Crown sovereignty, but the state did not forcibly alter indigenous ways of life. The end of international warfare on the continent marked a discernible change in the interest of the British colony toward the development of the perceived inferior cultures of indigenous peoples. With the *Gradual Civilization Act* as a foundation, the newly formed Dominion of Canada took on the task of "advancing" indigenous peoples. In the state's view, the first step toward civility required private ownership and cultivation of the land.

2.3 Civility, Farming, Morality and Religion in Canada, 1867–1951

Confederation in 1867 transferred responsibilities for indigenous peoples and land to the newly formed federal government of the Dominion of Canada.[26] The belief that indigenous peoples had no ownership rights to land persisted following the creation of Canada despite the fact that the state negotiated over 100 land treaties and transfers prior to Confederation. Many indigenous communities sought treaties and schooling to adapt to the changing social, political and economic environment around them. Their intention was to adapt from within the framework of their own traditions as opposed to dissolving their cultures into the Euro-Canadian one (Dickason 2009). The legislation on indigenous peoples merged civility with land, land with morality, and morality with the Christian faith.

2.3.1 Civility

From Confederation to 1951, through its legislation the state demonstrated a close connection between civility and land. Being deemed civilized came with both a price and prize for indigenous peoples. On one hand, being "enfranchised" was the only means to enter into the Euro-Canadian

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[26] Section 91(24) of the *British North America Act* of 1867 transferred responsibility of "Indians, and Lands reserved for the Indians" to the federal government. At the same time, historian Tony Hall notes, in an unpublished manuscript cited by Dickason (2009, 326), that the state granted the provinces the rights to "all lands, mines, minerals and royalties" in section 109. The federal-provincial tension that emerged in the courts in the 1880s is, according to Hall, a provincial socio-economic interest in denying any Aboriginal claims to the land. Either way, the state removed resources from the control of indigenous communities.

socio-political society. On the other hand, becoming "civilized" meant the loss of one's "Indian status" and the dispossession of one's former band reserve lands. In other words, as long as the state defined an individual as an "Indian," that individual could not vote or hold public office. Canada reaffirmed its pre-Confederacy commitment to the "progress" of indigenous peoples as early as 1869,[27] but its primary legislation on indigenous peoples came in the form of the *Indian Act* (1876), a consolidation of legislation on the management of "Indians" and the lands reserved for them. While the *Act* has undergone a number of revisions in the past 137 years, it continues to remain Canada's primary legislation on indigenous peoples.[28] Through 1951, the various consolidations of the *Indian Act* progressively became more forceful with respect to civility, with compulsory attendance at residential schools, bans on indigenous religious practices, and the state's self-imposed ability to strip indigenous peoples of their special status without consent.

The *Act* simply defines an "enfranchised Indian" as an "Indian ... who has received letters patent granting him in fee simple any portion of the reserve which may have been allotted to him … by the band to which he belongs or ... may have received letters patent for an allotment of the reserve" (1876, sec. 3). [29] State officials and Church leaders were to assess the ability of an individual to "become a proprietor of land" based on a probationary period during which observers would assess the individual's use of the land (sec. 87). After the probationary period, the allotted reserve land would be transferred to the "enfranchised Indian," who would then take a new name and, for legal purposes, cease to be an "Indian" (sec. 87, 88). Eventually the state established councils to assess the "fitness" of indigenous peoples prior to enfranchisement. At the centre of this process, however, remained the close connection between land and civility. The report filed by these councils included "a description of the land occupied by each Indian, the amount thereof and the improvements thereon" (1919–20, sec. 3).

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[27] See the *Act for the Gradual Enfranchisement of Indians* (1869). The *Act* opens by establishing that "no Indian … shall be deemed to be lawfully in possession of any land" without the approval of the government (sec. 1).

[28] There are a number of consolidations to the *Indian Act* including 1876, 1880, 1886, 1906, 1927, 1951, 1970, and 1985. Each new consolidation incorporated the many amendments the state had made to the previous consolidation, with the exception of the act of 1951, which could be characterized as a significant revision.

[29] The definition of "enfranchisement" remained relatively unchanged until the *Indian Act* of 1951. The state repealed this definition in the amendment of 1919–20 (sec. 3) but only because the state amalgamated the definition within the existing section pertaining to enfranchisement.

In 1933 (sec. 3), the state gave itself the power to enfranchise involuntarily. Prior to this point, indigenous peoples could choose for the state to assess them for enfranchisement, whereas the amendment of 1933 gave power to the state to assess the "fitness" of whomever they chose. This legislation draws important attention to the fact that "civility" was as much an ideology of progress as an ideology of dispossession, both of lands and status. Non-voluntary enfranchisement, at least on paper, allowed the state to re-distribute reserve lands and extinguish "Indian" status at its own convenience.[30] What exactly does "improvements" and being a proprietor of land mean from 1867 to 1951? The short answer to this question is *farming*.

2.3.2 Farming

The act of farming was the means by which indigenous peoples could make improvements on land and become good proprietors of land. The general perception was that, without farming, the land was lying in waste, and those living on the land without farming it were missing an opportunity to become civilized.[31] This perception is evident in legislation, treaties and the curricula at residential school, attendance at which became mandatory toward the end of the nineteenth century. In particular, the state promoted a non-industry-based sedentary life as a means toward "Indian civility."

The adoption of an agricultural way of life was a necessity if one sought security of the land. Section 8 of the 1884 amendment to the *Indian Act* entitled the Superintendent-General to take land away from Indigenous peoples who were "pursuing a trade which interferes with their cultivating

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[30] The state has used the paternalistic *Indian Act* to suppress and control indigenous peoples, but, at the same time, it has operated in the positive colonial spirit of the legislation, as a protection for indigenous peoples. In particular, it has helped to preserve indigenous lands and, to some extent, indigenous difference. State attempts to repeal the *Indian Act*, notably in 1969 and today, in 2013, have met indigenous resistance. In August 2012, the Conservative government of Canada announced that they were introducing a law to allow for private property on First Nations reserves. National Chief of the Assembly of First Nations, Shawn Atleo, opposes the bill, and many band councils have voiced their concern that the law would offend "traditional communal approaches to land" and open up the reserves to non-indigenous control. The Federation of Saskatchewan, Indian Nations expressed that they were "outraged and insulted" for the government having not consulted them on the proposed bill. The government's hope is to spur economic development on reserves and, inevitably, to eliminate the *Indian Act*—the primary legislation on indigenous peoples (Ibitson 2012). In 2012, the "Idle No More" grassroots protest movement emerged, in part, in response to the Conservative government's proposal.

[31] In the 1930s, the government of Canada scouted the potential of the Arctic for raising herds of animals. One hundred years after the initiation of civilization policies, the intention here was not to induce farming among the Inuit but rather tending animal herds (Dickason 2009). Farming was an endeavor pursued by the government in the Arctic, but it failed, in part, because of poor research (Diubaldo 1985).

land on the reserve." The state further amended the clause in the *Indian Act* of 1886 drawing the inability to cultivate land to the forefront (sec. 38). Although the section went through later revisions in 1894 (sec. 3), 1895 (sec. 1), 1898 (sec. 2), 1906 (sec. 48), and 1927 (sec. 50), the basic premise that unimproved land could be seized and leased by the Superintendent-General for the "benefit of any Indian" remained in place until 1951.

While many indigenous communities embraced farming for the potential benefits (i.e., economic or security) it could produce, the government's intention was civility and not industry. Historian Sarah Carter (1990, 1991) argues that the state did not provide indigenous communities of the prairies with the same opportunities as non-indigenous settlers. For example, in 1889, Indian Commissioner Hayter Reed (1849–1936) stated that peasant farming in other countries ought to be the model for indigenous farming in Canada. In effect, Reed's plan was to keep indigenous farms small and put limits on the types of tools indigenous farmers could use, which meant they would have access to only the most basic farming equipment. In her analysis of indigenous agricultural policies, Carter notes that the government controlled where an indigenous person had to farm, what they could produce, and what they could purchase. Even though resource development and agriculture were developing as lucrative industries across Canada, the state was restricting indigenous peoples from participating in that development.

Aside from the restrictions that inhibited indigenous peoples from benefitting from sedentary life, the state rewarded "improvements" of the land. Since the reserves were Crown land, the Superintendent-General had the authority to survey reserves in order to distinguish "improved lands" and then to divide the land into plots. If the land was taken for the purposes of railways, roads, or public works, Indian bands were to be compensated and those specific people who had improved the lands on which they lived would receive additional compensation (1876, sec. 20). Dispossessing indigenous persons of land became far more difficult if they made improvements to their land (1876, sec. 6; 1880, sec. 17). Settling and improving lands were associated with moral goodness (through enfranchisement policies) and had economic benefits providing security and compensation (e.g., 1880, sec. 21, sec. 81). Those who made "improvements" on the land received additional benefits and rights from the state, an important part of liberal thinking on land (which I discuss in the next section of this chapter as a requirement that continues to impede claims of Aboriginal title and rights).

Major treaties beginning in the early 1870s opened up Canada for settlement and development. These eleven numbered treaties (1871–1921) secured land westward from Ontario to the northeastern

edge of British Columbia and northward into the North West Territories. The state granted indigenous communities small reserves in accordance with pre-confederacy treaty making. The land they received was often neither the size desired nor in the locations they had wanted.[32] On these reserves, the government sought to manage the indigenous-land relationship through rewards and legislation. The treaties themselves contained provisions for cultivation and agricultural supplies. By Treaty 3 (1873), aids in farming became a staple of the numbered treaties (Dickason 2009).[33]

The ties between civility and agriculture were more explicit in the operation of church-administered, state-supported residential schools. In 1894, attendance in boarding or industrial schools became mandatory. Section 11(2) of the amendment (1894) reads:

> The Governor in General may make regulations, which shall have
> the force of law, for the committal by justices or Indian agents of
> children of Indian blood under the age of sixteen years, [34] to such
> industrial school or boarding school, there to be kept, cared for and
> educated for a period not extending beyond the time at which such
> children shall reach the age of eighteen years.

The state recognized the important role off-reserve schooling could play in advancing the civility of indigenous peoples. In particular, the government sought to provide knowledge and industry to young indigenous children. Historian John Milloy (1999) explains that residential schools "were part of a network of institutions meant to be servants ministering to industrial society's need for lawfulness, labour, and security of property" (33). From the outset of government involvement in indigenous

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[32] In the North, although these processes began much later, the government placed the Hudson Bay Company (HBC) in charge of the welfare of Inuit people as a condition of continuing to conduct business in the region. The permanent villages that were erected by HBC conformed to trade routes and not the necessities required for sustaining life. Following World War II, relocation of Inuit to the Arctic helped to provide settlement support to Canadian claims to the Arctic. After all, the government needed individuals who were able to cope with the conditions of the North. Just as in the case of the early colonial period in southern portions of modern day Canada, the Inuit served an important function for economy and politics (Dickason 2009).

[33] One should note that indigenous communities sought instruction and aid in farming, as they did with residential schooling. The immense decline of bison herds in the late-eighteenth century meant that Plains communities needed support in transitioning away from their traditional means of subsistence. The bison provided food, clothing, and even shelter for Plains communities so indigenous communities requested support from the state (Miller 2009).

[34] In the amendment of 1930 (sec. 3) the mandatory age was raised to include children of the age of sixteen.

schooling in the era of assimilation policies, labour and property were central ideological facets of the residential school project. By 1920, the state could legally remove indigenous children from homes with force.

Following the disappearance of the buffalo in the late nineteenth century, some indigenous communities initiated the construction of mission-operated schools in their communities. Many groups recognized that they needed help in transitioning from traditional forms of subsistence while others recognized the potential advantages of manipulating competing Christian missions. However, those seeking the aid of missionaries and subsequently state-supported education did not want or anticipate the fervour of Canadian education policies (Miller 1996).

School curricula addressed the specific kind of "civilized Indian" the state wanted to create. By 1910, schools were preparing indigenous children for a return to reserve life. Miller (1996) explains:

> Ottawa was particularly enamoured of agricultural instruction, which had the advantages of being cheap to provide, of helping to sustain the operation of the school, and of proving successful in at least a minority of cases. But, it was not uncommon, especially in the early decades, for no trades instruction beyond horticulture to be provided in many schools (156).

There was a general agreement among educators and state officials regarding the prioritization of agriculture in the early twentieth century. In 1906, a Methodist cleric-teacher argued that the teaching of trades was futile. He thought it would be best if indigenous boys learned farming, gardening and carpentry with a particular emphasis on advanced agricultural training. The state reaffirmed these policies in the 1930s even though the Department of Indian Affairs acknowledged that farming was on the decline and there was a need for a greater emphasis on skills associated with growing urbanization. Parents complained that children were being overworked on the farms and undereducated. The half-day system (in place until the 1950s) meant that children spent most of the day farming and doing chores and very little time in the classroom. The schools even had 'outing' programs in which the state placed young indigenous boys in the care of farmers in order to assist in harvesting crops (Miller 1996). The collaboration of legislation, treaties and schooling demonstrates an emphasis on agriculture (i.e., labouring upon the land) and private ownership (i.e., enclosure) that defines Canadian indigenous policy through 1951.

2.3.3 Morality

Morality plays an integral role in the civilizing project. The state required an examination of those voluntarily seeking enfranchisement as to their moral character (1880, sec. 86). The 1884 amendment further stipulated *how* the state should determine proper moral character. Testimony had to be:

> made under oath before a judge … by the priest, clergyman or
> minister of the religious denomination to which the applicant belongs
> or by two Justices of the Peace, to the effect that, to the best of the
> knowledge and belief of the deponent or deponents, the applicant for
> enfranchisement is and had been for at least five years previous, a
> person of good moral character, temperate in his or her habits, and of
> sufficient intelligence to be qualified to hold land (1884, sec. 16).[35]

Closely connected with farming and civility was Christian morality. In a report on the U.S. residential school program in 1879, Nicholas Flood Davin (1840–1901) reported to Prime Minister Sir John A. Macdonald (1815–1891) that Christian leaders should be in charge of schools for two reasons: the replacement of indigenous mythology with something positive, and the fact that teachers would already contain the necessary education and virtue. Macdonald later remarked that secular education might be fine for White children but that indigenous children needed moral guidance and instruction (Miller 1996).[36]

Christian morality alongside the management of property played an important role in both school curricula and indigenous policies. From 1876 to 1951, the *Indian Act* described "non-Christian

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[35] The inclusion of "sufficient intelligence to be qualified to hold land" stems from the *Indian* Act (1876, sec. 93) that "good conduct and management of property" would be considered evidence in support of awarding enfranchisement.

[36] Missionaries had experimented with industrial schools as early as the seventeenth century with little success. Day schools were not sufficient in leading indigenous youth away from their traditional ways. Children were able to return home and, more frustrating for missionaries, consort with immoral persons. Indigenous parents criticized conditions and the schools often had problems of attendance. Both state officials and missionaries largely accepted off-reserve residential schools as the best course of action despite the fact that the reserve schooling was a staple of many treaties (Miller 1996). There are a variety of explanations as to why the federal government adopted residential schools during this time. Scott Trevithick (1998) explains that more specific interpretations range from the cynical (i.e., the relinquishment of responsibility and the re-distribution of reserve lands) to the altruistic (misguided or otherwise), to the selfish (e.g., submission of indigenous peoples). Despite these specific differences, historians generally accept assimilation and civilization as the broad ideological motivations of the Canadian government.

Indians" as void of religion, "destitute of the knowledge of God" and incapable of comprehending morality without "any fixed and clear belief … in a future state of rewards and punishment" (1876, sec. 74–78; 1927, sec. 143).

2.3.4 Religion

Maybe the most telling legislation that brings together civility, agriculture and morality is the ban on many indigenous religious practices. There are two important reasons for the ban that was enacted by the government: the state understood indigenous religious practices as immoral (Dickason 2009), and the lengthy and well-attended ceremonies were, in the state's view, encouraging indigenous peoples to leave the sedentary life that the government was trying to enforce (Robb 1995). Some indigenous religious practices were outlawed from 1894 (sec. 3) to 1951. The amendment of 1895 elaborated on the ban:

> Every Indian or other person who engages in, or assists in
> celebrating or encourages either directly or indirectly another to
> celebrate, any Indian festival, dance or other ceremony of which the
> giving away or paying or giving back of money, goods or articles of
> any sort forms a part … and every Indian or other person who
> engages or assists in any celebration or dance of which the wounding
> or mutilation of the dead or living body of any human being or
> animal forms a part or is a feature, is guilty of an indictable offence
> and is liable to imprisonment … (1895, sec. 6).

For the state, civility entailed an understanding of the importance of improving land and adherence to the Christian faith.

In short, the *Indian Act*, treaties and school curricula between 1867 and 1951 embody the Lockean notions of civility, agriculture, and the private ownership of land. Euro-Canadian society conceived of indigenous peoples as a potential civilization in need of the proper education (Miller 1996). Both Church and state worked together to promote a Christian sedentary life alongside the private ownership of land as the means by which indigenous populations could ascend to Euro-Canadian civilization. The state employed the same foundational principles that justified the colonization of North America to justify the attempted eradication of indigenous cultures. The residential school

curriculum complemented enfranchisement policies by aiming to create persons capable of being industrious proprietors of land.

2.4 Land and Post-1951 Indigenous-State Relations

Canadian indigenous policies underwent significant changes following the Second World War. The international ascension of universal human rights translated into a greater emphasis on liberal democracy in post-war Canada. This trend is evident in the *Indian Act* of 1951. The government dropped the ban on indigenous religious ceremonies and both the definition of "enfranchisement" and curricula of residential schools emphasized good responsible citizenship (1951, sec. 108; Miller 1996). Involuntary enfranchisement (sec. 112) and the redistribution of reserve lands from enfranchisement (sec. 110) continued in the 1951 *Indian Act*, but a demonstrated ability to manage land was no longer a requirement. Section 108(b) stipulates that if "the Indian is capable of assuming the duties and responsibilities of citizenship" they were eligible for enfranchisement. In addition, the adoption of a Bill of Rights in 1960 coincided with indigenous suffrage. For the first time, indigenous peoples were able to participate formally in the political structures that governed their lives. Canada granted indigenous suffrage under an amendment to Canada's Elections Act in 1960.[37]

Guided by an enlightened egalitarian liberal philosophy, Pierre Trudeau's Liberal government issued the *Statement of the Government of Canada on Indian Policy* (1969), commonly called the *White Paper*. The government proposed the elimination of the special status separating indigenous peoples from the rest of Canadian social, political and cultural life. This included the dissolution of the *Indian Act* and the Department of Indian Affairs and Northern Development (IAND). Minister of the IAND, Jean Chrétien, argued that the deplorable social and economic state of indigenous communities was a result of policies that had restricted and impeded indigenous peoples from developing like other Canadians. He argued that the first step to achieve the dignity deserved by all humans was the redistribution and private ownership of land. The decision by the government to draft the legislation without consulting indigenous peoples and the widespread interpretation of the document as detrimental to indigenous culture and identity, resulted in what Olive Dickason (2009) describes as "a wall of opposition." She continues, "Amerindians achieved something approaching unanimity for the first time since the arrival of Europeans, and probably for the first time ever" (372).

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[37] Canada, until 1960, banned all registered "Indians" from participating in an election with the exception of those with military service.

The *White Paper* was defeated shortly after its creation, ushering in a new era of indigenous-state relations.

Operating within the new liberal democratic framework of the post-war era, indigenous voices began to speak out against the persistence of colonialism in a society seeking justice for all its peoples. In the same year that the government issued the *White Paper*, Harold Cardinal published *The Unjust Society*, (1969) in which he examined, what he calls, the "persistent state attempts at cultural genocide." Addressing the widespread poverty among indigenous peoples in Canada, Cardinal writes:

> Our people wish to become involved in all aspects of the
> professional community, but how many Indian doctors, lawyers,
> Indian community planners, Indian engineers, artists, writers,
> professors do you know in Canada? While we see the white society
> training its young people for life in the professional and
> technological world of the space age, we find the government
> attempting to train our people in skills that have not been required
> since the Industrial Revolution (1969, 15).

Moreover, he criticizes priest-teachers who, he argues, only cared about religious education and farming. Among the many problems that have defined indigenous-state relations in Canada, Cardinal identifies the particular conception of land that persisted in both Church actions and government policy even in 1969. Although the government repealed the *White Paper*, the question remains: what residual structures of European conceptions of property continue to subvert indigenous perspectives on land?

In 1982, Section 35 of the *Constitution Act* entrenched existing Aboriginal (Indian, Inuit and Métis) and treaty rights including those stemming from the *Royal Proclamation of 1763*. In the *Indian Act* of 1985, the state repealed the "enfranchisement" clause, the centerpiece of "Indian" policy since the mid-eighteenth century.

Despite the collective efforts of Church and state to civilize indigenous peoples through the imposition of a particular kind of land-person relationship, many indigenous communities continue to view their relationship with the land differently than that of Euro-Canadians. Scholars have voiced their concern that the Canadian legal-political apparatuses may not be able to understand this subject adequately. Anthropologist Paul Nadasdy (2005) writes:

> Though [Aboriginal peoples] have drawn and continue to draw their
> sustenance from the land, they did not—until relatively recently—
> think of their relation to the land in terms of "ownership." Instead,
> they were, and in many cases still are, enmeshed in a complex web
> of reciprocal relations and obligations with the land and the animals
> upon it. Although they have long made use of the land, that use is
> completely contingent on their fulfillment of certain obligations to
> both land and animals. The legal (and cultural) concepts of
> "ownership" and "property" recognized by Canadian courts and
> lawmakers cannot adequately represent the complexities of this
> relationship (247).[38]

The Supreme Court is aware of the different conceptions of property at work among some Aboriginal communities, but the requirements of the Court regarding title remains fixed in Euro-Canadian conceptions of property. In *R. v. Sparrow* (1990), the Court stated, "Courts must be careful to avoid the application of traditional common law concepts of property as they develop their understanding of ... the '*sui generis*' nature of aboriginal rights" (par. 68). Nevertheless, the government has often afforded this consideration to rights such as hunting and fishing—but never to ownership of land.

In the 1970s, Aboriginal title resurfaced in British Columbia where much of the land remains unceded and where the court determined that the *Royal Proclamation* did not apply (*Calder v. British Columbia* 1973).[39] Broadly speaking, title refers to ownership. In order for an indigenous community to make a claim to Aboriginal title, the community is still required to prove its claims within the context of Euro-Canadian legal conceptions of property. The Court summarized the case law on Aboriginal title in *Hupacasath First Nation v. British Columbia* (2005):

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[38] Lori Beaman (2006), Michael Ross (2005) and Rodney Bobiwash (1998) note similar concerns in the translation of Aboriginal concepts of property and ownership into the Euro-Canadian legal context.

[39] Since the *Calder* decision, there have been a number of landmark decisions regarding Aboriginal title but they have all stressed the same core elements summarized in *Hupacasath First Nation v. British Columbia* (2005). Decisions cited in this case include *Baker Lake v. The Queen* [1980] 1 F.C. 518, *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010 and *R. v. Marshall; R. v. Bernard* [2005] 3 C.N.L.R. 214.

The Court held that aboriginal title is one of the aboriginal rights and that, in order to prove aboriginal title, the claimant must establish aboriginal practices that indicate possession similar to that associated with title at common law. To establish title, claimants must prove "exclusive 'pre-sovereignty occupation'" of the land ... The Court said ... that "occupation" means physical occupation and that "exclusive occupation" means "the intention and capacity to retain exclusive control." The latter is not negated by occasional acts of trespass or the presence of other aboriginal groups with consent. Shared exclusivity could result in joint title and non-exclusive occupation may establish aboriginal rights short of title (par. 78).

In the case where communities can still pursue Aboriginal title, claimants must prove occupation, use and possession prior to colonial occupation. Aboriginal title and, subsequently, control over traditional land remains fixed in traditional understandings of private ownership. Whether there is a place within the Canadian legal system for traditional indigenous worldviews is a subject discussed in chapter 3, and a question that will continue to remain at the center of self-government debates.

In the early 1990s, the government established a Royal Commission to examine the relationship between indigenous peoples and the state. The Report of the Royal Commission on Aboriginal Peoples (RCAP), which has remained largely ineffective in restructuring indigenous-state relations, argues for greater political autonomy for indigenous communities. It also points to land as one of the central points of friction within indigenous-state relations. It reads, "Most Aboriginal people retain an intensely spiritual connection to the land of their ancestors—one that involves both continuity and stewardship. It is hardly surprising, then, that the most intense conflicts between Aboriginal and non-Aboriginal people centre on the use and control of land" (25). The Report also acknowledges the pervasive colonizing perception of land that travelled with Europeans to North America: "To non-Aboriginal people and governments, the many millions of unfarmed, undeveloped hectares of Canada were 'Crown land', public land—*their* land. To Aboriginal people, land belonged only to the Creator, but by virtue of their role as stewards, it was theirs to care for, to use—and to share if they chose" (26). The Report proposes that indigenous communities receive special access to (and, in turn, protection of) spiritually significant sites. Although the report brings these problems to light, the government has yet to address them officially.

In 2007, The United Nations passed its Declaration on the Rights of Indigenous Peoples with only four dissenting votes (Australia, Canada, New Zealand, and the United States). The Declaration, among other rights, urges states to relinquish more control of traditional lands to indigenous peoples. In 2008, Canadian federal parliament passed a resolution in support of the UN Declaration but the Conservative government continued to oppose the Declaration. Olive Dickason, in her analysis of the apparent discrepancy between Canadian indigenous policies and the pre-European existence of indigenous peoples writes the following:

> The primary objective of Amerindians is spiritual—one of peace and
> protection of the land (Mother Earth) and the waters of Turtle Island.
> This is a sacred trust. The continuity and integrity of their lands are
> important to the survival of the First Nations as an indigenous
> people. Generations of First Nation members have used the land and
> have shared in its bounty and its uses. Moreover, they will continue
> to use this land and teach their children about the Creator and the
> land. Thus, this relationship between the people and the natural
> world is all-important if they are to survive culturally. It is both
> simple and profound (432).

This is a perspective and a reality that, according to Dickason, the federal government denies. Whether we are speaking of aboriginal title or sovereignty, two central issues within contemporary indigenous-state relations, the issues of the inclusion and recognition of indigenous perspectives persists.

2.5 Conclusion

Anthropologist Talal Asad, in *Genealogies of Religion* (1993), elaborates on the subject of domination connected with the resurgence of natural law theory. In his analysis of "religion," he argues that there can be no universal definition of religion because its "constituent elements and relationships are historically specific" and its "definition is itself the historical product of discursive processes" (29). The universalization of this concept, Asad further argues, "separates it conceptually from the domain of power," which disguises the fact that universalized concepts are often associated with the socially and politically elite (29). The European-initiated project of modernization or Westernization, the subsequent universalization of a definition of religion, and the concepts of

"material and moral progress" intertwined with a new sense of historical time that charted European history from Greco-Roman antiquity through the medieval Catholic Church and into modernity (18). Dominant cultures could subsequently relegate other cultures to a less developed stage of civility. In particular, Asad argues, the late seventeenth and early eighteenth century "preoccupation with saving the biblical story of man's Creation and Fall gave way to a new concern with narrating the secular story of European world hegemony in developmental terms" (20). The result, he concludes, is that the application and institutionalization of perceived universal concepts as markers of a higher level of civility act to transform non-European communities.

What will become even more evident in the following chapters is that the protection of indigenous sacred sites and religious traditions is particularly inhibited by the fact that indigenous peoples do not control much of their traditional lands or hold the power to make decisions regarding matters of land. The assertion on the part of the Supreme Court that Aboriginal peoples must frame their title claims in Euro-Canadian understandings of property is a colonial structure that resembles the earliest treatment of indigenous philosophies of land. The assertion of a European philosophy of land onto indigenous peoples is not as insidious as it was in the seventeenth or nineteenth century, and even its characteristics have changed with time, but the effects of such an application remain similar. Locke sought the settlement of North America and depicted indigenous peoples as unworthy of private property. Colonial authorities and the early Canadian state sought to dismantle reserve lands through the enfranchisement policy in the *Indian Act*, while treaties, residential schools, and bans on indigenous religious ceremonies acted in support of that policy. Today, definitions of title within Euro-Canadian common law, among other factors that I will identify in the following chapters, continue to restrict and inhibit indigenous control of their traditional lands.

On a fundamental level, the denial of indigenous philosophies of land is an exclusion of indigenous religious perspectives. For communities that conceive of a connection between land, community and sacred power, protection, if not control, of particular tracts of land is integral for the preservation of religion, culture and community. In particular, the ban on religious ceremonies in the first half of the twentieth century is particularly revealing of the damaging effects the political-legal denial of indigenous philosophies of land can have on indigenous religious traditions. The effects are similar today. For example, how can an indigenous community protect sites they consider cosmologically sacred if they cannot prove their "use" of the site? In short, they cannot. This is a subject discussed further in the following chapter.

Chapter 3

The Conditions of Public Religion, Dispossession and First Nations Sacred Sites

3.1 Introduction

With growing social, economic and military expansion into the traditional territories of indigenous peoples, many First Nations communities have entered the public arena in order to seek protection for the natural spaces they hold sacred. The Canadian state expects indigenous communities to enter the public forum in the same manner as all other religious groups in a modern secular liberal state: as one group with one perspective among other groups with equally relevant perspectives. The premise is that religious communities can enter the public sphere in order to provide input on morally relevant public issues rather than to assert control over them. The conditions of modern, liberal democratic public religion create an environment where conflicts are open to negotiation and compromise.

The requirement of indigenous communities to enter the public forum in accordance with these conditions poses a significant problem. The expectation of the community as contributor rather than authority over the space opens the site to the politics of negotiation and compromise with competing public and private interests. Given the intimate connection between land and beliefs for many indigenous communities, First Nations are, in many ways, publically negotiating their religions. The division or desecration of sacred space may compromise or even destroy the religious beliefs of a particular community. Put simply, for some indigenous peoples, sacred space is non-negotiable.

