Unjust Relations: Aboriginal Rights in Canadian Courts

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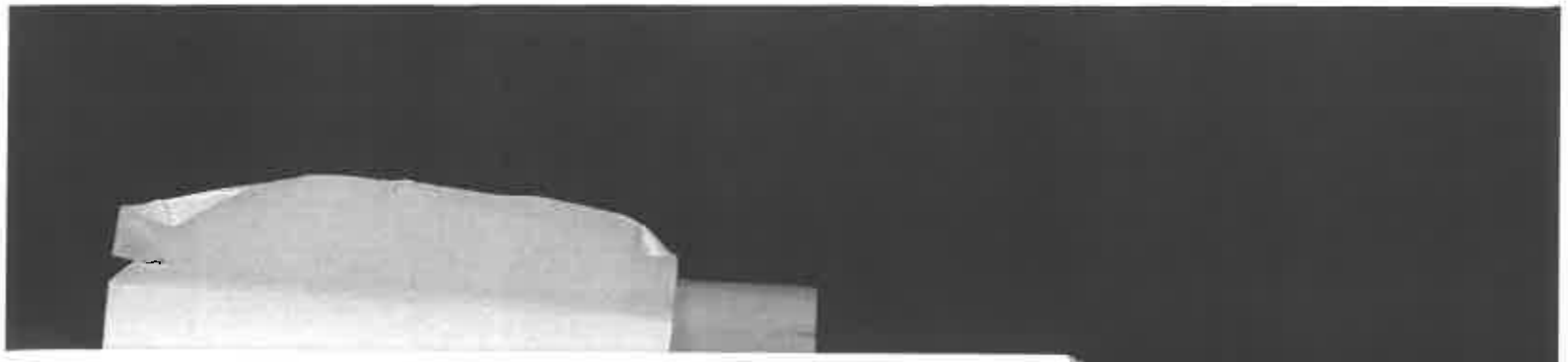


Theses on Aboriginal Rights

> Nothing, today, can be manifested. Except, possibly, the fact that humanity is not yet just. The indecency of a humanism that goes on as if nothing had happened. The task of extremist writing is to put through the call for a justice of the future. Henceforth, Justice can no longer permit itself to be merely backward looking or bound in servility to sclerotic models and their modifications (their "future"). A justice of the future would have to show the will to rupture.
>
> AVITAL RONELL

1. Justice colludes with totalizing power. Aboriginal rights themselves have been oriented as another tool of totalization, but also still contain the hidden promise of something else. For Aboriginal Canadians the law has acted as a vehicle of totalization, colluding with a power that demanded constraint, delimitation, definition, demarcation. Aboriginal rights have become an elaborate juridical doctrine that legitimates these processes, while at the same time it is the term we give to the remainder, what is left over, the excess of the process of totalizing; unknown and threatening, Aboriginal rights remain just over the horizon of established property relations. Totalization: the process by which objects, people, spaces, times, ways of thinking, and ways of seeing are ordered in accordance with a set of principles conducive to the accumulation of capital and the logic of the commodity form. Wealth piles up; every social product including people is made to be bought and sold, to have an exchange value and a use value; these principles spread as the dominant way of being in the world today: totalization. The order, the underlying rule, of these principles is the order of quantity, of homogeneity, of seriality. Fredric Jameson has written that "the social totality can be sensed, as it were, from the outside, like a skin at which the Other somehow looks, but which we ourselves will never see" (1992: 114). A system that presents itself—or attempts to present itself—as benign and nuturing to those inside of it, as a liberal democracy based on principles of individual rights and equalities, appears totalitarian to those, such as Aboriginal peoples, who experience its limits, its totalizing edges, who experience it as the process of totalization. Struggling against this process, resisting the imposition

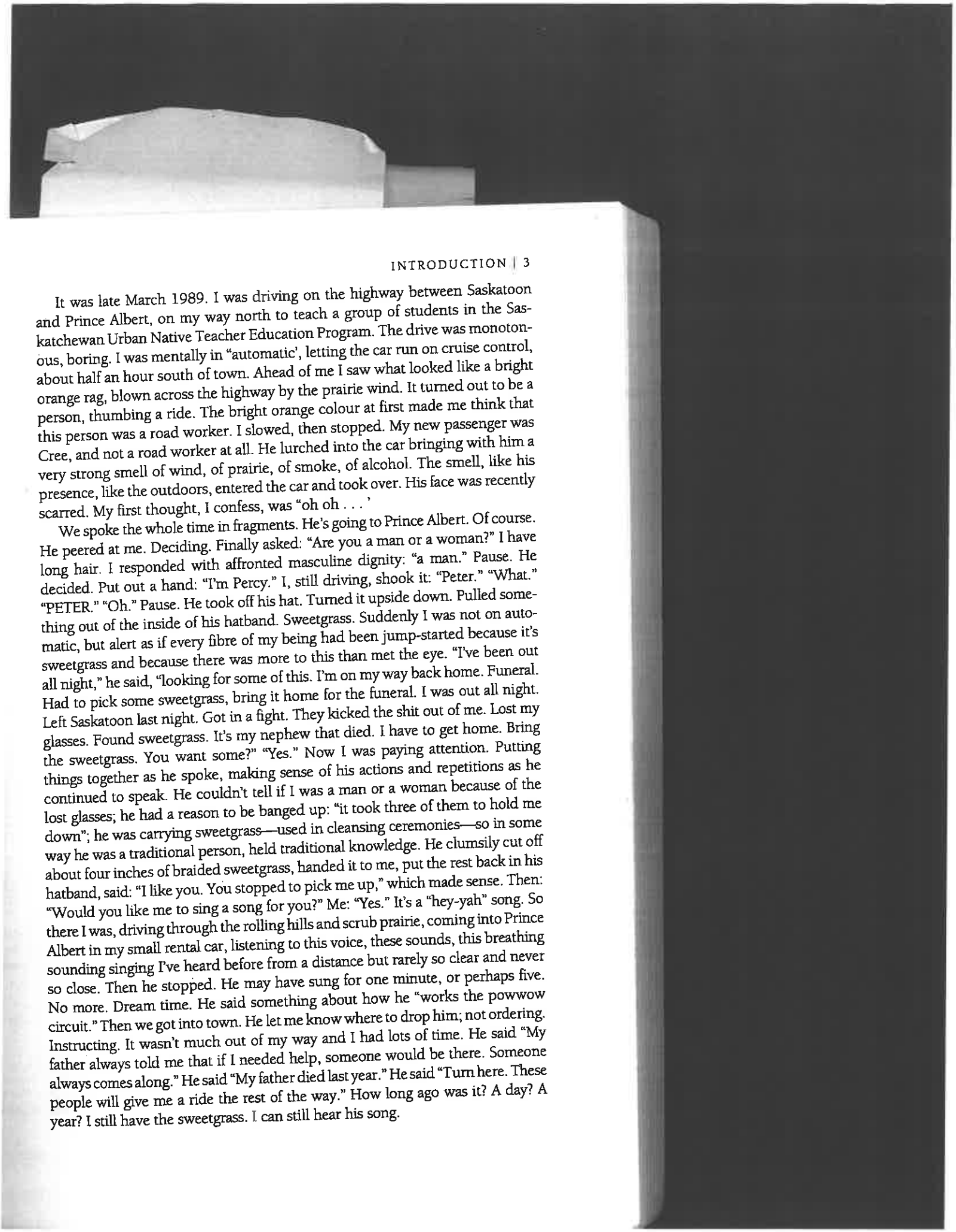
of this newly established order, Aboriginal Americans—Indians, indigenous peoples, First Nations, Native peoples, Métis, Inuit—find a variety of tools: violence, passive resistance, negotiation, the courts. A legal doctrine, Aboriginal rights, is set in play. Documents are produced, promises made.

