

# **Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System**

BRENDA L. GUNN\*

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\* B.A. (University of Manitoba), J.D. (University of Toronto), LL.M. (University of Arizona), Ontario Bar (2007). This paper is based on the research done for my LL.M. thesis, which I completed in May 2006. Most of the scholars I relied on in developing my thesis presented at the ILJ conference and several of the articles are published in previous editions of the ILJ. These and other scholars have been critical to my intellectual development and I hope I do their work justice. I also want to thank all the people (friends, family and mentors) who have contributed to my intellectual, spiritual and emotional development. Without their support and wisdom, I would not be where I am today.

*This article uses James (Sákéj) Youngblood Henderson's process to achieving a postcolonial legal consciousness as a methodology to gain greater recognition of Indigenous laws, which I argue will lead to better protection of Indigenous peoples' lands, territories and resources. First, I show how the liberal basis of the Canadian legal rights paradigm, as currently applied, does not reflect Indigenous peoples' own understandings of their rights and interests, and results in racist precedents that confine the power and authority of Indigenous peoples over their lands. Referring to other Indigenous scholars, I then discuss Indigenous peoples' connections with their lands, some of the rights and obligations that stem from this connection, and some of the Indigenous legal principles that govern this relationship. Finally, I turn to international law to demonstrate the ways in which Indigenous peoples' participation in the definition of their rights to their lands, territories and resources leads to different articulation of rights than is seen in Canadian Aboriginal title jurisprudence.*

## I INTRODUCTION

When Europeans arrived in what is now known as Canada, Indigenous peoples used and occupied the lands which now make up Canada. One of the greatest impacts of colonization on Indigenous peoples has been the dispossession from their lands. Foucault's concept of discipline describes how one (such as a colonizer) can control the other's (the colonized) body to reduce resistance and further exert power and control. Smith uses this concept of discipline and control over the person, to describe how the dispossession of Indigenous peoples from their lands was a critical tool in the colonization of Indigenous peoples. Some of the most common forms of discipline used in the colonization of Indigenous peoples are "exclusion, marginalization and denial. Indigenous ways of knowing were excluded and marginalized. This happened to Indigenous views about land, for example, through the forced imposition of individualized title, through taking land away for "acts of rebellion," and through redefining land as "waste land" or "empty land" and then taking it away.<sup>1</sup> These disciplines of exclusion, marginalization and denial were operationalized through the enclosure of Indigenous peoples, for example through the creation of reserves and the residential school system.<sup>2</sup> These sorts of discipline excluded Indigenous peoples from the colonies and reinforced the dichotomy between colonizer

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1. Linda Tulwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (New York: St. Martin's Press, 1999) at 68.
  2. *Ibid.*

and colonized. The separation of Indigenous peoples from their territories and dividing nations into small reserves was a key tool for the colonizers to assert control over Indigenous peoples.

During the colonization of the Americas, the Indigenous nations had (and continue to have) laws governing their use of the land and resources. The colonial process of dispossessing Indigenous peoples from their lands varied across the country. In many areas there were treaties signed in which the Indigenous peoples are said to have ceded their rights over vast amounts of their territories. Despite this treaty history, many areas in Canada have never been ceded by treaty. Before or during confederation, the Crown never entered into land cession treaties throughout most of Quebec, the east coast, most of British Columbia and the northern territories. Since the mid 1970s, Canada has begun signing modern-day treaties with communities who had not previously signed treaties. Despite the difference in the way in which the Crown has asserted sovereignty over Canada and claimed ownership over the land, Canadian laws apply uniformly across the country. Thus, Indigenous peoples see regaining recognition of their power and authority over their lands as a key step in the process of decolonizing Canada.<sup>3</sup>

Another aspect of colonization was the imposition of Western law on Indigenous peoples, including property law. Through the creation of the Canadian nation, Indigenous peoples' legal systems were suppressed. Today, there is a rift between what laws are officially recognized as part of the legal matrix and the *de facto* legal system. While Indigenous peoples' legal systems still exist, these laws are extremely limited in their recognized application to govern Indigenous lands.<sup>4</sup> The removal of Indigenous peoples from their lands and the imposition of Western laws have opened the opportunities for the "development" or destruction of Indigenous peoples' territories, which has serious impacts on their identity, culture, political activities and livelihood. The colonization process has hampered Indigenous peoples' ability to protect their lands.

Indigenous peoples in Canada have been trying to regain recognition of their power and authority over their lands since the Crown asserted sovereignty over the lands in question.<sup>5</sup> Indigenous peoples have turned to both domestic and international laws to reassert these powers, with varying

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3. James Sákéj Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 *Indigenous L.J.* 1.

4. See *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, where the court considers the connection the community has with the land to articulate an inherent limit on Aboriginal title rights. The court also decides that oral histories are relevant evidence to prove Aboriginal title rights.

5. This assertion has occurred through negotiation processes such as the modern-day treaty process and through the litigation process, including the original assertions in *Delgamuukw*, *ibid.*

degrees of success. One of the problems Indigenous peoples confront in domestic laws is that their “attempts to reclaim land, language, knowledge and sovereignty have usually involved contested accounts of the past by colonizers.”<sup>6</sup> This contested history has allowed Western courts to continue to produce jurisprudence that relies on legal doctrines, such as the doctrine of discovery and *terra nullius*, that have been discredited and are used to perpetuate the current colonial order.<sup>7</sup>

In this paper, I explore one problem Indigenous peoples face in protecting their lands, territories and resources. The Canadian common law limits the ability of Canadian laws to recognize the power and authority of Indigenous peoples to protect their lands. The Canadian legal system is based on liberal principles which emphasize individual rights, recognize limited Aboriginal title rights solely to put Indigenous peoples back in the place they were before colonization, and restrict the ability of Indigenous peoples’ cultures to evolve. Within the Canadian legal system, Indigenous peoples have limited ability to define their rights; rather, the Canadian courts define the scope of “Aboriginal rights.”

I use James (Sákéj) Youngblood Henderson’s process to achieving a postcolonial legal consciousness as a methodology to gain greater recognition of Indigenous laws, which I argue will lead to better protection of Indigenous peoples’ lands, territories and resources.<sup>8</sup> In the next section, I give an overview of the steps involved in moving towards a postcolonial legal consciousness. I also explain how the postcolonial legal consciousness applies to my goal of gaining greater recognition of Indigenous peoples’ power and authority over their own lands. This recognition will provide more appropriate and more effective protection of Indigenous peoples’ lands and better reflect the legal pluralism upon which Canada was founded.<sup>9</sup>

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6. Smith, *supra* note 1 at 30.

7. In *Mabo v. Queensland No. 2* (1992), 107 A.L.R. 1 (H.C.A.) [*Mabo*], Justice Brennan discusses the doctrine of discovery and *terra nullius* and concludes that:

The theory that the [I]ndigenous inhabitants of a “settled” colony had no proprietary interest in the land thus depended on a discriminatory denigration of [I]ndigenous inhabitants, their social organisation and customs. As the basis of the theory is false in fact and unacceptable in our society, there is a choice of legal principle to be made in the present case. This Court can either apply the existing authorities and proceed to inquire whether the Meriam people are higher “in the scale of social organisation” than the Australian Aborigines whose claims were “utterly disregarded” by the existing authorities or the Court can overrule the existing authorities, discarding the distinction between inhabited colonies that were *terra nullius* and those which were not (para. 61).

8. Henderson, *supra* note 3.

9. See John Borrows, “Creating an Indigenous Legal Community” McGill L.J. 160, for further discussions on legal pluralism [Borrows, “Indigenous Legal Community”].

## II A FRAMEWORK FOR MOVING TOWARDS POSTCOLONIAL LEGAL CONSCIOUSNESS

James (Sákéj) Youngblood Henderson recognizes that many Indigenous lawyers<sup>10</sup> experience the inherent tension between the Canadian laws and Indigenous legal systems.<sup>11</sup> This tension is created by the Eurocentric basis of the Canadian legal system, which excludes the perspectives of Indigenous peoples. Eurocentrism is

the gentle label academics apply to the legacy of colonization and racism .... The fundamental assumption of Eurocentrism is the superiority of Europeans over Indigenous peoples. Eurocentrism is not a matter of attitudes in the sense of values and prejudices. It is the structural keeper of the power and context of modern prejudice or implacable prejudice.<sup>12</sup>

The Canadian legal system is a key system to the perpetuation (or re/production<sup>13</sup>) of Eurocentrism; “the rule of law has operated as a mere word game, behind which lay total manipulation of Aboriginal and treaty promises, human rights and state obligations.”<sup>14</sup> Therefore, for Canadian law to provide adequate protection of Indigenous peoples’ lands, we must move away from the Eurocentric basis and the current legal structure and make room for Indigenous laws.

As the Eurocentric basis of the Canadian legal system is one of the barriers to creating this postcolonial legal consciousness, the three processes identified by Henderson to move towards a postcolonial legal consciousness all address Eurocentrism. These three processes are to decolonize judicial precedents, renew autochthonic ecological orders, and recognize diversity. These three processes involved in moving towards a postcolonial legal consciousness require contemporary scholars to “indigenize, critically historicize and dialogue comparatively.”<sup>15</sup> These three concepts are incorporated into the processes involved in the project for a postcolonial legal consciousness.

I use these processes as a framework to argue that the only way to adequately protect Indigenous peoples’ land is through the recognition of Indigenous peoples’ power and authority over their lands based on their own laws. The first section analyses and critiques the Canadian legal system’s protection of Aboriginal peoples’ rights and title. In an attempt to decolonize

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10. This term refers to Indigenous peoples who have been educated in colonial legal systems.

11. See John Borrows, “Foreword” (2002) 1 *Indigenous L.J.* i.

12. Henderson, *supra* note 3 at 4-5.

13. The slash in “re/produce” is a technique used by postmodern theorists to describe how a system can simultaneously produce and reproduce an effect.