At the same time, the use of land is an important public issue. Forestry, mining, farming and resource development lead to more employment and financial opportunities for all Canadians, indigenous and non-indigenous alike. With First Nations communities controlling less than 0.5 percent of the provincial land mass, the Canadian state controls many of these communities' traditional sacred spaces.[40] This makes these areas susceptible to socio-economic development.

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[40] Robert White-Harvey (1994) communicated this statistic in his analysis of the proportionality of land to indigenous populations in Canada, the United States and Australia. Canada's Aboriginal population consists of 3.5 percent of the population and they control less than 0.5 percent of the provincial land mass (that is, the area where most Aboriginal peoples reside), Australian indigenous peoples made up 1.2 percent of the population and control 10.3 percent of the land mass, and Native Americans comprise of 0.8 percent of the United States population and hold 2.8 percent of the land (excluding Alaska and Hawaii) (588).

I argue that the conditions to which religion must adhere in order to enter the public sphere successfully are potentially devastating to First Nations religions. Those communities that seek the protection of their sacred spaces through the Canadian judiciary do so at the jeopardy of their right to freedom of religion. These conditions of compromise may violate some indigenous peoples' right to freedom of conscience and religion guaranteed under section 2(a) of the Canadian Charter of Rights and Freedoms. Complicating the potential effects of such a violation is the fact that the deprivatization of the religions of First Nations communities is often non-voluntary, a defensive response to state-sanctioned encroachment.

I begin this chapter with an examination of secularization as a historical process that includes differentiation and privatization. In particular, I explore what José Casanova (1994) calls the "conditions of public religion," and how these broad historical processes manifested themselves in the Canadian state. I then turn to the subject of dispossession by using J.R. Miller's work (2009) to discuss treaty making in Canada. After establishing the two pervasive historical contexts of secularization and dispossession, I examine how First Nations communities have found relatively little success protecting their sacred sites through Canada's courts. Finally, I discuss case study examples demonstrating that the process of forced deprivatization encountered by First Nations seeking the protection of their sacred spaces threatens indigenous religious traditions.

3.2 Secularization and the Conditions of Public Religion

Traditionally, secularization refers to the broad historical socio-structural processes of the differentiation, decline, and privatization of religion. Differentiation is the process by which secular spheres such as politics, economics, and science separate from the religious sphere. Decline refers to the diminished and diminishing significance of religious beliefs, practices, and institutions. Privatization refers to the confinement of religion to its own sphere apart from the other "spheres," such as economy and state. Until the mid-twentieth century, scholars largely accepted secularization theory despite the fact that academia had offered little empirical evidence to support its fundamental claims. Even among the fathers of the sociology of religion (i.e., Max Weber and Émile Durkheim), the undisputed assumption was that religion would decline and disappear as the world became more modernized (Casanova 1994).

It was not until the 1960s when secularization began to receive critical attention from scholars. This involved distinguishing between what David Martin (2005, 17) calls the "viable core" and "doubtful peripheries" of secularization theory. More specifically, this critical analysis involved

distinguishing between the empirical evidence and anticipated outcomes of secularization (Casanova 1994). Thomas Luckmann (1967) was among the first to address critically the validity of the theory by challenging the notion of the decline of religious mentalities. Luckmann writes that secularization "in its early phases was not a process in which traditional sacred values simply faded away. It was a process in which autonomous institutional 'ideologies' replaced, within their own domain, an overarching and transcendent universe of norms" (101). In response to the evident growth and expansion of religion following World War II, scholars called the religious decline theory into serious question. The subsequent emergence of overtly public forms of religion in the 1980s such as the Islamic Revolution and Christian fundamentalism further weakened secularization theory by calling privatization into question (Casanova 1994).[41]

Despite the fact that one can empirically dismiss the classical theory of secularization, scholars such as Bryan Wilson (1985) and Karel Dobbelaere (1981, 2002) continue to assert the usefulness of the paradigm. Others such as David Martin (1978, 2005), Mark Chaves (1994), and Steve Bruce (2002) have sought to revise the theory in response to the criticisms that have led so many to abandon it.[42]

Sociologist José Casanova offers the most comprehensive revision of secularization theory in his seminal work *Public Religions in the Modern World* (1994). According to Casanova, differentiation remains the central defensible core of secularization theory. Even critics of the theory (e.g., Stark and Finke 2000), have accepted differentiation as a fixture of the modern (western) world. Along with Luckmann, Casanova dismisses religious decline as an empirically unsupportable theory. Where Casanova distinguishes himself from other theorists is with his revision of the privatization thesis. He draws a connection between privatization and differentiation by identifying certain conditions of public religion that allow religions to undergo a process of deprivatization (i.e. to re-enter the public sphere to some degree). Secularization theory continues to be a relevant and important theory because the conditions of modern public religion directly relate to the historical processes of differentiation that dictate contemporary spatial structuring. Religious communities and their beliefs can enter public

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[41] Most notably, Peter Berger (1999) criticizes the secularization theory on which he based his foundational work *The Sacred Canopy* (1967).

[42] In particular, proponents of secularization must address the evident discontinuities between secularization in Europe and the United States. For example, Martin (1978) addressed the historical contingencies that lead to different manifestations of secularization in different countries. Chaves (1994) deemphasizes the problematic aspects of traditional secularization theory and instead focuses more exclusively on differentiation. Bruce (2002) shifts the focus from irreligion to indifference and emphasizes the decline of pervasive worldviews.

arenas (such as politics and economics) but they must do so in accordance with certain conditions if they wish to find any success. In order to understand why these conditions exist and why they are required, it is important to chart the historical processes of differentiation.

Casanova identifies four historical developments that collectively contributed to the emancipation of the secular spheres from the control of the Church, which, in other words, contribute to the process of differentiation. These instigators of differentiation are: (1) the Protestant Reformation, (2) the rise of the modern state, (3) the onset of modern capitalism, and (4) the scientific revolution. Religious diversity, modern state policies of religious toleration, a growing interest in the economy as an end in itself and the discovery of new epistemological avenues of inquiry raised a multitude of different and sometimes competing worldviews to an equal place in the secular sphere. Religion, as one of these perspectives, became its own specialized sphere distinct from that of economy and state (Casanova 1994).

Despite this spatial restructuring, Casanova contends that the theory of privatization becomes problematic when one understands it as a normative theory of how religion "ought to behave in the modern world" (1994, 38). The privatization of religion is an integral facet of Western modernity. This is evident in the constitutional protection of the right to religion and conscience, which infers a right to freedom from both government and ecclesiastical control, and in the processes of differentiation that have constructed a "private sphere" separate from that of economy, science, and state. In the modern world, this private sphere has gradually come to house religion, however, it is optional that religion remains relegated there.

Deprivatization refers to "the process whereby a religion abandons its assigned place in the private sphere and enters the undifferentiated public sphere of civil society to take part in the ongoing process of contestation, discursive legitimation, and redrawing of the boundaries" (Casanova 1994, 65–66). Casanova addresses the important but limited role religions can play in the modern world. He writes:

> In modern differentiated societies, it is both unlikely and undesirable
> that religion should again play the role of systemic normative
> integration. But by crossing boundaries, by raising questions publicly
> about the autonomous pretensions of the differentiated spheres to
> function without regard to moral norms or human considerations,
> public religions may help to mobilize people against such
> pretensions, they may contribute to a redrawing of the boundaries,

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or, at the very least, they may force or contribute to a public debate
about such issues (1994, 43).

Religion can enter the public arena but cannot exert any authority over it. Religious communities must meet certain conditions in order to facilitate religion's entry into the public sphere. First, religious communities must accept their position as an equal participant as they engage with others in the public sphere. Second, they must recognize the legitimacy and autonomy of the State. This includes respecting others' freedom of conscience and right to privacy. Finally, they must engage in a reasonable and logical discourse and refrain from assertive claims of truth and belief. Once participating parties meet these conditions, conflicts encountered in the public sphere are open to the politics of negotiation and compromise (Casanova 1994).[43]

Religious communities cannot enter the public sphere without adhering to these conditions if they hope to achieve any success. This means that these communities will have to accept their private location in the modern world and abandon fundamentalism. Casanova explains the implications of this discursive model of public engagement.

The logic of open public discourse implies that modern societies,
while protecting the free exercise of fundamentalism in the private
sphere, procedurally cannot tolerate fundamentalism in the public
sphere. Fundamentalism has to validate its claims through public
argument. This presents fundamentalists with a stark choice. Those
who accept the rules of engagement in the public sphere and begin to
argue with their neighbors will have to abandon their
fundamentalism, at least procedurally. Their claims that their
normative wares are the only genuine ones or are more valuable than
those of their denominational competitors will be exposed to open
appraisal, to the typical plausibility tests, and to the bargaining
adjustments regnant in an open pluralist market of ideas … Those
who prefer not to compromise their ideas or to expose their
fundamentals to public [discursive] validation and to a probable
"plausibility crisis," will most likely abandon the public square and

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[43] This is what Casanova (1994, 166) refers to as the "discursive model of the public sphere."

return to their isolated hamlets, where they can protect the worth of

their sectarian wares uncontested … (1994, 166).

In short, religions who wish to enter the public arena to debate issues from their specialized position in the private sphere must do so in conformity with the conditions resulting from the process of differentiation.

Casanova's theory is not without its critics. Talal Asad (2003, 2006) rejects the potential of a particular religion to assume control through deprivatization, and questions the perceived neutrality of the public sphere. Asad writes, "If the legitimate role for deprivatized religion is carried out effectively … the allegedly viable part of the secularization thesis … [is] undermined" (2003, 182). Secularization is not simply a mask for Christianity. Asad's point is that certain religions who have adapted to the new *type* of religion that accompany secularization may be able to manipulate the public sphere in a way that renders the differentiation thesis unsupportable. Casanova (2006) responds by asserting that secularization is a useful analytical category for understanding the "transformation of modern European societies" and "the historical transformation of all world religions under conditions of modern structural differentiation" (19). He continues, "All world religions are challenged to respond to the global expansion of modernity by reformulating their traditions in an attempt to fashion their own versions of modernity" (29). Therefore, if religion is to successfully engage the public sphere it must meet the required conditions of public religion. In turn, all religions must project the universalized components of freedom of religion and conscience, which they legitimate through teaching and doctrine.[44] For Casanova, deprivatization confirms rather than dismisses differentiation and privatization.

With respect to the neutrality of the public sphere, Asad criticizes Casanova for not addressing how the religious and secular spheres interconnect. Although Casanova contends that his view of the public sphere is fluid and not as fixed as Asad makes it out to be, he does not fully address Asad's criticism that "the public sphere is *necessarily* (not just contingently) articulated by power … The dependence of some on the goodwill of others" (2003, 184). Instead, Casanova (2006) re-asserts that the public sphere is a "discursive or agonic space" where issues of "power and the power to set the

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[44] Casanova (2006) notes, not all religions must internally restructure to conform to the requirements of secularization. Religions that do not have a "high tension with the world" or ecclesiastical organizations do not undergo this internal process. "But," as Casanova writes, "How religions … respond to the imposition of the new global worldly regime of Western modernity becomes a very relevant question" (20).

terms of the debate" can be negotiated (14). Asad (2006) reminds Casanova that public spheres are not inherently neutral spaces in which such discourses take place. The legal apparatus of the state is responsible for deciding what falls under the protection of religious freedom and where religion ought to be properly located in modern societies. Asad maintains that the right to speak is contingent upon being heard. An uneven balance of power in the public sphere may privilege some groups over others.

In 2008, Casanova revisited *Public Religions*. In the chapter, he admits that his theory had a number of shortcomings including its "Western-centrism" (102). He explains that while we must acknowledge the Christian roots of "the secular" in modern Western countries, "the secular" may manifest in non-European communities, but this does not mean that European forms of modernity *act upon* them. He writes:

> All traditions and civilizations are radically transformed in the
> process of modernization, but they also have the possibility of
> shaping in particular ways the institutionalization of modern
> "religious" and "secular" traits. Traditions are forced to respond and
> adjust to modern conditions, but in the process of reformulating their
> traditions for modern contexts, they also help to shape the particular
> forms of "religious" and "secular" modernity (106).

Casanova appropriately reiterates that it is important to note the origins of specific manifestations of secularization, but the subject of indigenous peoples emerges only in his discussion of global and transnational communities and not in, I think, the more appropriate discussion of the development of a functionally differentiated society. He writes, the call for the protection of indigenous cultural rights "could easily be turned into a general principle of the reciprocal rights and duties of all peoples of the world to respect each other's traditions and cultures, constituting the basis of what could be called an emerging global denominationalism" (2008, 117). If religion is an intellectual, private endeavor, then this may be an ideal sufficient to foster religious freedom. However, as I will demonstrate below, the fact that indigenous peoples have had little say in the differentiation of Canadian society means that they have not been able to participate in defining the "religious" and "secular." In addition, conceptualizing religion as an intellectual endeavor, disconnected from physical spaces—a characterization of indigenous religions made by the B.C. Supreme Court and discussed below—means that a broadly accepted facet of indigenous religions may not be compatible in liberal democratic Canada. Despite Casanova's failure to address, what Asad (1993, 11) calls "the

"subsuming act" of mobility, his discussion of indigenous peoples as a global community—if the state were to ever recognize them as such—provides an important note regarding the emergence of multiple modernities. He writes, "It is time to make room for more complex, nuanced, and reflexive categories that will help us to understand better the already-emerging global system of multiple modernities" (2008, 119). In other words, Euro-Canadian modernities are not the only modernities present within Canada. These modernities and coinciding conceptions of "religious" and "secular" must be recognized to foster diversity and fundamental principles of liberal democracy.

To summarize, structural differentiation raised a variety of religious and non-religious worldviews to a legitimate position in the modern world. Ultimate authority in the public sphere rests in the state, and it has relegated religion to its own specialized space in the private sphere. If religions hope to affect matters of public interest, they must do so in accordance with conditions of compromise, negotiation and discursive legitimation. Asad's challenges point to two important questions regarding deprivatization important to current debates regarding the protection of First Nations sacred sites in Canada: what *type* of religion is allowed into the public sphere and who holds the *power* to make decisions regarding the exercise of religion in the public arena?

Lori Beaman (2006) argues that a pervasive Christian hegemony excludes First Nations religious traditions from protection under the law. While this may be true in the sense that a Christian hegemony has dictated the modern location of religion, the state acknowledges and accepts indigenous religions within the public sphere. For this reason, placing the blame on Canada's Christian heritage is too simplistic. The problem lies in the intimate connection between First Nations religion and physical space, the relatively little control First Nations communities have over traditional lands, and the conditions of public religion characteristic of modern secular states. The reality of differentiation forces First Nations to conform to a new publically accepted and regulated *type* of religion in order to maintain some semblance of traditional religions.

3.3 Differentiation and Religious Freedom in Canada

Secularization theory provides a theoretical foundation for understanding the differentiation of modern societies and the privatization of religion. However, as demonstrated by contemporary scholars of secularization theory (e.g., Martin 1978), secularization is altered by specific historical contingencies. Martin (2000) argues that secularization in Canada developed along a variety of different paths due to the "two, or possibly three," founding cultures of the nation (24).

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The close connection between Church and state in Canadian history is not a new observation. Of particular note is how, in the century prior to Confederation, some degree of acceptance and tolerance characterized English Protestant and French Roman Catholic relations. Following the defeat of the French in 1775, the English (i.e., Anglicans, Presbyterians, and, later, Methodists) rulers established exceptions for the French colony allowing Roman Catholics to serve in the government. Continuing tensions between mainstream religious communities would lead to further accommodations regarding separate schooling in the colonies (Seljak et al. 2011). This early relationship laid the foundations for negotiation and compromise among religious communities in the public sphere.

The few years prior to Confederation, and, arguably, the first century of the Dominion of Canada, indicate that the state only accepted and tolerated mainstream Christian communities. However, early economic relationships with indigenous communities demonstrate that the state was willing to put religion aside for the sake of the growing colonial economy. J.R. Miller (2009) demonstrates that indigenous peoples and state officials participated in traditional indigenous ceremonies to commence early land negotiations. As early as the seventeenth century, prospects for economic prosperity brought with them an acceptance of religious pluralism outside of Christianity in the public arena.

In English-speaking Canada, debates regarding the relationship between Church and state were beginning as early as the mid-eighteenth century. The Clear Grit party (later to become the Liberal Party of Canada) was particularly concerned with the state-sanctioned financial support received by churches. They were also concerned with state-sponsored religious education and the one-seventh of Crown lands set aside for the *de facto* established Anglican Church in Canada West (Ontario). In 1854, despite opposition from French colonists in Canada East who felt religion was under attack, the colonial government redistributed the so-called clergy reserves. Historian John Moir (2002) argues that the *Clergy Reserve Act* (1854) sought to "remove all semblance of connection between Church and State" (17). With the liquidation of the clergy reserves died any possibility that Canadian society would be united by a single church. After Confederation, the process of differentiation accelerated, especially with the growth of the state and the market society, which created powerful social institutions that could compete with the churches. Moreover, this growth created spheres of activity (political society and economic society) in which Christianity played only a minor role (Seljak et al. 2011; Miller 2009).

In Quebec, Roman Catholicism remained an important facet of public and social institutions until the 1960s. The Second Vatican Council (1962–65) dramatically altered the Catholic relationship with modern states. The ultramontane emphasis on the Church as the ultimate authority in the world

weakened with the acknowledgement of the temporal authority of modern liberal states and the universal acceptance of religious freedom.[45] Martin (2000) argues that as key distinctions separating Catholics in Quebec from others in Canada deteriorated, other markers of distinction also began to collapse and a differentiated Quebec emerged.

The unofficial acceptance of indigenous religious traditions from early European settlers quickly changed as their political-economic significance declined. Although a level of differentiation seems to have taken place by the time of Confederation, the experience of indigenous communities shows that the close connection between Church and state did not subside until well after the Second World War. As discussed in the previous chapter, the state placed churches in charge of mandatory, federally funded residential schools, and served as the gatekeepers to Euro-Canadian social and political life. Additionally, the state banned indigenous religious practices for over half of a century.

Following World War II, Canada, like many countries in the world, adopted fundamental human rights that enabled differentiation and the privatization of religion (Bader 2007).[46] In 1960, Section 1 of the Canadian *Bill of Rights* declared that "there have existed and shall continue to exist without discrimination by reason of race, national origin, colour, religion or sex" certain "human rights and fundamental freedoms." These rights and freedoms included equality under the law and, under subsection 'c,' "the freedom of religion." In 1982, the *Charter of Rights and Freedoms* embedded these and many other freedoms within the Canadian constitution. Section 15(1) reads, "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Section 2(a) of the *Charter* guarantees the "freedom of conscience and religion."

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[45] In his address following the release of *Dignitatis Humanae* (1965), a document calling for freedom of religion, Paul VI said, "And what is it that the Church asks of you, after almost two thousand years of all manner of vicissitudes in her relation with you, the powers of earth – what is it that she asks of you today? In one of the major texts of the Council she has told you what it is. She asks of you nothing but freedom – freedom to believe and preach her faith, freedom to love God and to serve Him, freedom to live and to bring to men her message of life" (Murray 1993, 212).

[46] Veit Bader, in *Secularism or Democracy?* (2007), argues that rigid secularism as a political doctrine is illiberal because it suppresses religion from the public arena. Bader contends that secularism is an unnecessary doctrine in modern states because the widespread adoption of liberal principles of equality and fundamental rights (including the right to religious freedom) has established differentiation and a foundational guarantee of religious freedom. Bader does not address the general processes of secularization and deprivatization that have been addressed in this chapter, but his arguments regarding differentiation in modern liberal states speaks to the broader argument of this section that Canada is in fact a secularized nation.

The fact that Canada's *Charter* does not include a clear "establishment clause" similar to that found in the First Amendment to the United States Constitution, has led some to challenge the existence of a Church-state division in Canada or the ability of the state to guarantee separation (e.g., Seljak 2008; Sharpe 2009). Jeremy Patrick (2006), in "Church, State, and Charter: Canada's Hidden Establishment Clause," argues that state-neutrality and secularization is not only supported textually by Section 15 and Section 2(a) of the *Charter* but that Canadian courts have adopted and supported a hidden American-style separation of Church and State since 1982. Both superior and lower courts have continually reiterated this fact. Patrick refers to a number of examples including *Reed v. Canada* (1989) where the court wrote that "Canada is a secular state with freedom of religion;" *MARL v. Manitoba (Ministry of Education)* (1992) where the court established that to "prefer one religion over another . . . contravenes the provisions of the Charter relating to freedom of religion;" *Rosenberg v. Outremont* (2001) where the court wrote that the *Charter* "would certainly prevent any instrument of the State from establishing an official religion or discriminating against a particular religion;" *Hall v. Powers* (2002) were the Court explicitly stated that the "separation of church and state is a fundamental principle of our Canadian democracy and our constitutional law;" and in the Supreme Court in *Congregation des temoins de Jehovah v. Lafontaine* (2004), it was declared that it "is no longer the state's place to give active support to any one particular religion . . . The state must respect a variety of faiths whose values are not always easily reconciled" (2006, 45–**4**6).

The implied American-style establishment clause has provided support for the further privatization of Christianity and, in particular, the differentiation of religion from the state and from the economy. In *R v. Big M Drug Mart* (1985), the Supreme Court determined that the laws prohibiting businesses from operating on Sundays were unconstitutional. A portion of the decision reads:

> The essence of the concept of freedom of religion is the right to
> entertain such religious beliefs as a person chooses, the right to
> declare religious beliefs openly and without fear of hindrance or
> reprisal, and the right to manifest religious belief by worship and
> practice or by teaching and dissemination...
>
> Freedom in a broad sense embraces both the absence of coercion
> and constraint, and the right to manifest beliefs and practices ...
> Freedom means that, subject to certain necessary limitations, no one

is to be forced to act in a way contrary to his beliefs or his conscience...

> To the extent that it binds all to a sectarian Christian ideal, the *Lord's Day Act* works a form of coercion inimical to the spirit of the *Charter* and the dignity of all non-Christians. In proclaiming the standards of the Christian faith, the *Act* creates a climate hostile to, and gives the appearance of discrimination against, non-Christian Canadians. It takes religious values rooted in Christian morality and, using the force of the state, translates them into a positive law binding on believers and non-believers alike. The theological content of the legislation remains as a subtle and constant reminder to religious minorities within the country of their differences with, and alienation from, the dominant religious culture (par. 94–97).

These types of restrictions limiting the control of Christian religious communities in the public sphere are also evident in restrictions of religious education in public schools (*Canadian Civil Liberties Association v. Ontario* 1990) and legislation on prayers at city council meetings (*Freitag v. Penetanguishene* 1997). The decisions made by the Supreme Court emancipate, to some degree, political and economic spheres from Christian hegemony and provide equality under the law for minority religious communities.

However, freedom of religion is not absolute. In *R. v. Jones* (1986), the Supreme Court affirmed that any right or freedom guaranteed under the *Charter* must be contextualized by the limitations outlined in section 1, which establishes that such freedoms are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (par. 23). In the *Big M* decision, the court defined "freedom" as follows:

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. ... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain

from acting on pain of sanction, coercion includes indirect forms of
control which determine or limit alternative courses of conduct
available to others (1985, par. 336).

The importance of section 1 is that it prevents any religious community from utilizing the protections guaranteed in section 2 without first justifying those claims through democratic engagement. Courts cannot construct or uphold decisions that privilege one particular community nor can decisions be overturned based on *any* infringement of religious freedom. A degree of argumentation and reasoning must take place in the public sphere in order to determine section 2(a) violations.

The state does not completely exclude religion from public discussions, especially with regard to subjects that are important for religious freedom. While non-religious justifications are required for decisions and laws, religious claimants are required to present the public order with pertinent information regarding their religion so that the court may accurately assess any violations of religious freedom. *Syndicat Northcrest v. Amselem* (2004) asserted that in order for one to claim a violation of their religious freedom:

He or she [must have] a practice or belief, having a nexus with
religion, which calls for a particular line of conduct, either by being
objectively or subjectively obligatory or customary, or by, in general,
subjectively engendering a personal connection with the divine or
with the subject or object of an individual's spiritual faith,
irrespective of whether a particular practice or belief is required by
official religious dogma or is in conformity with the position of
religious officials; and (2) he or she is sincere in his or her belief
(par. 56).

Sections 1, 2 and 15 of the *Charter* along with landmark court decisions on the subject of religious freedom in Canada, indicate that economy and state are separate from religious authority. Religion is located in the private sphere and deprivatization is a structural possibility in Canadian jurisprudence. In present-day Canada, no religious community can enter the public sphere nor influence the boundaries of that sphere without appealing to non-religious reasoning or claiming a violation of religious freedom. Either way, religions must engage, to some degree, in the discursive processes that

characterize secular liberal democratic states. This contributes to the requirements of a particular *type* of religion.

3.4 Dispossession and Socio-Economic Expansion

In the previous chapter, I briefly discussed treaties as they related to a perpetuated agenda that synonymously tied farming with the civilization of indigenous communities. In the present section, I return to the territorial treaties characteristic of contracts beginning in the mid-nineteenth century. The federal government designed many of these treaties for the purposes of dispossession and the exploitation of the land. The acquisition of the land that comprises modern day Canada resulted from the socio-economic drive of the Canadian government. Meanwhile, the government relegated First Nations families of five to a one square-mile plot designated by the federal government. These disparate and unequal outcomes were the result of the urgent need of First Nations communities to address declining bison herds, the decline of the fur trade, growing settler populations and expanding resource development.[47]

   The treaties of commerce and alliance that characterized early relations between indigenous communities and early European settlers in the first two centuries of contact were not unlike the treaties in which First Nations communities had with each other since before the arrival of Europeans. Due to the specific geographical location, expertise and needs of North American nations, trade was essential for sustaining life and culture, and peace was essential for the maintenance of trade. Once the state and indigenous communities established these relationships (best understood as kinship), they were maintained through ceremonies that involved pipe smoking, gift giving and feasts. Treaty signatories typically repeated these ceremonies every season to re-establish the compact (Miller 2009).

   Early North American traders recognized and accepted these contractual customs among First Nations communities. Ten years after the creation of the Hudson's Bay Company (HBC), its directors wrote to its representative, John Nixon, in Rupert's Land on May 29, 1680:

> There is another thing, if it may be done, that wee judge would be
> much for the interest & safety of the Company. That is, In the

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[47] This issue occurred much later in the North. It was not until following World War II that the decline of the White Fox devastated the local economy in the North. Schools began to be erected in the 1940s and control was given to Christian missionaries (Dickason 2009).

severall [*sic*] places where you are or shall settle, you contrive to
make compact [with] The Captns. Or chiefs of the respective Rivers
& places, whereby it might be understood by them that you had
purchased both the lands & rivers of them, and that they had
transferred the absolute propriety to you, or at least the only
freedome of trade, And that you should cause them to do some act
[which] By the Religion or Custome of their Country should be
thought most sacred & obliging to them for the confirmation of such
Agreements (quoted in Miller 2009, 12).

Friendship and cohabitation characterized these early commercial compacts. HBC representatives
would participate in ritual smoking and gift giving with First Nations communities in the spirit of the
pre-contact North American compacts. French, English and Dutch settlers would adopt this kinship
model in the northeast in the early period of colonization. These settlers understood quite quickly, as
First Nations communities had always known, that peace and trade were synonymous (Miller 2009).

Following economic and peace treaties, the *Royal Proclamation of 1763* marked the second phase
in treaty making in Canada: territorial treaties. To avoid mistreating First Nations communities and
their lands, the British government made provisions in the *Royal Proclamation* concerning the
sovereignty of the Crown, the sale and purchase of indigenous territories, and the rights of indigenous
peoples to those territories. The *Royal Proclamation* established the framework for treaty making in
Canada that remains today: treaties would have to be between the Crown and First Nations (and not
companies), negotiations would have to be public, and the state had to inform other First Nations
communities of the proceedings (Miller 2009).

Large territorial treaties began to emerge following the influx of British Loyalists after the
American Revolution (1775–1783). One of the most notable characteristics of these early settlement
treaties was that the state acquired land along waterfronts "for the simple reason that rivers and lakes
were the highways on which people travelled in these regions" (Miller 2009, 82). Some communities
realized that the acquisition of waterfront property and assurances under the *Royal Proclamation* of
fishing rights were not sufficient to protect the fishing rights of indigenous communities. In the Head
of the Lake Treaty (1805), the Mississauga demanded and received access to the waterfront. Many of
the early settlement treaties continued the protocols of pre-contact compacts (Miller 2009).

As discussed in the previous chapter, the viewpoint that indigenous peoples were uncivilized and uneducated primitive peoples began to dictate the language, and eventually the content, of nineteenth century territorial treaties. During negotiations with the Mississauga of "the River Moira, Smith's Creek" at Port Hope on 24 July 1811, Crown negotiator James Givins (c. 1759–1846) proclaimed the following:

> Children – I am happy to see you and I return thanks to the Great
> Spirit, that has been pleased to enable us to meet at this place in good
> health. Children – I am sent by Your Father the Governor to make an
> agreement with you for the purchase of a small piece of land ...
> Children – As your women and children must be hungry, I have
> brought some of Your Great Father's Bread and milk, and some
> ammunition for your young men, which I will give you before we
> hear this (quoted in Miller 2009, 89).

The response from the Mississauga was one of disdain at the settlement of Europeans upon their land. They accepted the treaty but sought the protection of fertile fields and sought to stop logging companies from taking large amounts of timber from their lands. As J.R. Miller (2009) notes, lands and resources were becoming a serious problem in the nineteenth century.

Following the War of 1812, peace between the United States and Britain resulted in a significant rise in the number of immigrants settling in British North America. In 1812 in Upper Canada, indigenous populations had dwindled to ten percent of the total population. Between 1821 and 1851, the number of British immigrants in North America tripled, further decreasing the indigenous presence and increasing the settler need for land. By 1827, the state had acquired nearly all the arable land in southern Ontario for European settlement. Although Crown negotiations continued to maintain the protocols of First Nations treaty making, the tone of the treaties changed following the war and influx of immigrants. Miller (2009) explains:

> Now that Aboriginal people were not obviously useful to the non-
> Native population as military allies or trading partners, they
> increasingly took on the role of obstacles to settler ambitions for
> economic development. In particular, a continuing migratory First
> Nations population that moved about the country to harvest the

resources of the land at various points during the cycle of the seasons
was not compatible with the emergence of a sedentary agricultural-
commercial society. Put most simply, migratory hunter-gatherers and
fields with crops could not coexist very easily ... From the settler
perspective, Indians were ceasing to be desirable partners and
assuming the role of barriers to the winning of wealth (102).