It is the job of the courts to interpret these documents. By doing so, the courts take on the role of defining, fixing and circumscribing Aboriginal rights. The courts characterize Aboriginal rights in a way that carries forward the project of totalization. In the Canadian context they do a very good job: Aboriginal title—the ownership of land—becomes constrained in 1888 so that it is defined as a "burden" on underlying crown title. That is, the crown "owns" all the land; Aboriginal people merely have some undefined legal interest in it. This legal fiction becomes the ground of Aboriginal rights jurisprudence, the ground upon which legal struggles in the last few decades have been and continue to be fought. But the battle was already lost over a century ago. What is left but to further circumscribe the remaining remainder, parcel out a few partial victories, a salve for the conscience of the colonizers, and define these as Aboriginal rights. Aboriginal rights: subject of intense legal debate, hence, provider of income to many a jurist.

* * *

II. In his well-known essay "Force of Law: The 'Mystical Foundation of Authority'" Jacques Derrida comments "to address oneself to the other in the language of the other is, it seems, the condition of all possible justice" (17). Later, he adds "the violence of an injustice has begun when all the members of a community do not share the same idiom throughout" (18). The point here is more than that common language is a precondition of justice; language itself already has justice buried within it. In the Drybones case, the fact that Drybones did not speak or understand English lead to an overturning of his initial guilty plea, and ultimately to the case's reaching the Supreme Court of Canada. But, again, Derrida's point has a much broader significance; language and idiom in this context speak to the politics of form, the language or conceptual knowledge of material and social structures that allows one to know, for example, that one is in a court of law. Aboriginal languages and Aboriginal forms have rarely been "addressed" by the courts; Aboriginal people have painstakingly had to learn the process of addressing the courts in order to begin to be heard. It is not insignificant that the two earliest cases cited here—St. Catherine's Milling (1888) and Re: Eskimos (1939)—did not involve direct participation of the people whose lives were most affected by them.

The languages of Aboriginal peoples, not just the verbal patterns and "translatability" but the very grammar implied in the cultural forms, have not been addressed by the courts. Sweetgrass is not burned to cleanse, pipes are not shared. Instead, the dominant cultural form presents itself as Truth: bibles are produced, spectacles are arranged. I have a story from my own experience that in some mediated way speaks to this issue:



It was late March 1989. I was driving on the highway between Saskatoon and Prince Albert, on my way north to teach a group of students in the Saskatchewan Urban Native Teacher Education Program. The drive was monotonous, boring. I was mentally in "automatic', letting the car run on cruise control, about half an hour south of town. Ahead of me I saw what looked like a bright orange rag, blown across the highway by the prairie wind. It turned out to be a person, thumbing a ride. The bright orange colour at first made me think that this person was a road worker. I slowed, then stopped. My new passenger was Cree, and not a road worker at all. He lurched into the car bringing with him a very strong smell of wind, of prairie, of smoke, of alcohol. The smell, like his presence, like the outdoors, entered the car and took over. His face was recently scarred. My first thought, I confess, was "oh oh . . . '

We spoke the whole time in fragments. He's going to Prince Albert. Of course. He peered at me. Deciding. Finally asked: "Are you a man or a woman?" I have long hair. I responded with affronted masculine dignity: "a man." Pause. He decided. Put out a hand: "I'm Percy." I, still driving, shook it: "Peter." "What." "PETER." "Oh." Pause. He took off his hat. Turned it upside down. Pulled something out of the inside of his hatband. Sweetgrass. Suddenly I was not on automatic, but alert as if every fibre of my being had been jump-started because it's sweetgrass and because there was more to this than met the eye. "I've been out all night," he said, "looking for some of this. I'm on my way back home. Funeral. Had to pick some sweetgrass, bring it home for the funeral. I was out all night. Left Saskatoon last night. Got in a fight. They kicked the shit out of me. Lost my glasses. Found sweetgrass. It's my nephew that died. I have to get home. Bring the sweetgrass. You want some?" "Yes." Now I was paying attention. Putting things together as he spoke, making sense of his actions and repetitions as he continued to speak. He couldn't tell if I was a man or a woman because of the lost glasses; he had a reason to be banged up: "it took three of them to hold me down"; he was carrying sweetgrass—used in cleansing ceremonies—so in some way he was a traditional person, held traditional knowledge. He clumsily cut off about four inches of braided sweetgrass, handed it to me, put the rest back in his hatband, said: "I like you. You stopped to pick me up," which made sense. Then: "Would you like me to sing a song for you?" Me: "Yes." It's a "hey-yah" song. So there I was, driving through the rolling hills and scrub prairie, coming into Prince Albert in my small rental car, listening to this voice, these sounds, this breathing sounding singing I've heard before from a distance but rarely so clear and never so close. Then he stopped. He may have sung for one minute, or perhaps five. No more. Dream time. He said something about how he "works the powwow circuit." Then we got into town. He let me know where to drop him; not ordering. Instructing. It wasn't much out of my way and I had lots of time. He said "My father always told me that if I needed help, someone would be there. Someone always comes along." He said "My father died last year." He said "Turn here. These people will give me a ride the rest of the way." How long ago was it? A day? A year? I still have the sweetgrass. I can still hear his song.

What took place could be seen as a kind of gift exchange. I gave a ride, I got a song. Perhaps my telling the story here is another gift, or perhaps I am merely returning what I was given. Some might say it is an appropriation: I am a non-Native. The song, made up more of vocables than words, says as much and more to me than the words of this text, both my own and those I have reproduced. It says, in part: this is not only another language, but another way of being language. A language not addressed by the courts. That version of Aboriginal rights that sees them as carving a space from which to resist totalization would say that Aboriginal rights cannot be comprehended at even the most minimal level if we do not pay attention to cultural difference. A truism of sorts; less obvious, perhaps, is the question of how different this difference is from other differences. A question to which I will return.

* * *

III. If we take seriously the notion that Aboriginal rights are a point of negotiation between non-Native and Native societies or realities in Canada today, we must simultaneously acknowledge the impossibility of defining Aboriginal rights. Thus, as against the common charge—self-government: a concept in need of a definition—we must affirm self-government and Aboriginal rights (the relation between these two terms to be discussed below) as the undefinable, fluid line of contact between two social orders. There can be no answer to the question "what are Aboriginal rights?" that is not in the terms of the dominant, non-Native society, a society that strives for fixity, for the definite and for definitions. Or, any answer to the question "what are Aboriginal rights?" is already an attempt to confine, constrain, demarcate, and delimit those rights and consequently part of the process of confining, constraining, demarcating, and delimiting Aboriginal peoples. Aboriginal rights become a growing body of interpretations of a limited set of documents as opposed to a shifting basis for negotiations founded upon the primacy of the notion of mutual respect.