14. Henderson, *supra* note 3 at 26-27.

15. *Ibid.* at 4.

these precedents, I show how the liberal basis of the Canadian legal rights paradigm, as currently applied, does not reflect Indigenous peoples' own understandings of their rights and interests and results in racist precedents that confine the power and authority of Indigenous peoples over their lands.

The next process is to renew Indigenous ecological orders from which stem many Indigenous laws on land use. Using two Indigenous scholars, the second section of this paper discusses Indigenous peoples' connections with their lands, some of the rights and obligations that stem from this connection, and some of the Indigenous legal principles that govern this relationship. As there is no single Indigenous view on land or one set of Indigenous laws, the second section focuses on the descriptions of the connections different Indigenous peoples have with their lands provided by several different scholars. This section also draws out some general legal principles that govern land use. This analysis is not meant to be comprehensive, but rather demonstrative of the tension between Canadian laws and Indigenous laws, reinforcing the need for Indigenous peoples to be able to use their own laws to protect their lands.

The recognition of diversity is the third process, which includes the need to dialogue comparatively. The last section uses international law to demonstrate the ways in which Indigenous peoples' participation in the definition of their rights to their lands, territories and resources leads to different articulation of rights than is seen in Canadian Aboriginal title jurisprudence. This section uses international law as a comparator because it exemplifies the coming together of Indigenous peoples and states to create a set of legal norms with the participation of Indigenous peoples, binding nation-states, and provides a more appropriate (or at least less Eurocentric) protection to Indigenous peoples' lands.

Some may question whether the law has the ability to improve the situation of Indigenous peoples in Canada, arguing that "it seems to make sense that the law cannot be the doctor if it is the disease."<sup>16</sup> However, despite the potentially inherent limits of the Canadian legal system (which are explored in this paper), it is important to keep pushing for changes within the Canadian legal system to end the oppression that it continues to impose. Further, *de jure* recognition of the *de facto* existence of Indigenous legal systems may provide additional protection to these Indigenous legal systems from further deterioration and provide the best protection for Indigenous peoples' lands.

By arguing for the recognition of Indigenous peoples' laws within the Canadian legal system, the goal is not to translate Indigenous laws to make them fit into the Canadian legal system. Rather, the paper attempts to follow

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16. *Ibid.* at 26-27.

the advice of Gordon Christie, who argues that the bringing together of the two legal systems requires the recognition “of the ability of Aboriginal peoples to continue to define themselves, including the capacity to project their own theories and particular forms of knowledge.”<sup>17</sup> Henderson’s framework for achieving a postcolonial legal consciousness to push for greater *de jure* recognition of the *de facto* operation of Indigenous peoples’ legal systems is one way to operationalize Christie’s advice.

Indigenous peoples’ struggle to transform the Canadian legal system to better recognize the position of Indigenous peoples within Canada has been described as a pursuit for a postcolonial legal thought.<sup>18</sup> The project of pursuing a postcolonial legal consciousness “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.”<sup>19</sup> A postcolonial legal consciousness is not merely a result, but is a process of moving forward from the colonial legacy that persists in Canada. One of the reasons that achieving this postcolonial legal consciousness is important is that Indigenous peoples “have come to understand that we cannot win at a game where the rules are rigged and likely to change as soon as we discover how they work. Forced to look inward for a secure cognitive foundation, educated Indigenous peoples have learned to know their own identity.”<sup>20</sup> A postcolonial legal consciousness opens the current conceptual basis of Canadian law and creates room for Indigenous peoples to define their engagement within the Canadian legal system.

The concept of the postcolonial legal consciousness provides for the inclusion of Indigenous laws within the Canadian legal matrix, recognizing the existence of three juridical systems within Canada. Canada is not a bijuridical country, but “numerous Indigenous legal traditions continue to function in Canada in systemically important ways. They influence the lives of Indigenous *and* non-Indigenous peoples.”<sup>21</sup> Multijuridical or pluralist better describes the Canadian legal system. However, there is a schism between the *de facto* operation of Indigenous peoples’ systems in Canada and the *de jure* recognition of these systems.<sup>22</sup> For Canada to truly be a

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17. Gordon Christie, “Law, Theory and Aboriginal Peoples” (2003) 2 Indigenous L.J. 67 at 72.

18. Henderson, *supra* note 3 at 13.

19. Iris Marion Young, “Hybrid Democracy: Iroquois Federalism and the Postcolonial Project” in Duncan Ivison, Paul Patton, & Will Sanders, eds., *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000) 237 at 237.

20. Henderson, *supra* note 3 at 17.

21. Borrows, “Indigenous Legal Community”, *supra* note 9 at 161.

22. See B. Morse, “An Overview of the Implicit and Explicit Recognition of Indigenous Law in Canada,” (Paper presented at the Indigenous Law Journal Conference, University of Toronto, January 26, 2007).

pluralist country there needs to be more comprehensive recognition of Indigenous laws as part of the mainstream Canadian legal system.

The project of moving towards a postcolonial legal consciousness recognizes “that solutions are posed from a combination of the time before, *colonized time*, and the time before that, *pre-colonized time*. Decolonization encapsulates both sets of ideas,” which requires an “analysis of how we were colonized, of what that has meant in terms of our immediate past and what it means for our present and future.”<sup>23</sup> The postcolonial project of reforming (or decolonizing) the existing Canadian legal system has two aspects: institutional and interpretive. The institutional aspect requires creating global systems of democracy for Indigenous peoples to achieve self-determination.<sup>24</sup> This institutional aspect is also applicable in the domestic realm and speaks to the need to reform the existing legal system through a process where Indigenous peoples are active participants in determining the terms of their engagement within Canadian society. The interpretive aspect of the postcolonial project requires rereading history to include the perspective of Indigenous peoples as actors in these histories and not merely objects of history.<sup>25</sup>

We have not yet achieved this postcolonial society. A postcolonial society would have “a deeper, inclusive, democratic governance that is capable of generating a high-energy political mobilization, which is cumulative, sustained, and motivated through institutional innovations, while respecting the inherent diversity of humans and ecologies.”<sup>26</sup> This recognition of diversity opens the doors to the recognition of Indigenous peoples’ laws. Mary Ellen Turpel suggests that each culture is capable of sensitivity to basic conditions of difference and should develop cross-cultural relations accordingly.<sup>27</sup> She believes that there is the possibility for tolerance of difference and the recognition of autonomous Indigenous communities.<sup>28</sup> It is the inter-cultural understanding that needs to be the basis of reconciling Indigenous and Western legal systems. With this understanding, we can begin to incorporate Indigenous legal values within the Canadian legal system, bringing us closer to the recognition of the multijudicial nature of the Canadian legal system.

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23. Smith, *supra* note 1 at 24.

24. Young, *supra* note 19 at 237.

25. *Ibid.* at 238.

26. Henderson, *supra* note 3 at 4.

27. Cited in Christie, *supra* note 17 at 113.

28. *Ibid.*



### III DECOLONIZING PRECEDENTS: DECONSTRUCTING ABORIGINAL TITLE JURISPRUDENCE IN CANADA

The first process in gaining a postcolonial legal consciousness is to decolonize Western precedents.<sup>29</sup> In order to decolonize precedents, it is important to start critically analyzing both the written text and subtext within the judgments. This type of analysis requires one to not only consider the intended legal effects, but also the unintended ramifications of certain doctrines. Critical race legal scholars, such as Derek Bell, Angela P. Harris, Robert A. Williams and Eric Yamamoto, have been undertaking this type of critical analysis for decades. These scholars have worked to uncover and name the embedded racism within Western legal systems. For example, Robert A. Williams, discussing the doctrine of discovery states,

Because of their lack of familiarity with the racist origins of the core doctrines of modern federal Indian law, most practitioners and students do not realize that every time the current Supreme Court cites to any of the core principles to uphold one of its Indian law decisions, it perpetuates and extends the racist legacy brought by Columbus to the New World of the use of law as an instrument of racial domination and discrimination against [I]ndigenous tribal peoples' rights of self-determination.<sup>30</sup>

The Canadian Oxford English Dictionary (2000) defines racism as “a belief in the superiority of a particular race and prejudice based on this.” Perea, Delgado, Harris and Wildman also provide a more detailed definition of racism:

[R]acism has a material component that is both collective and individual. The collective aspect of material racism includes the effort to structure social life and state policy along lines of racial difference, so that one “race” has greater access to economic, political, and social goods than the others(s). The individual aspect of material racism includes efforts to help or hurt particular individuals because of their perceived “race.”<sup>31</sup>

Robert A. Williams also provides a definition of racism, based on Albert Memmi's *The Colonizer and the Colonized*. He synthesizes and describes four essential elements of European-derived racist-imperial discourse:

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29. Henderson, *supra* note 3 at 36.

30. Robert A. Williams Jr., “Columbus's Legacy: The Rehnquist Court's Perpetuation of European Cultural Racism Against American Indian Tribes” (1992) 39 Fed. B. News & J. 358, cited in D.H. Getches, C.F. Wilkinson & R.A. Williams, *Cases and Materials on Federal Indian Law*, 5th ed. (USA: West, 2005), 36-37.

31. Juan Perea, Richard Delgado, Angela Harris & Stephanie Wildman, “Defining Racism and Race” in *Race and Races: Cases and Resources For A Diverse America* (St. Paul: West, 2000) 5.

1. Stressing *the real or imaginary differences* between the racist and his victim.
2. *Assigning values* to these differences, to the advantage of the racist and the detriment of his victim.
3. Trying to make them *absolutes* by *generalizing* from them and claiming that they are final.
4. *Justifying* any present or possible *aggressions or privilege*.<sup>32</sup>

Through my ensuing analysis, I will show how the jurisprudence on Aboriginal title is based on precedents that relied on doctrines, such as the doctrine of discovery that held North America to be *terra nullius* because the Indigenous peoples were not deemed legal subjects and the impacts that this jurisprudence has on the ways in which Aboriginal title is recognized in Canadian law.