Many First Nations communities understood that their relationship with the Crown was changing and either sought the protection of their fishing and hunting rights or lamented the irreversible effects of colonial expansion on their traditional ways of life. In the 1830s, the civilization policy of the British Empire began to take form and Christianization and civilization took precedent over participating in indigenous cultural traditions of treaty making. In 1836, Sir Francis Bond Head secured the last remaining arable land in southern Ontario from the Saugeen by promoting civilization and isolation, relocating the Saugeen away from the desired land (Miller 2009, 106).

Treaty making ceased for a decade until an interest in mining minerals in the north arose in the 1840s. In 1850, William B. Robinson (1797–1873) began acquiring land for the purposes of mining, after local indigenous communities reminded the Crown of their obligation to negotiate. Even though Robinson assured Ojibwa leaders that mining communities would not disrupt hunting and fishing as it had in the south, many communities were unconvinced and entered treaties as a form of economic security in the changing times. In the early 1860s, indigenous communities had to remind the government of its obligations as indigenous communities on Manitoulin Island voiced their concerns regarding the granting of licences to fishing companies to fish the waters surrounding the island. When approached about a treaty, an Odawa chief commented at a council meeting at Manitowaning on 5 October 1861:

The Great Spirit gave our forefathers land to live upon and our
forefathers wished us to keep it. The land upon which we now are is
our own, and we intend to keep it. The whites should not come and
take our land from us, they ought to have stayed on the other side of
the salt water to work the land there. The Great Spirit would be
angry with us, if we parted with our land, and we don't want to make
Him angry (quoted in Miller 2009, 120).

An unnamed warrior said, "This island, of which I speak, I consider my body; I don't want one of my legs or arms to be taken from me" (quoted in Miller 2009, 121).[48] Although the government guaranteed hunting and fishing rights for indigenous communities throughout the Province of Canada, the state effectively pushed them aside in favour of European economic development.

As Canada entered Confederation in 1867 and acquired Rupert's Land from the Hudson's Bay Company in 1870, the government began to secure the land of the many Plains and Woodlands indigenous communities. Their title to the land west of the Province of Ontario was officially recognized. The construction of a railway to the Pacific Ocean and the need to establish agricultural communities on the prairies made negotiations with First Nations imperative. Unlike the communities in southern Ontario which were sceptical of the often-violated treaties with Europeans, indigenous communities in the West were accustomed to dealing with fur traders who had upheld the protocols characteristic of First Nations treaty-making. Given the significant decline in buffalo herds by the late-eighteenth century, indigenous communities were both willing to accept and in need of transitional support (Miller 2009).

In the southern numbered treaties from 1871 to 1877, the government granted indigenous communities far smaller portions of land than initially anticipated. For example, in Treaty 1, indigenous communities asked for nearly two-thirds of Manitoba and the government allotted 160 acres to each family of five. In return, the state provided First Nations communities with compensation, schools, continued hunting rights, and promises of instruction in farming. Miller (2009) notes that the "written text silently passed over a lengthy, sometimes acerbic, argument over the extent of reserve lands" (164). In Treaty 3 (1873), the government increased reserve lands to 640 acres (one square mile) per family of five and the government-redressed shortcomings of the first two numbered treaties through language that was more explicit. Treaty 3 provided written assurances of hunting rights and the supply of farming equipment (unlike in the first two treaties). There were some restrictions identified. The treaty reads:

> Her Majesty further agrees with Her said Indians that they, the said
> Indians, shall have right to pursue their avocations of hunting and
> fishing throughout the tract surrendered as hereinbefore described,
> subject to such regulations as may from time to time be made by Her

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[48] In 1862, communities on the west side of the island agreed to terms but those on the east side have never signed a treaty (Miller 2009).

Government of Her Dominion of Canada, and saving and excepting

such tracts as may, from time to time, be required or taken up for

settlement, mining, lumbering or other purposes by Her said

Government of the Dominion of Canada, or by any of the subjects

thereof duly authorized therefor [*sic*] by the said Government (1873).

These restrictions on hunting and the allotment of one square mile to each family of five would remain a constant throughout the first seven numbered treaties.[49]

What Crown negotiators seemed unaware of at the time of their treaty making was the religious nature of these compacts for First Nations. Miller (2009) notes that Treaty 6 involved the ceremonial protocols of indigenous treaty making including the smoking of the pipe which "effectively made [the Great Spirit] party to the proceedings." Miller continues, the "terms that were then negotiated thus become a covenant – an agreement that involved First Nations, the Crown, and the deity. Although the Euro-Canadians did not understand the full significance of what transpired," representatives of the Crown "at least knew the pipe ceremony … was extremely important" (179). Euro-Canadians were entering into socio-economic contracts with First Nations and, simultaneously, First Nations communities believed they were entering into a spiritual covenant.

The paternalism characteristic of the recent consolidation of official state policies towards indigenous peoples also characterized the remaining treaties before treaty making virtually stopped from 1923 to 1975. Tensions grew as the indigenous participants of the southern treaties realized that the government was not upholding its end of the compacts. For example, Chief Ahtahkakoop voiced his concern that reserves were not located where he wished them to be. Despite these violations, northern communities sought treaties based on the evolving crises regarding the bison and the fur trade. The government was reluctant to negotiate with those indigenous communities until it was understood that acquiring their land would contribute to the economic development of the north-west and the prosperity of Canada. In particular, the pro-business thrust of Sir Wilfrid Laurier (1841–1919) and the Liberal government supported a wider infrastructure in pursuit of Canada's abundant natural resources. These economic aspirations dictated the placement of reserves. For example, in Treaty 9 (1905) in northern Ontario, the government did not grant reserve land near rivers that had the potential to produce hydroelectric power. These treaties continued to preserve hunting and fishing

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[49] Treaty 5 maintained a reserve distribution of 160 acres for each family of five, and included stipulations for hunting and fishing (1875).

rights in the same manner as earlier numbered treaties. Eventually, the prioritization of non-indigenous economic interests in the land over indigenous concerns characterized the half a century where the government stopped making treaties (Miller 2009).

First Nations across Canada entered into what they believed were spiritual agreements with Euro-Canadians in good faith and, in many ways, out of necessity. Crown negotiators silently dismissed the amount of land they sought, and federal surveyors most often ignored the particular plots of land they desired. With the exception of the arctic and British Columbia, First Nations had, without much choice, relinquished control of their land to the Crown. Despite the spiritual components of early compacts and the religious language of indigenous chiefs, use of the land to hunt and fish were the only rights afforded under these treaties. Well before Confederation, colonial authorities ignored the spiritual importance of the land and the complex indigenous relationship to it. The context of dispossession discussed here is an important factor in the subject of *power* as it relates to the public sphere.

Although a new and lengthy land claims negotiation process would begin in the 1970s, the Crown had already acquired most of the land in the provinces early into the twentieth century.[50] "As of 2001," indigenous rights lawyer Michael Ross notes that "there were 2,666 reserves belonging to 612 bands and covering slightly over 3 million hectares ... Since over 99 percent of the total land is off-reserve, thousands of First Nations sacred sites are located on public and private lands now under the control of others" (2005, 13). Additionally, Ross notes that only "rarely are First Nations lawyers members of the First Nations they represent and First Nations people make up a small portion of the judiciary." He continues, "It is highly improbable, then, that the site sacred to the litigating First Nation will also be sacred to the judge" (22). In this sense, Aboriginal communities will be dependent on the goodwill of the legal apparatus of the state to hear their claim.

3.5 Section 35(1) and First Nations Religious Freedom

Unlike in the United States, there is no specific legislation to protect Aboriginal religious traditions and sacred space in Canada.[51] However, section 2(a) of the *Charter* and section 35(1) of the

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[50] For more information on further land claim negotiations and the unique case of British Columbia, see J.R. Miller *Contract, Compact, Covenant* (2009) and Christopher McKee, *Treaty Talks in British Columbia* (2000).
[51] U.S. attempts include the *American Indian Religious Freedom Act* of 1978, its subsequent amendment of 1994, and Bill Clinton's 1996 Executive Order 13007,

Constitution Act provide some guidelines on how to protect sacred space. Aboriginal peoples occupy a special place within the Canadian state as national minorities with a special status popularly described as "citizens plus" (see Cairns 2000). The "plus" refers to unique group rights outlined in section 35 of the *Constitution Act* (1982). Section 35(1) reaffirms and recognizes existing Aboriginal and treaty rights. Generally speaking, 'Aboriginal rights' traditionally referred to land usage rights but the court has broadly interpreted these rights to include self-government (Dickason 2009). Although much of Canada acquired most of its land from indigenous peoples through treaties, the government guaranteed indigenous peoples access to traditional lands as stipulated in the *Royal Proclamation* and affirmed in *St. Catherine's Milling Company v. The Queen* (1888). The protection of and access to land and the use of resources on Crown lands for traditional ceremonial and food purposes indirectly provides a method by which First Nations communities can protect their off-reserve sacred sites. However, like section 2(a) of the *Charter*, section 35(1) is not absolute. In *R v. Sparrow* (1990), the Supreme Court found that section 35(1) "does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise" (par. 65).

In a case regarding fishing regulations, a Musqueam man claimed that drift net regulations for commercial fishing violated his Aboriginal right to fish for ceremonial and food purposes. The court took the opportunity to outline how an Aboriginal claimant may argue that the state has infringed section 35(1) and, subsequently, how the state may justify such an infringement. In *Sparrow*, it was determined that the "onus of proving a *prima facie* infringement lies on the individual or group challenging the legislation" (par. 70). The court also determined that the Crown has a duty to provide justification for any infringement, and ensure that such infringements are limited and that guidelines are established (especially with respect to "the limited nature of the resource") to address the conflicting interests of others (par. 76). In the process of establishing an infringement, *Sparrow* provided supporting evidence regarding the Musqueam traditional use of the land and the religious significance of salmon for his people.

In *R. v. Van der Peet* (1996), the Court provided additional clarification regarding the nature of Aboriginal rights. The decision reads:

> 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. ... In assessing a claim for the

existence of an aboriginal right, a court must take into account the

perspective of the aboriginal people claiming the right [but] ... that

perspective must be framed in terms cognizable to the Canadian

legal and constitutional structure (par. 46, 49).

In assessing a claim to an aboriginal right a court must first

identify the nature of the right being claimed in order to determine

whether a claim meets the test of being integral to the distinctive

culture of the aboriginal group claiming the right. ... To characterize

an applicant's claim correctly, a court should consider such factors as

the nature of the action which the applicant is claiming was done

pursuant to an aboriginal right, the nature of the governmental

regulation, statute or action being impugned, and the practice,

custom or tradition being relied upon to establish the right. ... The

activities must be considered at a general rather than specific level. ...

They may be the exercise in a modern form of a practice, custom or

tradition that existed prior to contact ... (par. 51, 53–54).

Michael Ross (2005) identifies a couple of reasons why the "integral to a distinctive culture test" is
problematic for First Nations communities. He points to the inherent difficulty of translating
indigenous perspectives into a Euro-Canadian context, and the "level of abstraction
(generality/specificity) at which a court decides to describe a claimed Aboriginal right can determine
whether or not the right passes" the test (16). A more general concern is the very fact that indigenous
cultures are subject to the scrutiny of public discourse. Together *Sparrow* and *Van der Peet* indirectly
require the public disclosure and explanation of indigenous religious beliefs as they relate to land and
resources in order that the court may protect such beliefs. Secrecy, which may be an integral
component of sacred sites, is an extraordinarily difficult ethic to maintain if a group seeks protection
in the public square.[52] Even if the court does recognize that an infringement has occurred and that a

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[52] For example, in the case of *Hupacasath First Nation v. British Columbia (Minister of Forests)*
(2005), entered into evidence was the following claim: "The Hupacasath traditionally visited sacred
sites throughout their traditional territory for spiritual purposes, and continue to do so. The
petitioners' evidence is that their sacred sites are secret, specific to families, and must be secluded

particular action is distinct to an indigenous culture, the infringement can still be justified by the state. In other words, these claims are subject to the politics of accommodation, negotiation and compromise.

In the cases where Aboriginal title is not established (such as in much of British Columbia), the court determined that negotiation and not litigation is the proper means by which title and rights should be defined (Ross 2005).[53] Given the potential length of the comprehensive land claim process (see McKee 2000; Miller 2009), the courts have established processes of dealing with the interim protection of traditional culturally significant spaces. Just as in the case of infringement, the "balance of convenience" test requires very similar requirements of disclosure and compromise.

Michael Ross (2005) explains that one of the two primary means by which First Nations communities seek the protection of their off-reserve sacred sites is through a temporary legal halt to development known as an 'interlocutory injunction.' First Nations in *MacMillan Bloedel Ltd. v. Mullin* (1985) first employed this strategy. Typically, the subject of Aboriginal title and rights satisfies the first question of pursuing an interlocutory injunction: whether the pursuit of the right is a fair one. The second question refers to the "balance of convenience."[54] Citing the nineteenth century orchestrator of the legal action, William Williamson Kerr (1820–1902), Justice Seaton explains how the balance of convenience may favour a claimant:

> A man who seeks the aid of the Court by way of interlocutory
> injunction, must, as a rule, be able to satisfy the Court that its
> interference is necessary to protect him from that species of injury
> which the Court calls irreparable, before the legal right can be
> established upon trial. By the term "irreparable injury" it is not
> meant that there must be no physical possibility of repairing the
> injury; all that is meant is, that the injury would be a material one,

from, and untouched by, other human beings. One particularly important sacred site is Grassy Mountain, which is in the Removed Lands and has never been logged" (par. 12). Although this is not the central argument of the Hupacasath First Nation, as a part of their argument the court scrutinizes it along with other aspects of their claim.

[53] The point was made in *Calder v. Attorney General of British Columbia* (1973 S.C.R. 313), but has been reasserted in the post-*Charter* era in *MacMillan Bloedel Ltd. v. Mullin* (1985, par. 109).

[54] Canadian jurisprudence established the guidelines for an interlocutory injunction long before their application to First Nations land issues. The case cited as precedent is *Wheatley v. Ellis and Hendrickson* [1944] 61 B.C.R. 55.

and one which could not be adequately remedied by damages; and by

the term "the inadequacy of the remedy by damages" is meant that

the remedy by damages is not such a compensation as will in effect,

though not in specie, place the parties in the position in which they

formerly stood (par. 67).[55]

In short, the court weighs the potential injury to either party against each other and it makes a decision based on this test. In this particular case, the court determined that allowing Macmillan Bloedel to log the particular tract of land on Meares Island would be more devastating for the Nuu-Chah-Nulth than it would if logging stopped for a temporary period. Seaton explains that not only must the court take the material and legal repercussions into consideration but the cultural implications as well. Citing *Foster v. Mountford and Rigby Ltd.* (1976), Seaton asserts that "monetary damages cannot alleviate any wrong to the plaintiffs that may be established and perhaps, there can be no greater threat to any of us than a threat to one's family and social structure" (par. 73). Although this case does not directly address religiously significant space, the ruling in favour of the Nuu-Chah-Nulth provides the means by which indigenous communities may protect certain sites.

Justice Seaton, however, stipulated that the decision of the court spoke to the unique circumstances of the case. He explained:

I have also said that to prevent or postpone logging on Meares Island

will not have a significant economic impact. When other areas are

considered, they will be considered in the light of this decision. They

will be seen as an addition to the Meares Island restriction and in

consequence, the balance of convenience may be seen to have shifted

to favour the industry (par. 77).

Michael Ross (2005) charts the early success and ultimate failure of what he calls the 'Meares Island strategy.' The opportunity for the socio-economic concerns of the state to outweigh the religious importance of particular spaces is far too great. Subsequent cases, where indigenous plaintiffs directly communicated the spiritual significance of space to the court, help to demonstrate how indigenous

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[55] For more information on interlocutory injunctions, its history and contemporary applications see Jean-Philippe Groleau (2008) "Interlocutory Injunctions: Revisiting the Three Pronged Test" in *McGill Law Journal* 53, 269–308. Justice Seaton cited W.W. Kerr's *A Treatise on the Law and Practice of Injunctions* (6th ed. 1981, 17–18).

peoples must make their religious traditions public in order to protect certain land and that the court will inevitably subject such land to the politics of compromise with competing economic interests.

Two cases help exemplify these points: *Tlowitsis Nation and Mumtagila Nation v. MacMillan Bloedel Ltd.* (1990) and *Siska Indian Band v. British Columbia* (1999). In both cases the religious significance of the contested space was an important aspect in the arguments of both claimants and, in both cases, the balance of convenience was determined to favour the industry. In the first case, Justice Mackinnon wrote, the "major emphasis by the plaintiffs as to the irreparable harm was directed to this area encompassing holy grounds that have great importance to these Native nations as spiritual grounds. Counsel referred to it an analogous to a Christian church or a Garden of Eden" (1991, 169). Mackinnon dismissed (secular) environmental concerns that accompanied the claim since the logging company had sufficiently investigated the effects of logging on the coastal whale habitat. Left with only the claim to sacred space and a lack of physical evidence to support such a claim, the judge questioned why the sacredness of the site did not appear in preliminary discussions with MacMillan Bloedel or press releases in the period since the site was under contention. Upon dismissing the injunction, he expressed his concern for not only the losses to MacMillan Bloedel but also that "the potential loss of employment of this Province is, in my view, a proper factor to consider in the balancing process." On appeal in the following month (December 1990), the court dismissed the following evidence:

> The applicants filed the affidavit of Daisy Smith in support of their application before the Chambers judge and filed the affidavits of May Smith and Simon Dick in this Court to support the position that the Watershed contained sacred ground which would be damaged if the injunction was not granted. May Smith and Simon Dick deposed that they attended residential Anglican schools many years ago and were punished if they spoke Kwakwala. For this and other reasons they had been afraid in the past to speak out about their religious beliefs and cultures.

> In my opinion, those affidavits do not offer an explanation for the lateness of the applicants' raising a claim that their right to engage in spiritual practices in the Lower Tsitika Valley Watershed was endangered (1991, 96).

The Tlowitsis-Mumtagila's reluctance to enter the space's religious significance into public dialogue greatly affected the outcome of the case. Ross (2005) explains the decision, "If the Tlowitsis-Mumtagila had asserted the valley's sacredness sooner, [the chamber judge] might have found, other things being equal, that it was sacred enough to qualify as sufficiently unique to tilt the balance of convenience" (68). In this sense, deprivatization is mandatory.

In the second case, the Siska band claimed that if logging were to continue in the Siska Valley and Siska Creek area "the Applicants will have lost their aboriginal rights to cedar and to certain sacred spiritual practices forever" (1999, par. 12). The Siska presented affidavits and academic reports regarding the cultural, spiritual and economic importance of the space to the court to support the Siska claim that the contested space was of "exceptional spiritual and cultural significance" (par. 40). In denying the injunction, Justice Sigurdson pointed to many of the same economic reasons stated in the *Tlowitsis-Mumtagila* case and questioned the spiritual and cultural uniqueness of the space to be logged. Ross (2005) explains that due "to its lack of specificity, then, the evidence failed to single out the Siska Valley as unique compared with many other relatively pristine areas in British Columbia" (66). The Siska band made the claim that since the area had not been subject to industry activity, it allowed them the opportunity to continue their spiritual and cultural practices in a natural setting. Sigurdson acknowledged this fact and the importance of the cultural and spiritual ceremonies when he instructed them to conduct them in many of the other pristine places that exist within their traditional territory. The protection of an entire space is difficult to ascertain because the economic concerns of industry and state will inevitably dictate a compromise. In these cases deprivatization and the conditions of discursive legitimation and negotiation are, in a sense, mandatory if a First Nation hopes to protect their sacred sites. This speaks to both the *type* of religion and the subject of *power* that underlies the public arena.

3.6 Section 2(a) and First Nations Religious Freedom

Not many First Nations communities have sought the protection of their sacred site explicitly on the premise that the space holds spiritual significance. Subsequently, the court has never afforded protection to a sacred site based on its sacredness alone (Ross 2005). Although the preferred means of protecting First Nations sacred space is through section 35(1) (injunctions or procedural violations of a fiduciary duty to consult), indigenous communities have brought infringements of section 2(a)

before the court as well.[56] *Kelly Lake Cree First Nation v. Canada* (1998) is a unique case that brings together section 35(1) and section 2(a) claims.

In 1998, the Saulteau First Nation (SFN) and Kelly Lake Cree Nation (KLCN) sought a legal halt to oil drilling operations by Amoco (an American oil and chemical corporation) in a portion of territory that falls under Treaty 8 in northeastern British Columbia. The claim was two-fold: (1) the Crown had not satisfied its fiduciary duty to consult as established in *Sparrow* (1990) and elaborated upon in *Delgamuukw* (1997), and (2) that the drilling operation violated their right to freedom of religion and conscience guaranteed by the *Charter*. The reason why the court rejected both claims relates to the extensive negotiations that took place before the trial and the fairness of the agreement that negotiators reached during the consultation process. The SFN rejection of this compromise and the KLCN's refusal to participate in the discussions did not stop Justice Taylor from ruling in favour of the compromise that the committee reached.

It should be no surprise that the court spent a great deal of time seeking to understand the religious significance of Mount Monteith and Beattie Peaks (more commonly known as the "Twin Sisters"). The claim to a constitutional violation of the SFN and KLCN's right to freedom of religion and conscience rested at the heart of this case. The area holds spiritual significance for four communities: the SFN, KLCN, The West Moberly First Nation and the Halfway River First Nation. Justice Taylor writes:

> The area of the Twin Sisters and its surrounding terrain has been the
> subject of prophesy and mythology amongst aboriginal peoples ... It
> is nevertheless clear on the evidence that this general area
> surrounding the Twin Sisters has a significant spirituality about it to
> First Nations people (par. 17–23).

Turning to the SFN, Taylor explains:

> According to the affidavit evidence of various SFN members and
> elders, this was because of a vision of a prophet-like leader,

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[56] Ross (2005) discusses two strategies by which First Nations communities have sought the protection of their sacred space. The first refers to injunctions (discussed above) and the second refers to procedural fairness regarding the Crown's fiduciary duty to consult. I briefly discussed this earlier when addressing *Sparrow* but, put simply, the Crown has an obligation to consult with First Nations communities where a particular project may affect them.

Kakagoogenis. He led his people from Manitoba to the area known
as "The Mountains That Sit Together" because of visions he had of
this sanctuary and how to provide for his people in times of need
(par. 24).

The KLCN claim the area is of the "utmost spiritual significance" and although the Cree migrated to
the area much like the Saulteau, intermarriage has brought many Deneza descendants into their
community (par. 21). The Deneza (of whom the West Moberly and Halfway River First Nations are
direct descendants) believe that their people "are charged by a prophesy from their leader Matchecha
to be stewards of the two mountains that sit together as a place of spiritual refuge" (par. 22). In many
ways, the site is cosmologically significant for First Nations communities in the area and acts as a sort
of *axis mundi*.

In 1991, Amoco sought a drilling licence for the Twin Sisters area at which point "aboriginal
interests were required to be considered" (par. 35). In 1992, the Treaty 8 Tribal Association
completed an ethno-historical report. The public report outlined the importance of the space to
Deneza, Saulteau and Cree communities and expressed the concerns of elders for any industrial
development of the area. In the following year, interested parties met to discuss the report and they
formed a Co-Management Advisory Committee involving the SFN, West Moberly First Nation,
Halfway River First Nation, the Ministry of Energy and Mines (MEM) and Amoco. The committee
decided at this point that drilling could not commence in the Twin Sisters area without further
discussion. Reports indicated that parties might be discussing the possibility of drilling in a less
contentious area (par. 43). Between 1995 and 1997, negotiations continued between First Nations,
MEM and Amoco. Throughout this period, the SFN were unconvinced that the committee was
adequately addressing their cultural interests.

In 1997, the Advisory Committee identified the Twin Sisters area as one of uniqueness for
Aboriginal history, culture and religion, subsequently forming the Twin Sisters Management
Committee (TSSMC) (par. 63). The Management Committee quickly arrived at a compromise among
the interested parties that they felt would allow all interests to be reasonably satisfied. The report for
the Committee divided the contested area into three zones: a protected space near the peaks of the
mountain and two sub-levels lower on the mountain that allowed for varying degrees of industry
operation (par. 66). The West Moberly and Halfway River First Nations signed the agreement in
October 1997. The SFN did not sign the agreement. Over the course of 1997 and 1998, MEM

attempted to contact SFN regarding the drilling project and the court interpreted the few responses of the SFN as a rejection of the project altogether. The court reported, "The SFN continued to press their fundamentally different approach ... one of adamant resistance to any development" (par. 100).

The KLCN were not involved in the Twin Sisters negotiations for unresolved political reasons stemming from their division from the Kelly Lake First Nation in 1996. Although the Crown did not recognize the state's obligation to consult the KLCN, Taylor asserted that even if there were a duty to consult the community, the fact that the KLCN did not seek to participate in the discussions nullified any existing rights (par. 165). With respect to the SFN, it was clear to the court that consultation on the part of MEM and Amoco had taken place. Taylor notes that "consultation is a two way process" (par. 206). The SFN also contended that the court demonstrated bias by failing to mention the spiritual significance of the site. Taylor quickly dismisses this claim by pointing to the initial court report that opens with a discussion of the spiritual significance of the site and subsequent external reports that addressed many of the same points.

The SFN also claimed that there was an error of fact regarding the size and scope of their sacred space. Taylor quickly dismisses this point as well:

> While the introductory paragraph of the decision refers to the "alpine area of the Twin Sisters", that was in reference to the original application by Amoco. A complete reading of the decision makes it abundantly clear to any right-minded person that [the MEM representative] was alive to the sacredness of a much broader area. In fact, he makes reference ... to the [Advisory Committee] process that was "critical in identifying First Nations interests in the Twin Sisters areas and concerns regarding the well drilling proposal." The decision then ... refers to the TSSMC "development of a plan that recommended protected special management zones where restricted resource development could occur in the Twin Sisters area" (par. 228).

Moreover, Taylor asserted that the SFN's "right to be heard" had been satisfied and that it was apparent that MEM understood the importance and significance of the space. The major issue for

Taylor was not the MEM's duty to consult but rather the SFN and KLCN's willingness to participate.[57]

The only viable claim remaining for both the SFN and KLCN was that the operation violated their section 2(a) right.[58] Taylor remarked, "Assertion of the freedom of religious practice is a discrete issue that relates to all Canadian citizens" (par. 161). After citing the definition of freedom of religion given in *Big M* (1985), Taylor concludes the following:

> Section 2(a) does not protect a concept of stewardship of a place of
> worship under the protection of religious freedom ... Even if I were
> incorrect in that conclusion, the adherence of the decision-makers to
> the ... protected area in fact protects an area for both alpine and sub-
> alpine activities upon which there can be an absolute stewardship
> and within areas I and II a lesser form of stewardship (par. 195).
>
> Additionally ... the provisions taken ... amount to a minimal
> interference with the exercise of religious freedom in terms of the
> sanctity with which the general area is viewed (par. 196).

Taylor concluded his judgement by returning to the issue of religious freedom. He stated:

> The intellectual aspect of a concept of stewardship for times of need
> in refuge is not impugned and while in a perfect world as viewed by
> the SFN, such drilling would never occur, the activity does not deny
> that concept. The provisions of a protected area provide a basis for
> that continued intellectual stewardship that is an aspect of the area's
> spirituality. While geographically constricted, it is not eliminated to

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[57] The SFN also made claims to a violation of rights stemming from Treaty 8. Although Treaty 8 only specifies hunting, fishing and trapping rights to the land, Taylor agreed the Crown had "conducted itself in a manner consistent with the existence of the asserted spiritual or religious rights" (par. 248).
[58] The KLCN were not involved in initial reports regarding the spiritual significance of the site for their community. Taylor was still willing to accept the fact that the KLCN possessed spiritual beliefs intimately connected to the contested area. Taylor writes, "The area of the Twin Sisters is a territorial aspect of the exercise of religious rights and customs even though there is a dearth of evidence of actual physical exercise of the religious customs. The religious rights and customs lie in the prophesy and the intellectual stewardship with which First Nations people view the area of the Twin Sisters" (par. 189).

the extent that there is limitation or coercion of the existence of the
religious rights (par. 251).

Taylor was critical of the unwillingness of the SFN to compromise on the drilling activities in the consultation process. He continued to criticize the SFN and KLCN for making a claim that was not susceptible to compromise and negotiation. Taylor admits that there are geographical limitations but contends that the protected space still allows them to maintain their beliefs and practices. What is implied is that this decision allows for both socio-economic interests and religious concerns to be satisfied. The fact that the SFN clearly believed that the space was non-negotiable was an unacceptable position. The problem, of course, is that a retreat to their 'isolated hamlets' to protect 'the worth of their sectarian wares uncontested' is not an option for First Nations communities. Their "wares" are the subject of debate. Failure to engage in discursive processes in the public could mean the loss of religious spaces and their interconnected beliefs.

3.7 Conclusion

In *Strange Multiplicities* (1995), James Tully argues, "If constitutionalism is approached from the perspective of the struggles of Aboriginal peoples, unnoticed aspects of its historical formation and current limitations can be brought to light" (5). The relationship between religion and land characteristic of many First Nations religious traditions offers a unique challenge for the protection of First Nations cultures under section 35(1) of the Constitution and the broader right to freedom of religion and conscience under section 2(a) of the *Charter*. In other words, the way religion *must* represent itself in the public sphere has been historically crafted in a manner that does not account for indigenous religions. Colonization, dispossession, small disparate populations and under representation contributes to an imbalance of power in matters of land in the public arena. Additionally, secularization defined a new *type* of religion based on the conditions of liberal democratic engagement. These two contexts culminate in a sort of forced deprivatization that provides First Nations communities with only two options regarding their religious beliefs: change or potentially lose them altogether. More specifically, the problem lies in the intimate connection between land and religion that the conditions of public religion do not adequately accommodate. Especially in the case of the SFN and KLCN, it is clear that the court understood stewardship as an intellectual endeavour separate to that of the land. The court understood the importance of land to

First Nations religious traditions, but it could not protect the entirety of a sacred site if there were other competing interests in the land.