This must be affirmed at the outset. Undefinability must colour and override all the interpretations of these seemingly fixed and canonical texts. The limits of interpretation, of understanding, of western forms of knowledge, of the totalizing dynamic that governs so much of history, must be acknowledged. And, if I stress the alterity of Aboriginal peoples, the "otherness" of the other, rather than reaching that desired point of balance where we can understand that, in the words of Dominick LaCapra, "the comprehensive problem in inquiry is how to understand and to negotiate varying degrees of proximity and distance in the relation to the "other" that is both outside and inside ourselves" (140), it is because in this field of relations between power and knowledge, where the illusion of total understanding has served colonial power very well, where "when an Indian breathes, it's politics" (Cindy Gilday), where being itself is the question in question, we are at a beginning point and must destabilize the comforting narratives that consolidate our selves, our forms of knowledge, our legal claim to be right and to make legal claims.

* * *

IV. The discourse of Aboriginal rights, although it speaks the language of justice and although in the Canadian context it has constantly referred to abstract and universal ideals, has been and remains profoundly political. The term "Aboriginal rights" has come into prominence fairly recently, gaining particular currency in the last few decades. In the early 1960s, when as a result of status Indians gaining the vote it became clear that the special status of Indians involved at a minimum equal citizenship rights with a likelihood of additional rights, the concept of "citizens plus" was advanced by H.B. Hawthorne in his *Survey of the Contemporary Indians of Canada*. This concept, embodying the notion that Aboriginal peoples had all of the rights of Canadian citizens plus additional rights by virtue of their status as prior occupants, was endorsed and employed by Native political organizations in their struggle against the proposed White Paper policy of 1969. The White Paper, formally called *Statement of the Government of Canada on Indian Policy 1969*, had proposed removing most forms of special status for Aboriginal peoples in the hopes of ending discrimination against them. While the policy may have been well-intentioned, it amounted to a proposal for wholesale assimilation in the eyes of most Aboriginal leaders and was attacked until it was withdrawn in 1971. Through the 1970s the concept of "citizens plus" continued to evolve; as citizenship rights were secured the "plus" or additional rights became the focus of discussion.

In the late seventies, when constitutional negotiations came to dominate the Canadian and Aboriginal agendas, the term "Aboriginal rights" gained greater prominence. The term "Aboriginal," eventually defined in the Constitution Act (1982), became popular because it could be used to describe all of the many First Nations and categories of Native peoples; these included status and non-status Indians, Métis and Inuit. In Canada it had not acquired the problematic connotations that other jurisdictions, such as Australia, had imposed on it. Thus, the term "Aboriginal rights" quickly replaced the term "citizens plus" in legal and political discourse and remains a focal concept for negotiating the boundary between Aboriginal and non-Aboriginal peoples. This political micro-history was acknowledged by the Supreme Court of Canada in the Sparrow decision, as part of the justification for the argument that the words "existing Aboriginal rights" in the Canadian Constitution, since they were the result of a lengthy and intense political struggle, had to mean *something*.

* * *

V. The evolving doctrine of Aboriginal rights grounds itself on a significant historical fiction: what we now want was always already present, what is now desired was there all along. An important article by Brian Slattery on "Understanding Aboriginal Rights", partly inspired by the decision in the Guerin case and itself quoted favourably in the later Sparrow decision, remains the most useful general introduction to the issue of Aboriginal rights from a legal per-

spective. Slattery attempts to develop an overall theory of Aboriginal rights, whose basic tenets are summarized as follows:

> From early colonial days, the doctrine of Aboriginal rights has formed part of the basic constitutional structure of Canada. It originated in principles of colonial law that defined the relationship between the British Crown and the native peoples of Canada and the status of their lands, laws, and existing political structures. Some of those principles were articulated in the Royal Proclamation of 1763, and were reflected in treaties concluded between the Crown and particular native groups. At Confederation, they passed into the federal sphere, and formed a body of basic common law principles operating across Canada. In principle, these principles were liable to be overridden by legislation. However, they were protected in part by the provisions of constitutional instruments such as the Proclamation of 1763, and the Constitution Act, 1867. With the enactment of the Constitution Act in 1982, they have become constitutionally entrenched. (782-3)

Although I am in sympathy with much of Slattery's argument, which has enormous tactical value in the legal struggle for Aboriginal rights, there is surely something disingenuous in this attempt to forge such a consolidated historical narrative. It seems to me as interesting and important to stress the ways in which Aboriginal rights were as equally ignored "from early colonial days", or through much of the colonial period, as they "formed part of the basic constitutional structure." Slattery's historical narrative presents what appears to me as a story of fits and starts, a fragmented narrative of fundamental injustices, as though it were a seamless narrative that coalesces in a doctrine of Aboriginal rights which have "always already existed" in a "hidden constitution" of Canada. I am more inclined to say that the way the principles of Aboriginal rights were employed in the late nineteenth and early twentieth centuries violated the principles of the Royal Proclamation of 1763. Furthermore, those principles themselves must not be the horizon for how we see or negotiate Aboriginal rights today. I have other criticisms of Slattery—my own emphasis is on culture and political rights as much as Aboriginal title, I would take issue with Slattery's understanding of "Indian Country" in the Proclamation—but do refer the reader to him for an alternative "map" of Aboriginal rights.

* * *

VI. The dual-sided approach to Aboriginal rights—as a tool of totalization and as what totalization allows outside of itself—is reflected in the question of the origin of Aboriginal rights. When we consider Aboriginal rights in Canada we have, ironically enough, a number of originary moments of historical and textual significance. Two deserve particular attention while I will omit a series of others, such as Papal bulls and documents of the French and Spanish American regimes,

which by and large played a secondary role in the legal texts under consideration and represent a more specialized topic. The two originary moments to be examined here are of special importance for British North America and hence for what would become Canada: first, the fact and idea of Aboriginal people's prior occupation of the continent; and second, the Royal Proclamation of 1763.

Prior occupation is the historical ground upon which Aboriginal rights rest. "They were here first" translates into: "at one time, all of this land was theirs. We rarely conquered them by force of arms. Now all this land is ours. We must owe them something." That "something" is Aboriginal rights. Aboriginal rights can be said historically to derive from the prior occupancy of Aboriginal peoples, their occupation from time immemorial—or at least from the time of the coming of the Europeans—of the lands now constituting Canada. Over this ground, Aboriginal rights can be characterized as pre-dating or "pre-existing" European occupation. Aboriginal peoples, of course, did not go around talking about their rights; mostly, they spoke in a discourse of responsibilities and respect. But that discourse was circulated among themselves. When others came and established—or forced—dominance, it became relevant to speak of rights as a way of negotiating relations. In the terms of this origin story, the role of courts and constitutions is to recognize what always already pre-existed: namely that Aboriginal peoples had special rights by virtue of their prior occupancy of the Americas. The history of Aboriginal rights then becomes a history of when and where these rights were recognized and when and where they were ignored.