I believe that using the terms “racist” and “racism” is a powerful tool of decolonization because it directly identifies the subtext within the case law. I recognize that the outright naming of racism often makes us uncomfortable. However, the methodology of decolonizing precedents requires this embedded racism to be revealed. Only through truly naming and recognizing the basis of the jurisprudence will we ever be truly able to move past doctrines such as the doctrine of discovery and towards a more inclusive and pluralist legal system that extends appropriate protection to Indigenous peoples’ lands. I feel that using the term racism is critical to recognizing the limitations that currently exist within the Canadian legal system. It is our discomfort with naming racism *as* racism that in part allows the colonial violence to continue.<sup>33</sup>

A necessary step in decolonization is explicitly naming the Eurocentric basis of the Canadian legal system and the resultant racist jurisprudence. Precedents based on racist doctrines, such as the doctrine of discovery, “should have no judicial authority in postcolonial law; they are unconscionable and represent the prejudice and bias of another legal era.”<sup>34</sup> Before Indigenous legal systems can be recognized, the faults of the existing system must be exposed. Canadian jurisprudence based on liberal principles and rooted in doctrines such as the doctrine of discovery are unable to produce anything but racist legal principles.

To decolonize precedents, advocates must show the racist basis of the decisions. The first step to decolonizing precedents and showing the racism

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32. Robert A. Williams, Jr. “Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law” (1989) 31 *Ariz. L. Rev.* 237, cited in Perea, Delgado, Harris & Wildman at 26. Albert Memmi’s original definition of racism is found in *The Colonizer and the Colonized* (Boston: Orion, 1965).

33. For more on this issue, see S. Razack, *Looking White People in the Eye: Gender, Race, and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998).

34. Henderson, *supra* note 3 at 37.

perpetuated within the jurisprudence requires a critical retelling of history.<sup>35</sup> This critical historicizing is part of the interpretative aspect of the postcolonial legal consciousness project. This interpretative aspect is important because the chasm between the *de facto* operation of Indigenous legal systems and the limited *de jure* recognition of these systems partly stems from a lack of shared history and philosophies.<sup>36</sup> We must retell (or share Indigenous versions of history) because “narratives of national identity are predicated on the obligation to forget the multi-dimensional cultural interaction producing societies and institutions, especially in the colonialist interactions of European peoples with other peoples of the world.”<sup>37</sup> Through revisiting the historical narratives that legitimate the assertion of Crown sovereignty and the imposition of Western laws, we create space for Indigenous legal systems.

Linda Tuhiwai Smith advocates for Indigenous scholars to continue to approach every issue “with a view to *rewriting* and *rerighting* our position in history. Indigenous peoples want to tell our own stories, write our own versions, in our own ways, for our own purposes.”<sup>38</sup> The rewriting or rerighting of history “draws upon a notion of authenticity, of a time before colonization in which we were intact as [I]ndigenous peoples.”<sup>39</sup>

I have attempted to briefly reriht history by starting this paper with a description of the dispossession of Indigenous peoples from their lands and describe the loss of the recognized power and authority over their lands. Describing the different ways that Indigenous peoples were dispossessed from their lands and Eurocentric laws imposed names the problem and sets the stage for my proposed solution that to adequately protect Indigenous peoples' land and move away from the colonial legacy in Canada, there is a need for greater recognition of Indigenous peoples' laws within the Canadian legal system.

Part of the process to reriht history requires a hybridization of histories (those told by the colonizers and those told by Indigenous peoples), which “means reversing the linearity of the official story, and allowing ‘strategies of subversion that turn the gaze of the discriminated back upon the eye of power.’”<sup>40</sup> I attempt a process of hybridization through the deconstruction of the Canadian legal system, describing its liberal basis and examining the limitation which leads to precedents (including the recognition of Aboriginal

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35. Young, *supra* note 19 at 237-238.

36. Christie, *supra* note 17 at 71.

37. Young, *supra* note 19 at 238.

38. Smith, *supra* note 1 at 28.

39. *Ibid.* at 24.

40. Homi Bhabha, cited in Young, *supra* note 19 at 238-239.

title in Canada) based on racist principles.<sup>41</sup> The deconstruction of the Canadian legal system allows for the insertion of “the subjectivity of colonized people into the imperial narrative”<sup>42</sup> and refocuses history on the consequences of the encounter between nations. By focusing on the interaction of nations during colonization, Indigenous legal systems can be identified as the missing component of the Canadian legal matrix.

Hybridizing history through the inclusion of Indigenous peoples’ retelling of history will break down the colonial dualities of self/other, inside/outside, civilized/savage, citizen/alien, and modern/primitive.<sup>43</sup> Breaking down these dichotomies is key because the process of “othering” through maintaining strict dualities keeps Indigenous peoples and their legal systems marginalized. This process of hybridizing is also a useful tool in the third process of recognizing diversity, which is discussed in the last section of the paper. This idea of hybridization is a critical component (and the result) of the deconstruction of the Canadian legal system.

### **Identifying the Liberal Basis of the Canadian Legal System**

This section provides a general description of liberal theory and how it informs the Canadian legal system and the rights protected under Canadian law. I then examine the Aboriginal title jurisprudence in Canada and point out the ways in which it is confined by liberalism to begin the process of decolonizing these precedents.

Gordon Christie identifies two fundamental tenets of liberalism: respect for the autonomy of the individual and the principle of equality.<sup>44</sup> The principle of equality does not require that all interests be valued equally, but does require that all individuals be valued equally.<sup>45</sup> As a system of ideas, Linda Tuhiwai Smith claims that “liberalism focuses on the individual who has the capacity to reason, on a society which promotes individual autonomy and self-interest, and on a state which has a rational rule of law which regulates a public sphere of life, but which allows individuals to pursue their economic self-interest.”<sup>46</sup> The premise of liberal theory is the “distinct and

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41. *Mabo*, *supra* note 7. As noted above, Justice Brennan questioned the doctrine of discovery and *terra nullius* as a legally valid way to assert sovereignty and ownership of land. These doctrines first emerged in Aboriginal title jurisprudence in the Marshall trilogy, which is also relied on in Canadian jurisprudence, including *Calder v. British Columbia (Attorney-General)*, [1973] S.C.R. 313.

42. Young, *supra* note 19 at 239.

43. *Ibid.*

44. Christie, *supra* note 17 at 81.

45. *Ibid.*

46. Smith, *supra* note 1 at 59.

independent being, *holding* values and *having* interests, capable of reflection and self-examination, essentially interested in 'living a good life.'"<sup>47</sup>

Liberalism assumes that everyone has an interest in living a good life and each person must strive to better him or herself according to his or her own sense of what is valuable. This pursuit is described as the "liberal project." Christie, drawing on Will Kymlicka, who is a prominent liberal theorist, describes the liberal project as the individual pursuit for the good life.<sup>48</sup> This pursuit requires that each person is free from outside coercion or interference.<sup>49</sup> Therefore, society must be structured to facilitate each individual's endeavours to discover good ways of living.<sup>50</sup> This search continues throughout one's life. In order to pursue the liberal project of living the good life, liberalism places equality and liberty as the most fundamental values for society to protect. Thus, the rules guiding society must focus on one's capacity to choose how to pursue the good life and not on articulating one specific formulation of it.<sup>51</sup>

According to liberal theory, a society should be constructed to create a context of choice with minimal constraints on the individual.<sup>52</sup> Therefore, the "state must recognize the freedoms necessary for our moral enterprise, ensuring that we are all free to constantly re-evaluate our beliefs and values, free to cast aside beliefs and values we find wanting, and free to remake ourselves in light of new beliefs and values we now find personally meaningful."<sup>53</sup> The Canadian legal system, based on liberalism, protects rights that promote the realization of this liberal project.

Within this liberal world, the role of the law is to ensure that freedoms are respected and protected.<sup>54</sup> James (Sákéj) Youngblood Henderson states that the "common law rules were organized around a principle of individual autonomy and consent."<sup>55</sup> If conflicts over resources arise in legitimate pursuits, the role of the law is to balance and allocate resources by "considering the intrinsic worth or value of the interests."<sup>56</sup> Determining the value of interests is how the "law may act as an institution to promote particular values."<sup>57</sup>

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47. Christie, *supra* note 17 at 105.

48. *Ibid.* at 74.

49. *Ibid.*

50. *Ibid.*

51. *Ibid.* at 77.

52. *Ibid.* at 79.

53. *Ibid.* at 80.

54. *Ibid.*

55. Henderson, *supra* note 3 at 11.

56. Christie, *supra* note 17 at 80.

57. *Ibid.*

The liberal interpretation of individualism, autonomy and equality conflicts with many Indigenous peoples' values. The fundamental principles underlying liberalism are alien to the belief structures of Aboriginal peoples.<sup>58</sup> Thus, there is an inherent limit in the Canadian common law's ability to extend protection to Indigenous peoples' lands. Further the application of liberal laws to Indigenous peoples will perpetuate the racism within the legal system. Gordon Christie goes as far as to argue that the law as a liberal institution cannot protect the essential interests of Aboriginal peoples.<sup>59</sup>

Part of the way that racism is perpetuated within liberal theory is that liberalism does not see any intrinsic value in culture. Christie argues that some liberals, like Kymlicka, have recognized that cultures may have an instrumental value in providing the context for individual choice.<sup>60</sup> Therefore, cultures can be protected to the extent that they do not impose constraints on individual liberty.<sup>61</sup> Because a central value within liberalism is the individual freedom to dissent from the group and join other groups, the challenge within liberalism is to balance the placing of value in individuals with how to get this autonomous self to direct energies towards the goodness of the world.<sup>62</sup> The only limit that liberalism places on the individual is that one must not interfere with another individual's liberal project of pursuing the good life.<sup>63</sup> The liberalization of Aboriginal communities is inappropriate because Aboriginal communities already know how to live a good life, thus the liberal project is irrelevant.<sup>64</sup>

Some theorists have attempted to apply liberal principles to describe and extend protection to cultural groups. David Hollinger identifies two different types of multiculturalism: the pluralist model treats "groups as permanent and enduring, and as the subject of group rights" and the cosmopolitan (or postethnic) model "accepts shifting group boundaries, multiple affiliations and hybrid identities, [and] is based on individual rights."<sup>65</sup> Will Kymlicka argues that there are two different ethno-cultural groups in Canada.<sup>66</sup> The first group is composed of immigrants, who after the dominion of Canada assimilated into the British cultural norms. The second group is composed of Indigenous peoples and the Québécois. Kymlicka refers to the second group

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58. *Ibid.* at 91.