How can the Canadian state adequately address the requirements of public religion and First Nations sacred space? Can Canada protect First Nations sacred sites? My intention in this chapter was not to provide solutions to a well-known problem but rather to provide some clarification as to *why* First Nations are facing this problem in the first place. The issue I addressed in this chapter is more pervasive than Christian hegemony and representation. It has to do not only with liberal democratic ideology but also with land distribution, political history, the socio-economic project of modernity and, no doubt, many other systemic components. It most certainly has to do with power; but how the state can address such power relations is a troubling and difficult question. Even with a greater emphasis on indigenous sovereignty and self-government as suggested by the Royal Commission on Aboriginal Peoples (1996), the contemporary relationship regarding the limited, spiritual, profitable, and contested space shared by all Canadians would remain unaddressed. What is clear is that First Nations sacred sites are unique in the Canadian state and Canada has granted First Nations special rights as national minorities. Although the United States attempts to protect Native American sacred sites and religious freedom ultimately failed (see Mazur 1999), their attempt to address the specific issues facing indigenous religious freedom is an effort not yet mirrored in Canada.

Chapter 4

Communicative Democracy and the Nature of Indigenous-State Relations

4.1 Introduction

The problem facing indigenous religious traditions and their sacred sites is caught in a quagmire of social, political and philosophical trends deeply rooted in western colonial thought. Since the 1960s, indigenous peoples realized that if they were to emerge from the systemic oppression of colonialism, Canada needed to provide access for indigenous voices and perspectives in the decisions and structures affecting their communities. Despite philosophical differences, scholars of indigenous descent who seek change within Canada and not separation from it share the same goal: Aboriginal and non-Aboriginal Canadians must reformulate the foundations of law and politics to include indigenous peoples and their perspectives.

Inclusion of indigenous peoples and their perspectives requires that the state confront Canada's colonial heritage and accusations of continuing injustices. Granted, Canada has taken several important and positive steps in the past fifty years to bring indigenous peoples into the governing structures that once excluded them. Indigenous suffrage in 1960 brought Aboriginal peoples into the wider polity and the constitutional recognition of Aboriginal rights in 1982 distinguished them as distinct peoples deserving of their own seat at the constitutional negotiating table. More recently, the inclusion of indigenous voices and perspectives in decision-making processes is now a standard of Canadian constitutional, political and legal discourses, but scholars, indigenous and non-indigenous alike, continue to criticize government efforts.

In this chapter, I examine the complexity of the contemporary indigenous-state relationship as demonstrated in the duty to consult and accommodate with the help of communicative democratic theory. Through the theoretical lens of communicative democracy, it is possible to understand what the Canadian state is attempting to accomplish in pursuit of a more just society. At the same time, the theory provides insight as to the limitations of these attempts without self-reflective analysis of the state's own place in their relationship with indigenous peoples. The promotion of deliberation to broaden social knowledge among relationally autonomous groups, to include minority narratives and perspectives, and to promote learning and understanding among diverse communities, is without purpose if the interests of one group impede the ability of another "to actively engage in the world

and grow" (Young, 2000a, 184). As will be demonstrated in the first section, deliberative democracy requires a separation between deliberative parties and the formal regulation of procedures. Civil society and the state are complementary, but the tension between these two spheres provides for the framework of democratic justice. Merging these two complementary powers tends to tip the balance of power in one direction restricting either self-determination or self-development. This is why it is so important for the state to consider its own place in contemporary indigenous-state relations.

In many ways, the state understands the fundamental concern of indigenous peoples. Government decision-makers have actively sought to implement a new relationship that addresses these concerns. Both the RCAP report (1996) and recent developments concerning the duty to consult and accommodate have sought to realign indigenous-state relations in a manner more receptive to Aboriginal peoples' special place within Canadian borders as unconquered peoples. The Canadian government has sought the inclusion of indigenous perspectives in political procedures and decision-making. In particular, the duty to consult and accommodate demonstrates the Canadian state's commitment to inclusion and deliberation as important political ideals on the path to correct the social, cultural, economic and political domination of indigenous peoples.

I begin this chapter with a brief overview of communicative (or deliberative) democracy. I understand communicative democracy as embodying the foundational ideals of just relations in a democratic state. It is my contention that the Canadian state adopts many of the tenets of this theory in relation to Aboriginal peoples. The theory also provides for an analysis of the complexity and difficulty of contemporary indigenous-state relations. In the second section, I examine the duty to consult and accommodate. Unlike with the RCAP *Report* (1996), which the Liberal government of Jean Chrétien unceremoniously shelved, the consultation doctrine is the new rubric for indigenous state relations when it comes to matters of land. In this section, I demonstrate my claim that Canada supports communicative democratic processes in a limited way. I then examine the Voisey's Bay negotiation in Labrador in the late-1990s. This case demonstrates a relatively successful application of communicative democratic principles, providing some precedent for a just relationship. Finally, I return to some of the postcolonial challenges offered in the introduction of this dissertation to determine whether communicative democracy and the consultation doctrine effectively address postcolonial critiques of power and agency-subjectivity in the liberal state.

4.2 Communicative Democracy and the State

The purpose of this section is not to develop a new theory of deliberative democracy or to provide an overview of the extensive literature on the many debates and discussions among its proponents and critics. Rather, the purpose of this section is to answer three important questions. (1) Why is inclusive deliberation so important in a just democracy? (2) What is the place and role of the state in deliberative politics? (3) How can deliberative politics extend to include multiple political jurisdictions and, in such a case, what is the role of the state? Following the political philosopher Iris Marion Young (2000a), I use the term "communicative democracy" rather than the more popular terms "deliberative democracy" or "discursive politics." The reason for this is that Young's theory best describes the foundational principles of the modern indigenous-state relationship regarding land. In this theory, narrative, rhetoric, teaching and learning are promoted in decision-making processes instead of universalized procedures of communication.[59] The communicative democratic approach helps to foster the inclusion of minorities and, through its procedures, legitimate formal decision-making processes. In addition to Iris Marion Young, I draw on the work of Jürgen Habermas who "is responsible for reviving the idea of deliberation in our time, and giving it a more thoroughly democratic foundation" (Gutmann and Thompson 1996, 9). Young and Habermas' discussions of deliberative democracy also provide elucidation on the contentious role of the state in deliberative processes.

4.2.1 Why is inclusive deliberation so important in a just democracy?

Young (2000a) argues that justice requires that individuals be self-determining. "Self-determination," Young writes, "consists in being able to participate in determining one's action and the condition of one's action; its contrary is domination" (32). Democratic societies that exclude individuals from participating in decisions affecting their lives, and the conditions in which those decisions are made, "do not live up to their promise" (13). From the communicative democratic perspective, practical reason and sovereignty reside in procedural action oriented toward understanding. In other words, justice resides in the communicative activity of deliberating parties unlike in the case of liberalism where justice resides in the balanced governmental output of constitutionally established rights (Habermas 1996). The result of liberalism is a form of domination where individuals are no longer

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[59] One of the most common criticisms of deliberative politics has been the emphasis of "a universal norm of rational dialogue" to resolve disagreements in the deliberative procedure (Habermas 1996, 310). A set of rules and restrictions regarding dialogue may lead to the exclusion of some individuals even within the deliberative process.

able to participate in the decisions or structures that affect their lives. By contrast, communicative democracy requires self-determination for justice.

It may seem odd to criticize liberalism as unjust; however, the argument is particularly appropriate in the Canadian context. Dale Turner (2006) dedicates the first half of *This is Not a Peace Pipe* to a criticism of "White Paper" liberalism, Alan Cairns' *Citizens Plus* (2000), and Will Kymlicka's *Multicultural Citizenship* (1995). Turner argues that these three approaches to Aboriginal matters share a common conclusion. He writes, "Most importantly, they do not recognize that a meaningful theory of Aboriginal rights in Canada is impossible without Aboriginal participation" (7). Put another way, they develop a theory of Aboriginal rights in Canada but effectively ignore Aboriginal participation in the development of that theory. The application of rights imposes conditions and may even affect deliberation. For Turner, then, only when one is able to participate in the decisions that affect them can they be self-determining individuals in a just society.

In reasons that will become more apparent when I address the next question, deliberation is necessary to address the potential corruption of a state-centered conception of justice. In deliberative democracy, participants engage each other with the knowledge that they are answerable to each other. Young (2000a) argues that, in order to address the real correlation between socio-economic power and political power that leads to exclusion, marginalization and the preservation of privilege, democracies ought to promote greater inclusion in decision-making processes. She writes, "Participants arrive at a decision not by determining what preferences have greatest numerical support, but by determining which proposals the collective agrees are supported by the best reasons" (23). Deliberating parties will reject or refine proposals based on proper dialogical examination. Young outlines four normative ideals to help guide deliberation. They are (1) the *inclusion* of all affected parties in the process of discussion and decision-making; (2) a *political equality* that promotes free and equal expression without domination or coercion; (3) a *reasonableness* of participants who seek insight and understanding of different perspectives with at least the initial intention of reaching an agreement regarding collective problems; and (4) a *publicity* to which participants are required to express themselves in the "plural public-speaking context" in a way that "all those plural others" can understand (25).

Deliberation must be inclusive to be effective. Even when individuals have access to processes of decision-making they may encounter internal forms of exclusion where the dominant mood finds minority views "are so different from others' in the public that their views are discounted" (Young

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2000a, 55). In contrast to many deliberative political theories, Young argues that deliberative processes should not restrict political communication (i.e., the use of rhetoric, figurative language, emotion, etc.).[60] Many advocates of deliberative democracy contend that this process goes beyond mere speech and response to transform "the preferences, interests, beliefs, and judgements of participants" (26).

One way to combat the issue of what Young terms "internal exclusion" is through the adoption of *narrative* as a communicative ideal. Young writes, "Storytelling is often an important bridge in such cases between the mute experience of being wronged and political arguments about justice.[61] Those who experience the wrong, and perhaps some others who sense it, may have no language for expressing the suffering as an injustice, but nevertheless they can tell stories that relate a sense of wrong" (72). Narrative also helps to address ignorance, false understandings or stereotypes that one group may have of another. It can help to foster a better understanding of the "practices, places, or symbols" held by diverse communities and the reasons why they value and give priority to them (75). She writes:

> Indigenous people in Anglo settler societies, for example, too often encounter incredulity, mockery, or hostility from whites, when they try to make major political issues out of holding or regaining control over a particular place, or insist on their right to fishing or gaming particular species in particular ways, or face police batons in protest of development projects that they believe desecrate burial sites. The meanings and values at stake here cannot be explained in universalizable arguments. Those facing such lack of understanding often rely on myths and historical narratives to convey what is meaningful to them and why, to explain 'where they are coming from' (75).

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[60] In light of this criticism of deliberative democracy, Young states that "communicative democracy" may be a better term to address the shortcomings of the vast majority of deliberative democratic theories.

[61] Young (2000a) also includes ideals of *greeting* and *rhetoric* in her discussion of combating internal exclusions. For purposes of concision, I only focus on *narrative* because it emphasizes the realities of plural publics and situation positions that are so important to the deliberative process.

Deliberation in a plural society requires a mode of communication that speaks to the fact that different groups possess uniquely situated values that inform their perspectives on matters of justice and public interest. Narrative allows individuals to present their concerns in a more effective manner. Listeners of narrative not only learn about other groups, but also learn to situate their own values in relation to others. This communicative ideal helps to broaden social knowledge and promote inclusion through education. Inclusive deliberation is necessary for self-determination and non-domination in a democratic society (Young 2000a).

4.2.2 What is the place and role of the state in deliberative politics?

Communicative democracy does not forgo the state in favour of deliberation among those in civil society. Instead, the state is "a subsystem specialized for collectively binding decisions" (Habermas 1996, 300). The deliberative process points the activities of the subsystem and its administrative power in specific directions. Relationally, deliberative power generates from the public sphere, the periphery of the nucleus that is the state. Deliberations pass from the periphery into the nucleus of administrative processes in order that the state may formally institute them. Law and politics, in Habermas' view, help to reduce the social complexity of a large, diverse society. He writes, "The basic rights and principles of government by law can be understood as so many steps toward reducing the unavoidable complexity evident in the necessary deviations from the model of pure communication" (327).

The state also functions as an important institution for the promotion of justice by providing the buttresses against oppression. According to Young, one should understand justice as both self-determination and self-development. She writes:

> Self-development means being able actively to engage in the world
> and grow. Just social institutions provide conditions for all persons to
> learn and use satisfying and expansive skills in socially recognized
> settings, and enable them to play and communicate with others or
> express their feelings and perspective on social life in contexts where
> others can listen. Self-development in this sense certainly entails
> meeting people's basic needs for food, shelter, health care, and so on.
> It also entails the use of resources for education and training. Self-
> development does not depend simply on a certain distribution of
> materials goods. Using satisfying skills and having one's particular

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cultural modes of expression and ways of life recognized also
depend on the organization of the division of labour and the
structures of communication and co-operation. While self-
development is thus not reducible to the distribution of resources,
market- and profit-oriented economic processes particularly impinge
on the ability of many to develop and exercise capacities. Because
this is so, pursuit of justice as self-development cannot rely on the
communicative and organizational activities of civil society alone,
but requires positive state intervention to regulate and direct
economic activity (2000a, 184).

The state acts as the formal institutor of structures that allow plural publics of self-determining people to engage each other in a way that promotes learning and combats institutional oppression. While the state and civil society are complementary, there is a tension between the deliberative public and the state because there is a tension between "participating in one's action and determining the condition of one's action" and actively engaging and growing in a diverse world (Young 2000a, 32). Self-determination without the formal and centralized regulations of the state may lead to competition and selfishness among plural publics while a state without a deliberative public sphere may fail "to take account of individual, group and local differences" (190). In other words, communicative democracy promotes "relational autonomy" in which "persons [can] pursue their own ends in the context of relationships in which others may do the same" (231).[62] The state provides the context and ensures formal regulations to bring attention to the relationships among diverse peoples.

This formal procedure of self-development must still adhere to communicative power despite its location in the political sphere. Habermas (1996) writes, "The constitutional state does not represent a finished structure but a delicate and sensitive—above all fallible and revisable—enterprise, whose purpose is to realize the system of rights *anew* in changing circumstances, that is, to interpret the system of rights better, to institutionalize it more appropriately, and to draw out its contents more radically" (384). In some cases, the state may reverse the circulation of power, generate decisions from within, and project them outward into the periphery. In this case, Habermas contends, "The only

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[62] Quite simply, relational autonomy refers to the fact that "people live together." Young (2000a) continues, it is "because they are together, they are all affected by and relate to the geographical and atmospheric environment, and the structural consequences of the fact that they all move in and around this region in distinct and relatively uncoordinated paths and local interactions" (222).

decisive question concerns which power constellations these patterns reflect and how the latter can be changed. This in turn depends on whether the settled routines remain open to renovative impulses from the periphery" (357). In other words, the decisions from within the administrative nucleus must be susceptible to the deliberative processes of the public sphere to maintain legitimate democratic authority. The periphery is not responsible for formally instituting its deliberations—that is the responsibility of the administrative nucleus. According to Habermas, one should not view this role for the periphery as incapacitation. He writes, "The administration does not, for the most part, itself produce the relevant knowledge but draws it from the knowledge system or other intermediaries" (372). Ideally, deliberation among affected parties translates from communicative power into legislative and legal power. Those within the nucleus of formal power do enter the public domain of communicative procedures but they may do so "only insofar as they make convincing contributions to the solution of problems that have been perceived by the public or have been put on the public agenda with the public's consent. In a similar vein, political parties would have to participate in the opinion- and will-formation from the public's own perspective" (379). The ability for the deliberative public to influence the political sphere may seem difficult, but power shifts from the political to the communicative with the greater vibrancy of affected peoples (i.e., the public). The state and deliberative politics are interwoven. In a complex society, the state may act as formal administrator, ultimate decision maker, and participant in the deliberative process, but only insofar as it acknowledges the communicative power of the deliberative public as the cornerstone of a just democracy.[63]

4.2.3 How can deliberative politics extend to include multiple political jurisdictions and, in such a case, what is the role of the state?

In the final chapter of *Inclusion and Democracy*, Young analyzes three popular arguments, the positivist, nationalist (assimilationist and separationist), and associative, that have framed how nation-states have conceptualized their responsibility to justice as limited to its own citizenry. She criticizes

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[63] Associative democratic theorists such as Paul Hirst (1993) and Joshua Cohen and Joel Rogers (1992) have sought to address the division between civil deliberation and the state through models of associative democracy. These theories attempt to integrate civil society with the state in a less contentious way. The problem, according to Young (2000a), is the potential imbalance that can occur in the process of balancing state authority with civic deliberation. In her analysis of leading theorists on associative democracy, Young argues that analyses tend to highlight the tension rather than resolve it. Inevitably, theorists succumb to the domination of one power over the other. Although the two spheres overlap each other in a complex society, their functions are separate and must remain distinct.

these three arguments for assuming a limited state-centered justice rather than arguing in favour of it. She contends, "Obligations of justice extend globally in today's world" (2000a, 246). Natural resources, land, and environmental protection are among the points of interdependence across borders and jurisdictions. Just as with the "relational autonomy" of self-determining citizens in a state, that supports the self-development of all, deliberative politics can extend to international and multi-jurisdictional relations. With respect to the latter relationship, "Many peoples [who] suffer at the hands of nation-building efforts to suppress or assimilate culturally distinct peoples ... claim a right of self-determination as a means to throw off the yoke of cultural imperialism and gain some control over resources as a base for the life and development of their people" (255). These aspirations for self-government within existing state jurisdictions, notably made by indigenous peoples across the world, provide a unique challenge to modern conceptions of state sovereignty. "Despite unjust conquest and continued oppression, however, few indigenous peoples seek to establish an independent, internationally recognized state with ultimate authority over matters within a determinately bounded territory. For the most part indigenous peoples seek greater and more secure autonomy within the framework of a wider polity" (Young 2000a, 255–6).[64] Young contends that one should understand these claims as non-domination rather than non-interference. On one hand, the distinct peoples have the right to self-determination through their own governance in which they can determine their own goals and ways of life. On the other hand, interdependence is an undeniable reality of the modern world and distinct political institutions must be accountable to each other. Just as regulations are required for the deliberative operation of civil society, regulations are also required to guide the procedures of deliberation among multiple jurisdictions and states. Just as in the case of civil society and the regulations of the political sphere, those involved in international or multi-jurisdictional relations must also be involved in the creation of those regulations. Young stipulates:

> Understood as non-domination, self-determination must be detached
> from territory. Given that a plurality of peoples inhabits most
> territories, and given the hybridity of peoples and places that
> characterizes many territories, institutions of governance ought not to
> be defined as exclusive control over territory and what takes place
> within it. On the contrary, jurisdictions can be spatially overlapping
> or shared, or even lack spatial reference entirely (2000a, 261).

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[64]This statement holds true for Canada with the notable exception of indigenous philosopher Taiaiake Alfred and certain grassroots organizations such as those found at Gustafsen Lake.

Young correctly notes that sovereignty and self-government are not entirely necessary where rights of land use and access have been determined such as in Canada. Deliberative processes can be extended to global relationships both within and outside of a nation's borders.

However, there are certain limitations with this theory of global relationships. The root of this problem is the difficulty "of trying to apply a principle of self-determination as non-domination in a world where state sovereignty remains and where its hegemonic interpretation remains non-interference" (263). If nations move into the periphery in international relations, what will enforce the formal regulations instituted to promote self-development among a differentiated global community? Ideally, strong global institutions would be the proper adjudicator of human rights and self-development, but when one understands self-determination as non-interference, the state has typically retained the dual role of self-interested party and decision maker. Young proposes international and overlapping regulatory bodies to determine the standards of engagement between citizens, organizations and governments to deterritorialize "some aspects of sovereignty" and reposition them within the deliberative process (267).[65]

Democracy requires deliberation to be just. Justice requires that affected peoples possess the ability for both self-determination and self-development. The tension and separation of the self-determining peoples, on the one hand, and the regulatory institutions, on the other, are required so that a diverse society can be reasonably just (i.e., relational autonomy). Domestically, internationally, or within overlapping jurisdictions, democratic legitimacy rests in the deliberations of the plural publics only in that they may deliberate upon the regulations that guide those deliberations, and, in that an external mediator formally institutes those regulations. Domestically, the state carries out the role of mediation and leaves deliberation to civil society. In international or domestic nation-to-nation relationships, the mediator ought to be a third party to maintain separation between the periphery and the nucleus. In a world where most states understand sovereignty as non-interference, deliberative processes often fail at the regulatory level.

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[65] Young (2000a) proposes seven international regulatory bodies, but admits that her list is only a few examples of the potential mediators of international politics. Her seven regulatory bodies include "(1) peace and security, (2) environment, (3) trade and finance, (4) direct investment and capital utilization, (5) communications and transportation, (6) human rights, including labour standards and welfare rights, [and] (7) citizenship and migration" (267).

4.3 The Duty to Consult and Accommodate

Battles at the barricades or in the courts are not the ideal location for healthy indigenous-state relations. However, blockades have been helpful in bringing matters to the attention of the court, and the court has been helpful in determining some of the failures of the Canadian state's relationship with indigenous communities. This process has helped to establish some guidelines for a better indigenous-state nation-to-nation relationship. The consultation doctrine legally obligates the state to consult and accommodate First Nations communities affected by government projects. The state has come to understand the duty to consult and accommodate as an Aboriginal right protected under Section 35 of the *Constitution Act* (1982), although the courts did not begin to provide a definition of the doctrine until 2004.[66] The duty to consult and accommodate seeks to broaden social knowledge of indigenous peoples and their perspectives through a deliberative process of consultation. While consultation has been effective in fostering a better and more just indigenous-state relationship, the procedural regulations established by the courts and upheld through government policies may ultimately deny the justice attained through deliberative processes.

Legal scholar Dwight Newman (2009) summarizes the "duty to consult" from the three landmark cases that brought definition to the doctrine.[67] He explains:

> (1) The duty to consult arises prior to proof of an Aboriginal rights or title claim or in the context of uncertain effects on a treaty right;
>
> (2) The duty to consult is triggered relatively easily, based on a minimal level of knowledge on the part of the Crown concerning a possible claim with which government action potentially interferes;
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> (3) The strength or scope of the duty to consult in particular circumstances lies along a spectrum of possibilities, with a richer

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[66] In *The Duty to Consult New Relationships with Aboriginal Peoples* (2009), Newman explains, "Recent discussion, however, springs from a trilogy of cases in 2004 and 2005: the Haida Nation case, the Taku River Tlingit First Nation cases and the Mikisew Cree First Nation case. These three cases have set Aboriginal rights in Canada, and Aboriginal/non-Aboriginal relations, on a fundamentally different course than they were on before. At the same time, they have generated many questions and a great deal of uncertainty" (9).

[67] The three cases include *Haida Nation v. British Columbia (Minister of Forests)* [2004] 3 S.C.R. 511, *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] 3 S.C.R. 550, and *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388.

consultation requirement arising from a stronger *prima facie*
Aboriginal claim and/or a more serious impact on the underlying
Aboriginal right or treaty right;

(4) Within this spectrum, the duty ranges from a minimal notice
requirement to a duty to carry out some degree of accommodation of
the Aboriginal interests, but it does not include an Aboriginal veto
power over any particular decision; and

(5) Failure to meet a duty to consult can lead to a range of remedies,
from an injunction against a particular government action altogether
(or, in some instance, damages) but more commonly an order to
carry out the consultation prior to proceeding (16).

If a court finds in favour of an Aboriginal claimant arguing that the state has not met its duty to consult, it will send both parties back to the negotiating table. In the end, the court simply determines whether satisfactory consultation has taken place. Newman (2009) argues there are four identifiable and sometimes overlapping theoretical frameworks motivating the doctrine (depending on each individual case). Clauses (1) and (2) are emblematic of the most common theoretical foundation put forth for the doctrine: the honour of the Crown. In *Haida Nation v. British Columbia* (2004), Chief Justice McLachlin wrote,

Put simply, Canada's Aboriginal peoples were here when Europeans
came, and were never conquered. Many bands reconciled their
claims with the sovereignty of the Crown through negotiated treaties.
Others, notably in British Columbia, have yet to do so. The potential
rights embedded in these claims are protected by section 35 of the
Constitution Act, 1982. The honour of the Crown requires that these
rights be determined, recognized and respected. This, in turn,
requires the Crown, acting honourably, to participate in processes of
negotiation. While this process continues, the honour of the Crown
may require it to consult and, where indicated, accommodate
Aboriginal interests (par. 25).

Like Newman, Michael Ross (2005) examines the underlying frameworks of the consultation doctrine. He argues that the emphasis on "Crown honour" is an important and potentially devastating clarification for First Nations communities. He writes:

> The Supreme Court of Canada's shift from the Crown's fiduciary relationship to the Crown's honour carries noteworthy consequences for the duty of accommodation. Where the Crown owes a fiduciary duty of accommodation to an Aboriginal group, as, for instance, when treaty rights are at stake, it is obliged to act with reference to the group's best interest. But where its duty of accommodation is grounded directly in its honour, as when unproven Aboriginal rights and title are at stake, the Crown is obliged only to balance Aboriginal interests reasonably with competing interests (152).

The consultation doctrine is a positive step forward in ensuring dialogue between indigenous peoples and the Canadian state, but the state emphasis on itself rather than First Nations acts to diminish the power and place of indigenous peoples in those conversations. Additionally, McLachlin's statement on Crown honour speaks to one of the central issues with the consultation doctrine: its contradictory nature. Crown honour simultaneously acknowledges indigenous peoples as unconquered and asserts the Crown sovereignty over land.

Newman (2009) argues that the second theoretical approach, which is evident in clauses (3) and (4), is results-based and could render clause (2) much less effective for Aboriginal claimants. Newman holds that "circumstances in which governments wished to develop certain lands for significant economic development purposes would, on this account, reasonably give rise to a more attenuated duty to consult in relation to proposed government activities on those lands" (2009, 19). The spectrum of circumstances could result in the prioritization of state or economic interests over Aboriginal ones given a large enough state project. This philosophy of the doctrine, on its face, expresses a state-centered conception of justice that bases its legitimacy, to return to Habermas (1996), on the "output of government activities that are successful on balance" (298). If we interpret this in multi-jurisdictional terms, it is the self-determination of the state dictating the regulations of self-development for itself and its citizenry. In either case, the state has overridden procedures of deliberation.

Newman also identifies that the court understands the consultation doctrine as an ongoing process of reconciliation. Clause (5) speaks to this point. This is not, however, reconciliation of past injustices such as in the case of the Residential Schools Truth and Reconciliation Commission (TRC), but rather a reconciliation of Crown sovereignty and Aboriginal title. McLachlin explains:

> The jurisprudence of this Court supports the view that the duty to consult and accommodate is part of a process of fair dealing and reconciliation that begins with the assertion of sovereignty and continues beyond formal claims resolution. Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*. This process of reconciliation flows from the Crown's duty of honourable dealing toward Aboriginal peoples, which arises in turn from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people (par. 32).

The duty to consult continues to assert control over the foundations of indigenous-state dialogue—in this case, Crown sovereignty. Newman notes that an ends-based result could even render ongoing dialogue unnecessary. The duty to consult provides for the inclusion of Aboriginal voices, but not necessarily in a meaningful way. It does not adequately address the subject of power in those consultations necessarily constituted by the colonial encounter. In part, the process seeks a more honourable relationship, but the application of this doctrine favours a state-centered distribution of rights without reference to relations of power. Maybe even more important, as Newman explains, is that the state ultimately decides when their actions trigger a duty to consult and the extent of that consultation. Even in its ideal application, the consultation doctrine has yet to include deliberative processes in the formation of its regulations. The predominant informants of the contemporary consultation doctrine reside in court decisions.

Newman argues that the duty to consult requires a degree of reasonableness that satisfies the honour of the Crown. By reasonableness, Newman refers to the state's "consultation spectrum" that dictates the level of consultation based on the strength of an Aboriginal claim or the impact of the activity on Aboriginal or treaty rights. The doctrine may require the state, at least to provide notification and, at most provide accommodation. Accommodation is subject to the balance of

convenience characteristic of modern liberal democratic societies as discussed in chapter 3. Newman, who recognizes that the doctrine needs time to develop, argues that despite criticisms regarding the lack of power held by indigenous communities in the procedure, the potential benefits have yet to become clear.[68] He writes:

> Establishing legal norms for the purposes of reconciliation may be necessary to promote efforts at reconciliation and to protect the rights of different parties, but if this encourages parties on either side to seek to do the minimum permitted under the legal norms, it will not have the positive outcomes that real efforts at consultation and reconciliation could have. … Consultation embodies the possibility of genuinely hearing one another and seeking reconciliations that work in the shorter-term while opening the door for negotiations of longer-term solutions to unsolved legal problems. Those potentially engaged with consultations, whether governments, Aboriginal communities, or corporate stakeholders, ought to bear in mind not only their doctrinal legal position but the longer-term prospects for trust and reconciliation that will enable all to live together in the years ahead (2009, 63–64).

The optimism Newman demonstrates toward the consultation doctrine is quite similar to the normative ascriptions of indigenous political thinkers on the subject of good indigenous-state relations. The purpose is to affect change at a fundamental level where social knowledge is developed, and power changes on a fundamental level rather than shifting from one party to the other. For Newman, at the foundation of the doctrine, ideally, is the principle of listening rather than state-goal-based accommodation.

Two cases, in particular, helped to establish the contemporary consultation doctrine: the *Haida* case and the *Taku River Tlingit First Nation v. British Columbia* (2004). *Haida* established the foundational components of the duty to consult while *Taku River* elaborated upon its limitations. The concerns of the Taku River Tlingit First Nation (TRTFN) in response to the court's decision in favour

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[68] In particular, Newman (2009) points to a public criticism of the lack of veto power for indigenous communities may lead to government exploitation. He cites Konrad Yakabuski, "Hydro-Québec a Slow Learner on Native Rights," *Globe and Mail* (12 March 2009, B2).

of the government's approval of the Tulsequah Chief Mine Project help to demonstrate concerns regarding the subject of power in decision-making processes and the inclusion of indigenous perspectives.