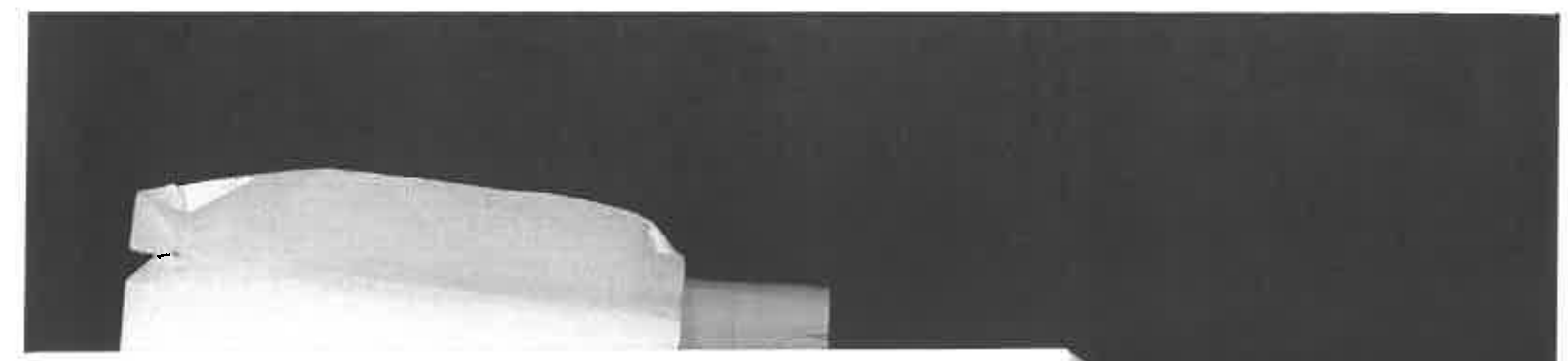
The second story accounting for the origin of Aboriginal rights is more popular because it has more fixity or discursive certainty. The Royal Proclamation of 1763 can be described as the textual ground of Aboriginal rights. Aboriginal rights were established (or, better, recognized) by a document signed by a British monarch. The Royal Proclamation then became the founding document by which Aboriginal rights were enshrined in British law, which itself came to dominate Canada. The Proclamation itself was an outcome of the Seven Years War (or the French and Indian War) of 1756 to 1763. When the British defeated the French on the Plains of Abraham they established their dominance, as opposed to other European powers, over much of North America. One purpose of the Proclamation, which followed the Treaty of Paris that ended the war, was to establish boundaries and administrations for the new British possessions. Aware that their Aboriginal allies were an important factor in the victory and that those same allies were unhappy with colonists trying to grab the land, the Colonial Office also attempted through the Proclamation to reassure its Indian allies by protecting their lands. About half the matter of the Proclamation deals with new colonies and half deals with Aboriginal rights. The Proclamation has never been revoked; along with the Hudson's Bay Company's Royal Charter (1670), it is one of the first British documents dealing with what would become Canada; it has been characterized as having the legal force of a statute or law; it has also been characterized as having, by convention, constitutional status and as a result could be said to be the first constitution of Canada; it is reaffirmed

by name in section 25 of the Constitution Act (1982); lawyers for Aboriginal people and legal scholars have called it an Aboriginal *magna carta.*

The language of the Proclamation is notoriously ambiguous. The section on Aboriginal rights tries to do two basic things: it affirms that territories beyond the boundaries of the colonies were "Indian lands" and could not be settled on; and it establishes a process whereby Aboriginal peoples could surrender their lands only to the Crown. Thus, the Proclamation can be said to have acknowledged that Aboriginal people held title to much of the Americas. The nature, value and limits of such title was in doubt. Two questions were particularly vexing and will crop up in the legal decisions that follow. The first is this: did the Proclamation recognize pre-existing Aboriginal rights or did the King create Aboriginal rights? It is an important question because if the King created these rights then he may have had the power to uncreate them, to take them away. If he recognized them then he was effectively affirming a reality that could not be changed. The document is silent about this question, although at one place it says "until Our further pleasure be known" implying that the King thought he could change his mind about the subject. The second question has to do with the jurisdiction of the Proclamation: where did it apply? Some argue that western Canada, possibly *terra incognita* (unknown territory) at the time of the Proclamation, should not be considered within its framework; but here the literal wording strongly favours a more general applicability. The Proclamation reads "all the lands to the west of the sources of the rivers flowing into the Atlantic" are lands where Indians have title. Literally, "all the lands" would include those in western Canada. There is some debate, as well, about whether much of the Canadian northwest was truly *terra incognita*; for example, see Hall's dissent in the Calder case.

Historically, then, Aboriginal rights can be thought to have two sources. They come from Aboriginal people's prior occupancy of the Americas or from the Royal Proclamation of 1763 or possibly from both. The documentary history of Aboriginal rights, and their evolution, can be traced through a series of policies and acts that followed. The British North America Act of 1867, unlike the Proclamation, contained only one line about Aboriginal peoples, but the line was very important. Section 91 of the BNA Act lists areas of federal responsibility; line 24 on the list of federal responsibilities is "Indians and lands reserved for Indians." Effectively—and consistent with the implicit policy embodied in the Proclamation—the BNA Act entrenched the notion that the highest level of government should have jurisdiction over Aboriginal matters because it would be more likely to see the long-term importance of protecting Aboriginal lands against other interests, including provinces, that would be more likely to appropriate and use those lands. Section 91 (24) thereby implicitly recognized that the federal government had a special responsibility for Aboriginal peoples as well as jurisdiction over them and their land. The nature of this responsibility was one of the central questions in the Guerin case.

Under the authority of section 91 (24) the federal government passed an



Enfranchisement Act (1869) and, eventually, an Indian Act (1876) with many subsequent amendments. One section of the Indian Act, section 88, deals with Aboriginal and treaty rights. Section 88 says that provincial laws of general application apply on reserves and to status Indians unless those laws contradict federal legislation or violate treaty rights. Section 88 ensured that treaty rights were to have precedence over provincial laws of general application although arguably the federal government continued to have the power to override treaty rights.

The treaties themselves are the last major piece in the historical puzzle that constitutes Aboriginal rights. The treaties were negotiated in accordance with the provisions of the Royal Proclamation. Their purpose, from the government's viewpoint, was to extinguish or get rid of any Aboriginal title and rights to land. In exchange, Aboriginal first nations gained reserve lands, annuities, one-time presents of cash and agricultural supplies, and a variety of other, sometimes amorphous, treaty rights. Some first nations, notably the Dene, were convinced that their treaty was a treaty of peace and friendship rather than a land surrender. Other first nations have accepted that their Aboriginal title was extinguished through the treaty process but have insisted that they have treaty rights that go beyond the narrow reading of the written words in the treaty documents. They insist that the spirit of the treaties is their real meaning and that treaty rights are much more valuable than is often thought. The Sioui decision goes some way towards supporting this view.

Together these documents—the Royal Proclamation, the BNA Act, section 88 of the Indian Act, the various treaties—along with the doctrine of prior occupancy, are the crucial locus for legal arguments respecting the nature and origins of Aboriginal rights. The court cases refer consistently to various combinations of these documents as well as to each other.

A new document, the Constitution Act of 1982, was added to this framework within the last decade and has changed how older documents are interpreted. Two sections of the Constitution Act are particularly important: section 25 of the Charter of Rights and Freedoms has determined that equality rights guaranteed by the charter cannot be interpreted in a manner that would diminish Aboriginal rights. Section 25 refers to Aboriginal and treaty rights and specifies as well rights associated with the Royal Proclamation. Section 35 of the Constitution Act says that "existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed."