59. *Ibid.* at 70.

60. *Ibid.* at 92.

61. *Ibid.*

62. *Ibid.* at 97.

63. *Ibid.* at 79.

64. *Ibid.* at 108-109.

65. Will Kymlicka, "American Multiculturalism and 'Nations Within'", in Ivison, Patton, & Sanders, *supra* note 19 at 218.

66. *Ibid.* at 219.

as “nations within nations”; these groups originally had self-government and have continued to fight to regain their autonomy.<sup>67</sup>

Kymlicka argues that Canadian immigration policy is cosmopolitan because it views membership or affiliation with cultural groups as voluntary and encourages people to interact and share their cultures with one another.<sup>68</sup> He argues that it is appropriate for immigration policy to encourage cosmopolitan multiculturalism; however, he is concerned about the application of these principles to nations within nations. Kymlicka discusses various assimilationist policies of the Canadian government and then argues that the goal of these policies was to disempower the nations within, “justified partly on the grounds that minorities which viewed themselves as distinct ‘nations’ would be disloyal and potentially secessionist, and partly on the grounds that national minorities are ‘backward’ and ‘uncivilized,’ and that their languages and cultures were not worthy of respect and protection.”<sup>69</sup> Kymlicka continues to argue that these assimilationist policies have changed, pointing to different domestic and international advances to support his claim.<sup>70</sup> I disagree and believe that current ways the Canadian government and courts recognize Aboriginal rights are still assimilationist, but in a more subtle way. This point will be elaborated upon in the following section.

Kymlicka disagrees with theorists such as Hollinger who would argue that minority nationalism is racist.<sup>71</sup> According to him, this view does not take into account that these nations within “understand themselves as ‘nations’ and ‘cultures’, rather than races.”<sup>72</sup> Kymlicka denies that minority nationalism is racist by distinguishing between cosmopolitan multiculturalism and minority nationalism.<sup>73</sup> According to Kymlicka, “nationalism is a doctrine about the boundaries of political community, and about who possesses rights of self-government.”<sup>74</sup> It is perfectly acceptable to expect all nations to be postethnic (or cosmopolitan), “where group identities and memberships are fluid, hybrid and multiple.”<sup>75</sup> It is through this process of expecting nations within to be cosmopolitan that Kymlicka reconciles liberal concepts with the protection of minority cultures/nations. In his view, as long as the nation within is a liberal nation then it should be protected. Using Kymlicka’s theory exemplifies some of the problems that occur when

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67. *Ibid.*

68. *Ibid.* at 220.

69. *Ibid.* at 224.

70. *Ibid.* at 225-226.

71. *Ibid.* at 229.

72. *Ibid.*

73. *Ibid.* at 231.

74. *Ibid.*

75. *Ibid.*

liberalism is applied to Indigenous peoples. Often, the application of liberal theory imposes a belief system that may not coincide with Indigenous culture and values.

### Recognition of “Aboriginal Title” Rights in Canadian Law

With this general understanding of how liberal values are embedded in the Canadian legal system, I now identify the ways in which these underpinnings impact Aboriginal title jurisprudence in Canada to show the limitations in the current scheme of protecting Indigenous peoples’ lands. The Supreme Court of Canada describes Aboriginal rights as *sui generis*. The Court held that Aboriginal rights cannot be described by the current liberal discourse within the Canadian legal system, but they have nonetheless been unable to fully protect Aboriginal interests outside the dominant liberal paradigm.<sup>76</sup>

In *Delgamuukw v. British Columbia*,<sup>77</sup> Lamer C.J. reiterated earlier decisions that Aboriginal title (as an Aboriginal right) is *sui generis*.<sup>78</sup> Lamer held that the source of Aboriginal title is prior occupation and the interaction between the common law and Aboriginal law.<sup>79</sup> Lamer further recognized that “the content of Aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those [A]boriginal practices, customs and traditions which are integral to distinctive [A]boriginal cultures.”<sup>80</sup> But Lamer C.J. placed a limitation on the uses of Aboriginal title such that “lands subject to [A]boriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group has had with the land which together have given rise to [A]boriginal title in the first place.”<sup>81</sup>

The scope and content of Aboriginal title as defined by Canadian courts is constrained by liberalism because the idea of equality limits Aboriginal rights to being corrective—that rights and title will only be recognized to put Aboriginal people in the position they were in before contact with Europeans.<sup>82</sup> Providing a more robust understanding of these rights is thought to violate the belief that everyone is to have equal access to pursue the good life and no one should be given an unfair advantage in this pursuit.

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76. *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 19.

77. *Supra* note 4.

78. *Ibid.* at para. 112.

79. *Ibid.* at para. 114.

80. *Ibid.* at para. 117.

81. *Ibid.* at para. 128.

82. Christie, *supra* note 17 at 84.



The limitation placed on Aboriginal title by the courts is indicative of the racist nature of liberal theory. The Court is willing to provide some protection for Aboriginal peoples to maintain their pre-colonization or “savage” lifestyles. Thus this “special right” of Aboriginal title cannot be used in a modern—a.k.a. in a non-savage—Indian manner because that would be giving them an unfair advantage. If Aboriginal people want to act like white or “civilized” people, then they must follow the white laws, like everyone else.

One of the rights that is a recognized component of Aboriginal title is the governments’ duty of consultation and accommodation. According to this duty, the government must consult Aboriginal peoples when they contemplate conduct that may affect potential Aboriginal or treaty rights.<sup>83</sup> The type and degree of consultation varies depending on the strength of the right, the inherent limits of the right, and the degree of the infringement. The Supreme Court of Canada has clearly indicated that this duty of consultation and accommodation is not a veto, but only requires the government to enter into conversations with affected Aboriginal communities with a good faith intention to substantially address their concerns.<sup>84</sup> These limitations placed on the duty of consultation reflect the liberal basis of the Canadian legal system because they do not require the government to actually respect and protect Indigenous interests in the land, but to make attempts to reconcile any rights Indigenous peoples may have.

Since the Constitutional protection of Aboriginal and treaty rights was established in 1982, Aboriginal title cannot be extinguished; however, title may have been extinguished prior to 1982. As the purpose of constitutionally recognizing Aboriginal rights was to reconcile the prior occupation by Aboriginal peoples with the Crown’s assertion of sovereignty, Aboriginal rights are not absolute.<sup>85</sup> This reconciliation process may require the Crown to infringe Aboriginal title rights, which is permitted, provided the infringement does not breach the honour of the Crown or its fiduciary duty.<sup>86</sup> As Aboriginal title includes the limited right to determine what uses the land is put to, “the fiduciary relationship between the Crown and [A]boriginal peoples may be satisfied by the involvements of [A]boriginal peoples in decisions taken with respect to their lands. There is always a duty of consultation.”<sup>87</sup> Again, liberal theory underlies the rationale behind the Crown’s ability to infringe Aboriginal title because it is the state’s role to balance potentially clashing rights. The state must not be restrained from

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83. *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511 at para. 35.

84. *Ibid.* at para. 48.

85. *Delgamuukw*, *supra* note 4 at para. 165.

86. *Ibid.*

87. *Ibid.* at para. 168.

having the power to ensure that every individual has equal access to pursuing the good life. The process of reconciliation is a liberal concept because liberal theory does not condone any special or differential rights and privileges. Thus, Aboriginal peoples' rights to their land must be made to fit into the existing Canadian legal system.

In order to provide adequate protection of Aboriginal peoples' land, we must move away from the recognition based on these liberal concepts towards basing these rights on Indigenous legal traditions. While this seems like an astronomical feat, the recognition of Indigenous rights in international law (which is binding on Canada) and the already recognized bi-juridical basis of the Canadian legal system means that the inclusion of Indigenous legal systems is not a big stretch. Further, continuing to identify the racist premise of the current recognition of Aboriginal title will make it harder for the Canadian system to maintain its legitimacy. And as John Borrows has acknowledged, "numerous Indigenous legal traditions continue to function in Canada in systemically important ways. They influence the lives of Indigenous *and* non-Indigenous peoples."<sup>88</sup>

#### IV RENEWING INDIGENOUS ECOLOGICAL ORDERS AS THE BASIS OF INDIGENOUS LEGAL SYSTEMS

The second process in moving towards a postcolonial legal consciousness is to renew autochthonic (or Indigenous) ecological orders. The revitalization of Indigenous peoples' traditional knowledge and the legal systems which stem from that knowledge is critical to right the wrongs of colonization. Henderson argues that the solutions and healing are found within Indigenous peoples' own knowledge, cultures and laws. Space must be made within the Canadian legal system to recognize this knowledge, including Indigenous legal systems. Gordon Christie suggests that the recognition of Indigenous legal systems is not a question about how to translate Aboriginal interests into group rights and fit them into Canadian law, but rather it is a question of the ability of Aboriginal peoples to continue to define themselves, including the capacity to project their own theories and particular forms of knowledge.<sup>89</sup>

Henderson argues that the problem with Eurocentric administrative systems is that they "ignore the ecological contexts of Indigenous thought."<sup>90</sup> To renew autochthonic ecological orders, Henderson argues that "Indigenous peoples must distinguish between the existing legal system that

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88. Borrows, "Indigenous Legal Community", *supra* note 9 at 161.