In 1994, Redfern Resources Ltd. began the process of acquiring and re-opening an old mine in northwestern British Columbia at the meeting point of the Taku and Tulsequah Rivers (65 kilometers northeast of Juneau, Alaska and 100 kilometers south of Atlin, British Columbia). The TRTFN were concerned about an access road to the mine that would run through their traditional territories. Under the B.C. *Environmental Assessment Act* (1995), Canada had a duty to consult with the TRTFN. In many cases, various acts of government trigger the duty to consult and accommodate. The courts only become involved once a party involved in the consultation process becomes dissatisfied with the process. In such a case, the court is responsible for determining whether the government adequately met its duty.

Once the state determines that an environmental assessment is required, it forms working committees to address the environmental concerns of the various parties. In this case, the TRTFN, the federal and provincial governments, the U.S. and Alaskan governments, and the Atlin Advisory Planning Commission participated in the assessment process. The proponent creates a report based on public consultations and the information generated by the committees. The Planning Committee may approve a report or instruct the proponent to include additional information.

In January 1997, the Committee determined that Redfern's first report was deficient. The TRTFN was concerned with deficiencies surrounding basic information regarding the impact of the access road, the protection of wildlife and traditional land use. An additional report was prepared on TRTFN traditional land use upon recommendation from the Committee. Redfern submitted a second report including the land-use study in November 1997. The TRTFN felt the land-use study required additional information and the Environmental Assessment Office ordered an addendum to the report. In March 1998, the Program Committee submitted an additional recommendations report to the executive director. The TRTFN were the only members of the committee who disagreed with the recommendations report. They submitted their own report voicing their concern with the process and the recommendations. The Executive Director referred the project application to the ministers with the recommendations report and the TRTFN report.

The ministers granted project approval shortly thereafter. The TRTFN criticized the referral to the ministers because it did not adequately address their concerns or refer to the addendum regarding

their traditional land use. In February 1999, they brought their concerns before the court on administrative grounds that the state failed to adequately consult and accommodate the TRTFN. The lower court agreed with the TRTFN, as did the Court of Appeal in 2002. In 2004, the Supreme Court overturned the decision of the lower court.

The TRTFN felt their concerns were not included in the recommendations report and not acknowledged by the ministers of environment, forestry and mines, and northern development. They did not feel that their "sustainability as a people," Aboriginal rights or implications for pending treaty negotiations were adequately addressed. The judge who heard the TRTFN claim in the B.C. Supreme Court (2000, BCSC 1001) agreed that the final stages of deliberation appeared to exclude TRTFN participation. Justice Kirkpatrick concluded:

> It is plain from the [Ministers' reasons for] decision that the
> Ministers relied on the conclusions of "the majority of the Project
> Committee." That is clearly a reference to the Recommendations
> Report. There is no indication that the Ministers made an
> independent assessment of the merits of the issues raised by the
> proponents' application. Further, the time lapse between the filing of
> the Recommendations Report and the decision of the first minister
> (one day) strongly suggests that there could not have been an
> independent assessment. In my view, it is therefore reasonable to
> infer that the Recommendations Report was the only basis on which
> the Ministers decided to issue the Project Certificate (par. 34).

Kirkpatrick was critical of the recommendations report for failing to mention the term "sustainability" given its significance for the TRTFN. In reference to the addendum that received no attention in the final report, Kirkpatrick emphasized the important connection between land, society, culture, economy and governance that the recommendations report should have taken into consideration. In her reasons for judgement, she restated one of the central conclusions of the addendum:

> Impacts on traditional land use are impacts that affect the integrity
> and well-being of TRTFN institutions and the social and cultural
> well-being of the community. These links cannot be overstated. At
> bottom, they are the fundamental difference between the TRTFN and

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non-native society, in that their traditional institutions and system of
governance are fashioned to a great extent from the very values their
traditional land use supports (par. 59).

Kirkpatrick concluded, "It can be said ... that there was inadequate (and perhaps no) assessment of evidence produced by or on behalf of the Tlingits. In this respect, the decision was unreasonable" (par. 85). Kirkpatrick ordered the parties to reconvene and deliberate on the concerns of the TRTFN and the reasons presented in her decision.

Affidavits provided additional information in support of the TRTFN claims to the court. They continued to assert their concerns regarding the correlation between the access road and the Tlingit connection to the land. One member wrote:

One of the reasons I tend the trail is to make it possible for our
people to stay on the land. That's my dream. That's why I do the
work year after year. If a road goes over the trail or near the trail it
takes the whole relationship with the land away. Redfern told me that
the road will make it easier for us to access our lands, but I believe
that really it will only make it easier for everybody else to access our
land. Under our system, when one house or family manages an area
in our traditional territory other families and houses respect that. But
after the road is built everybody else will access our lands and they
will not respect it the way we do (2002, 39).

A TRTFN council member further expressed, "I told them when we saw the route that it would wipe out our migratory trails and history and that our Tlingit culture and traditions would follow" (2002, 40).

While waiting on Kirkpatrick's decision, TRTFN submitted a report to the Ministry of Forests titled *Ha tlatgi ha kustiyi: Protecting the Taku Tlingit Land-based Way of Life* (2000). In this report, they reiterated the important connection between culture, land, economy and society that they felt the access road and subsequent mitigations overlooked. They wrote:

The natural resources of the territory affected by the proposed
project form a substantial contribution to our domestic economy and

the culture of our people. Our land-based way of life requires that we
continue to maintain and strengthen our relationship to the land. This
means that we have an ongoing responsibility to protect our trails,
camps, villages, and spiritual connections to our land and our creator
(2)

In the TRTFN view, the recommendations report did not adequately address their intimate connection between land, animals, religion, economy and culture. The land-use report and minority report expressed these concerns and called for further deliberation but the ministers, according to the TRTFN, fully considered neither.

In a split decision, the B.C. Court of Appeal (2002) upheld Kirkpatrick's ruling. The Crown's central argument was that it did not hold a fiduciary right to consult with First Nations communities who have yet to establish Aboriginal rights or title in court proceedings. On behalf of the majority, Madam Justice Rowles disagreed with the Crown's claim. She wrote, "As the Crown does here, that establishment of the Aboriginal rights or title in court proceedings is required before consultation is required, would effectively end any prospect of meaningful negotiation or settlement of Aboriginal land claims" (par. 174). Reports during the assessment process and information provided throughout the first court case clearly established the potential impact of the project on the sustainability of the TRTFN ways of life. According to Rowles, the law requires the Crown "to ensure that the substance of the Tlingits concerns had been addressed" (par. 194). The majority concluded that the Project Committee had gathered sufficient information concerning TRTFN concerns, but that the ministers had not considered the evidence in its entirety. They instructed the ministers to reconsider their approval with respect to their decision and Tlingit concerns.

Madam Justice Southin, dissenting, argued that the ministers had sufficiently consulted with the TRTFN prior to making their decision. She writes:

I have concluded on the whole of the evidence that the objections
and reservations of the Tlingit were known to the other members of
the committee before the referral and were made known to the
Ministers in the Recommendations Report. The right to be consulted
is not a right of veto. To put it another way, the right to be heard,

whether in this or any other process, and no matter how great the

issue, is not a right to victory (par. 100).

Southin concluded that a duty certainly exists without first establishing rights or title, but that the TRTFN claim that the ministers overlooked their perspective was overstated.

In 2004, the case went before the Supreme Court of Canada (SCC) and the decision of the lower courts was overturned. Like Southin in the Court of Appeal, the SCC agreed that the Crown had a duty to consult with the TRTFN and that the process leading up to the ministers' decision satisfied their fiduciary duty. The SCC explained:

The TRTFN's role in the environmental assessment was, however,

sufficient to uphold the Province's honour and meet the requirements

of its duty. Where consultation is meaningful, there is no ultimate

duty to reach agreement. Rather, accommodation requires that

Aboriginal concerns be balanced reasonably with the potential

impact of the particular decision on those concerns and with

competing societal concerns (2004, par. 2).[69]

Based on the demonstrated potential economic, social, and cultural impacts on the TRTFN during the consultation process, the SCC believed that the honour of the Crown dictated that the state accommodate TRTFN to some degree. The SCC determined that the extensive involvement of the TRTFN with the planning committee and various sub-committees inevitably affected Redfern's proposal. The SCC disagreed with the TRTFN, stating that the Recommendations Report sufficiently accommodated TRTFN concerns with the inclusion of mitigation strategies for future management of the road and the collection of information.

The concerns of the TRTFN and the eventual decision by the SCC demonstrate a fundamental limitation regarding the modern relationship between indigenous peoples and the state. The consultation doctrine simultaneously promotes a deliberative democratic process where procedure determines authority and state-centered liberal decisions that seek to maintain balance by enforcing constitutional imperatives. The lower courts in *Taku River* emphasized the unreasonableness of the procedure whereas the Supreme Court emphasized the reasonableness of the outcome. The TRTFN

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[69] The SCC discusses their explanation regarding the balance of societal interests at paragraph 42 as well.

felt that the planning committee and ministers did not fully understand or accommodate the importance of their "habitat."[70] The difficulty the courts face is that they must subjectively decide from case-to-case whether the Crown sufficiently accommodated Aboriginal concerns. They have established a firm doctrine of consultation, but accommodation based on a spectrum analysis—that is, a sliding scale of accommodation based on state analysis of an Aboriginal claim—remains too vague for many First Nations communities and their lawyers.

In 2008 and 2009, Aboriginal treaty and rights lawyer Maria Morellato completed studies on Crown consultation policies and practices for the National Centre for First Nations Governance. In both studies, she concludes that, in order to foster meaningful engagement, reconciliation, and uphold the honour of the Crown, the most important policy change that the state needs to enact is joint decision-making processes on matters pertaining to indigenous land. She continues, this "essential 'missing piece' undermines the legitimacy of any consultation and accommodation process and renders 'referrals' associated with Crown decisions affecting land and resources largely ineffective and dysfunctional" (2009, 8). Morellato identifies the sometimes-contradictory founding principles of the consultation doctrine arguing in favour of honour and reconciliation as opposed to teleological principles related to spectrum analysis.

The Crown has recognized that inclusion in decision-making is a concern within the consultation doctrine debate. Recently, British Columbia discussed limited joint decision-making processes but policies have yet to emerge from those ideas (Morellato 2009). In the government's updated guidelines for federal officials to fulfill the duty to consult (2011), the government provides a series of guiding principles to enact change in indigenous-state relations. The second guiding principle provides the opportunity for consultation with Aboriginal groups in decision-making if the government deems such a measure appropriate. The consultation directive of the next guiding principle states, "Federal officials must be able to demonstrate in decision making processes that Aboriginal concerns have been addressed or incorporated into the planning of proposed federal activities" (2011, 12). The fourth guiding principle clearly outlines a communicative method of engagement. It reads

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[70] In their report to the Ministry of Environment, the TRTFN clarified, it "should be obvious why the patterns of Tlingit land use, or Tlingit "habitat" (campsites, trails, gathering areas, villages, grave sites, spiritual places, and so forth) correspond so closely with prime fish and wildlife habitat areas. The abundance and diversity of these resources are how our people survived and continue to survive today" (2000, 2).

The Government of Canada and its officials are required to carry out a fair and reasonable process for consultations. A meaningful consultation process is characterized by good faith and an attempt by parties to understand each other's concerns, and move to address them. Federal officials can begin a consultation process by applying the Updated Guidelines in concert with any tools, policies or guidelines developed by their department or agency. Federal officials, during a consultation process, must reasonably ensure that Aboriginal groups have an opportunity to express their interests and concerns, and that they are seriously considered and, wherever possible, clearly reflected in a proposed activity. Aboriginal groups also have a reciprocal responsibility to participate in consultation processes.

... Federal officials must seek to develop processes that move beyond a project-by-project approach to consultation and move towards one that facilitates the inclusion of Aboriginal perspectives, timely decision making, integrates with and strengthens regulatory processes and promotes economic benefits for all Canadians (13).

The eighth guiding principle stipulates that the government will "develop and maintain meaningful dialogue with its partners" (i.e., Aboriginal groups) to facilitate long-term relationships (15). Often other policies and legislation such as the environmental assessment process will help to carry out these principles.

Despite the theoretical underpinnings of the doctrine as a step toward deliberative processes of joint decision-making, The TRTFN case remains a foundational case for the implementation of the duty to consult and accommodate. Decisions ultimately rest with the state because they are responsible for the interests of all Canadians. The guidelines for consultation read:

Informed by its discussions with Aboriginal groups during the consultation process, the Crown must select appropriate accommodation option(s). Generally, the most appropriate measure(s) are those which are most effective in eliminating or

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reducing adverse impacts on potential or established Aboriginal or
Treaty rights while taking into account broader societal interests.

The duty to consult does not include an obligation on the Crown to
agree with Aboriginal groups on how the concerns raised during
consultations will be resolved (2011, 65).

There is an inherent tension between the foundational principles and implementation of the consultation doctrine. In certain circumstances the doctrine might call for joint decision-making but such is rarely the case (Morellato 2009). Moreover, in the guidelines, the state portrays itself as a "partner" in conversation with others; but in implementation, the state portrays itself as a neutral mediator of competing claims.

Herein lies an unresolved contradiction when it comes to Canada's relationship with indigenous peoples: how can a state be both an interested partner and a neutral mediator? This unresolved tension is what makes the ideal form of the duty to consult and accommodate from an indigenous perspective so difficult to apply. In *Inclusion and Democracy*, Young (2000a) writes:

Most of the world's indigenous peoples claim rights of self-
determination against the states that assert sovereign authority over
them. States organized according to currently accepted principles of
sovereignty, however, find it difficult or impossible to accommodate
these claims. Because they claim rights to use land and resources,
and to develop governance practices continuous with pre-colonial
indigenous practices, indigenous peoples' demands do not easily
cohere with the more formal and bureaucratic governance systems of
modern European law (255).

The fact that indigenous communities have different perspectives on land, governance, law, property and religion renders deliberative processes even more important. Many of the foundational principles of the consultation doctrine emphasize the Canadian state's recognition of inclusion, the broadening of social knowledge, and role of narrative in mending the oppressive and dominative state-indigenous relationship that continues to be present today. However, the state has also shown that in moving

toward a nation-to-nation relationship, it is unwilling to relinquish its role as both self-determining participant and mediator of self-development.

4.4 The Voisey's Bay Mine and Mill Project Negotiation

In 1994, Vancouver-based mining company Diamond Fields Resources Incorporated discovered a significant mineral deposit at Voisey's Bay in Labrador. The site is 35 kilometers southwest of the Inuit community of Nain and 79 kilometers northwest of the Innu village of Davis Inlet. Both the Innu and Inuit claim the area as their own unceded territory.[71] Diamond Fields, unaware of pending Aboriginal land disputes in the area, accumulated more than 8000 claims and setup exploratory drill sites without formally consulting the Inuit or the Innu. In February 1995, Diamond Field's actions prompted a blockade and protest from the Innu Nation, resulting in $15,000 in damages from fires set at the exploration site. Innu leader, Peter Penashue told reporters, "From the Canadian point of view, [the arson is] against the law. ... But from international law, we feel we are within our rights because these are trespassers who have come into our lands" (Innu admit 1995). In late June 1995, the Newfoundland and Labrador provincial government, responding to public pressure, took action to mediate the situation. They banned further claims to the Voisey's Bay area and instructed existing claim holders that they would require government approval before conducting operations in the area (Innu win 1995). Reports of burial sites and other historical and culturally significant spaces did not stop Diamond Fields from moving forward with their project without any meaningful consultation with the two Aboriginal groups. In *Mining, the Environment and Indigenous Development Conflicts* (2009), Saleem H. Ali notes that Diamond Fields "clearly had little or no incentive to interact constructively with the native groups because their aim was mainly to sell the company to a larger mineral conglomerate" (98).

At a conference on the impacts of mining on Aboriginal peoples in Sudbury in November 1995, William Barbour, president of the Labrador Inuit Association (LIA), stated, "A lot of people look at this as the greatest thing that's happened in North America in the last 30 years. But for a lot of us back in Labrador, this is going at a pace we've never seen. ... We're said to be anti-development, but we're not. We just want it to be done properly and we want to have a say in it" (Innu object 1995). Early in 1996, the Innu Nation Taskforce on Mining Activity completed a report titled *Ntesinan, Nteshiniminan, Nteniunan (Between a Rock and a Hard Place)* where they asserted that Diamond

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[71] Inuit refer to this area as *Tasiujatsoak* and Innu call it *Kapukuanipant-kauashat*.

Fields should (1) broaden their conception of the environment and (2) commit themselves to an ongoing partnership with the Innu that involves meaningful participation in decision-making. The report also encouraged the Innu to continue protesting as a means to affect change if consultation was unsatisfactory (Ashini 1999; Bailey 1996).

In August 1996, international Canadian mining giant Inco Limited purchased Diamond Fields for $4.3 billion, securing the Voisey's Bay claim. In the following month, the Voisey's Bay Nickel Company (VBNC), a wholly owned Newfoundland subsidiary of Inco, filed for an environmental assessment under the *Canadian Environmental Assessment Act* (1995). The environmental assessment process is a necessary and crucial step in the development of resource projects such as those at Voisey's Bay. Without clearance through the environmental assessment process, the project cannot move forward. Shortly after VBNC made this announcement, Canada, the provincial government, the LIA and the Innu Nation entered an unprecedented agreement in the relatively short history of environmental assessments. Ali (2009) explains, they "successfully negotiated a memorandum of understanding (MOU) establishing a joint, four-party environmental assessment process for the project. ... Instead of the federal minister making the final decision on the project, a panel would report to all four parties (98). Participants signed the MOU on 31 January 1997. Minister for the provincial Department of Mines and Energy stated, "It is unique in that it is a four-party agreement on mining in the North. ... It means that there's a harmonized process so there's one environmental impact assessment and that Aboriginal groups had and will continue to have full formal input." In the same report, the Federal Environment Minister stated, "The harmonization process will ensure an efficient, effective and fair evaluation. One in which all interested individuals and groups will have an equal opportunity to express their views and concerns about the project" (Hayes 1997, 15).

The *Canadian Environmental Assessment Act* (1992) did not require the inclusion of the LIA and Innu Nation as joint decision-makers but it did provide the opportunity for the Minister of the Environment to proceed in such a fashion. According to Section 40(2), the Minister of the Environment "(a) may enter into an agreement or arrangement with that jurisdiction respecting the joint establishment of a review panel and the manner in which an assessment of the environmental effects of the project is to be conducted by the review panel; and (b) shall ... offer to consult and cooperate with that other jurisdiction respecting the assessment of the environmental effects of the project." The Act defines "Jurisdictions" in Section 12(5) as:

> (a) the government of a province;

(b) an agency or a body that is established pursuant to the legislation of a province and that has powers, duties or functions in relation to an assessment of the environmental effects of a project;

(c) a body that is established pursuant to a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and that has powers, duties or functions in relation to an assessment of the environmental effects of a project; or

(d) a governing body that is established pursuant to legislation that relates to the self-government of Indians and that has powers, duties or functions in relation to an assessment of the environmental effects of a project.

The Innu Nation continues to be involved in land claims and comprehensive self-government agreement negotiations with the Canadian government (Higgins 2008). The LIA finally secured a comprehensive self-government agreement in 2005 after 30 years of negotiation, resulting in the Nunatsiavut Government through the Labrador Inuit Land Claims Agreement (LIA 2009).[72] Neither group formally qualified under Section 40(2) in 1996. However, "interested parties" (i.e., "any person or body having an interest in the outcome of the environmental assessment for a purpose that is neither frivolous nor vexatious" [sec. 2]) may agree to participate in mediation of the environmental assessment (sec. 29[3]). Although Section 5 of the Act stipulates that actions of the federal government trigger environmental assessments, section 48(1) clarifies that the Minister may refer to mediation *any* action affecting the following:

(a) Lands in a reserve that is set apart for the use and benefit of a band and that is subject to the *Indian Act*,

(b) Federal lands other than those mentioned in paragraph (a),

(c) Lands that are described in a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and that are prescribed,

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[72] In this agreement, the LIA secured 15,000 square kilometers of the 72,500 square kilometers settled. On these lands, they received rights to co-management (LIA 2009).

(d) Lands that have been set aside for the use and benefit of Indians pursuant to legislation that relates to the self-government of Indians and that are prescribed, or

(e) Lands in respect of which Indians have interests...

Section 48(6) elaborates on "lands in respect of which Indians have interests":

(a) Land areas that are subject to a land claim accepted by the Government of Canada for negotiation under its comprehensive land claims policy and …

(b) Lands that belong to Her Majesty or in respect of which Her Majesty has the right to dispose and that have been identified and agreed on by Her Majesty and an Indian band for transfer to settle claims based on

(i) An outstanding lawful obligation of Her Majesty towards an Indian band pursuant to the specific claims policy of the Government of Canada, or

(ii) Treaty land entitlement

If there is any impact on affirmed or potential Aboriginal lands, the Act requires the government to engage in the environmental assessment mediation. Mediation may occur whenever the Minister believes the environmental impact will be adverse or where public concerns warrant such activity (sec. 25). In these cases, however, ultimate authority rests with the Minister and not "interested parties" or the public. Both the public and "interested parties" inform the decisions made, as outlined throughout the text of the Act, but they do not have the authoritative power equated to the process of joint inter-jurisdictional cooperation.

If the Minister determines a review panel is necessary and "interested parties" agree to participate, the panellists are to "(i) ...be unbiased and free from any conflict of interest relative to the project and ... have knowledge or experience relevant to the anticipated environmental effects of the project" (sec. 33[1][a]). In the case of multiple jurisdictions, this is a joint decision making process whereas in the other case, the panel is selected by the Minister. The task of the mediation panel is to act as an

administrator of assessing the environmental effects of a particular project, ensuring publicity, and establishing the guidelines for a comprehensive study (if so required). When the assessment is complete, the panel generates a report and recommendations that they present to the Minister and, in the case of a joint review panel, to the cooperating authorities. Essentially, the review process employs experts to mediate deliberations.

For Voisey's Bay, the MOU (1997)[73] declared that the Minister should select panellists from a list of nominations generated between the four groups. Each group could nominate three individuals and the Minister had to include at least one individual from each nomination list (sec. 3.3). The LIA received two of their nominations (Hayes 1997). One of the primary responsibilities of this panel is to establish the guidelines for the Environmental Impact Statement (EIS) that VBNC must complete. Upon reviewing the project proposal and separate reports from both the LIA and the Innu Nation, the panel created draft EIS guidelines that they presented to the public. Step 4 in the review process reads:

> The Panel will carry out a comprehensive scoping exercise to explain
> the Review process, to help identify priority issues to be addressed
> during the Review, and to receive comments on the Panel's Draft
> EIS Guidelines. The scoping exercise must include seeking Innu and
> Inuit views about traditional ecological knowledge to be used for EA
> purposes, how traditional ecological knowledge should be obtained
> and how it should be evaluated. The scoping exercise will be carried
> out through public meetings in the communities of Nain,
> Utshimasits, Sheshatshiu, Hopedale, Makkovik, Rigolet, Postville
> and in other locations in the Province as may be determined by the
> Panel. Oral comments received at public meetings will be considered
> by the Panel as fully as written comments (1999, 22).

The steps also stipulate that the panel may ask VBNC to attend these meetings to field questions and respond to concerns (although the panel would ask VBNC to conduct their own scoping meetings in

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[73] The MOU cited here appears in the Final Panel Report for the Voisey's Bay Mine and Mill Environmental Assessment Panel completed in 1999. The MOU appears as "Appendix C" on page 22. Included in this appendix are "Schedule 1" and "Schedule 2" outlining procedures for the panel and a description of the project.

drafting the EIS).[74] Once the panel accepts the EIS, the panel brings the report to the public again for comments. Step 9 in the review process reads, "Once the Panel determines that the EIS is sufficient to proceed to public hearings, it will schedule and announce the public hearings within 7 days. The Panel will attempt to schedule the public hearings to maximize the attendance and participation of the public, taking into account the seasonal activities and traditional practices of the Innu and Inuit" (22). In addition, the MOU states that virtually all material collected must be available in Innu-Eimun and Inuktitut at the same time they are available in English. Some information must also be available in audio format. The panel conducted 20 scoping hearings throughout Labrador and 32 public hearings following the completion of the EIS (23).

The MOU explicitly called for the inclusion of Aboriginal knowledge in the assessment of environmental impacts. To include traditional knowledge, VBNC would have to include the narratives of Inuit and Innu speakers. Throughout the EIS (1997), VBNC intersperses indigenous narratives to foster the inclusion of traditional knowledge. In the introduction to the EIS, it reads:

> VBNC is committed to the consideration of Aboriginal knowledge in the environmental assessment process. VBNC has incorporated Aboriginal knowledge into environmental planning and in this EIS document to the extent that such knowledge has been made available by Aboriginal peoples.
>
> "Aboriginal knowledge means things like the knowing that you learn from hunting over the course of your life, and the kind of knowing that makes you want to respect the animal spirits, and how all these ways of knowing work together to help you understand and make predictions about the proposed mining project at Voisey's Bay" (Panel Report 1999, app. C, 1.4.3).

VBNC joined in partnership with the Innu Nation to better integrate indigenous knowledge into the EIS and promote a holistic approach to ecology (7.4). VBNC, along with their Aboriginal partners, sought to demonstrate that actions affecting migration patterns and breeding grounds not only affected animals, but the cultures, spiritual practices and ways of life of Labrador's indigenous

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[74] VBNC notes in the EIS (1997) that cooperation and consultation with indigenous peoples has been widely recognized in the mining world as a beneficial business practice since 1994.

populations. For example, chapter 16 on Caribou opens with an Innu narrative and proceeds to contextualize that information for the purposes of the EIS. It reads:

> "Hunting is more than food on the table. It is a fundamental part of who we are. It is part of our way of life. The animals we hunt are not just commodities. We believe that they are given to us by the animal masters, and that by hunting, we show respect for the land and all that it provides."...

> Caribou are important to the residents of northern Labrador, particularly Innu and Inuit for whom it is a major part of their diet. Caribou are also the focus of many cultural activities of the region and are an important base of the traditional economy. The harvest of caribou is part of the social structure and culture of Labrador north coast communities.

The prevalent inclusion of narrative throughout the EIS and the number of public panel meetings conducted demonstrate a commitment to inclusive, just proceedings. More importantly, however, is the fact that the LIA and Innu Nation were included as partners, even though the *Environmental Assessment Act* (1992) did not explicitly recognize them as partners in the decision-making process. The ability of Innu and Inuit governments to deliberate on the formal parameters of deliberation allowed for individuals within those communities to participate in a meaningful way. The third-party panel acted as administrator for the process and ultimately the LIA, Innu Nation, provincial and federal governments were answerable to each other. In many ways, the Voisey's Bay negotiation accomplished what the liberal state often cannot: the deterritorialization of sovereignty.

Voisey's Bay is an excellent example of a just partnership between indigenous peoples and the Canadian state, but it is also somewhat concerning. Even without completed comprehensive land claims or self-government agreements, the state treated the Innu Nation and LIA as partners, allowing them to participate in formally constituting the contours of deliberation and providing the opportunity for Innu and Inuit peoples to participate meaningfully as self-determining peoples. Voisey's Bay, however, is not the standard. If self-government is a requirement to foster just relations for Aboriginal peoples, many communities may have to wait quite some time. According to Aboriginal Affairs and Northern Development Canada (AANDC), the state has completed 18 comprehensive self-

government agreements involving 32 communities while 393 communities are currently at the negotiating table in 83 different venues (AANDC 2010). The LIA took nearly 30 years to complete their claim and in 2011, the Maa-nulth treaty on Vancouver Island was a process that took 20 years. In the recent rewrite of the *Canadian Environmental Assessment Act* (2012, c. 19, sec. 52), the state has not changed the definitions of "jurisdictions" and joint review panels.[75] Voisey's Bay at least provides evidence that partnership is an option even if it is not a requirement.

4.5 The Challenge of Post-Colonialism

The consultation doctrine demonstrates the state's recognition that justice requires the relinquishing of some power in the indigenous-state relationship. Voisey's Bay demonstrates how relinquishment is conditional upon the generosity of the state. If the state can retract or withhold the redistribution of power, does the colonialism that postcolonialism hopes to address not remain firmly in place? The consultation doctrine does not immediately provide redress from imbalances of power such as those identified by Talal Asad (1993, 2003), and discussed in both the second and third chapters. Nor does communicative democratic theory provide immediate answers to the subject of power. Two challenges remain. First, the Habermasian notion of "neutral" public deliberative space is, as Asad argues, a fallacy. "The public sphere," he contends, "is *necessarily* (and not just contingently) articulated by power. And everyone who enters it must address power's disposition of people and things, the dependence of some on the good will of others" (2003, 184). Second, a particular group may be active participants in decision-making processes, but the "*structures* of possible action" regulate those decisions independently of indigenous choices (Asad 1993, 17). Implementation or acceptance of those "western" structures, Asad contends, brings with them "specific forms of power and subjection" (13).

   The first point to note is that both the Duty to Consult and Accommodate and broader deliberative democratic theory (of which communicative democracy is a part) are cyclical and, in theory, never ending. "The open-ended nature of deliberation enables citizens or legislators to challenge earlier decisions, including decisions about the procedures for making decisions. Deliberative democracy's provisionality checks the excesses of conventional democracy's finality" (Gutmann and Thompson

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[75] One interesting addition to the act is Section 16(3). It reads, "The environmental assessment of a designated project *may* take into account community knowledge and Aboriginal traditional knowledge" (emphasis added). Unlike other factors that the Minister *must* consider, traditional knowledge remains an option.

1996, 19). Once participants have committed to a form of deliberative engagement, the process of deliberation should inevitably allow participants to change the very structures of engagement.