There is no clear, evolutionary logic in the historical development of Aboriginal rights. In spite of after-the-fact stories that have tried to imply a consistent logic in the approach to Aboriginal rights, there was a basic incoherence, an instability and set of contradictions embodied in the approach of various British and Canadian administrations. Sandwiched between two important moments when those rights were affirmed in limited ways—1763 and 1982—was a long period when the rights were sometimes recognized and more often than not ignored outright. The recognition and affirmation of Aboriginal rights cannot

be seen as an outcome of a progressive liberalization of society, as the latest step in a process by which every day, in every way, things are getting better and better. It is a history of sustained, often vicious struggle, a history of losses and gains, of shifting terrain, of strategic victories and defeats, a history where the losers often win and the winners often lose, where the rules of the game often change before the players can make their next move, where the players change while the logic remains the same, where the moves imply each other just as often as they cancel each other out. It is a complex history whose end has not been written and whose beginnings are multiple, fragmentary and undecidable.

* * *

VII. Without limiting or defining, and hopefully without circumscribing, Aboriginal rights, it is possible to map the terrain of Aboriginal rights as they have been circumscribed by the State and the courts, to describe them and subject them to analysis. The metaphor of mapping was employed by Slattery, who wrote that "the goal, then, is to provide a map for understanding what Aboriginal rights are all about "(732). The notion of cognitive mapping has been deployed by Fredric Jameson in his *Postmodernism, or, The Cultural Logic of Late Capitalism* (1991) as a way of linking particular events to totalizing contexts and of negotiating trajectories through the postmodern world. In this sense Aboriginal rights act more as a kind of compass for Aboriginal peoples, a mechanism for tracing or negotiating a path through the postmodern. Aspects of this trajectory can be mapped through both the historical and structural descriptions I am attempting here, although this can never serve to tell us what Aboriginal rights are "all about".

Structurally, Aboriginal rights can be divided into two main types or categories: property rights and political rights. This boundary is a slippery one. Some rights occupy both fields and it is possible to argue that one type without the other is virtually meaningless. However, the distinction serves a useful function if it allows us to situate and specify Aboriginal rights, to distinguish between them and to understand how different kinds of Aboriginal rights relate to each other.

Aboriginal property rights themselves can be further divided into land rights and resource rights. The term "Aboriginal title" is used legally to specify Aboriginal rights to land. It can be argued that Aboriginal title is the basis of all other Aboriginal rights; that all the other political and property rights flow from the doctrine of prior occupancy and the title to land that the doctrine implies. Aboriginal title may be characterized as that title that Aboriginal peoples have by virtue of their prior occupancy, from time immemorial, of their traditional territory; alternatively, Aboriginal title may derive from occupancy over an extensive period of time of lands within "Indian territory" as that territory was described by the Royal Proclamation. Legally, it has been distinguished from fee simple title and is seen as a lesser form of ownership. It is thought of as a legal burden on Crown title, as an interest of unspecified value that Aboriginal

people have in their traditional lands or, more specifically, on the surface of that land. This, at least, is how the courts have come to circumscribe the notion of Aboriginal title. Instead, it is possible to argue that Aboriginal title is Aboriginal ownership, the nature of which has not yet been understood by non-Native institutions—including the courts and the State—but which has some recognizable features. Aboriginal title involves ownership in common; it is not generally thought of as title held by individuals to specific pieces of land but rather as title held by nations to broad territories. Further, Aboriginal title could also be characterized as inalienable. That is, it is not possible to buy or sell Aboriginal title, it exists by virtue of an historical fact—prior occupancy—which cannot be undone. In this view, Aboriginal title would underlie Crown title, rather than the reverse, it would remain even where land claims and treaties pretend to extinguish it, and it would give Aboriginal peoples the fundamental, ongoing basis for negotiating their shifting relationship with non-Native society.

The second form of Aboriginal property rights I specified is to resources. These would include the hunting, fishing, trapping and gathering rights that various Aboriginal nations exercise to differing degrees, depending on whether they have treaties, the nature of those treaties, the historical position of provincial jurisdictions, and so on. Recognition of these kinds of rights varies widely across the country. Aboriginal resource rights are related to Aboriginal title; they usually imply rights to surface resources, the resources Aboriginal people can show they used "since time immemorial". It is possible to argue that resource rights are actually, legally, the form that Aboriginal title takes; that Aboriginal title is itself a usufructuary right guaranteeing access to resources, to use resources on the land, rather than to the land itself. Clearly, I have distanced myself from this kind of interpretation. While resource rights may derive from Aboriginal title, they are not the same: one refers to land itself, the other to resources on it. Legally, while Aboriginal title is seen similarly throughout Canada, Aboriginal resource rights vary dramatically province by province (or territory), First Nation by First Nation, treaty by treaty, and through the complex interplay of each of these factors (and others).

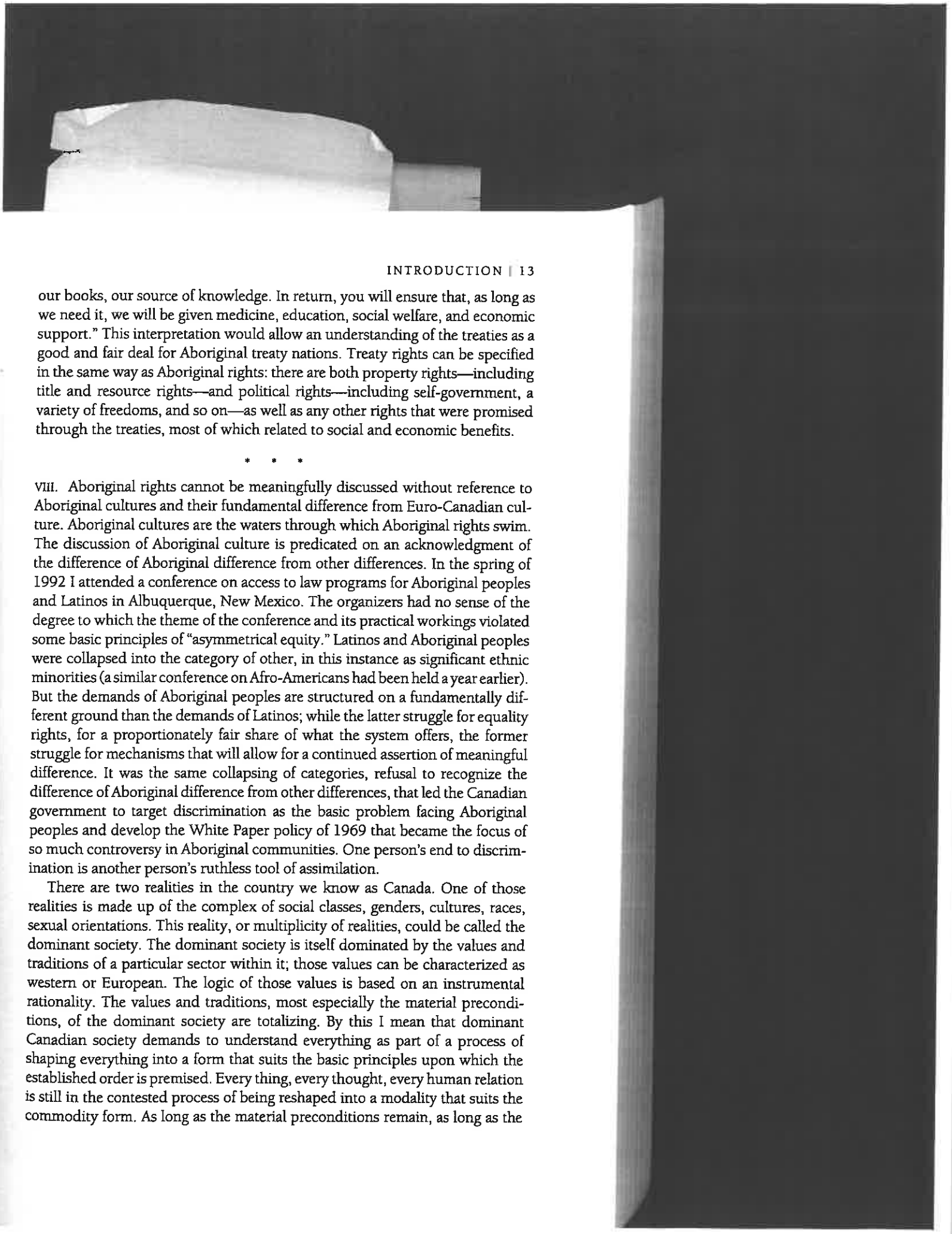
Aboriginal political rights involve a separate complex of laws, doctrines and regions. The most important of these, certainly the most prominent, is the right of Aboriginal self-government. But political rights also include a variety of freedoms: free movement beyond provincial and national borders, freedom of religion or spirituality, freedom from taxation, and so on. Aboriginal political rights, like Aboriginal title, can be thought of as rights deriving from prior occupancy. But in this case, what is fundamental is the notion that prior occupancy implies a right to have no restriction on cultures, ways of life, or traditions. Immigrant peoples, who whether or not of their own choosing leave their homelands, are in a position where they, to a greater or lesser degree, must accept the dominant cultural values of their chosen land. Aboriginal peoples did not choose to join the dominant cultural order; it chose to impose itself on them. Aboriginal political rights are the rights that derive from this situation.