89. Christie, *supra* note 17 at 72.

90. Henderson, *supra* note 3 at 44-45.

regulates us and the environment from the subtle and complex system of Indigenous ecological orders.”<sup>91</sup> Indigenous peoples need to push for the recognition and incorporation of their ecologically based legal systems into the Canadian legal system. This component of the postcolonial legal strategy requires Indigenous peoples to find ways to incorporate specific Indigenous laws and legal principles into the Canadian system.

Henderson suggests that “to speak initially, they [Indigenous peoples] have to share Eurocentric thought and discourse with their oppressors; however, to exist with dignity and integrity, they must balance Eurocentric knowledge with Indigenous knowledge and live with the ambiguity of thinking against the educated self.”<sup>92</sup> With this statement, Henderson seems to acknowledge that framing Indigenous interests as “rights” in such a way that the interests of Indigenous peoples and majority society converge may be a necessary first step in the postcolonial society. However, he continues to warn that “innovative, interpretative convergences of Indigenous and Eurocentric thoughts are needed in all levels of education to create a postcolonial society.”<sup>93</sup> Henderson seems to be promoting a strategy that begins with interest convergence, but continues to push for the postcolonial project, as described by Young. Advocates need to push the Canadian legal system to begin to recognize Aboriginal peoples as subjects. Henderson presents the challenge for Indigenous lawyers: “While Indigenous lawyers still have to acknowledge the dialectic of colonization, we must also have the courage to cause legal transformation.”<sup>94</sup> The goal would be to truly recognize the Canadian legal system as pluralist and not just dualist (of common and civil law).

### **Indigenous Legal Systems and Laws Relating to Land Use and Protection**

Before describing how international law exemplifies the diversity component of the postcolonial legal consciousness in its recognition of Indigenous peoples' rights to land, territories and resources, this section provides an overview of some writing on Indigenous legal principles as they relate to Indigenous peoples' relationship with their lands. My goal for this section is not to outline *the* Indigenous land laws, but rather to provide some examples of Indigenous laws as a basis for my analysis of international laws

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91. *Ibid.* at 45.

92. *Ibid.* at 18.

93. *Ibid.*

94. *Ibid.* at 24.

on Indigenous peoples' land rights and to point out some of the themes that may re-emerge through a process of renewing Indigenous ecological orders.

Discussing the basis of treaty negotiations in Canada, Borrows identifies some of the values underpinning Indigenous laws. These values include peace, friendship and respect.<sup>95</sup> Borrows notes that these values were contained within the treaty process and therefore are included within the Canadian legal landscape.<sup>96</sup> The inclusion of these legal values within the treaty-making process necessitates their recognition within the broader Canadian legal system.

Borrows describes some of the features of Indigenous law. He states that Anishinabek law is a precedent-based system.<sup>97</sup> These precedents are contained within the stories; these stories provide a basis to judge and guide actions.<sup>98</sup> Recounting an incident about how his community handled a situation where a man was threatening others and himself, Borrows distills several legal principles: friendship, counselling together, unanimity, compassion, love, and restoration to the individual, and community restoration.<sup>99</sup> From this story, Borrows also draws out a legal process to address problems: go with friends, form a council, be unanimous, and act in such a way that you are responsible for the decisions you make.<sup>100</sup> Borrows believes that these legal values continue within Indigenous communities and can help answer today's pressing problems.<sup>101</sup> The identification of precedents, principles and processes demonstrates the existence of Indigenous legal systems, which can be known and applied. While the actual content of these legal precedents, principles and processes contained within some Indigenous laws may differ from those contained within the Canadian legal system, their content is not so foreign as to preclude their application to protect Indigenous peoples' lands.

As opposed to the Canadian legal system, which is based upon a liberal theory of individuality, Sákéj Henderson argues that Indigenous legal systems are grounded in and stem from ecological knowledge.<sup>102</sup> This knowledge informs not just Indigenous peoples' laws, but also other teachings and customs. Indigenous teachings present justice as "animate forces in human consciousness."<sup>103</sup> Henderson explains that Indigenous peoples "believe in the spiritual force of law and justice in Indigenous

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95. Borrows, "Indigenous Legal Community", *supra* note 9 at 163.

96. *Ibid.* at 161.

97. *Ibid.* at 166.

98. *Ibid.*

99. *Ibid.* at 170.

100. *Ibid.* at 171.

101. *Ibid.* at 168.

102. Henderson, *supra* note 3 at 24.

103. *Ibid.* at 27.

knowledge and languages.”<sup>104</sup> The teachings within Aboriginal communities contain intergenerational solutions and remedies to many contemporary problems, especially for those people who are trying to promote and enhance the lives of Indigenous peoples.<sup>105</sup> Given the different foundations of Western and Indigenous laws, it is the renewal and recognition of Indigenous land laws that will provide better protection of Indigenous peoples' lands.

As indicated above, the source of Indigenous laws is the ecological knowledge that is contained in the community's stories and oral traditions. In his report developed for the Law Commission of Canada, Borrows presents the laws of many different Indigenous nations within Canada. Borrows tells the Anishinabek creation story, which describes the order in which the universe was created. He writes:

Last of all he made man. Though last in order of creation, least in the order of dependence, and weakest in bodily powers, man had the greatest gift—the power to dream. Kitche Manitou then made The Great Laws of Nature for the well being and harmony of all things and all creatures. The Great Laws governed the place and movement of sun, moon, earth and stars; governed the powers of wind, water, fire and rock; governed the rhythm and continuity of life, birth, growth and decay. All things lived and worked by these laws.<sup>106</sup>

When trying to determine how Indigenous laws would protect lands, it is important to understand how different Indigenous peoples view the land as this bears on the ways in which the land is protected. According to Henderson, “Indigenous law is based on the implicate order. Life within an ecosystem and ancient promises made to the forces of the place are the sources of Algonquian governance, rites and laws.”<sup>107</sup> This idea of an implicate order also indicates that the source of Indigenous laws is the interconnection with the ecological systems. Therefore, the source of law is not positivism or natural law, but is found within the relationships that comprise the ecosystem.

Oren Lyons describes a “fundamental understanding in Indian government, and it is that all life is equal. Whether it is the growing life of trees, plants, or animals, or whether it is human, all life is equal.”<sup>108</sup> The

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104. *Ibid.*

105. *Ibid.* at 3.

106. John Borrows, “Chapter 2: Examples of Indigenous Law” in *Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada* (Ottawa: Law Commission of Canada, 2006) 42 [Borrows, “Chapter 2”].

107. Henderson, *supra* note 3 at 27.

108. Oren Lyons, “Spirituality, Equality, and Natural Law” in Leroy Little Bear, Menno Boldt & J. Anthony Long, eds., *Pathways to Self-Determination: Canadian Indians and the Canadian State* (Toronto: University of Toronto Press, 1984) 5 at 6.

purpose of the law is about maintaining balance and order throughout the system. This understanding of “equality” determines who (or what) has rights under Indigenous laws. Humans are not the only subjects of law; the total environment (earth and animals) is also a subject of law. This understanding has implications for the protection Indigenous laws afford to the land: land is not merely an object to be exploited, but rather has rights which must be respected. Therefore decisions on land use often require balancing the rights of the land and the rights of the people to use the land.

However, the idea of who has “rights” must be used with caution. Henderson continues to explain that “Algonquian teachings assert that legal rights are only one of several imperfect ways of defending what is better in Indigenous values and life against what is worse.”<sup>109</sup> Therefore, Henderson argues that “establishing respect for legal rights cannot automatically ensure a better life for anyone; for that, after all, is the job of each generation and extended families.”<sup>110</sup> Thus, a critical component of Algonquian legal systems is the recognition that each person has the responsibility to promote respect for the laws and rights. They recognize that the law is not an institution that can just exist, but people must partake in the process for the law to function.

The basis of Indigenous peoples’ interest in lands is the reciprocal relationship between the people and the land. Oren Lyons speaks of the interconnections between all things on Earth and points out that there is not the same hierarchy of living things—humans, animals, plants—that is often attributed to Western thought. Lyons states:

[I]t has been the mandate of our people to look after the welfare of the land and its life. Central to this responsibility is a recognition and respect for the equality of all of the elements of life on this land. Recognition and respect for the equality of all elements of life is necessary because it brings us into perspective as human beings. If all life is considered equal, then we are no more or no less than anything else. Therefore, all life must be respected. Whether it is a tree, a deer, a fish, or a bird, it must be respected because it is equal.<sup>111</sup>

With this quote, Lyons is identifying a component of Haudenasaunee law that holds that humans have certain rights to use land for different purposes.

Henderson explains that “the belief that the ecological order is connected through relationships with the keepers of life is the premise of our worldviews. By knowing our relationships with the natural order, our shared relationships can sustain harmony and balance.”<sup>112</sup> Borrows’ report to the

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109. Henderson, *supra* note 3 at 27.

110. *Ibid.*

111. Lyons, *supra* note 108 at 6.

112. Henderson, *supra* note 3 at 45.

Law Commission of Canada also includes an overview of some Cree laws, which describe relationships like the one between the Cree and animal-persons: “[A]nimals are regarded as persons in their own right; the relationship between the Cree and animal-persons is governed by the same legal considerations that govern human relationships.”<sup>113</sup> Borrows states that according to Cree law “if animals are not treated appropriately ... something bad will happen.”<sup>114</sup>

Winona LaDuke also describes the relationship Anishinaabe people have with the land, pointing out the responsibilities implicit in that relationship. LaDuke also notes that in the Anishinaabe language, the word for all our relatives refers not only to “those with two legs, but those with four legs, or wings, or fins.”<sup>115</sup> Thus, in determining the scope of rights Indigenous peoples have to their lands, it is important to recognize that rights to use land are not just distributed amongst humans, but that other animals and plants must be considered in allocations and permissible uses.