However, the dynamic nature of deliberative democratic theory does not dispel the challenge. To borrow a question from Talal Asad (1993, 12): "To the extent that such power seeks to normalize other people's motivations, whose history is being made?" Are these structures of engagement in which indigenous peoples enter still the structures of another, more powerful culture? Is their entrance into these structures problematic from the very start because the structures dictate they conform to processes that have grown out of Euro-Canadian "western" political philosophy? To borrow from Asad again, even if the state has allowed indigenous peoples into the decision-making processes, "Who is its author, who is its subject?"

The answers to these questions are difficult, to say the least. Certainly, as Asad (1993) notes, the outcomes of the adoption or acquisition of "western" structures "is never fully predictable" (13). More relevant inquiries here are (1) whether indigenous entrance into and acceptance of Euro-Canadian political structures requires translation at all, and (2) whether systems that began as unjust can be corrected. Scholars of indigenous descent have offered their thoughts on the compatibility or feasibility of Euro-Canadian politics and procedure and there is, as mentioned at the outset of this chapter, no consensus.

John Borrows (2002) argues that one can find correlations between indigenous philosophies of law and politics and those of Euro-Canadian society. For Borrows, the state and indigenous peoples can engage each other in a mutually respectful manner on a common ground. Borrows contends that indigenous perspectives can also contribute to broadening the state's knowledge of a variety of issues. At a fundamental level, Borrows believes that the (predominantly non-indigenous) state and indigenous peoples can work together to overcome colonial structures. Ideally, one would no longer have to distinguish indigenous peoples as a group separate from the Canadian state. Dale Turner (2006) is critical of Borrows' assertions regarding commonalities, but praises him, nonetheless, as a "word warrior" skilled and engaged in both indigenous and European legal philosophies. Turner argues that indigenous "word warriors," such as Borrows, need to engage in agonic (i.e., competitive) political dialogue to attain political power and affect change at the foundations of Euro-Canadian legal-political understandings. In both cases, these scholars promote the inclusion of indigenous peoples within colonial structures in order that they may alter systemic issues of power at their origin.

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It is important to note that only officially recognized groups possess the rights to consultation. Not all indigenous peoples agree with band governments established through the *Indian Act*. Mohawk scholar Taiaiake Alfred (2005, 2009), director of the School of Indigenous Governance at the University of Victoria, is critical of contemporary leadership as a component of colonial oppression. He believes that separation from the Canadian state and a return to traditional ways of living is the means by which indigenous peoples can achieve power and freedom. Some groups may choose to align themselves politically with traditional hereditary leadership or a broader religious community.[76] Alternative indigenous communities have met similar problems in the court when it comes to issues of recognition and fiduciary consultation. Dwight Newman (2009) explains how the state has marginalized some indigenous communities from consultation processes because they are not officially recognized First Nations. He explains that the court rejected the province-wide Native Council of Nova Scotia because it contained some non-Mi'kmaq members. In 2007, the Alberta Energy and Utilities Board applied a ruling handed down in Newfoundland and Labrador earlier that year when they denied political recognition to four different parties. Newman explains that among these groups were "two groups attempting to constitute themselves from individuals of already existing *Indian Act* bands, of an individual not connected to an Aboriginal community, and of an elders' society not showing itself to be the corporate agent of a rights-bearing Aboriginal community (2009, 39). Ross (2005) points to the same issue for nations who have separated from recognized First Nations communities such as the Kelly Lake Cree Nation and the Poplar Point Ojibwa. The courts contended that neither group possessed any rights to state consultation regarding developments on their land. This is not to say that the state is acting maliciously. On the one hand, the essentialization of the tribal boundaries is clearly a subject that the state ought to address given the examples stated above and the discussion that follows in the next chapter. On the other hand, an assertion on the part of a particular group requires some mediation to avoid fraudulent or overlapping claims. Personal conviction, at the state level, is certainly too vague to trigger consultation. Given the colonial context, this subject is complex and maybe even irreconcilable, but one of which the state must be conscience.

Will the consultation doctrine be successful? As Dwight Newman (2009) reminds us, the consultation doctrine is simply too new to make any definitive judgements. With respect to postcolonial critiques of the implementation of western political structures among non-western peoples, the potential implications, as Asad (1993) writes, are always uncertain. The consultation

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[76] In the following chapter, I discuss a group who aligned themselves with pan-indigenous religious communities and political movements.

doctrine certainly has its limitations and the correctives it may offer, if any, are by no means immediate. What the consultation doctrine does offer is an acknowledgement on the part of the state that an imbalance of power exists and needs to be corrected. The first step in this corrective, as acknowledged by both indigenous and non-indigenous scholars and policy-makers, is through the act of inclusion.

4.6 Conclusion

Both the Canadian state and indigenous writers have identified a more just indigenous-state relationship is a more inclusive, deliberative one. Beginning in 1960, the self-determination of indigenous peoples—that is, participation in the decisions that affect one's life—started to become an ideal shared by both indigenous peoples and the state. According to some, however, justice continues to remain elusive for indigenous peoples in Canada. In the current context for indigenous-state land discussions—namely, the duty to consult and accommodate—communicative democratic theory helps to identify both the importance and limitation of the doctrine. The promotion of self-determination through inclusive participation in decision-making processes is only meaningful if no participant in those deliberations also holds the power to define the contours of deliberation and, in turn, mediate communication. The Canadian state often occupies an ambiguous role in indigenous-state relations as both mediator and self-interested party or partner. The consultation doctrine, for the time being and despite its best intentions, does not provide indigenous communities with the justice they desire.

Voisey's Bay provides some precedent for a more meaningful relationship that embodies essential facets of a communicative democratic process. Through Environmental Assessment legislation, the state interpreted itself as a partner with indigenous peoples. The affected parties (i.e., the government and indigenous communities) jointly established a third-party panel of relatively unbiased experts to mediate the deliberative process based on jointly established guidelines. The Innu Nation and LIA did not have veto power at Voisey's Bay, and there is nothing to indicate that they sought such power. What they sought, and received, was participation and inclusion in decisions and processes of deciding.

Voisey's Bay, however, is a notable exception even within the context of the *Environmental Assessment Act* (1992) that led to the resulting deliberative democratic model of indigenous-state relations. The Act legislates that the government is not required to engage in such a relationship

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unless a band has negotiated a land or comprehensive self-government claim. Unless the state institutes joint decision-making procedures such as Morellato (2008; 2009) describes, comprehensive self-government agreements may be the long-term answer for bands seeking partnership with the Canadian state, meaningful self-determination for Aboriginal peoples, a role in defining the rubrics of communicative processes and an active role in self-development for its people. This is, however, a long process.[77]

What does this mean for indigenous religions and sacred space? Certainly, the benefits of adopting a deliberative approach to indigenous-state relations, and the problems raised by the ambiguous role of the state, stretch far beyond the protection of sacred sites and indigenous religious traditions. As I noted in chapter 2, Euro-Canadian perspectives of land and religion largely, if not wholly, continue to impede the ability of indigenous peoples to protect their sacred spaces. In addition, the Canadian state has actively suppressed and attempted to destroy indigenous religions and indigenous perspectives on land. These actions manifested themselves in the laws that governed the lives of indigenous peoples. The state has proven itself a self-interested party in the indigenous-state relationship. The fact that indigenous peoples remain largely excluded from participating in the administrative structures that continue to influence their communities, cultures and lives, is an underlying cause of the persistent threat to indigenous sacred space. Self-government may be an excellent long-term solution, but given the immediate threat to indigenous sacred space, a short-term solution remains imperative.

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[77] See J.R. Miller's (2009) discussion of the contemporary state of comprehensive land claims negotiations.

Chapter 5

The Colonial Discourse of Indigenous Religions and the Challenge of Diversity

5.1 Introduction

Since the seventeenth century, indigenous peoples of North America have lived within colonial structures that attempted to regulate nearly every aspect of their lives.**[78]** From how one ought to understand property to proper religious belief, European settlers sought the civilization of North America's indigenous inhabitants. Central to this project, as I alluded to in chapter 2, were the false stereotypes of indigenous peoples. To be an "Indian" meant one was uncivilized and incapable of participating in politics or owning land. To be an "Indian" and not a Christian meant one was untrustworthy and without a sense of morality. The image of the "Indian" that John Locke portrayed in his *Second Treatise on Civil Government* (1690) significantly influenced the activities and aspirations of colonial powers. Following the Second World War, attitudes toward indigenous peoples began to change as many countries, including Canada, embraced principles of individual freedom and human rights. The adoption of an official policy of religious freedom was particularly important given the state's previous efforts to destroy indigenous religious traditions. As I discussed in chapters 3 and 4, the state accepts the fact that indigenous religious traditions are important facets of contemporary life for indigenous peoples in Canada; however, this does not mean that pervasive stereotypes of indigenous peoples and their religious traditions do not continue to complicate and disturb indigenous-state relations.

Two interconnected problems persist. First, the state understands indigenous religious traditions as relics of the distant past, which means that the state does not recognize these traditions as diachronic (i.e., undergoing continual historical change) in nature. Second, given the fact that the state fixes indigenous religious traditions historically, outsider observations of heterogeneity and diversity, and internal debates of authenticity and authority, pose unique problems for the legal protection of indigenous religious traditions, ceremonies, and spaces. In other words, the state, in its formal dealings with indigenous peoples, does not indicate that it fully grasps or recognizes the complexity

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[78] Small portions of this chapter first appeared in Nicholas D. Shrubsole (2011), "The Sun Dance and the Gustafsen Lake Standoff: Healing through Resistance and the Danger of Dismissing Religion" in the *International Indigenous Policy Journal* 2(4).

of contemporary indigenous religious traditions, and this misunderstanding of or failure to recognize the complexity of indigenous religions, I argue, has negative consequences for the future of those traditions.

In chapter 3, I identified certain conditions that the state places upon religions in the public arena of the modern world. I argued that these conditions apply to all religious traditions, and conform to expectations brought about by processes of differentiation and privatization. I introduced two subjects of importance, *type* and *power*. I dedicated most of the third chapter to the subject of *power*. In this chapter, I return to the subject of *type*. How does the state understand indigenous religious traditions, and why is the state's understanding problematic?

The focus of this chapter is twofold. First, I contrast the diverse and diachronic nature of indigenous religious traditions with a colonial discourse that, for the most part, portrays them as homogenous and fixed in a historical past. In this colonial activity, Euro-Canadian—more importantly state representatives—reject the "newness" of indigenous religions that have developed through "contact and combination," and the natural processes of development and diversification. Second, related to this exclusion, I examine how the identification of state-instituted indigenous political representation as religious authorities may perpetuate stereotypes of homogeneity and ignore cultural change and difference. My purpose here is not to make a normative claim regarding state-instituted indigenous governance, but rather, more simply, to identify diverse perspectives on indigenous leadership, through prominent indigenous scholars, pan-indigenous (or intertribal) communities and religious organizations, and to highlight how these views, at times, may conflict with each other.

My premise in this chapter is that the failure to grasp or recognize diversity is not simply a nuisance, but a component of colonial discourse that determines agency-subjectivity and power. The state cannot equate "authentic" indigenous religions with historically located traditions if it wishes to understand when indigenous religious traditions are present and important. Nor can it necessarily rely on the bureaucratic structures *it* has created to regulate indigenous-state relations for an answer. My argument is not that the state needs to recognize grassroots organizations or, say, pan-indigenous religious communities as official nations warranting a nation-to-nation relationship, but rather that an official awareness and acknowledgement of the diversity of indigenous communities may help in the task of mediating competing parties in civil society.

To lay the foundations for this argument in this chapter, I begin by examining the complexity of cultural difference in the context of the colonial discourse. Through Homi Bhabha's influential work *The Location of Culture* (1994), I identify the dominating and common colonial "stereotype" and "fixity" in the interpretation of diachronic "cultures of survival." Through Bhabha, I identify the political implications of this discourse, referencing indigenous scholar Taiaiake Alfred (2009) and his congruent criticism of contemporary Canadian state praxis and indigenous leadership. Following this, I examine the state's tendency to authenticate indigenous peoples and their religious traditions through historicization, and the problem with this practice, especially in the context of a modern revival of indigenous religious practices and beliefs. Given the broad range of indigenous religious traditions, and ceremonies that exist among the many varied and diverse communities of indigenous peoples in North America, the second half of this chapter focuses on one ceremony to illustrate my point. I examine the development and spread of the Sun Dance and its complicated transmission and translation for some indigenous peoples. I conclude with an analysis of a case study, the Gustafsen Lake Sun Dance and subsequent standoff in the interior of British Columbia in 1995. The Sun Dance demonstrates the diachronic nature of indigenous religions in a persisting colonial discourse, and the potential dangers of rejecting and marginalizing the "newness" of indigenous spiritual practices and affiliations. Claims to violations of religious freedom initiated the tension at Gustafsen Lake, and the state's reluctance to acknowledge religion as an important component of the confrontation and their persistent attempts to deal with the local elected Shuswap leaders, whom the Sun Dancers did not recognize, exacerbated the situation. Further complicating meaningful dialogue was the state's coordinated attempt to silence and discredit occupiers.

5.2 The Politics and Complexity of Cultural Difference

The support of a nation-to-nation relationship may help to address some of the broader issues of injustice identified within contemporary indigenous-state relations, but what of the more specific subject of cultural diversity within indigenous communities? This question is crucial, for it speaks to a tension that arises when specific identity claims collide with the political power that comes with a consolidated claim to national identity. Or, as Homi Bhabha put it, the promotion of one nation with a singular homogenous, repeating culture is a product of "cultures' own structured demand for imitation and identification" (1994, 138). In his book *Nations and Nationalism* (2006), sociologist Ernst Gellner argues that the reproduction of particular kinds of people within a "national culture" often subverted, oppressed, or destroyed local and minority cultures in the name of political and

economic ends. It is not simply these ends that bind these people together but, as David Miller (1995, 25) argues, the "common public culture" itself. However, culture is not predictable, consistent, and static. As Bhabha (1994) argues, culture is "an uneven, incomplete production of meaning and value, often composed of incommensurable demands and practices, produced in the act of social survival" (172). In a colonial situation, Bhabha argues, the culture of survival stands in contrast to prevailing myths of national culture. He writes, "The transmission of *cultures of survival* does not occur in the ordered *museé imaginaire* of national cultures with their claims to the continuity of an authentic 'past' and a living 'present'" (172). Even in these "cultures of survival," however, there exists diversity and change. In other words, minority cultures in a colonial context, such as those of indigenous peoples, are heterogeneous modes of resistance.

In the introduction to *The Location of Culture* (1994, 2), Bhabha asks the following question: "How do strategies of representation or empowerment come to be formulated in the competing claims of communities where, despite shared histories of deprivation and discrimination, the exchange of values, meanings and priorities may not always be collaborative and dialogical, but may be profoundly antagonistic, conflictual and even incommensurable?" Bhabha contends that colonial discourse understands the difference of the "Other" as a homogenous, "recognizable totality" existing without change or complexity (71). These important tools of "stereotype" and "fixity" frame cultures of the "Other" as both unchanging and repetitive, and backwards and disorderly. He argues that this positioning of culture is "continually under threat from diachronic forms of history and narrative, signs of instability" (71). The result is that minorities in "the opinion of the liberal public sphere ... are relegated to a distanced sense of belonging elsewhere" (Bhabha 2001, 46).

The imposition of concepts of "stereotype" and "fixity" are particularly devastating for indigenous communities. In effect, colonialism supports a "teleology" where "the native is progressively reformable," and a visible separation between the colonial power and the colonized, "which, in denying the colonized the capacities of self-government, independence, [and] Western modes of civility, lends authority to the official version and mission of colonial power" (Bhabha 1994, 83). This understanding of "native" populations translates into systems of governance both within and over the community. Bhabha writes:

> By 'knowing' the native population in these terms, discriminatory
> and authoritarian forms of political control are considered
> appropriate. The colonized population is then deemed to be both the

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cause and effect of the system, imprisoned in the circle of
interpretation. What is visible is the necessity of such rule which is
justified by those moralistic and normative ideologies of
amelioration recognized as the Civilizing Mission or the White
Man's Burden. However, there coexist within the same apparatus of
colonial power, modern systems and sciences of government,
progressive 'Western' forms of social and economic organization
which provide the manifest justification for the project of
colonialism ... It is on the site of this coexistence that strategies of
hierarchization and marginalization are employed in the management
of colonial societies (83).

It is exactly this perspective of state-sanctioned structures of governance that leads Mohawk
philosopher Taiaiake Alfred (2009) to reject the systems of governance enacted by the Canadian
government. Alfred writes:

The fact is that neither the state-sponsored modifications to colonial-
municipal models (imposed in Canada through the Indian Act and in
the US through the Indian Reorganization Act) nor the corporate or
public-government systems recently negotiated in the North
constitute indigenous governments at all. Potentially representing the
final solution to the white society's "Indian Problem," they use the
co-operation of Native leaders in the design and implementation of
such systems to legitimize the state's long-standing assimilationist
goals for indigenous nations and lands (27).

Alfred continues by asserting that very little has changed in the way of Euro-Canadian perceptions of
indigenous peoples as primitive, backwards, and in need of help. Alfred contends that the state
selectively engages only those indigenous peoples that conform to the persistent colonial project of
"civilizing" indigenous peoples. He argues that the state manipulates "lines of cleavage" within the
indigenous identity to legitimate its own systems of control. Alfred acknowledges a diversity of
perspectives, but qualifies those diverse identifications with the colonial encounter and the level of

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decolonization of consciousness one has undergone. He identifies these points on the "spectrum of identity" as follows:

> (1) The traditional nationalist represents the values, principles, and approaches of an indigenous cultural perspective that accepts no compromise with the colonial structure.

> (2) The secular nationalist represents an incomplete or unfulfilled indigenous perspective, stripped of its spiritual element and oriented almost solely toward confronting colonial perspectives.

> (3) The tribal pragmatist represents an interest-based calculation, a perspective that merges indigenous and mainstream values toward the integration of Native communities within colonial structures.

> (4) The racial minority ("of Indian descent") represents Western values—a perspective completely separate from indigenous cultures and supportive of the colonial structures that are the sole source of Native identification (56–57).

Stereotypes of an uncivilized people both help to legitimate colonial power and illegitimate indigenous diversity. Alfred claims that the state seeks indigenous peoples from the latter two categories, ignoring those in the first two. Unlike John Borrows or Dale Turner, discussed in the previous chapter, Alfred believes that seeking change within the system is naive and a proven method of failure.

   In many ways, Alfred is describing what Bhabha calls the "singularity of difference" perpetuated by colonialism (1994, 74). Bhabha contends that scholarship urgently needs to address these singularities, which postcolonial theorists call the homogenization of the "Other." In his chapter "How Newness Enters the World," Bhabha explains that the complexity of difference is an important aspect of "agency in a form of the 'future' where the past is not originary, where the present is not simply transitory" (219). He continues, "The 'newness' of migrant or minority discourse has to be discovered in *medias res*: a newness that is not part of the 'progressivist' division between past and present, or the archaic and the modern; nor is it a 'newness' that can be contained in the mimesis of 'original and copy'" (227). This "newness" may even be a point of contestation within communities.

One may wonder how to discern the "newness" Bhabha speaks of in relation to the culture(s) from within which it emerges. Tradition still plays an important role in "newness." He explains, "The 'right' to signify from the periphery of authorized power and privilege does not depend on the persistence of tradition; it is resourced by the power of tradition to be reinscribed through the conditions of contingency and contradictoriness that attend upon the lives of those who are 'in the minority'" (2).

Unlike Bhabha, I am not concerned with the "creation of agency through incommensurable (not simply multiple) positions" in the discourse of minorities (231). Rather, my intention is much simpler and modest. Colonial discourse tends to homogenize and fixate the "Other" (such as indigenous peoples), and that act has manifested itself in particular structures of power and governance. Minority communities and their cultures are neither homogenous nor fixed in an historical past that has already written their futures. If one understands agency as intimately connected to self-determination, and self-determination is an important facet of justice, then these facts regarding diversity and stereotypes are issues to which states ought to be aware or recognize.

With respect to the subject of justice for indigenous peoples in contemporary Canada, two important and interconnected points of interest emerge from Bhabha's analysis of diversity. The first point concerns the perpetuation of stereotypes of an "imaginary Indian" that simultaneously dominates indigenous peoples through its own implemented systems of governance, and confirms the value and worth of its own colonial ambitions of superiority and universality. The second is the treatment of indigenous religions and ceremonies as static, unchanging traditions of the past as opposed to diachronic components of a culture of survival.

5.3 The "Imaginary Indian" and Indigenous Religious Traditions

In 1899, the government of Canada enlisted poet Charles Mair (1838–1927) to carry out negotiations pertaining to Treaty 8. He remarked that the indigenous peoples he met in northern Alberta were not the "Indians" he had come to imagine. Instead, Mair wrote:

> There presented itself a body of respectable-looking men, as well
> dressed and evidently quite as independent in their feelings as any
> like number of average pioneers in the East ... One was prepared, in
> this wild region of forest, to behold some savage types of men;
> indeed, I craved to renew the vanished scenes of old. But, alas! One

beheld, instead, men with well-washed unpainted faces, and combed

and common hair; men in suits of ordinary store-clothes, and some

even with "boiled" if not laundered shirts. One felt disappointed,

even defrauded. It was not what was expected, what we believed we

had a right to expect, after so much waggoning and tracking and

drenching and river turmoil and trouble (quoted in D. Francis 1992,

2–3).

In the opening chapter of *The Imaginary Indian: The Image of the Indian in Canadian Culture* (1992), the historian Daniel Francis juxtaposes Mair's account and his own modern-day encounter with First Nations peoples. Francis recalls that he came to realize his preconceived notions of "Indians" were simply untrue. He contends that he did not come to imagine "Indians" in isolation, but instead amidst a culture in which "public discourse about Native people still deals in stereotypes." "Our views of what constitutes an Indian today are," Francis asserts, "as much bound up with myth, prejudice and ideology as earlier versions were" (7). The "imaginary Indian" is a pervasive myth rooted deep within the Euro-Canadian colonial past that manifests in both popular perceptions of indigenous peoples and state legislation. In particular, Francis points to the perception that indigenous cultures were primitive and undeveloped while Euro-Canadian culture was superior. As a result, government policies and residential schools sought to correct indigenous peoples in accordance with popular prejudice. The space in which these cultures engage each other is contingent upon power. Francis argues that the group that "enjoys advantages of wealth or power or technology ... will usually try to impose its stereotypes on the other" (221). He concludes that as long as the state continues to deal with an "imaginary Indian," they are silencing real indigenous voices.

The pervasive myth of indigenous peoples who exist in some far off past is a perception that continues to dictate state decisions regarding indigenous religions in both Canada and the United States. In particular, there is an overwhelming assumption that indigenous cultures are historical rather than modern. Native American scholar Vine Deloria Jr. wrote the following regarding historicization and authenticity for Native American religions:

In denying the possibility of the continuing revelation of the sacred

in our lives, federal courts, scholars and state and federal agencies

refuse to accord credibility to the testimony of religious leaders,

demand evidence that a ceremony or location has always been

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central to the belief and practices of the tribe, and impose

exceedingly rigorous standards on Indians who appear before them.

This practice does exactly what the Supreme Court avows is not to

be done — it allows the courts to rule on the substance of religious

belief and practice. In other words, courts will protect a religion if it

shows every symptom of being dead but will severely restrict it if it

appears to be alive (1999, 211–12).

Building upon Deloria's argument, Tracy Leavelle (2010) argues that perceptions of Native American religions as historical artefacts continue a legacy of colonialism that understands indigenous religions as primitive and misguided. Leavelle concludes that the state ignores, marginalizes, and dismisses contemporary forms of indigenous religions altered by "contact and combination." The state has proven it is willing to protect "pure" forms of Native American religion despite the fact that their very nature is diachronic.

Deloria (1999) argues that the problem rests in a pervasive perception of religion as historically located, where doctrines are established and canons are closed. This is not the case for indigenous spiritual practices and sacred spaces. An historic example of this is the Salteaux First Nation, discussed in chapter 3, which travelled to the Twin Sisters area in the eighteenth century in response to new revelations from spiritual leaders. A more recent example is the Sioux Valley Dakota Nation in Manitoba whose spiritual leaders discovered a ceremonial Sun Dance site in Birds Hill Provincial Park in 1999. With support from the province, the Sioux Valley Dakota practiced the ceremony from 2000 to 2007. Mark Ruml (2009), a religious studies scholar who both studied and participated in the Birds Hill Park Sun Dance, shows how indigenous religious traditions continue to evolve and change today. In the case of the Birds Hill Park Sun Dance, for example, the sacredness of a site grows as a community establishes their connection to the land. From the moment elders chose the site to the first dance, Ruml writes, there is "a process of increasing sanctification" (196). This evidence, that indigenous communities are discovering (or creating) new sacred sites, suggests that the state's protection of only pre-colonial indigenous cultures, outlined in *R. v. Van der Peet* (1996), could have serious implications for forms of religious practice developed long after colonization. There is a contradiction between law and the actual practices of indigenous peoples. This contradiction has led to the loss of indigenous sacred space, as demonstrated in chapter 3, and armed conflict, as demonstrated later in this chapter.

In addition to new practices emerging within particular communities, the meanings of traditional practices are also highly susceptible to change. The fact that indigenous religions are experiential rather than canonically closed is a distinction and a serious concern to which contemporary practitioners of indigenous religions are astutely aware. In an article on the Indigenous Knowledge Documentation Project,[79] Ruml (2011) notes that participants were concerned that the documentation of their teachings and beliefs may be misunderstood as authentic when in fact meanings, interpretations, and teachings may change from day to day. Elders echoed this concern. Ruml writes, "Although oral expression may place limits on a felt understanding of 'Truth', the written form serves as a further reification" (157). Ruml concludes that one should understand investigations of indigenous religious traditions as snapshots rather than absolutes.

In addition to the very nature of indigenous religions as experiential, contact has resulted in cultural change and loss among many First Nations communities. In particular, the effects of and responses to Canadian assimilation policies regarding indigenous cultures led to the loss and alteration of many indigenous religious beliefs and practices. For example, indigenous communities on the West Coast altered their Potlatch practices in many ways to disguise traditional customs (Cole and Chaikin 1990). Displacement, dispossession, and resource development continue to force indigenous spiritual practices to respond to the ever-present effects of colonialism (e.g. Ross 2005). Those communities that experienced cultural loss have begun to re-learn their traditional practices and beliefs. For some this has meant the repatriation of cultural artefacts (e.g. Bell 2008), while for others it has meant relying on colonial writings to piece together their cultures (e.g. Parkhill 1997). Put simply, conceptions of "pure" and untainted forms of indigenous spiritual practices and beliefs are both fictional and ahistorical. Indigenous religions, like all religions, continue to transform and develop both internally and in response to external forces.

Following the Second World War migration to the cities, the construction of pan-indigenous urban community centres, Aboriginal-run schools, and even prisons provided for sites of cultural sharing, renewal, adoption, and adaptation. This process of social and cultural revitalization is explicitly evident in the United States and just as important, although less obvious, in Canada (Legrand 2003; Fonda 2012). Historian Ken Coates (2012) writes, "Pan-Indigeneity is one of the most important religious and spiritual phenomena observable among Indigenous populations today" (223). Both

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[79] This project "provides a forum for Aboriginal Elders and teachers to share their traditional teachings, stories, songs, and oral histories, focusing on the spiritual teachings and ceremonies" (Ruml 2011, 155).

indigenous and non-indigenous peoples have criticized pan-indigenous spiritual practices as non-traditional and therefore not authentically indigenous. Coates responds by stating that the "emergence of shared spiritual traditions is ... a fairly logical outgrowth of social and demographic change. The practices provide a symbolic and practical identifier for indigenous people and a recognizable means of asserting Aboriginality to non-Indigenous peoples" (224). In other words, one could understand the pan-indigenous religious movement as the outgrowth of a culture of survival.

In Canada, more specifically, Reginald Bibby and James Penner (2009) conclude that a revitalization of indigenous religions is particularly prevalent among Canadian indigenous youth. Aboriginal Affairs and Northern Development Canada (AANDC) research and religious studies scholar, Marc Fonda (2011, 174) writes, "The increasing interest among scholars of religion, increased numbers of books being written on the subject, and the fact that Aboriginal spiritual thinking and epistemologies are promoted in national Aboriginal organizations" is evidence that Canada is amidst a revitalization of indigenous religions. This revitalization is particularly important for public policy, Fonda argues, given the demonstrated connection between "cultural continuity" and well-being. However, the state's primary means of gathering information on its citizenry is, in Fonda's analysis, inadequate to recognize this revitalization. He criticizes census practices for (1) assuming a lineage of belief determinable by the religion of the previous generation and (2) allowing for only one choice in the field of religious beliefs. In many ways, the census reflects the larger limitation facing contemporary indigenous religions. It understands them as unchanging, singular, and unaffected by contact and combination.

Scholars suggest these revitalization movements may be inherently political (Adelson 2008; Tanner 2008; Fonda 2011). For instance, Adelson (2008) writes, "There has been a tremendous growth of Native Spirituality across indigenous Canada, and this growth has occurred, significantly, in tandem with the larger, more overt political recuperative process" (276). The "rise of pan-Indian spirituality" not only presents what Fonda (2011, 183) describes as "evidence of vital and thriving cultures that are adopting to different conditions of life, different situations, times, and technologies," but also evidence of the importance of both understanding and protecting contemporary forms of indigenous religions regardless of the contentious debates in existence among some indigenous communities. As Fonda (2011) concludes, there is still a lot of research to be conducted on the "varieties, characteristics," and "politics" of the revitalization of indigenous religions.