Aboriginal self-government means the right to make decisions that are important to self-constitution. Aboriginal people have the right to be self-determining, to make decisions for themselves, in the forms that are appropriate to their cultural values. This latter point is particularly important. Regardless of the level of power provided to Aboriginal governments, every decision that is made following the dominant logic, in accordance with the hierarchical and bureaucratic structures of the established order, will take Aboriginal peoples further away from their own culture. Every decision that is made in the form appropriate to traditional cultures will be another step in the life of that culture.

Aboriginal people, by and large, never surrendered their right to control their own destiny. Furthermore, the line of contact or negotiation between Natives and non-Natives is a political line. Politics has assumed a crucial place in the lives of Aboriginal peoples. In this context, political control has become the primary concern of many Aboriginal communities; other issues either derive from it or are secondary.

Other political rights like freedom of movement, the right to their own spirituality, freedom from taxation, and so on, can be seen within the same logic, as rights derived from prior occupancy. Some of these political rights might derive from treaties or land claims. The economic advantages that might be conferred as a result of the use of these rights—for example, the employment of free movement across borders to sell goods duty-free—can be said to appropriately belong to First Nations. Whatever economic advantages might derive from these rights are comparatively small compensation for the losses Aboriginal nations have experienced and, given the economic deprivation experienced today by many Aboriginal people, might also offer one of the few practical possibilities for future economic self-sufficiency. It is interesting to note that these are the rights that have been most abused historically, particularly through the Indian Act, which restricted movement of Indians, banned specific cultural practices and limited basic civil liberties. Finally, these political rights in no way limit Aboriginal people's rights as Canadian citizens; they are additional rights that derive from prior occupancy.

Having provided a map of the terrain of Aboriginal rights, it is important to make a few comments about treaty rights, which are also the subject of many of the legal decisions that follow. Treaty rights can be seen as specific rights which different First Nations gained in exchange for limiting their Aboriginal title or agreeing to peaceful relations with non-Natives. Treaty rights can in theory involve anything, including rights to health, education, economic resources, and so on, depending on the terms of the treaty in question. If the treaties are to be seen as meaningful, rather than as outdated examples of near-fraud on the part of non-Natives and foolishness on the part of a generation of Aboriginal leaders, they must be interpreted beyond the literal meaning of the words in the treaty documents. By giving non-Natives access to huge amounts of lands and resources, the Treaty Nations were in effect saying, through the treaties: "you now have our source of economic well-being, our source of health,



our books, our source of knowledge. In return, you will ensure that, as long as we need it, we will be given medicine, education, social welfare, and economic support." This interpretation would allow an understanding of the treaties as a good and fair deal for Aboriginal treaty nations. Treaty rights can be specified in the same way as Aboriginal rights: there are both property rights—including title and resource rights—and political rights—including self-government, a variety of freedoms, and so on—as well as any other rights that were promised through the treaties, most of which related to social and economic benefits.

* * *

VIII. Aboriginal rights cannot be meaningfully discussed without reference to Aboriginal cultures and their fundamental difference from Euro-Canadian culture. Aboriginal cultures are the waters through which Aboriginal rights swim. The discussion of Aboriginal culture is predicated on an acknowledgment of the difference of Aboriginal difference from other differences. In the spring of 1992 I attended a conference on access to law programs for Aboriginal peoples and Latinos in Albuquerque, New Mexico. The organizers had no sense of the degree to which the theme of the conference and its practical workings violated some basic principles of "asymmetrical equity." Latinos and Aboriginal peoples were collapsed into the category of other, in this instance as significant ethnic minorities (a similar conference on Afro-Americans had been held a year earlier). But the demands of Aboriginal peoples are structured on a fundamentally different ground than the demands of Latinos; while the latter struggle for equality rights, for a proportionately fair share of what the system offers, the former struggle for mechanisms that will allow for a continued assertion of meaningful difference. It was the same collapsing of categories, refusal to recognize the difference of Aboriginal difference from other differences, that led the Canadian government to target discrimination as the basic problem facing Aboriginal peoples and develop the White Paper policy of 1969 that became the focus of so much controversy in Aboriginal communities. One person's end to discrimination is another person's ruthless tool of assimilation.

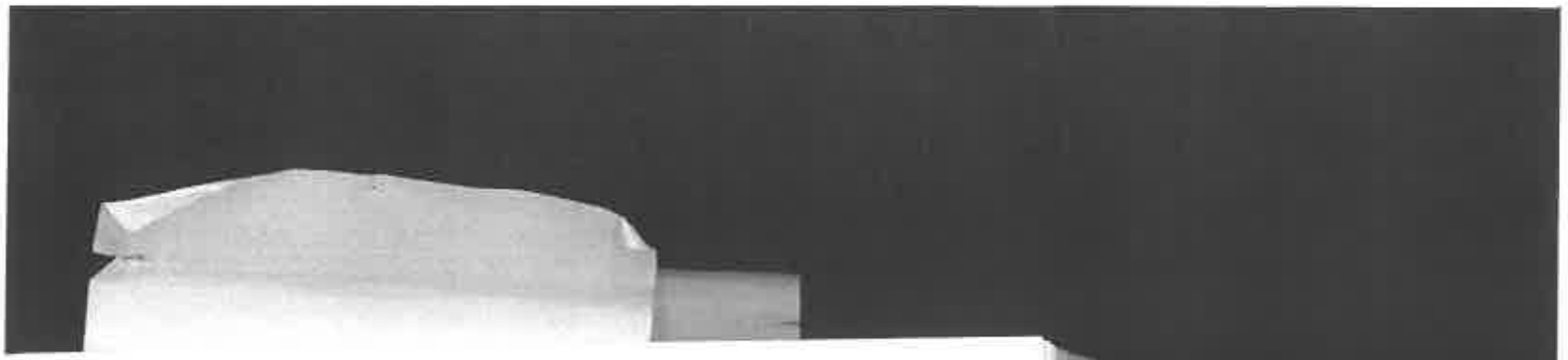
There are two realities in the country we know as Canada. One of those realities is made up of the complex of social classes, genders, cultures, races, sexual orientations. This reality, or multiplicity of realities, could be called the dominant society. The dominant society is itself dominated by the values and traditions of a particular sector within it; those values can be characterized as western or European. The logic of those values is based on an instrumental rationality. The values and traditions, most especially the material preconditions, of the dominant society are totalizing. By this I mean that dominant Canadian society demands to understand everything as part of a process of shaping everything into a form that suits the basic principles upon which the established order is premised. Every thing, every thought, every human relation is still in the contested process of being reshaped into a modality that suits the commodity form. As long as the material preconditions remain, as long as the