Borrows explains how land rights are distributed amongst the Anishinabek; Anishinabek nations are organized in a clan system with each family “classified by a *dodem*, designated by taking a symbol from nature, and descending in the male line.”<sup>116</sup> These “totemic obligations help the Anishinabek allocate resources in hunting grounds, fishing grounds, village sites, and harvesting/gathering sites.”<sup>117</sup> From this understanding of how rights are allocated between people, the laws also describe how humans can use resources. Borrows provides the following example:

[U]sing rocks [land] without their consent would be akin to using other people against their will .... Therefore, to ensure that rocks and land are used appropriately, particular ceremonies, or legal permissions, are needed .... Under Anishinabek legal traditions, rocks (earth) could not be owned or allocated if this ownership implied control of the earth without its consent.<sup>118</sup>

Borrows explains further:

[T]he concept of reciprocal obligations between rocks and humans is an important part of Anishinabek law. People are the beneficiaries of the earth's care, and under Anishinabek law, this creates duties for the beneficiaries as

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113. Borrows, “Chapter 2”, *supra* note 106 at 51.

114. *Ibid.* at 51-52.

115. Winona LaDuke, “The People Belong to the Land” in Jerry Mander & Victoria Tauli-Corpuz, eds., *Paradigm Wars: Indigenous Peoples' Resistance to Economic Globalization: A Special Report of the International Forum on Globalization Committee on Indigenous Peoples* (San Francisco: Sierra Club Books, 2006), 19-21.

116. Borrows, “Chapter 2”, *supra* note 106 at 36.

117. *Ibid.*

118. *Ibid.* at 38.

well as for the earth (as the so-called trustee). Humans and others have rights relative to the earth in their jurisprudence, they also have duties. Duties or obligations are central to relationships under Anishinabek Law.<sup>119</sup>

This guardian or fiduciary relationship between humans and land is not adequately addressed within current Canadian jurisprudence on Aboriginal title. Given the limitations of liberally-construed rights, the Canadian legal system is not able to recognize these rights. Thus to protect and promote this relationship, Indigenous peoples need to be able to govern their relationship with land by their own laws.

Dr. Johnston, an Anishinabek Elder, describes the duration of one's rights and obligations to the land:

No man can own his mother. This principle extends even into the future. The unborn are entitled to the largess of the earth, no less than the living. During his life a man is but a trustee of his portion of the land and must pass on to his children what he inherited from his mother. At death, the dying leave behind the mantle that they occupied, taking nothing with them but a memory and a place for others still to come.<sup>120</sup>

Borrows explains that the Anishinabek laws on land ownership are loosely analogical to Western legal constructs of trusts. He states that "under Anishinabek law, land is held by the present generation for future generations. Land does not belong to a person or people in the sense that they have absolute discretion and control; land is provisionally held for present sustenance and for the sustenance of those yet unborn."<sup>121</sup>

The above description of some of the principles of Indigenous legal systems shows that Indigenous laws provide for a different relationship between Indigenous peoples and their lands. Indigenous laws do not just set out simple rules for what can be done on what pieces of land. Rather, the laws draw out complex relationships, which lead to different rights and obligations. The purpose of these laws is to protect this relationship and maintain a balance within the ecosystem. Therefore, under Indigenous laws the approach to resource development may differ from the Canadian legal system. At a minimum, the underlying values and relationships between beings would lead to different factors being considered when making decisions according to Indigenous laws.

Understanding and renewing the ecologically-based Indigenous legal systems is critical to providing better protection of Indigenous peoples' lands because the protection that is extended is based on their own

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119. *Ibid.* at 40.

120. *Ibid.* at 39.

121. *Ibid.*



knowledge and values connected to the lands. Renewing ecological knowledge held by Indigenous peoples, especially in relation to land use, is a critical component of moving towards a postcolonial legal consciousness that recognizes the role of Indigenous legal systems within the juridical traditions in Canada to protect Indigenous peoples' lands. Without the inclusion of these ecologically-based laws, Indigenous peoples' lands will not receive adequate protection. The recognition afforded to Indigenous peoples' lands under international law may provide a positive example of how Western legal systems and Indigenous legal systems can co-exist within a pluralist society.

## V RECOGNIZING DIVERSITY: THE RECOGNITION OF INDIGENOUS PEOPLES' LAND RIGHTS IN INTERNATIONAL LAW

The final process to move towards a postcolonial legal consciousness is recognizing the importance of human diversity to break down existing dichotomies such as “the distinctions between savage/civilized, special rights/general rights, public/private, state/society, legislative/judicial, power/law and law/policy.”<sup>122</sup> Henderson explains that “the collapse of these dualities is fatal to colonial legal thought, which is founded on the strategy of difference illustrated by these dualities.”<sup>123</sup> Breaking down these dichotomies creates room for the recognition of the role of Indigenous legal systems within the broader Canadian legal system because Indigenous peoples are no longer objects of law being acted upon, but have actively participated in the definition of their rights.

Indigenous peoples in Canada have been participating in international fora including the United Nations, the Organization of American States and the International Law Organization for many decades now. Indigenous peoples have engaged many different tactics at the international level and have phrased their claims in different ways. The participation of Indigenous peoples in these processes has led to the recognition of Indigenous peoples' land rights. This section describes Indigenous peoples' engagement with the international arena to show how international law recognizes Indigenous rights to land by reference to their own traditional laws. I argue that this incorporation of Indigenous legal principles in international laws exemplifies the final process in moving towards a postcolonial legal consciousness—recognizing diversity—because it provides for multiple legal influences to create a new set of legal norms that bind nation-states.

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122. Henderson, *supra* note 3 at 48.

123. *Ibid.*

Further these norms are the result of multi-party negotiations: nation-states, Indigenous peoples, and other non-state actors.

### **Indigenous Peoples' Engagement with the International Arena**

Before discussing the specific content of Indigenous peoples' land rights in international law, I outline the different ways Indigenous peoples have framed their rights and how these rights have been invoked by Indigenous peoples in Canada. It is important to understand how Indigenous peoples have engaged with states at the international level to fully appreciate the current content and scope of land rights recognized in international law. The direct interaction between Indigenous peoples within Canada and the Canadian state on these rights further supports the argument that Canadian common law and Indigenous legal systems can co-exist.

Benedict Kingsbury separates Indigenous peoples' claims into five categories: "human rights and non-discrimination claims; minority claims; self-determination; historic sovereignty claims; and claims as [I]ndigenous peoples, including claims based on treaties or other agreements between [I]ndigenous peoples and states."<sup>124</sup> Under the human rights model, Indigenous peoples frame their rights in such a way to demand respect for their basic human rights.<sup>125</sup> These "claims are usually made against the state, but may be directed substantively at conduct by certain non-state groups, including armed bands, mining corporations, or [I]ndigenous peoples' organizations."<sup>126</sup> Indigenous people in Canada have used the human rights model through submitting individual complaints and shadow reports before human rights bodies including the Human Rights Committee. In its most recent report, the Human Rights Committee stated that the Committee "while noting with interest Canada's undertakings towards the establishment of alternative policies to extinguishment of inherent [A]boriginal rights in modern treaties, remains concerned that these alternatives may in practice amount to extinguishment of [A]boriginal rights."<sup>127</sup> Utilizing the human rights model, Indigenous peoples have been able to get international

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124. Benedict Kingsbury, "Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law" (2001) 34 N.Y.U.J. Int'l L. & Pol. 189 at 190.

125. *Ibid.* at 194.

126. *Ibid.*

127. Human Rights Committee, "Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee, Canada" Doc. No. CCPR/C/CAN/CO/5 (20 April 2006) at para. 8 ["Concluding Observations"].

recognition of the problems with the current Canadian system for delineating Indigenous peoples' lands.

Using the minority model, Indigenous peoples are described as a particular type of minority group within the nation-state deserving protection. One example of the minority approach is the interpretation given to article 27 of the *International Covenant on Civil and Political Rights*.<sup>128</sup> Indigenous peoples in Canada have invoked the minority model to gain recognition of their land rights in the *Ominiyak* case before the Human Rights Committee ("HRC").<sup>129</sup> The Committee found that Canada violated the Lubicon Lake band's article 27 right by not recognizing their land rights.<sup>130</sup> In its most recent report on Canada, the Committee referred to articles 1<sup>131</sup> and 27 when recommending that Canada

make every effort to resume negotiations with the Lubicon Lake Band, with a view to finding a solution which respects the rights of the Band under the Covenant, as already found by the Committee. It should consult with the Band before granting licenses for economic exploitation of the disputed land, and ensure that in no case such exploitation jeopardizes the rights recognized under the Covenant.<sup>132</sup>

By using the minority model, the Lubicon Lake Band was able to gain recognition of the problems within the Canadian approach to addressing land issues, particularly in relation to resource exploitation including issues such

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128. *International Covenant on Civil and Political Rights*, (19 December 1966), 999 U.N.T.S. 171, arts. 9-14 (entered into force 23 March 1976) [*ICCPR*]. Article 27 states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

129. Human Rights Committee, *Bernard Ominiyak, Chief of the Lubicon Lake Band v. Canada*, 38th Sess., Communication No. 167/1984, UN Doc. CCPR/C/38/D/167/1984 (26 March 1990).

130. *Ibid.* at para. 33.

131. *ICCPR*, *supra* note 128, Article I states:

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

132. "Concluding Observations", *supra* note 127 at para. 9.

as the need for the Band to be included in the decision-making process. Further, the HRC report reiterates the connection between Indigenous peoples, their lands and their culture.