Given the diversity of contemporary indigenous religions, the importance of these traditions, in whatever form, for the well-being of indigenous peoples, and the popular misconceptions that have always seemingly accompanied non-indigenous contact with indigenous cultures, there is a need for broadening the social knowledge of indigenous religious traditions in both public and political life. Considering the contentious nature of some contemporary forms of indigenous religious practices and beliefs within particular Aboriginal communities, this subject is of particular importance.[80]

5.4 Diversity and the Sun Dance Ceremony

Since the primary case study for this chapter deals with the Sun Dance ceremony, it is important to introduce the tradition. First, however, it is necessary to state a disclaimer in relation to what I have written above. In his study of the Lakota Sun Dance, Dale Stover (2001) points to a problem regarding the study of the ceremony. He writes:

> For traditional Lakota people the contemporary Sun Dance signifies the continuation of and identification with the traditional ways of ancestral generations, whereas for European American culture it represents the epitome of "otherness," the imagined "primitive" world of indigenous America before European contact. Lakota Sun Dancing carries this double marking because it emphatically represents an embodied spirituality that is, on the one hand, deeply characteristic of indigenous traditions and is, on the other hand, at profound odds with a Eurocentric modernism that dualistically segregates the religious experience of the subjective self from the objective, embodied realities of the world. European American descriptions of Lakota Sun Dancing typically manifest the predilection of the metropole for assigning to indigenous rituals only those meanings that conform to modernist categories of thought (823).

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[80] One of the most recent controversies surrounding the revitalization of indigenous religious traditions in Canada was in Oujé-Bougoumou, Quebec, where a Cree community collectively decided to tear down a Sweatlodge that one of their community members had erected on the reserve. The predominantly evangelical Christian community also banned all forms of indigenous religions in early 2011 (A. Francis 2011).

Stover examines three studies of the Sun Dance that focus on the authenticity of the ceremony, as opposed to the aspects that make up its contemporary forms. Moreover, given the fluid, adaptive nature of indigenous religious traditions, there is an inherent difficulty in any general examination of the Sun Dance ceremony. An historical study of the ceremony does provide evidence of the adaptive and experiential nature of the Sun Dance, but it does not dictate its modern forms. In other words, studying an "historical" Sun Dance should not correspond with contemporary inquiries as to the authenticity of the ceremony, despite the fact that scholarship has tended to do just that.

Within the region where the Sun Dance originated, Great Plains communities such as the Cheyenne and Lakota have oral traditions that trace the ceremony to time immemorial. While European scholarship acknowledges that the origins of the Sun Dance certainly extend deep into the unwritten histories of North American civilizations, scholars typically hold that the ritual first emerged among the Plains Algonquians at the turn of the eighteenth century. The ceremony then spread throughout the Great Plains to communities in contemporary Canada and the United States, including the Arapaho, Ankara, Assiniboine, Blackfeet, Cheyenne, Comanche, Crow, Eastern Dakota, Gros Ventre, Hidatsa, Kiowa, Lakota, Mandan, Ponca, Plains Cree, Plains Ojibwa, Sarsi, Shoshone, and Ute (Hirschfelder and Molin 2001).

Colonialism and the move to reserves affected the Sun Dance ceremony. Joseph Jorgensen (1985) contends that the contemporary form of the Sun Dance is one "born of misery and oppression" persisting in a context of misery and oppression (117). Although his analysis should not be broadened to include all communities, Jorgensen points to a significant change among the Wind River Shoshone, for example, who saw the meaning of the Sun Dance move away from the purposes of "insuring successful bison hunts and warfare to an increased concern over illness and community misery" (114). He argues that similar patterns emerged among the Ute. Legislation banning the ritual in both Canada and the United States over the first half of the twentieth century meant that further changes were required of the ceremony. Thomas Mails (1998) explains that, for the Sioux, maintenance of an illegal ceremony meant changing the time of the ritual (to blend with American holidays such as Independence Day), and the hiding of the piercing ritual, which officials had cited as a primary reason for the ban of the ceremony in both countries.

Put bluntly, there is no singular form of the Sun Dance. It has developed differently in each community in response to internal and external forces. The most prominent aspect of the Sun Dance is the piercing ritual that involves tearing of flesh as an act of self-sacrifice, the embodiment of pain

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and suffering, the dismantlement of egos, the initiation of visions, and the attainment of power, among other things. However, some groups, such as the Kiowa, did not include the piercing practice within their Sun Dance ceremony (Hirschfelder and Molin 2001).

To make claims regarding a Lakota, Kiowa, or Ute ceremony today is problematic given the fact that, even among communities where the ceremony is traditional, it can be distinctly pan-indigenous in nature. In his study of the Oglala Lakota religious identity, Paul Steinmetz (1998) notes that multiple Sun Dances occur on the reserve each year, involve participants from outside the Lakota Nation, and emphasize "Indian identity" rather than tribal identity (32). Eventually, Sun Dances began to take place in locations where practitioners had not traditionally performed them. Amidst the 1995 Sun Dance at Gustafsen Lake, Jorgenson explained to *Vancouver Sun* readers that they should not be surprised to see the ritual—which originated and developed among Plains communities— emerge in places where it had not historically been part of indigenous religious practice. Referencing the Navajo of Arizona and the Paiutes in Nevada and Oregon, Jorgenson contends that following the standoff at Wounded Knee, South Dakota, in 1973, a new religious movement began to spread across North America that emphasized redemption through spirituality. Young indigenous peoples embraced traditional practices such as the Ghost Dance and Sun Dance because, as Jorgenson explained, they offer relief from personal problems, a more defined identity, and a sense of honour (Hume 1995).

The American Indian Movement (AIM), which led the violent standoff at Wounded Knee, is an excellent example of a pan-indigenous organization that is politically active against state-sponsored indigenous leadership and religiously committed to the Sun Dance ceremony. One of the AIM leaders at his trial for Wounded Knee expressed how his religious convictions confirmed through the Sun Dance ceremony provided him and others with the courage to stand up in defence of indigenous peoples and protest elected leadership (Sayer 1997). One of the most notorious AIM members, Leonard Peltier, controversially convicted by a U.S. federal court of killing two Federal Bureau of Investigation (FBI) agents during a 1975 shootout in Pine Ridge, South Dakota, wrote an autobiography entitled *Prison Writings: My Life is My Sun Dance* (1999). In the book, he details the important role the Sun Dance played in providing him with identity and strength in his struggle for Native American freedom.[81]

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[81] Many Sun Dancers have not interpreted the ceremony in the same way as the AIM or, later, as those at Gustafsen Lake. For example, participants of the Dakota Eagle Sun Dance in Manitoba incorporate the ideals of the Sun Dance by helping the elderly and responding to community requests

Since 1990, AIM has held an annual Sun Dance ceremony in its home state of Minnesota, but AIM's ties to the Sun Dance go back to nearly the origin of the movement. In a press release of July 2011, the leaders of AIM decided to disassociate themselves from a ceremony in Michigan where they felt practitioners were "acting in a non-spiritual way." AIM announced that it had banned those practitioners who had come from Michigan to their ceremony. At the risk of sounding elitist, AIM recounted the origin of its first Sun Dance in 1971 in response to the suppression of the ceremony in Pine Ridge, South Dakota. It went on to assert that there are hundreds of Sun Dances each year, and while "Indian people can have all the Sun Dances they want," it hopes that organizers are responsible (AIM 2011). Even within the pan-indigenous movements, there is contestation regarding the ceremony, but the close connection between AIM and the Sun Dance is an excellent example of how the ceremony has diversified in the past few decades.

5.5 Splitting the Sky and Transmitting the Sun Dance Ceremony

AIM is an even more appropriate example when one considers that the 1995 Gustafsen Lake Sun Dance leader, Splitting the Sky, was a member and regional leader of the American Indian Movement in the 1980s. As discussed above, a number of important structural and organizational changes have led to even greater diversity within the Sun Dance ceremony. Further adding to the complexity of indigenous religious traditions is the manner by which practitioners learn about religious traditions today. One generation does not necessarily pass these traditions on to the next, as the Canadian census assumes. Uniquely transmitted religious traditions or ceremonies do not make them any less authentic for practitioners. The story of Splitting the Sky's encounter with the Sun Dance is one illustration of how some indigenous peoples may learn religious traditions and practices in modern day Canada.

Splitting the Sky is a Mohawk born and raised in New York State. His childhood memories are mostly of his experiences in foster homes and various state-sponsored housing and correctional facilities. The state took him from his mother at a very young age and he only briefly remembers spending some time with his grandmother on the Tonawanda Indian reserve just outside of Buffalo. By his own admission, he spent most of his early life partying and getting into trouble without any real sense of identity or direction. He spent the 1970s in prison following an attempted robbery

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(Ruml 2009). Given the adaptive nature of the ceremony, however, interpretations of the ritual that involve political action or even violence cannot be dismissed as an anomaly or rejected from the tradition altogether.

conviction and the subsequent conviction of killing a prison guard during the 1971 Attica prison riot. During this time, he began to come "into awareness historically of [his] own roots as an indigenous person, as a Mohawk Native" (Splitting the Sky [STS] interview with author, 31 Mar 2011). Literature, rather than first-hand accounts of indigenous heritage, provided him with the foundations of his identity. His studies began with Dee Brown's *Bury My Heart at Wounded Knee* (1970). Later, he encountered *Lame Deer: Seeker of Visions* (1972), *Black Elk Speaks* (1932), and, Elliot Silverstein's film *A Man Called Horse* (1970), which first informed his knowledge of the Sun Dance. He recounted to me his feelings of watching Richard Harris act out the Sun Dance ceremony in *A Man Called Horse*:

> And this guy is standing there and all of the sudden I see them cut his chest in two places and then they put the hooks in ... All of the sudden drumming, the beat became fast and furious. And this was totally exciting me. And ... all of the sudden they start pulling him up and everyone who's there looking at it says "Oh, man, look at this. This is incredible! Look what they're doing, this ritual." And I thought to myself, "Jeez, if a white man can do that, I can do that" (STS interview with author, 31 Mar 2011).

After discussing the impact of *Bury my Heart* and *Black Elk*, he remarked, "Anyways, that being the basis of my search because I was pretty much, you know, in the foster homes and boarding schools, residential schools, and most of my life was spent away from my Native heritage" (STS interview with author, 31 Mar 2011). Following a prison-cell revelation in the mid-1970s, which he interpreted through Eastern philosophy, he became fascinated with the power and strength that, he believed, he could attain through religious belief and experience (STS 2001).

   After being pardoned from his conviction during the Attica riot, Splitting the Sky met American Indian Movement members at a rally on the Washington Mall in 1980. They invited him to participate in the Sun Dance ceremony, which he claimed was central to the AIM and its appeal to him and other members. He stated:

> The Sun Dance eventually became part of the essential ceremony in the movement throughout all North America and all four directions. It helped us to create a pan-indigenous movement – very key. Which

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is why historically when the cavalry came in and the generals and the criminals came in, the first ones they wanted to kill was the spiritual leaders of these very ceremonies. And that's why these spiritual leaders were always first designated to be killed and/or co-opted. If they could not be bought off they were killed instantaneously because that was a source of power (STS interview with author, 31 March 2010).

Within a year of becoming involved with AIM, Splitting the Sky was on his way to South Dakota to participate in his first Sun Dance. The ceremony at Gustafsen Lake was his sixteenth.

Splitting the Sky's life story is an exemplary case demonstrating how indigenous peoples are formulating, learning, re-learning, and teaching their spiritualities and religions in the wake of outright state-sanctioned attempts to eradicate indigenous cultures. His interpretation of the Lakota origin of the Sun Dance and Black Elk's teachings is that indigenous ceremonies, in general, are sources of community strength that can help to unify indigenous peoples and combat the genocide brought on by the colonial experience. During his fifth Sun Dance ceremony, while suspended in the sacred arbour, he articulated that a vision and journey to the spirit world gave him an understanding of how one could attain strength, unity, and freedom. He recounted:

I started crying, in my heart it felt like I was crying. And then I could see, I looked into the sky and the whole sky was this face of this great powerful thunder and lightning being. And I said to him, 'spiritual father, are you the power, the thunder and the lightning being? And it just smiled at me, this beautiful smile, almost like a Mona Lisa smile on a great powerful warrior in the sky …I began to sob, not through my face but my heart was sobbing and I wept like a child and I totally broke down, my ego was broke down. I had a momentary vision that said 'prepare for hard times to come' but don't worry, the powers are with you and then there was just these thousands of eagles that were flying in the spiritual realm, all around … It helped me see, at that point, on physical levels, that this world does not stop here (STS interview with author, 31 Mar 2011).

Through the Sun Dance, he reported that he was able to establish a connection between past, present, and future generations. He was also able to transcend a fear of death that, in turn, gave him the courage to engage in defensive stances with those who threatened "his nation, his extended family" (STS interview with author, 31 Mar 2011).

He conducted his first two Sun Dances in South Dakota in 1980 and 1981, and then returned to the East Coast to continue the ceremony in Port Tobacco, Maryland, roughly 35 miles (60 kilometres) outside of Washington, D.C. The land on which they conducted the ceremony, which took place during the 1980s, received a blessing from Leonard Crow Dog, a well-known Lakota Medicine Man, a member of the AIM, an occupier at Wounded Knee, and a supporter of a pan-indigenous community. With the location of the dance in such close proximity to the capital, and with support of the AIM, the ceremony attracted new participants from across the country. Splitting the Sky eventually made his way to Canada in 1993 and participated in a Sun Dance in Saskatchewan. He then sought out another Sun Dance after relocating to Hinton, Alberta. There he met Percy Rosette, who had been conducting ceremonies at Gustafsen Lake in British Columbia since 1990.

Splitting the Sky's spiritual journey and re-discovery of traditional indigenous spiritualities is an exemplary story of the pan-indigeneity that emerged in the second half of the twentieth century. Traditional indigenous religious practices and beliefs provided him with a sense of identity, determination, and purpose that may have otherwise been unrecognized and undeveloped during his early troubled life. His story is not unique. He spoke of many others who came to Maryland, experienced the Sun Dance for the first time, and returned to their homelands to continue the practice. Even at Gustafsen Lake, a young Anishiaabe from Ontario, James "OJ" Pitawanakwat, participated in the ceremony for the very first time and expressed an attraction and appreciation for indigenous religious practices following the standoff (Pitawanakwat 2001).

The story of Splitting the Sky demonstrates some of the complexities of contemporary indigenous spiritual practices and the importance of understanding diversity and developments within those traditions. There appears to be a correlation between the revitalization of indigenous religions, identity, and well-being. For structurally disadvantaged groups, the inclusion of the perspectives informing these spiritual practices and beliefs in civil society can help to preserve minority cultures and, in turn, the self-determination of minority groups. It can also help broaden social knowledge. In principle, this ought to help combat stereotypes of indigenous religious traditions. Iris Marion Young (2000a) argues:

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Most group-based movements and claims in contemporary
democratic polities derive from relationally constituted structural
differentiations. When so understood, it becomes clear that socially
situated interests, proposals, claims, and expressions of experience
are often an important resource for democratic discussion and
decision-making. Such situated knowledges can both pluralize and
relativize hegemonic discourses, and offer otherwise unspoken
knowledge to contribute to wise decisions (7).

In addition, the diversity of indigenous religions, the contentiousness of their existence in some communities, and the pan-indigenous political movements to which some ceremonies have connected, makes this issue far more complicated for mediators of self-development in a democratic society.

5.6 The Gustafsen Lake Sun Dance Ceremony and Occupation

The Gustafsen Lake Sun Dance, occupation and standoff are a series of events that demonstrate the need for a broader social knowledge of contemporary indigenous religious traditions, the potential negative role the state may play in mediating disputes involving indigenous religions, and the potential effects of exclusion. Before beginning to tell the story of Gustafsen Lake, it is appropriate to make an important point regarding civil disobedience. Practically, civil disobedience has proven to be an effective means of enacting social change for many indigenous groups. For example, the Innu Nation has been particularly successful in drawing public attention to matters of injustice and instigating meaningful discussion. Iris Marion Young (2000a) explains that one can understand civil disobedience, in theory, to be reasonable in an agonic, deliberative model of democracy. She writes:

Under circumstances where there are serious conflicts that arise from
structural positions of privilege and disadvantage, and/or where a
subordinated, less powerful or minority group finds its interests
ignored in public debate, members of such groups do not violate
norms of reasonableness if they engage in seriously disruptive
actions, or express their claims with angry accusations.
Disorderliness is an important tool of critical communication aimed
at calling attention to the unreasonableness of others—their

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domination over the terms of debate, their acts of exclusion of some
people or issues from consideration, their use of their power to cut
off debate, their reliance on stereotypes and mere derision (48–49).

She continues, "I aim to challenge an identification of reasonable open public debate with polite, orderly, dispassionate, gentlemanly argument" (49). These kinds of restrictions on reasonableness are exactly the reason why Young advocates for communicative democracy rather than a traditionally more mechanistic deliberative democracy. It is not my intention to condone or condemn the actions of the occupiers; however, it is imperative that their actions are not dismissed based on the standoff or the civil disobedience that led to violence. Moreover, I do assert that the state could have (1) done more to facilitate mediation, (2) provided a safe environment for deliberation, and (3) more fully understood or recognized the importance and complex role of religion in the confrontation.

In 1990, a group of indigenous peoples began conducting a Sun Dance in the interior of British Columbia at Gustafsen Lake. Through visions, Percy Rosette, a Shuswap man from the area, and others, discovered the Sun Dance site and the burial grounds they believed to be nearby the site. Rosette approached the owner of the area at Gustafsen Lake to ask for permission to hold a Sun Dance on the grounds. Lyle James, an American rancher who held title over the land for his cattle company (since 1972) entered into a verbal agreement with Rosette to use the area for a period of four years under the condition that the Sun Dancers would not erect any permanent structures. Gustafsen Lake (or Ts'peten for local indigenous communities) was a popular camping and fishing area for indigenous and non-indigenous alike, so allowing the ritual to take place was of little consequence to James. The Sun Dance drew participants from both Canada and the United States, attracting between 400 and 500 people in the first two years. Rosette would take the title "Faith Keeper" responsible for protecting the sacred Sun Dance site. Members of the local elected Shuswap leadership admitted that they were not familiar with the ceremony before Rosette and John Stevens, a medicine man from Alberta, brought it to the B.C. interior. Indeed, the Sun Dance is not traditional to the interior of British Columbia (Lambertus 2004; Switlo 1997).

In 1994, the Sun Dance continued as usual despite the fact that Rosette's initial agreement with Lyle James had ended in the previous year. James visited the site after the completion of the ceremony to find that Rosette and his partner Mary Pena had taken up residence at the lake. Unknown to James at the time, Rosette and Stevens had enlisted the aid of Bruce Clark, a lawyer and veteran activist for indigenous land rights. Rosette had been involved in researching land claims for the

Shuswap Nation and had discovered that the land on which the Sun Dance was taking place had been part of a larger tract of land whose rightful owner, in Rosette's view, was the Shuswap Nation and not the James Cattle Company. Rosette claimed that local elected leadership had intentionally lost the evidence he had collected. As early as 1992, local elected Shuswap leaders were having problems with the Sun Dancers. One member of the Cariboo Tribal Council commented that he was concerned with the fact that the Sun Dancers were "mixing religion and politics" in their preparatory meetings (Lambertus 2004, 30).

Central to the standoff to occur later that year was Clark's Petition to Queen Elizabeth II, dated 3 January 1995, and signed by both Rosette and Stevens. Clark's Petition is an exercise in Canadian and British jurisprudence and international law, arguing for third-party adjudication over unceded indigenous lands within the contemporary boundaries of the Canadian state. The petitioners attested that because of the illegal usurpation of land by the federal government, indigenous peoples, under the current tribal system, were facing "serious mental harm," as defined under the United Nations' *Convention on Genocide* (1948), leading to "prejudiced rates of mortality." The plaintiffs identify themselves as "The Tribal System Natives of the Sun-Dance (central), the Potlatch (western), and the Feast of the Dead (eastern) traditions."[82] Representatives of indigenous religious traditions sought restitution from the Queen rather than elected First Nations leadership. The Attorney General of British Columbia stopped the petition at the provincial level and did not forward it to Ottawa.[83]

The Royal Canadian Mounted Police (RCMP) was involved early in 1995 to mediate what they had determined to be a civil matter. After chasing grazing cattle from the Sun Dance site in the previous year, occupiers erected a fence around the sacred arbour to protect the space from defecating cattle (Lambertus 2004). On 13 June, out of fear that the Sun Dancers were trying to stake out territory, James presented the Sun Dancers with an eviction notice. Although James argued that the serving of the notice was quite formal, Sun Dancers contended that ranch hands were responsible for a number of violations toward their religious beliefs, including the interruption of ritual preparation, the photographing of Sun Dancers in preparation and the desecration of a sacred spear on which ranch

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[82] An Oregon District Court (in *United States v. Pitawanakwat*, dealing with the extradition of one of the occupiers) described the plaintiffs in Clark's petition as a "Native Sovereignty Association" (2000).

[83] In 2012, following the housing crisis at Attawapiskat, Ontario, and the proposal by the Conservative government to dissolve the *Indian Act*, elements of the grassroots, leaderless, "Idle No More" movement have made similar petitions for third-party adjudication on matters pertaining to justice for indigenous peoples in Canada.

hands impaled the eviction notice. The violation of sacred objects and religious practice was complicated by the fact that the ranch workers were allegedly brandishing weapons and stated it would "be a good day to string up some red niggers" (Lambertus 2004, 32).

A press release of 17 June, signed by the self-proclaimed "Defenders of the Shuswap Nation," outlined the events of 13 June and the various violations to their sacred site that took place at the hands of the James Cattle Company. Fearing the suppression of their religious ceremony, they offered an open invitation to all Sun Dancers "to come to Gustafson Lake and ensure that this Sun Dance [would] be held as planned to sustain [Original Peoples'] inheritance and religious freedom." Conceptualized within the context of the colonial experience, the attempted eviction on the part of James and the response of the RCMP to engage as anything more than passive mediator at this early juncture contributed to the perception among occupiers that indigenous religion was under attack.

On 17 June, the Sun Dancers met with representatives of the James Cattle Company and locally elected leaders from the Cariboo Tribal Council. At the meeting, the parties supposedly reached an agreement that would allow the Sun Dance to occur in early July, after which point occupiers would vacate the site (Lambertus 2004). The Sun Dancers rejected the resolution and issued a press release on 18 June, identifying themselves as the "defenders of the Gustafsen Lake Sacred Grounds," and affirming that the space was non-negotiable. They stated, "It is our belief that the presence of the ancestral powers on this land will ensure that our struggle will be victorious" (Defenders 1995). Asserting their belief in the spiritual significance of the Sun Dance site, the defenders again confirmed their intention to ensure that the ritual take place, despite the perceived attempts to suppress the ceremony. Splitting the Sky later stated that the Sun Dancers might have left the site after the ceremony if it were not for the persistent violations to their preparations (Lambertus 2004).

On 28 June, Stephen Frasher of the *100 Mile Free Press* published an article highlighting a primary concern of the situation at Gustafsen Lake that observers would later forget. In his article, "Is Gustafsen Lake a Sacred Site? Or More?" Frasher identifies the important connection between land disputes and religious practice for Faith Keeper, Percy Rosette, noting the divide between the "traditionalists" and elected Shuswap leadership. He concludes, "Preventing the Sundance itself, [occupiers] say, would be an infringement of religious freedom and human rights."

In the early stages of the occupation, three First Nations RCMP constables were involved in the mediation of the civil dispute between James and the Sun Dancers. They were responsible for maintaining some form of security for the site and were active in setting up meetings between the

competing parties. Splitting the Sky invited Constable Wood in mid-June to attend the ceremony. Constable Andrew attended the opening day of the ceremony and reported that there were no problems at the site. Sun Dancers took Constable Findley on a tour of the burial grounds and sacred arbour before they invited him to participate in prayer and a cleansing sweat with the Sun Dancers. Findley expressed in his notes that he had established a good rapport with the occupiers and that the presence of eagles upon their concluding handshakes was a good sign (Switlo 1997). Wood, Andrew, and Findley believed that a meeting established for late August would have resolved the situation if not for the occupiers' discovery of the Emergency Response Team (ERT) on 18 August (Lambertus 2004). After the incident, the RCMP asked the three indigenous officers who had been working the case not to visit the camp. Wood eventually quit the RCMP. Andrew and Findley later expressed their frustrations with the RCMP for ignoring them during the later stages of the occupation (Pemberton 1997).[84]

One of the greatest detriments to recognizing the important role religion played at Gustafsen Lake was the combined efforts of local Shuswap leadership and the media, both of which, to varying degrees, advocated for dismissing the validity of the religious beliefs of the Sun Dancers. The early introduction of mixing politics and religion, which upset Shuswap Chief Antoine Archie, led him to research the Sun Dance practice that had begun occurring in Shuswap territory in 1990. Archie explained in a July 1997 interview that the elected Shuswap leadership challenged those at Gustafsen Lake by claiming that the "real Sun Dancers" told them they needed to take a break (Lambertus 2004, 31). Newspapers picked up the story of the Sun Dance as a modified import that challenged the occupiers' right to stand in defence of the land (Thompson 1995; Roberts 1995; sundance ritual new to B.C. 1995). Additionally, the public assertions by local leadership that there were no burial sites on the premise (Chiefs condemn 1995) and that the land held no specific spiritual significance (Platiel 1995) were some of the most damaging statements in understanding the important role religion played in the dispute.

Amidst much controversy and criticism, the Sun Dance began on 2 July with protection from the RCMP (Switlo 1997). The strong political nature of the occupation led many to believe that the religious beliefs at Gustafsen Lake were less than genuine. On the day the Sun Dance began, a news article in the *100 Mile House Free Press* reported a local Sun Dance elder as condemning the

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[84] Findley would express his frustrations during the trial for those from Gustafsen Lake but would later recant his concerns in lieu of the evidence of weapon caches, articulating that he was not sure if they did the right or wrong thing (Pemberton 1997).

militancy of the 1995 Sun Dancers, arguing the occupiers were "part and parcel of the Confederacy movement for sovereignty under the umbrella of the Sun Dance" (Sun Dancer denounce 1995).

When occupiers invited local media, who had been covering the Sun Dance since 1993, into the camp in late June to view the site, Steven Frasher noted that the things Splitting the Sky spoke to them about were "entirely different than anything [the media had] heard associated with Gustafsen Lake before." He explained that despite the speech they received on jurisdiction and rightful ownership of the land, there was no evidence provided to support their claims, and interpreted the tour of the Sun Dance grounds and alleged burial site as a ploy to "create their spin on the situation." Observing Splitting the Sky and Rosette speaking during the tour he recalled that Rosette was uncomfortable because "for him it was a Native spiritual thing." Frasher also noted that Splitting the Sky and the militant faction of the group "would have to latch [their] cause to take whatever legitimacy they could from what Percy was doing," a claim he and other reporters had been asserting since the beginning of the occupation (Lambertus 2004, 35–36).

Rumours of gunfire and armament at the camp started to surface in July and early August. The RCMP initially dismissed ranch worker claims of gunfire. This changed when the RCMP apprehended two of the Sun Dance participants fishing illegally in the Fraser River and found an assault rifle in their truck. The RCMP decided not to go to the media with their decision to intensify their investigation of the occupiers for fear that it "would give them the audience" they wanted (Lambertus 2004, 42). Instead, they decided to send in a reconnaissance team to gather information before removing the occupiers, despite the fact that the Aboriginal officers mediating the situation had already setup a meeting for later in August (Lambertus 2004).

5.7 The Standoff

On 18 August, occupiers discovered and shot at an RCMP Emergency Response Team (ERT) sent to conduct reconnaissance on them, officially beginning the standoff. Four hundred RCMP officers and four Armoured Personnel Carriers (APCs), supplied by the Canadian military under Operation Wallaby, converged on 20 square acres outside of 100 Mile House to confront nearly two dozen armed people. On 25 August, the Cariboo Tribal Council invited National Chief Ovide Mercredi to mediate and end the standoff. The RCMP told Mercredi that he had two days, during which time they would continue planning alternative procedures for removing the occupiers. Media coverage of the

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first meeting reported that Mercredi was largely unsuccessful despite his comments to the contrary.[85] Following the first meeting, the RCMP cut off access and cell phone communication with the occupiers. The RCMP did not permit media to enter the camp for Mercredi's second meeting with the occupiers. Mercredi noted afterward that the meeting consisted mostly of those at the camp voicing their frustrations regarding the RCMP action (Lambertus 2004).

In her comprehensive study of the media and Gustafsen Lake, Susan Lambertus (2004) explains the significance of the RCMP action:

> The RCMP's strategies of barricading the primary road to the camp and cutting off the camp's ability to communicate with anyone other than law enforcement personnel probably had the strongest influences on the [negative] media characterizations [of the occupiers]. The RCMP did not likely anticipate at the time that these common law-enforcement practices would result in the escalation of stress inside the camp, the altering of news-gathering processes, and the magnification of the RCMP's power to interpret the event to the media. These outcomes increased the risk of violence as well as the potential for media distortion (63).

For the RCMP, the actions were a preventative measure against violence and a means to cut off any instructions received from either Splitting the Sky, who left the camp shortly before the standoff, or Bruce Clark. For the camp, it was a sign that the RCMP was setting the stage to storm the site. The RCMP began the confrontation as mediators; however, by August, they had taken on a more oppositional role. In addition, the media became almost completely dependent on the RCMP to provide or deny them information. On the afternoon of 27 August, reports that two ERT officers encountered gunfire from the camp ended any further chance of Mercredi returning to the site to mediate (Lambertus 2004).

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[85] Reporters and, in turn, government officials, and the RCMP, derived their opinions regarding the effectiveness of Ovide Mercredi based on audio recordings of the meeting. Susan Lambertus (2004) argues, "Although audiotapes provide accurate quotations, other non-verbal communicative details are missing, such as body language, gestures, facial expression and eye contact. Furthermore, an awareness of the positioning and impression management that underlies such negotiations, as well as a knowledge of Native communication styles, would have provided a broader interpretive base for understanding the situation" (60).

In addition to setting up barricades around the occupation site, the RCMP confiscated video footage of and released by the occupiers. According to facts later publicized at trial, the RCMP also fabricated stories that contributed to negative public characterizations of those in the camp (Lambertus 2004). On 23 August, the RCMP seized the documentary *Defenders of the Land*, shot by non-indigenous occupier Trond Halle, from the Canadian Broadcasting Corporation (CBC). On 6 September, they confiscated the CBC footage captured earlier in the standoff when the CBC had access to the camp. In both cases, the RCMP considered the video footage of occupiers to be evidence in a criminal investigation. The day before the RCMP seized the second video footage, they reported an incident of gunfire between occupiers and police vehicles. At the trial, it became clear that within 24 hours of the incident, the RCMP could not confirm occupiers had shot their vehicles. The forensic evidence identified toward the end of the standoff suggested that a tree branch might have hit the vehicle. The RCMP did not retract any statements regarding the alleged attack by occupiers (Lambertus 2004).