necessity for expansion of the commodity form and the accumulation of capital continue as fundamental social forces, the project of totalization will continue without rest.

The existence of an alternative Aboriginal reality can be quantified. Time and again, all of the statistical indices point to a distinctive position for Aboriginal peoples in Canadian society. The indices form what I call a morbid line: higher rates of death due to violence, lower life expectancy, lower levels of education, poorer housing, poorer job prospects, higher rates of infant mortality, higher rates of suicide. Statistically, Aboriginal peoples belong to the dispossessed in Canadian society, the very poor. Here alone, there is a certain call to justice. Of a friend, Drucilla Cornell eloquently wrote "in her death she remains as the limit of the system in which she was killed. In the death that demands redress we will always hear the call of the Other" (1992b: 89). The many deaths premised, not by the existence of this different social reality but by its impossible marginalization and its impossible struggle to survive as a difference, are in themselves a call. However, unlike unemployed workers, recent immigrants, single mothers, visible minorities, and other structural fragments at the margins of society who also call, Aboriginal peoples have a unique cultural claim.

Non-Aboriginal cultures within the multicultural fabric known as Canada almost all have homelands elsewhere. That means that if a recent immigrant from Poland loses her language, while this may be individually sad, it is not a cultural tragedy. Polish will still be spoken in Poland. Thai will still be spoken in Thailand. Jamaican culture will continue to thrive in Jamaica and German culture will continue to thrive in Germany. If the Cree language disappears from Canada, the Cree language disappears from the earth. If the Gitksan culture is erased in northern British Columbia, the Gitksan culture becomes extinct. The fact of prior occupancy implies or embodies the fact of territorial cultural centres or homelands. There is nowhere else for the Kaska-Dene to go. In the fall of 1991, when Angela Sidney died, we lost the last fluent speaker of Tagish; thus continues a legacy that even preceded the death of the last fluent speaker of Beothuk, Shawnadithit.

The positive value of cultural diversity, in a world where "ethnic tensions" seem to pose some new and very real threat, can be discussed with reference to a concrete example. The example, or story, or metaphor, deals with the relation of knowledge to experience: When you walk through the bush, what you see depends on what you know. If you walk down a trail as a trained geologist, while you see the trees, the swamp, the sky, what you are likely to notice is the way glaciers thousands of years old made the landscape, leaving behind striations in the rock, the way this vein of quartz is likely (or not) to be mineral-bearing, and so on. If you walk down the same trail as a botanist, while you would see the same sky and rocks you would be more likely to notice that this is a transition zone between boreal and coniferous forest, that the processes of decay and replenishment are at a specific stage, that certain uncommon species of wildflower can be found on this part of the trail. A hunter might walk down



the same trail with quite a different perspective, noting locations for trap settings, animal prints and droppings, the flicker of partridge tails. An artist might see a perspective or view of the relation between trees and sky and rocks that promises a lively canvas. A lover might notice almost nothing, seeing only the eyes or smile of a companion who stayed behind. One way to walk down the trail is to know as much as possible about rocks, about trees, about animals, about air, and perhaps about art and love. The more we know, the more we can gain from our walk, the richer our experience of the walk. As well, the more areas we know about the more likely we are to encounter the one or two features on the trail that stand out (if this trail happens to pass a gold outcrop or the nest of a rare bird). It is useful to remind ourselves, in this era when knowledge has been so intimately connected with the workings of power, that knowledge can also enrich experience and help us see more. Cultures are also ways of seeing and ways of experiencing. The more cultures we have available to us, the more ways we have of seeing, the richer we are as societies and as individuals.

While this argument could be employed to defend the general principle of cultural diversity, Aboriginal cultures in Canada belong to a specific type of culture that deserve special attention. Aboriginal peoples belonged to gathering and hunting cultures. Unlike the agricultural and industrial cultures that make up most of the rest of the multicultural Canadian framework, there is a qualitative break in the nature of gathering and hunting cultures from the other two. Gatherers and hunters viewed themselves, the world around them, the objects they used, and other people they encountered in drastically different ways which we are only beginning to understand today. A single example can be deployed to illustrate this. The way we view objects, things, is drastically different. People from either agricultural or industrial societies have a cognitive relation of desire to objects. We want things. Even if we are not sure whether or not we can use something, we want it. Our desire exists because of a material precondition: we have a place to put things. So, if we encounter a strange object on the trail, if it at all appeals to us, we collect it and take it home. Most gatherers and hunters have quite a different way of looking at objects. They have a cognitive relation of suspicion. The first thing they are likely to think of on seeing an object is "how much does it weigh?". This is because, as nomadic peoples, any object they possess has to be carried. They are more likely than not to leave behind an object that we would take. Agricultural and industrial societies are accumulative; gatherers and hunters are not. So they "see" objects differently.

Furthermore, the argument about prior occupancy joins with my arguments about the substantive character of gathering and hunting cultures. Canada's First Nations occupied this land, even by the most conservative estimates, for thousands of years before the first city-state societies developed in Eurasia or Africa. While I would argue that Aboriginal people lived no closer to "nature" or "the land" than our own societies (how can anyone live closer to nature when nature is inside of each of us? when every society produces its own concepts of what nature is or is not?) they did, through millennia of occupation, develop special

understandings of their homelands and special ways of interacting with landscapes and resources. Their names of, their thoughts about, their knowledge of this land deserve a respect they have not been accorded. This knowledge has been structured so differently from our own concepts, our own way of conceptualizing in instrumental rationalities, that we have not been able to appreciate it.

What I am trying to specify here is the difference of Aboriginal difference from other differences. Too often, the phrases "pre-industrial" or "pre-capitalist" or "traditional" are used to cover over the importance of the neolithic break, the rupture between gathering and hunting peoples and agriculturalists. In effect, I am suggesting that gatherers and hunters are more different from industrial and agricultural societies than the other two are from each other. The nature of this difference is frequently elided. Substantively, the values of gatherers and hunters, the way of seeing, the forms of language, are so different and in many ways opposed to our own that we have barely begun to comprehend and the very act of comprehending becomes itself political as it draws us away from ourselves.