The self-determination model “is about the relation between state and community.”<sup>133</sup> Kingsbury contends that most Indigenous people do not see self-determination as a way to secede from the nation-state within which they reside, rather “most of the groups participating in the international [I]ndigenous peoples’ movement ... expect to continue in an enduring relationship with the state(s) in which they presently live.”<sup>134</sup> The Human Rights Committee has recognized the right of Indigenous peoples in Canada to self-determination, which includes rights over their lands, territories and resources. In their 1999 “Concluding Observations,” the Committee specifically stated that it “emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.”<sup>135</sup> The Committee also expressed its disapproval of Canada when stating that the Committee,

while taking note of the concept of self-determination as applied by Canada to the [A]boriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State party to report adequately on implementation of article 1 [self-determination] of the Covenant in its next periodic report.<sup>136</sup>

By connecting the idea of self-determination to land rights, the HRC recognizes that Indigenous peoples have the rights to govern their lands with their own laws.

The historic sovereignty approach is related to the idea that “treaties between [I]ndigenous peoples and colonizing or trading states made over several centuries commonly were premised on the capacity of both parties to act. In some cases, this implied recognition of the capacity of the leaders of the [I]ndigenous people to act directly in international law.”<sup>137</sup> In the report on his mission to Canada, Special Rapporteur Rodolfo Stavenhagen discussed the treaty-based relationship between Aboriginal peoples in Canada and the government and called on Canada to continue with the

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133. Kingsbury, *supra* note 124 at 223.

134. *Ibid.* at 221.

135. Human Rights Committee, “Concluding Observations of the Human Rights Committee: Canada” UN Doc. CCPR/C/79/Add.105 (7 April 1999) at para 8.

136. *Ibid.* at para. 7.

137. Kingsbury, *supra* note 124 at 234.

modern-day treaty process in recognition of the treaty tradition in Canada.<sup>138</sup> In relation to land rights articulated in these modern treaties, he recommended that “the inherent and constitutional rights of Aboriginal peoples are inalienable and cannot be relinquished, ceded or released, and that Aboriginal peoples should not be requested to agree to such measures in whatever form or wording.”<sup>139</sup> By recognizing the treaty history in Canada and encouraging the governments to continue this process, Stavenhagen recognizes that Indigenous peoples must have control over their lands and their connection with these lands is unseverable.

The final model Kingsbury outlines is the Indigenous peoples approach, which is based on “the construction and affirmation of a distinct program of ‘rights of [I]ndigenous peoples,’ going beyond universal human rights and existing regimes of minority rights, has been one of the objectives of the international [I]ndigenous peoples’ movement.”<sup>140</sup> Kingsbury identifies several normative features of this approach:

The legal regime for restitution of traditional lands and territories; historically-grounded and culturally-grounded entitlements and responsibilities with regard to natural resources; religious sites, and spiritual connection or guardianship with particular land, water, mountains, etc; entitlements and responsibilities based on treaties or other agreements to which the [I]ndigenous people is party; certain constitutional arrangements for participation and political structures for membership and self-government; duties in relation to ancestors and future generations; continuance of certain kinds of economic practices; and perhaps entitlements and responsibilities in relation to traditional knowledge.<sup>141</sup>

The Indigenous peoples’ model appeals to the history of colonization and the distinctive cultures of Indigenous peoples. Kingsbury believes that “the most powerful argument for a distinctive legal category based on special features of [I]ndigenous peoples is wrongful deprivation, above all, of land, territory, self-government, means of livelihood, language, and identity.”<sup>142</sup>

The participation of different Indigenous peoples in the United Nations Open-Ended Working Group on the *Draft Declaration on the Rights of Indigenous Peoples* is one example of utilizing the Indigenous peoples approach. Many Indigenous communities have actively participated in this working group. The Grand Council of the Crees has been an active

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138. Commission on Human Rights, *Mission to Canada, Addendum: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Rodolfo Stavenhagen*, UN ESCOR, 61st Sess., UN Doc. E/CN.4/2005/88/Add.3 (2 December 2004) at paras. 19-32.

139. *Ibid.* at para. 99.

140. Kingsbury, *supra* note 124 at 237.

141. *Ibid.* at 240.

142. *Ibid.* at 244.

participant in the process since the beginning and submitted a document to the tenth session titled “Assessing the International Decade: Urgent Need to Renew Mandate and Improve the U.N. Standard-Setting Process on Indigenous Peoples’ Human Rights,”<sup>143</sup> which clearly indicates their support for the norms and rights articulated in the *Declaration*. Indigenous peoples in Canada have also been actively involved in the creation of *International Labour Organization Convention 169*<sup>144</sup> and in the process around the Organization of American States draft *Declaration on the Rights of Indigenous Peoples*. Through their active participation in the drafting and negotiation process, various Indigenous peoples have been able to articulate their rights in a way that is meaningful to them.

While there are benefits and drawbacks to the various approaches identified by Kingsbury, the result of Indigenous peoples advocating for the incorporation of their rights into international law has clarified the obligation of nation-states to recognize and protect Indigenous peoples’ rights. These different approaches have resulted in the recognition of several substantive rights including the right to self-determination; the rights to their lands, territories and resources; and the right to consultation.

Patrick Macklem distills Indigenous peoples’ rights in terms of two different categories: differentiated and non-differentiated. Differentiated rights are those rights that “differentiate Indigenous people from non-Indigenous people and directly implicate the moral significance of history.”<sup>145</sup> Macklem argues that “part of the appeal of differentiated rights of Indigenous peoples lies in the intuition that there is something about Indigenous difference that merits legal protection.”<sup>146</sup> Differential rights “represent legal commitments to address adverse distributional consequences produced by assertions of territorial sovereignty over [I]ndigenous peoples and [I]ndigenous territory.”<sup>147</sup> The recognition of differentiated rights for Indigenous peoples’ land has been articulated in the International Labor Organization *Conventions 107* and *169* and the *Draft*

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143. Grand Council of the Crees (Eeyou Istchee), *et al. Assessing the International Decade: Urgent need to Renew Mandate and Improve the UN Standard-Setting Process on Indigenous Peoples’ Human Rights*, submitted to the 10th Session of the UN Open-Ended Working Group on the *Draft Declaration on the Rights of Indigenous Peoples* (March 2004).

144. International Labor Organization, *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, adopted 27 June 1989 by the General Conference of the International Labor Organization at its 76th session, entered into force 5 September 1991 [*ILO Convention 169*].

145. Patrick Macklem, “Indigenous Rights and Multinational Corporations at International Law” (2001) 24 *Hastings Int’l & Comp. L. Rev.* 475 at 480.

146. *Ibid.* at 481.

147. *Ibid.* at 482.

*Declarations on the Rights of Indigenous Peoples* currently being developed in the United Nations and the Organization of American States.

Undifferentiated rights are those rights that attach to every person.<sup>148</sup> Undifferentiated rights “attach to [I]ndigenous peoples not on account of their [I]ndigenous difference but instead because they relate to aspects of identity that are seen as constituting fundamental attributes of all human beings regardless of individual, social or historical differences.”<sup>149</sup> In the assertion of undifferentiated rights, “the fact that a community is [I]ndigenous may be relevant to the content, but not the availability, of these rights.”<sup>150</sup> Again, Macklem relates that “part of the appeal of undifferentiated rights, such as the right to belong to one’s culture, lies in their relation to universal conceptions of human rights, a cornerstone of contemporary international human rights law.”<sup>151</sup> Indigenous peoples have gained recognition of the land rights through general human rights instruments including the *International Covenant on Civil and Political Rights*, the *Convention on the Elimination of All Forms of Racial Discrimination*, the *American Declaration on the Rights and Duties of Man*, and the *American Convention on Human Rights*.

This overview of Indigenous peoples’ engagement in the international arena demonstrates the active role Indigenous peoples, including Indigenous peoples from Canada, have had in defining and scoping the rights now recognized in international law. This is an important point because it is contrary to how Aboriginal title jurisprudence has developed in Canada. Indigenous peoples may be bringing claims to the courts and trying to argue within the common law, but they are so constrained in these arguments that they are not able to reflect how their laws say to protect their lands. In international law, Indigenous people have had much greater ability to articulate their laws and international bodies generally do not define rights for Indigenous peoples, but recognize the rights of Indigenous peoples to protect their lands in accordance with their laws. The articulation of Indigenous peoples’ rights to the protection of their lands is discussed below.

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148. *Ibid.* at 479.

149. *Ibid.* at 481.

150. *Ibid.*

151. *Ibid.*

### **The Recognition of Indigenous Peoples' Land Rights as an International Legal Norm**

With the above background that demonstrated that there are a variety of rights recognized in international law that Indigenous peoples participated in articulating, this section provides a more specific focus on the scope and content of Indigenous peoples' rights to their lands, territories and resources. James Anaya argued that to determine the scope and content of Indigenous peoples' land rights in international law, one must consider all international declarations, treaties, decisions, advisory opinions and other international documents. Taking the totality of these documents, one can find the normative content of Indigenous peoples' land rights, which recognizes that Indigenous peoples have a special connection to land and thus require special protection of their lands to ensure Indigenous peoples' ability to continue to use, occupy, develop and control their lands, territories and resources. Indigenous peoples have been key to defining these rights and have successfully defined these rights in reference to their own traditional laws. Thus the rights articulated in international law recognize diversity by adding another layer to the Canadian legal system. I describe the applicability of this normative framework in describing the content and scope of rights before applying it in the context of Indigenous peoples' rights to their lands, territories and resources.