On 7 September, the Shuswap Nation held a meeting involving 17 of their bands. The purpose of the meeting was to establish a team of Aboriginal intermediaries to bring the standoff to a peaceful resolution. The Shuswap Nation invited the RCMP and media as guests, asking them to adhere to their agenda and to attend only those portions of the meeting for which they had given permission. The view of indigenous communities in the area was that Gustafsen Lake was an indigenous issue that would be resolved through indigenous means. Once they were able to access the camp, the intermediaries were able to provide a different perspective on the occupiers and the conditions at the lake. Chief Nathan Matthew of the North Thompson band, and chairperson of the Shuswap Nation, expressed his concern regarding the public depiction of occupiers at the camp. The *Vancouver Sun* quoted Matthew stating that the camp had transformed from "a defence-oriented camp to a peace camp" (Hopes falter 1995). B.C. Attorney General Ujjal Dosanjh responded acerbically in the *Victoria Times Colonist*, "Peace camps do not have AK-47s" (Native leaders tightlipped 1995).

Shortly after these comments, on 11 September, an extensive firefight took place between the RCMP and occupiers. The incident involved the APCs on loan from the Canadian Military and thousands of rounds of ammunition. The incident began when RCMP detonated an "early warning device" buried in an access road to the camp, blowing out the front axle of the truck carrying occupiers. Non-indigenous occupier Suniva Bronson was the only individual shot and wounded during the confrontation. The three occupants of the truck were heading to get water for the

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indigenous intermediaries set to arrive that afternoon. Whether the occupiers knew the RCMP had tightened the camp perimeter the day before and cut off access to the well and firewood, remains unknown. The next day, Matthew clarified his comments regarding the "peace camp," stating that he wanted to remind people of the site's significance as ceremonial Sun Dance grounds (Three Natives 1995).

The portrayal of the occupiers following the firefight was the "most vilifying" of all the news coverage (Lambertus 2004). The RCMP took the opportunity to enact a smear campaign[86] identifying the names and criminal records of the occupiers. The RCMP worked out the media strategy on 1 September but seized the opportunity following the firefight to enact the plan. According to Susan Lambertus (2004), "The success of the 'smear campaign' rested on the RCMP's knowledge of the kind of news that would have the greatest appeal, their knowledge of news production practices, and their authority as the most important media source" (122). The RCMP contrasted negative characterizations of the occupiers with positive assertions regarding their own actions. The occupiers were officially violent criminals (Lambertus 2004).

After an incident on 12 September, in which ERT officers shot at an unarmed occupier, a shift in the approach by the RCMP turned their attention back to the religious aspect of Gustafsen Lake. On 13 September, on the same day a spiritual leader from the local Penticton band was able to bring someone out of the camp, the RCMP arranged for Dakota spiritual leader Arvol Looking Horse to enter the site. While performing a religious ceremony the occupiers agreed to leave the camp after three days. However, the RCMP stifled the progress made by Looking Horse when they coerced CBC radio to broadcast a message to occupiers from Chief Antoine Archie, ensuring their safety if they surrendered. The RCMP stated that the occupiers requested the assurance from local leadership, but, following the broadcast, reporters and supporters of the occupiers questioned the choice of Chief Archie given the occupiers' stance toward elected leadership (Lambertus 2004). Looking Horse, unaware of the RCMP plan, criticized the police for not giving him enough time (Lee 1995).

On 17 September, medicine man John Stevens led the twelve remaining occupiers out of the camp, ending the standoff. Two days afterward, the media discovered that at least three weeks earlier

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[86] Susan Lambertus (2004), in her analysis of the media and the RCMP, notes that on 1 September the RCMP were recorded stating that "smear campaigns are our speciality" (122). In an interview with Lambertus, Sergeant Montague agreed that putting out their criminal records could be interpreted as a smear campaign, although the term "smear campaign" does not appear in the official RCMP media plan.

Splitting the Sky had provided two names to the RCMP who could act as mediators in the conflict: Looking Horse and Stevens. RCMP Corporal John Ward confirmed for reporters the existence of Splitting the Sky's list of mediators; however, he denied that the RCMP ignored the importance of religion in the conflict and told reporters it was "not a big deal." He continued, "We knew about these people. We had a list of them. It was a matter of when we were going to use them, plain and simple" (Lee 1995).

Splitting the Sky's choice to recommend Looking Horse and Stevens as mediators in the conflict is important because it speaks to the foundational purpose that drew occupiers to the site. It also speaks to the point Chief Matthew made following the firefight: this is a sacred ceremonial site. Splitting the Sky offered this perspective on the mediators:

> John Stevens had the total respect of everyone. So, if John Stevens says 'go for it,' then all right, we went with his protection and the spirits that walk with him. And, if he says it's time to quit then it's time to quit ... What John Stevens says goes. That's it. That's the law. He was the keeper of that Sun Dance, the Medicine Man for the Sun Dance (STS interview with author, 31 Mar 2011).

Splitting the Sky thought Chief Arvol Looking Horse deserved an opportunity to mediate since he is a respected Lakota spiritual leader and the nineteenth generation holder of the sacred pipe of the White Buffalo Calf Woman. The Lakota tradition understands the White Buffalo Calf Woman to have brought the Lakota people their most sacred possessions and rites, including the Sun Dance ceremony. Splitting the Sky concluded our conversation by re-affirming the authority of Stevens at the Sun Dance grounds.

The RCMP charged 18 people in the Gustafsen Lake standoff. The most serious of the sixty charges laid was attempted murder, but the most serious conviction was "mischief causing danger to life." The trial lasted ten months, beginning 8 July 1996 and ending on 27 May 1997. In his statement to the court before it found him guilty of "mischief causing danger to life," James Pitawanakwat defended his stand at Gustafsen Lake: "Ceremonies like the Sun Dance need to be protected from cultural genocide. This is the basis for my resistance. We are not militants or terrorists. We are warriors to our people. Our families. Our generations yet to come" (2001, 38). In addition,

Pitawanakwat's statement emphasizes a concern made explicit in pre-ceremony press releases; namely, indigenous religion was under attack at Gustafsen Lake.

5.8 Conclusion

Different cultural communities have a tendency to homogenize the "Other." However, within particular structures of power, the dominant group's perspectives may influence policy, procedure and practice. As Homi Bhabha, Taiaiake Alfred, and Daniel Francis have argued, states are often concerned with only dealing with one type of national minority—that is, the one that they attempted to create. This homogenization is equally prevalent when it comes to the subject of indigenous religious traditions, which the Euro-Canadian state understands as historically located. Indigenous religious traditions are always changing in response to both internal and external factors, just as all religions do, and indigenous communities are internally diverse, as is the case in all cultural groups. This fact is particularly prevalent in pan-indigenous movements that transcend tribes, nations, and borders. To judge these movements against their historical forms is an impossible and unfair standard. Complicating public inquiries into the authenticity of a practice is the highly politicized nature of some contemporary movements and the state's tendency to deal exclusively with the political structures it has created for indigenous communities. To facilitate meaningful dialogue in conflictual situations, the state must acquire a broader understanding of indigenous religious traditions, movements, ceremonies, and practices, and their potential political affiliations outside state-sanctioned indigenous governance. Within the context of the Sun Dance Ceremony, which helped to narrow the scope of this chapter, the stories of the American Indian Movement and the 1995 Gustafsen Lake Sun Dance leader, Splitting the Sky, helped to bring attention to the importance of having a more nuanced understanding of indigenous religious traditions than the state currently possesses.

In particular, the Gustafsen Lake confrontation speaks to the necessity of broadening the social knowledge of indigenous religions, the importance of a state apparatus that fosters communicative engagement, and the potential effects of misunderstanding and excluding minority communities from meaningful dialogue. Throughout this chapter, I addressed two separate but interconnected points regarding indigenous religious traditions and the state. First, the spiritual significance of Gustafsen Lake was a fact never seriously addressed by the RCMP, either in their capacity as mediator or opponent. Second, the RCMP contributed to the marginalization of occupiers' through the erection of communicative barriers. With respect to the first point, the demonstrated lack of appreciation for the

religious significance of the space led to escalating tensions and prolonged the confrontation. The media and local elected leadership mirrored this lack of appreciation in their condemnation of the Gustafsen Lake Sun Dance as inauthentic. The RCMP emphasis on the criminality of the occupying contingent and their pursuit of aggressive tactics and political mediation demonstrates a lack of appreciation for the spiritual significance of the space communicated by indigenous intermediaries and occupiers at every stage of the occupation and standoff. Only when the RCMP brought indigenous religious leaders to the camp did the confrontation finally end. Concerning the second point, the RCMP manipulated and controlled the conditions of debate, stifled the activities of indigenous mediators, and relied on their stereotype of occupiers' as proven criminals to justify their tactics. Despite the fact that mediators articulated the progress they were making in their conversations with occupiers, the RCMP aggravated the situation by conducting reconnaissance, cutting of media access, tightening the boundary around the camp, and coercing the CBC to broadcast a surrender message. Put simply, there was a serious misunderstanding of the importance of religion at Gustafsen Lake and the state, through its police force, exacerbated the situation.

The standoff did, however, eventually come to an end. The RCMP made a number of important decisions over the course of the incident that provided for constructive dialogue among competing parties. In the occupation period, facilitation of meetings between occupiers, the protection of the site during the Sun Dance ceremony, and the inclusion of indigenous RCMP officers as mediators who were familiar with the occupiers, issues, and modes of communication, helped to facilitate meaningful dialogue. During the standoff, the inclusion of indigenous intermediaries and, eventually, an agreement on mutually decided upon mediators helped end the standoff.

Chapter 6

Conclusion: The Future of Indigenous Religious Traditions and Sacred Sites

On June 11, 2008, Prime Minster Stephen Harper apologized to Aboriginal peoples for the government's role in residential schools. The apology opens:

> For more than a century, Indian Residential Schools separated over
> 150,000 Aboriginal children from their families and communities. In
> the 1870s, the federal government, partly in order to meet its
> obligation to educate Aboriginal children, began to play a role in the
> development and administration of these schools. Two primary
> objectives of the Residential Schools system were to remove and
> isolate children from the influence of their homes, families, traditions
> and cultures, and to assimilate them into the dominant culture. These
> objectives were based on the assumption Aboriginal cultures and
> spiritual beliefs were inferior and unequal. Indeed, some sought, as it
> was infamously said, "to kill the Indian in the child." Today, we
> recognize that this policy of assimilation was wrong, has caused
> great harm, and has no place in our country.

As demonstrated in the opening chapter of this dissertation, the preservation of culture and the protection of religious freedom are foundational components not only of liberal democracies in general, but Canada specifically. If Canadian policy makers are serious that the destruction of indigenous religions and cultures "has no place" in modern day Canada, then Canadian policy toward indigenous peoples needs a thorough reassessment and revision. There is little debate among activists, academics, and policymakers that the formation of Canada coincided with policies that destroyed indigenous cultures and degraded indigenous peoples. Despite various measures to create a more just and equitable state, including the repatriation of the Canadian constitution and the recognition of Aboriginal rights in 1982, our colonial heritage remains evident in the structure of the country. In this dissertation, I have attempted to identify and explain the nature of this structure and discuss the consequences it has had in marginalizing all discussion of religion, and the human right to freedom of religion, in formulating responses to indigenous claims on land. The backdrop to this dissertation is

the assumption that Canadian policy should be oriented to meet the foundational principle of a liberal democratic state—that is, the pursuit of justice. In the context of Prime Minister Harper's response to Canada's residential school policies, I see the preceding pages as a contribution to efforts that will help Canada make good on an overdue apology.

6.1 Issues and Arguments

To borrow from historian Mabel Burkholder (1923), the account of religion, land and democracy in indigenous-state relations is an "odd story" indeed. How is it that religious freedom remains elusive for some indigenous communities, and the preservation of culture seems so difficult, despite the importance of these ideals in a liberal democratic state? Given the steps toward inclusion, recognition, the acceptance, at some level, of difference, and the dissolution of assimilationist policies, the answer is not as insidious as it was in the nineteenth century, nor is it simply the product of a veiled classical liberal monism. The problem requires us to delve into the very core of Canada as a colonial, liberal, democratic state.

In chapter 2, I argued that one part of the problem lies in vestigial and ongoing structures of Canada's colonial heritage. European settlers and colonial governments used a particular land-person relationship and philosophy of land to justify colonization, dispossession, and assimilation. This philosophy helped to structure treaties, residential school curricula, and the primary legislation on indigenous peoples in Canada, the *Indian Act*. The colonial project, at the heart of which was a European land-person relationship, not only dispossessed lands, it also devastated cultures, obscured cultural contexts, and displaced communities. Despite concessions from the Canadian government, claims for tracts of land continue to remain fixed in European-colonial conceptions of private ownership, perpetuating the confiscation and destruction of indigenous sacred sites and, in turn, traditional religions. Even though the courts acknowledge that indigenous peoples have a unique perspective on the land, standards remained fixed in the colonial past.

Other problems exist in the very structures of liberal democratic engagement. In chapter 3, I demonstrated that differentiation and privatization are pervasive structural forces that dictate the conditions of religion in the public arena. Indigenous religious traditions are susceptible to the same requirements that all religious groups must adhere to if they wish to enter public discussions of morally relevant subjects. Participants must be willing to negotiate, compromise, and provide publically intelligible arguments to support their claims. The problem is that the topic of conversation

for indigenous communities seeking the protection of their sacred sites correlates with their religious beliefs. The fate of the site may in fact determine the existence of particular belief structures. Unlike any other community in Canada, the state asks indigenous peoples not only to compromise on the morally relevant subject of land but, in turn, to concede to the negotiation of their very beliefs intimately tied to that land. The structure of this relationship hinders, if not denies, indigenous peoples their freedom of conscience because with the violation of particular spaces there is, in the view of many indigenous communities, a violation of their beliefs. Complicating matters is that the dispossession justified through the European concept of property makes the deprivatization of indigenous religions a forced endeavour. In other words, socio-economic development into lands that indigenous peoples no longer control forces them into the public arena to protect their sacred sites. This is, as José Casanova (2008, 106) notes, an alteration mandated by the global shift of another's modernity.

As discussed in chapter 4, other problems relate to structural issues of power in the very nature of indigenous-state relations. Are indigenous peoples *partners with* or *subjects of* the Canadian state? The new framework for the indigenous-state relationship, the "Duty to Consult and Accommodate," makes answering this question difficult. Canadian case law demonstrates that consultation is a positive step in indigenous-state relations, but it falls short of providing redress for the protection of sacred sites. As long as indigenous peoples do not have access to the administrative levels of power that dictate what happens to particular tracts of land, they will always be subject to the goodwill of the Canadian state. Despite this, the state acknowledges that it must relinquish some power in the indigenous-state relationship if it wishes to have a just society. There are recent cases, such as Voisey's Bay, where a clear partnership between the state and indigenous peoples was established, but that is not the standard. In effect, the state has created an ambiguous tension where indigenous peoples are, at times, partners, subjects, or both.

In addition, in chapter 5, I argued that popular perceptions of indigenous religions provide even further problems for indigenous communities in modern Canada. Moreover, the debates regarding authenticity and authority (common to all religious communities) are problematic for some indigenous peoples when such debates surface in the public arena on matters of land and politics. It is difficult for the state to provide adequate protection of religions when it appears that the state misunderstands indigenous religions, all of which has led to legal, political, and social missteps. The state understands that indigenous religions are not dead, but it conceives of them as historically

located and homogenous, rather than as dynamic, diverse traditions, with historical and modern characteristics that contact and combination have altered. The state tends to favour stereotype and the political structures that it, itself, has created for indigenous peoples. The result, as was the case at Gustafsen Lake, is that state action or inaction may threaten some religious ceremonies, practices and beliefs, and create, rather than diffuse, conflict.

The future of indigenous religious traditions, sacred sites, and cultures is a subject inseparable from contemporary discussions surrounding the politics of indigenous-state relations.[87] This dissertation has helped draw attention to and provide some understanding toward the impediments of justice and, at times, peace, brought on by the "natural" structures of Canada. I have argued, albeit critically, in this dissertation for a more inclusive democratic partnership between indigenous peoples and the Canadian state. I argued that this kind of relationship lies crowded at the core of the modern consultation doctrine. Regardless of the status of indigenous title (through comprehensive land claims or self-government), the consultation doctrine provides for an overlapping jurisdictional model that more adequately addresses the finite nature of land, the permanent presence of Euro-Canadians, and the existence of unconquered national minorities, than simple jurisdictional divisions could ever address. In other words, there will always be the spaces between indigenous controlled and Crown lands where sacred sites may be explicitly or implicitly under threat.

I contend that a communicative democratic relationship allows for the inclusion of traditionally excluded peoples into all structural facets of modern political life. The ultimate goal of this process is that participants can assess and redefine their structures as self-determining partners. At a fundamental level, it will provide an environment for Euro-Canadians to think about land in a different way. It requires proper education, good listening, and collective decision-making. The

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[87] Recently, the "Idle No More" movement, which arose in 2012 as I was finishing the writing of this dissertation, has drawn attention to the immediate importance of recommendations for change pertaining to the injustices felt by indigenous peoples in Canada. The "Idle No More" movement exemplifies not only broader frustrations regarding imbalances of power in the contemporary indigenous-state relationship but also the diversity of indigenous peoples across Canada who have mobilized independent of leadership, centralized organization, or single cause. The movement began online and took a more definitive form following the housing crisis at Attawapiskat, Ontario, where some government officials blamed the Attawapiskat First Nation for the problems they were facing, proposed pipeline projects through traditional indigenous lands, and the subsequent omnibus legislation proposed by the federal government to dissolve the *Indian Act* without consulting indigenous peoples. More importantly, these issues, identified through Idle No More highlight many of the broader issues facing indigenous-state relations related to the preservation of indigenous religious traditions and sacred sites.

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persistent effects of the colonial encounter cannot be reversed, but Canadians, indigenous and non-indigenous alike, do not have to live within colonial frameworks that perpetuate the oppression of some based on the universalized conceptions of another.

Aboriginal title is a complicated subject in the courts that tends to remain fixed in European conceptions of ownership, but comprehensive land claims, even though they may take decades, are important steps in seeking a more balanced indigenous-state relationship. However, interim measures are still required to protect sacred sites and indigenous religions today. In an attempt to cede some immediate power over land to indigenous communities, Tom Flanagan, Christopher Alcantara, and André Le Dressay in *Beyond the Indian Act: Restoring Aboriginal Property Rights* (2010), propose the immediate transfer of current reserve lands to indigenous communities who desire such control. Ultimately, Flanagan and his co-authors, who derive their policy suggestion from the conclusion of the Nisga'a comprehensive land claim and self-government agreement from 2000, believe that immediate land transfers will bypass the bureaucracy of indigenous land management and spur economic development. The state ought to consider any proposal that relinquishes paternalistic control while preserving indigenous difference, but the transfer of reserve lands offers little in the way of the administrative change that comes with a more communicative democratic partnership, or the many sacred spaces that lie off reserves. The indigenous-state relationship requires legal, political, and administrative structural change at the federal level.

This change begins with an education platform that communicates the importance and complexity of indigenous religious traditions to all Canadians.[88] Broadening social knowledge is a key facet of the deliberative democratic approach and the state can play a role in fostering this change. A broader social knowledge fosters justice through education and understanding. At the state level, it would provide for more informed mediation of public debates regarding authenticity, diversity and authority among indigenous religious communities. This entails justice for not only recognized national minorities, but also minority communities within the broader category of national minority. At the public level, an initiative toward education will benefit the wider Canadian society, who plays a role in the perpetuation of stereotypes regarding indigenous religions.

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[88] The subjects of long-term education programs, short-term mediation strategies, and interim protection of sacred sites are implications I identified in the *International Indigenous Policy Journal* (Shrubsole 2011).

David Seljak (2009) argues that policy makers and most of the Canadian public have been content with the de-Christianization and subsequent removal of all religion in public schools in its push toward a multicultural polity. He argues that a multicultural Canada "lacks credibility when its school system, an important state-controlled vehicle of socialization into a common Canadian culture, values, and social institutions for young people, ignores or suppresses a key element in the identity of so many citizens." Canada has "raised a generation of religiously illiterate students" (179). Although teaching indigenous spiritualities contains its own set of difficulties,[89] a commitment to a diverse religious education program would help to provide citizens in both social and political life with different conceptual frameworks. This would allow for those in places of authority to perform the necessary "cultural relocation" as Ross (2005, 23) calls it.

In the long-term, a more comprehensive education program on religion may be very helpful, but in the short-term, there have been demonstrated effective methods to ensure that state action is respectful and aware of the presence of religion. In particular, the interim protection of sacred sites and the inclusion of specialists and insiders in mediation have been effective procedures for preserving sacred sites and initiating communicative dialogue between competing parties in the public arena.

Interim measures agreements have been one of the primary methods by which First Nations communities have been able, in the short term, to protect their off-reserve sacred sites. Ross (2005) explains that these agreements move negotiations toward a more comprehensive understanding of the importance of particular sacred places. One of the primary issues with the handling of sacred space in Canada's courts, according to Ross, is their failure to understand the ethic of a site properly. Interim agreements, which provide protection until the conclusion of deliberations on a case, provide for the initial and outright protection of sacred sites. Ross argues that the state needs to address the religious significance of the space and potential damage to the site during this period before the state takes any action.

In addition, one can find explicit examples of these kinds of short-term solutions in state responses to new religious movements and violent confrontations such as those at Gustafsen Lake. For instance, the Royal Canadian Mounted Police (RCMP) praised their own acts following the Gustafsen Lake

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[89] Two examples of these difficulties include the pedagogical methods of teaching diverse experiential religious traditions such as those of indigenous spiritualities, and the debate on who has the authority to teach indigenous religious traditions.

standoff arguing that "patience, psychology, and overwhelming firepower" helped to avoid an incident such as that at Waco, Texas, in 1993, between Mount Carmel Davidians and federal authorities, resulting in the deaths of over 75 people (Howard 1996). Their efforts may have ensured that no one died at Gustafsen Lake; however, it was not simply a result of psychology and certainly not a result of patience or excessive firepower. The standoff ended because the RCMP turned to experts on indigeneity and religion.

One of the primary downfalls at Waco was that there was no proper analysis conducted of the religious beliefs of David Koresh and his new religious movement (Rosenfeld 2000). Following the siege at Waco, the U.S. Attorney General and Federal Bureau of Investigation (FBI) director developed a "critical response management policy" to handle situations such as those at Waco. This policy included three components: (1) actions should be predicated on known facts; (2) negotiations should dictate strategy; and (3) "the FBI must never hesitate to go outside of government to seek other experts or other people who might help [them] peacefully [resolve] a crisis situation" (Rosenfeld 2000, 325). In compliance with the third component of this policy, the FBI requested three scholars in order to provide aid during the Justus Freeman standoff in Montana in 1996. Jean E. Rosenfeld was one of the three scholars contacted by the FBI. She argues that the FBI's willingness to understand the religious motivations of the group better resulted in a peaceful end to the 81-day standoff. In an article detailing her role in the confrontation, Rosenfeld (2000) explains that one of the first tasks the FBI asked her to complete was to divide the Freeman into religious and non-religious groups. The FBI assumed that those with criminal records were not religious, but she was able to provide evidence that all the members of the group were in fact religious and they were most likely willing to die for their beliefs. She explains that the FBI's assumptions regarding those with criminal records were "based on the conventional wisdom that religion is intrinsically good" (330). The assembled scholars informed the FBI that any breach of the perimeter of the site would most likely result in violence. The support provided by Rosenfeld and two other scholars established a context in which meaningful dialogue could take place. Eventually, insiders from the religious community were able to diffuse the situation.

Just as one cannot reduce indigenous spiritualities to the singular, indigenous communities contain many voices. This is why an effective deliberative state apparatus capable of fostering self-development among competing parties is so crucial. To be effective, it must understand the importance of cultural autonomy for self-determination. It must also understand aspects of cultural

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autonomy such as religious belief and practice if it is to be an effective mediator. This involves interim protection measures for sacred sites, long-term goals of broadening social knowledge, short-term protocols for addressing religious diversity, and the inclusion of diverse indigenous voices and perspectives.

   Land will always remain a collective subject of concern given its potential economic and cultural value. Canada has no legislation to address this issue, and the attempts in the United States, such as the *Native American Religious Freedom Act*, have been but commendable failures. How might a Canadian indigenous religious freedom act look? The answer to this question may be a valuable exercise in drawing the state's attention to the specific issues faced by indigenous peoples and their religious traditions.

6.2 Next Steps in Research

In this dissertation, my focus on religion, land, and democracy in Canadian indigenous-state relations helped to (1) identify some of the central issues impeding indigenous religious freedom, (2) provide the necessary context for a subject that cannot be separated from politics, and (3) functionally narrow the scope of this dissertation. There are even more layers to this subject and my hope is that the theoretical framework I constructed in this dissertation will provide some inroads for further investigation. Some examples of these layers include those discussed by Huston Smith in *A Seat at the Table: Huston Smith in Conversation with Native Americans on Religious Freedom* (2006) such as, for example, the preservation of language and the role of traditional knowledge. Intellectual property, the broader acceptance of cultural knowledge, and threats to cultural modes of communication are important subjects for indigenous religious freedom. Additionally, the subjects of cultural appropriation (e.g., Jenkins 1999), the repatriation of cultural heritage (e.g., Bell 2008), and the politics of academia in the study of indigenous religious traditions (e.g., Irwin 2000) are further topics related to indigenous religious freedom that fall outside the scope of this dissertation.

   Furthermore, I introduced some subjects that I chose not to pursue in depth because they would have drawn me away from the central focus of religion and land in indigenous-state relations to the broader subject of indigenous religious traditions themselves. First, I have made reference to the attempts in the United States to address the specific issues faced by Native American religious traditions and, in particular, their sacred sites. While writing this conclusion, I asked myself, "Should this dissertation have commented further on a Canadian First Nations' religious freedom act?" My

answer was that it should not. An act addressing the specific issues faced by indigenous religious traditions requires indigenous voices, perspectives, and authorship. For this reason, I hope that a future outgrowth of this work might be a conversation on such legislation if only for the immediate purpose of drawing Euro-Canadian attention to the subject of indigenous sacred sites and religious traditions. Given the diversity among indigenous peoples and communities, this task may be difficult, but helpful in communicating difference within indigenous religious traditions.

Second, the subject of friction within indigenous communities and controversies over authenticity and authority is a subject I introduce in chapter 5 to discuss state mediation of conflict in the public arena. The recent decision of an Evangelical Cree community to tear down a Sweatlodge on its reserve in Oujé-Bougoumou, Quebec, in 2011, identifies the continuing importance of a more detailed analysis of the politics of religious diversity within indigenous communities. This subject, I believe, requires a very different kind of research, best addressed as another dissertation rather than simply an additional chapter. How do indigenous communities negotiate this difference? What is the relationship between "traditional" indigenous religious traditions and Christianity? Should we conceptualize Christianity as a traditional indigenous religious tradition? What are the implications of that relationship for protecting the religious freedom of indigenous peoples? How ought the state address the subject of religious freedom within national minority communities? Is the intrusion of the state into indigenous communities to protect indigenous religious traditions an act of colonialism? A natural outgrowth of this dissertation is the investigation of these sorts of questions.

6.3 Conclusion

I began this dissertation with a brief analysis of the preface to Mabel Burkholder's *Before the White Man Came* (1923) and her short re-telling of an "Indian legend" regarding indigenous views of the European appropriation of land. The explicitly racist, dismissive and ignorant tone of the work was characteristic of a Canada nearly one century into its official policy attempts to assimilate indigenous peoples. My intention there was to introduce perspectives of indigenous peoples, land, and religious beliefs that would no doubt be unacceptable in our modern liberal democratic society. Albeit in very different ways, I argue that these perspectives persist into the twenty-first century of indigenous-state relations.

At the foundation of this dissertation is an already well-articulated history of the exclusion of indigenous peoples from colonization through to today. However, there is more to this "odd story"

than historical circumstances of dispossession and political exclusion. Since this is the first detailed examination of indigenous religious freedom in Canada, my intention has been to point to three broader issues for the protection of indigenous sacred sites and religious traditions, and one philosophical framework in an attempt to address some of these issues. Although this framework lacks clarity in contemporary indigenous-state relations, it exists within that relationship and provides inroads toward resolving some of the primary issues facing indigenous religious traditions today.

The first of these issues is the very nature of liberal democratic engagement on matters of religious significance in a secular state. Religion is not simply an intellectual endeavor or a legal concept for indigenous peoples. Belief may be connected to particular spaces and the compromise and negotiation of those spaces may mean the destruction of particular religious traditions. Second, the consultation doctrine provides a meaningful framework for the inclusion of indigenous peoples, but disproportionate power at the administrative level ultimately means that indigenous peoples hold little control over land. For indigenous religious traditions, this means that communities for whom a site is sacred may not have enough power to influence the fate of a space. Third, religious diversity among indigenous peoples and the politics surrounding that complexity poses a significant problem for the protection of indigenous religious traditions and sacred sites. If indigenous religious traditions cannot grow, change, and adapt as they always have, in a way that maintains a close connection with land, then not all indigenous peoples can expect to have religious freedom.

Within the historical context of political exclusion and dispossession, these three subjects, secularization, contemporary indigenous-state relations and power, and indigenous religious diversity, provide serious challenges to a state that guarantees religious freedom for all its citizens, and one that has guaranteed cultural rights for indigenous peoples. Deliberative democracy provides some avenues of redress for these social and structural issues. Although they are not fully developed, one can find many deliberative democratic principles in the modern indigenous-state relationship. The framework provided by deliberative democracy may, as argued throughout, provide meaningful change in relation to inclusion, the dispersal of power, broadening social knowledge and, ultimately, justice.

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