* * *

IX. Another story comes to mind.

It's October and I'm in Yellowknife to begin the process of consulting over a research project I have in mind. My friend Dorothy asks me to drive her out to her parents' bush camp because her partner has to work that weekend. Our drive takes us out of one reality—that of Yellowknife, capital of contradictions—and into another—a small wall tent, one of many strung out along the north shore of Tucho (Great Slave Lake) where Dogrib families are working on caribou hides brought in by the fall hunt.

I feel like I'm being treated as the guest of honour; fed fresh rabbit and wonderful stories told in Dogrib by Dorothy's father (she translates). I help a bit with bringing in wood; Dorothy's mother is the busiest of us, patiently scraping caribou hides to remove the fat. The mood is all relaxed, easy, comfortable. In spite of a very cool early winter day, the tent gets quite warm. We shift around, moving away from the drum-barrel stove when it gets too hot, moving closer as it cools, adding wood and moving back again; the rhythm of our movements reflected in the rhythm of our conversation.

Through the whole period of my visit the portable radio phone is on. Occasionally we hear other families talking with each other. More often than not, these conversations provoke bursts of laughter in the tent: someone is gossiping, someone else is berating her adult children for not coming out to the camp to help. Radio phones, rifles, power saws, potato chips, soft drinks; all an intimate part of this reality, which remains open to being described by that contradictory yet potent, maddeningly ambiguous though politically charged word: traditional.

When I see Dorothy's parents occasionally in Yellowknife, the situation loses

its ease. I get tea for them, smile. Unable to speak their language, I wonder if I'm doing the right things, following the right protocols. But they belong there, too.

* * *

X.

> Emmanuel Levinas once indicated that we need rights because we cannot have Justice. Rights, in other words, protect us against the hubris that any current conception of Justice or right is the last word.
>
> DRUCILLA CORNELL (1992a: 167)

It is a truism to suggest that Aboriginal cultures, like western cultures, need not be seen as static or preserved in some pure, untainted way. There is as much of the postmodern as there is of the paleolithic in contemporary Aboriginal communities. The point is that, given how little we know about Aboriginal peoples, they themselves should have a greater measure of control over their destinies. While acknowledging what we don't know, we can also acknowledge that their cultural traditions are not outdated or outmoded remainders of a past way of life and need not be assessed by the ethnocentric and racist standards that were common in the past. Rather, Aboriginal cultural traditions should be respected and appreciated for what they have to offer. The first step is probably to acknowledge how little we understand. This is itself a political gesture, a move to resist the illusion of total understanding that totalization gives itself and carries with it. A version of Aboriginal rights that respects this would allow Aboriginal peoples to be placed in a structural position where they do not have to accept the imposition of dominant values and logics as a pregiven context; where instead they have the ability to negotiate their own trajectory through the historical continuum, to resist the continuing onslaughts of totalization. Aboriginal rights act as a principle from which the position of First Nations in Canadian society may be renegotiated on an ongoing basis. Recognition of Aboriginal rights implies that such negotiations might take place based on the principle of mutual respect rather than the principle of structural dominance. Or, at least, that Aboriginal peoples have some ground upon which they can resist totalization.

We would be wise not to ignore the radicality of this call. Derrida has written that "each advance in politicization obliges one to reconsider, and so reinterpret the very foundations of law such as they had previously been calculated or delimited" (28). The call for a version of Aboriginal rights that resists totalization is a call that challenges the established order; it is a call that demands room for that which is not only different, but in many ways opposed.

* * *

XI. The challenge posed by Aboriginal rights, precisely, is that they force us to re-examine the foundations of law. In a powerful indictment of the way in which

western courts have circumscribed Aboriginal rights, James Youngblood Henderson observed that:

> The courts became caretakers of the racism of the late nineteenth and twentieth centuries. Such cowardice incurs an enormous cost. When governments act in a disorderly and lawless way, their courts save face by classifying oppression as justice or confiscation as a political question. Either way, they remove the cause of action from their jurisdiction. Their decisions do not pretend to have any generality or stability, nor can they sensibly speak of fixed entitlements and duties. As a result, Aboriginal people are deprived of the rule of law. (220)

Henderson's critique thus moves in a different direction than my own. He argues, effectively, that the basic principles of western law are sound—specifying in particular the tort and restitution principles, and the contract and property principles (186)—but that they were not applied fairly to Aboriginal peoples. From this basis he indicts the Canadian courts: "In its approach to the rights of native peoples the law becomes tyranny at worst and an ineffective apologist at best. The Canadian governments may call it law, but it is racism. It is not founded on the principles that recognize the supremacy of God and the rule of law" (220).

While this argument has a great deal of force, particularly in understanding the history of the legal devolutions of Aboriginal rights, it also gives a great deal away. The ultimate vision here is not one in which Aboriginal cultures continue to maintain their basic integrity and resist totalization, but rather one in which Aboriginal peoples take their place as property holders within the established order, gaining their fair share. While Aboriginal leaders certainly cannot be faulted, given the often desperate circumstances of the people, for trying to improve the material well-being of Aboriginal communities, we should not confuse these efforts with the greater challenge posed by the being of Aboriginal cultures as distinct cultures to the foundations of the established order.

* * *

XII. This book provides an overview of how Aboriginal rights have been framed, understood, and often ignored in the legal forum. Most of the cases reproduced here are from the last few decades, when increasing attention to Aboriginal issues developed as a result of a political and cultural renaissance in Aboriginal affairs. Almost all of these cases deal with the issue of Aboriginal title although three deal with what we might call "citizenship" rights. All but one were decided by the Supreme Court of Canada. The exception was appealed beyond the Supreme Court of Canada to the Judicial Committee of the Privy Council in England, when that possibility for appeal still existed. These are the most frequently cited rulings around Aboriginal rights in Canadian jurisprudence. I have left out the voluminous case load dealing with hunting, fishing, and trapping

rights in specific provincial jurisdictions. Although there are important Supreme Court of Canada decisions in these areas, they usually are of primary relevance to specific regions only and there are so many cases that it would be difficult to justify the inclusion of some rather than others.

In editing the cases I have been torn between two impulses. On the one hand, I wanted the cases to be as complete as possible so that the whole argument would be available and readers would be free to decide what parts of it are more important. On the other hand, wanting to produce a single volume that included all the most important cases, I needed to be conscious of the size of the volume. In editing decisions, I used a light hand; I chose to remove some technical aspects of the decision that were not related to Aboriginal rights issues. I also removed the official summaries that begin each case, substituting my own less technical introduction. Finally, where in the same case different Supreme Court Justices cited the same document I often removed the later quotations. In sum, the cases presented here are virtually complete and all deletions are indicated with ellipses.

I began this introduction by referring to Avital Ronell's call for a justice of the future which would show a "will to rupture". This is because there seems to me a danger in the project of defining Aboriginal rights—even where these definitions might involve important material gains for Aboriginal communities—with too much fixity. Such definitions will constrain Aboriginal rights and, like the written version of the treaties, may not serve Aboriginal peoples well in an uncertain future. The will to rupture in this context must be a reminder of the necessary fluidity of Aboriginal rights, of Aboriginal rights as a line of negotiation rather than a specific allowance, exception, or lenience. Aboriginal rights: the mark, within the established order, of what has not been established.

Peterborough, Ont.
November 1993

PETER KULCHYSKI

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