Anaya uses a normative framework to advocate for a broad and expansive definition of Indigenous peoples' rights. He argues that "international law increasingly addresses and is shaped by nonstate actors and perspectives. Individuals, international organizations, transnational corporations, labour unions, and other nongovernmental organizations participate in procedures that shape the content of international law."<sup>152</sup> This approach provides that Indigenous peoples are subjects of international law with powers to participate and shape how their rights are defined. In this way, Indigenous peoples are able to advocate for international law to recognize their rights as they see their rights. International law "seeks to define norms not by mere assessment of state conduct but rather by the prescriptive articulation of the expectations and values of the *human* constituents of the world community."<sup>153</sup> Thus Indigenous peoples' rights are not limited to the words within any specific treaty or convention, but also encompass the expected standards of conduct to which states and other nonstate actors are held. These standards are increasingly based on Indigenous peoples' own legal systems and cultural norms.

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152. S. James Anaya, *Indigenous Peoples in International Law*, 2d ed. (New York: Oxford Press, 2004) at 50 [Anaya, *Indigenous Peoples*].

153. *Ibid.* at 50-51.



This normative approach to defining Indigenous peoples' rights is based on a "realist interpretation" of rights. A realist interpretation of the content of Indigenous peoples' rights

takes advantage of the evolution in values and shifts in power generated by [I]ndigenous peoples' claims, such that, in some measure, the rights demanded by [I]ndigenous peoples to lands and natural resources can be seen not simply as inspirational, but as rights that already form part of international law within a value structure that is presumptively shared by all.<sup>154</sup>

The realist interpretative approach focuses

on the principles and values behind the formal wording of text, on how relevant actors understand those principles and values to be acted upon, and on possible or actual changes in those understandings .... With its focus on the confluence of values, power (including the power of both governmental and nongovernmental actors), and change, the realist approach does not necessarily or always yield the preferred or optimal results.<sup>155</sup>

There are three well-accepted interpretative maxims to guide the determination of the content of rights under the realist approach: "keeping in mind the overall context and object of the instrument of which they form a part; in light of the larger body of relevant existing or developing human rights standards; and in the manner that is most advantageous to the enjoyment of human rights."<sup>156</sup>

Anaya's realist approach has been utilized by the Inter-American Commission on Human Rights, when it stated that instruments within the Organization of American States system "should be interpreted and applied in context of developments in the field of international human rights law since those instruments were first composed and with due regard to other relevant rules of international law applicable to member states against which complaints of human rights violations are properly lodged."<sup>157</sup> Thus, the Commission concluded that it would "interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law."<sup>158</sup> The Inter-American Court

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154. S. James Anaya, "Indigenous Rights, Local Resources and International Law: Divergent Discourses About International Law, Indigenous Peoples, and Rights over Lands and Resources" (2005) 16 *Colo. J. Int'l Envtl. L. & Pol'y* 237 at 257-258.

155. Anaya, *Indigenous Peoples*, *supra* note 152 at 256.

156. *Ibid.* at 257.

157. *Maya Indigenous Communities of the Toledo District (Belize)* (12 October 2004), Inter-Am. Comm. H.R. No. 40/04, 12.053 at para. 86 [*Belize*].

158. *Ibid.* at para. 88.

of Human Rights has also applied this realist approach when it “looked to the core values represented by the American Convention’s property provision in association with international trends in acceptable action and thinking about [I]ndigenous peoples’ rights. In doing so, the Inter-American Court employed what it termed an ‘evolutionary’ method of interpretation.”<sup>159</sup>

The realist interpretation concludes that the various conventions, declarations, commentaries and decisions represent and articulate customary international law on the rights of Indigenous peoples. Under the normative approach, all states are bound to the international legal standards on the rights of Indigenous peoples, regardless of whether a specific state has signed onto a specific convention. Using this normative realist approach, I outline the content and scope of Indigenous peoples’ rights to their lands, territories and resources by drawing together decision and commentaries by international bodies and the texts of international instruments.

The Inter-American Court of Human Rights has held that the source of Indigenous peoples’ land rights is their collective attachment or relationship with their lands. The Court stated that “among [I]ndigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on a group and its community.”<sup>160</sup> Applying general provisions on the right to property within human rights treaties, the Inter-American system has “recognized that the property rights protected by the system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law.”<sup>161</sup> Thus, Indigenous land rights in international law are *sui generis*. This is different than the way in which *sui generis* has evolved in Canadian jurisprudence, which limits Aboriginal title to a lesser form of land holding than generally recognized in Canadian law. Rather, applying the concept of *sui generis* in the international context has promoted Indigenous peoples’ lands to some other category of property than what might normally be encompassed within these property provisions.

*ILO Convention 169* requires governments to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this

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159. Anaya, *Indigenous Peoples*, *supra* note 152 at 253.

160. *Mayagna (Sumo) Community of Awás Tingni v. Nicaragua* (31 August 2001), Inter-Am. Ct. H.R. at para. 149.

161. *Belize*, *supra* note 157 at para. 117.

relationship.”<sup>162</sup> Further, Article 27 of the *International Covenant of Civil and Political Rights*, which protects minority rights, has been interpreted to protect the special connection of Aboriginal peoples with their lands. The Human Rights Committee observed “that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of [I]ndigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.”<sup>163</sup> The Commission went on to reiterate that

[I]ndigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the [I]ndigenous community as a whole and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the [I]ndigenous communities and the effective realization of their human rights more broadly.<sup>164</sup>

The recognition of the special connection that Indigenous peoples have to their lands and the relationship that stems from this connection as the main impetus to protect the lands leads to very different articulations of rights than what is recognized as Aboriginal title in Canada. Aboriginal title in Canada is based on prior occupation. However, recognizing that Indigenous peoples have a special connection with their lands from which their culture manifests seems to indicate a stronger basis for a right than merely being first in time. The cultural connection as the basis of the right leads to the protection of the right through reference to the culture and its own governing mechanisms.

The right to land also includes the right to special measures to protect this land. The *ILO Convention 169* states: “Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.”<sup>165</sup> The *Convention* continues to require states to “take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.”<sup>166</sup>

The Inter-American Commission of Human Rights has held that states have the obligation

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162. *ILO Convention 169*, *supra* note 144 at article 13.

163. Human Rights Committee, “General Comment 23: The Rights of Minorities” (Art. 27 of the *ICCPR*, *supra* note 128 at para. 7.

164. Belize, *supra* note 157 at para. 114.

165. *ILO Convention 169*, *supra* note 144 at article 4.

166. *Ibid.* at article 14.

to take the measures aimed at restoring, protecting and preserving the rights of [I]ndigenous peoples to their ancestral territories. It has also held that respect for the collective rights of property and possession of [I]ndigenous people to the ancestral lands and territories constitutes an obligation of OAS member states, and that the failure to fulfill this obligation engages the international responsibility of the states.<sup>167</sup>

The Commission held that the general right to property under the American *Declaration* applies to Indigenous peoples to provide

protection of traditional forms of ownership and cultural survival and rights to land, territories and resources. These have been held to include the right of [I]ndigenous peoples to legal recognition of their varied and specific forms and modalities of their control, ownership, use and enjoyment of territories and property, and the recognition of their property and ownership rights with respect to lands, territories and resources they have historically occupied.<sup>168</sup>

The articulation of Indigenous rights to their lands in this case reiterates the importance of the state's protection extending beyond demarcating the land itself. States must also protect the Indigenous peoples' forms of ownership and land holdings. This right prevents the state from imposing specific types of protection, such as reservations, and requires the state to allow the community to define their own rights. This reference to Indigenous peoples' traditional forms of ownership requires there to be a recognition and promotion of the laws by which the community would normally govern their lands.

The Committee on the Elimination of Racial Discrimination has also recognized Indigenous peoples' rights to land. In their *General Recommendation* on Indigenous peoples, the Committee

calls upon States parties to recognize and protect the rights of [I]ndigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.<sup>169</sup>

Indigenous land rights in international law also include the right to make decisions regarding the use of the lands. This right is often articulated as the

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167. *Belize*, *supra* note 157 at para. 115.

168. *Ibid.*

169. UN Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Indigenous Peoples*, UN Doc. A/52/18, Annex V (18 August 1997) at para. 5.

right to consultation before development occurs on Indigenous peoples' lands. The United Nations *Draft Declaration on the Rights of Indigenous Peoples* recognizes:

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.<sup>170</sup>

This aspect of the right of Indigenous peoples to their lands addresses resource development and extraction. While international law does not recognize that Indigenous peoples have a veto over development on their lands, it does hold state governments (and possibly corporations) to a high standard for consultations with the Indigenous peoples before any sort of development that may impact Indigenous peoples' rights can occur. The right to free, prior and informed consent requires that the states and Indigenous peoples come to an arrangement or agreement before resource extraction. Further, this right has a retroactive aspect to it, which requires states to take steps to facilitate the return of communities who been removed from their lands. Again, this right provides a different approach than what is taken under Canadian law. This right is not contrary to Canadian law, but may not be recognizable under the current Aboriginal title regime that places a heavy weight on the economic benefits from resource extraction. The only way for this right to be given full effect is to recognize Indigenous peoples' lands are governed by Indigenous peoples' laws, especially when it comes to resource extraction and exploitation.

The totality of these various sources of international law leads to the recognition that Indigenous peoples have a special relationship with land and that states have an obligation to provide special protection for these lands. Indigenous peoples have the right to own, develop, control and use their communal lands, territories and resources in accordance with their traditional land-holding system. Indigenous peoples have the right to make informed decisions, as guided by their laws, regarding the future development of their lands and should be compensated for developments that have already occurred. This right, as developed with the active participation of Indigenous peoples, creates a much stronger right and

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170. UN, *Draft Declaration on the Rights of Indigenous Peoples*, as agreed upon by the members of the UN Working Group on Indigenous Populations at its 11th session, Geneva, July 1993. Adopted by the UN Subcommission on Prevention of Discrimination and Protection of Minorities by its resolution 1994/45, UN Doc. E/CN.4/Sub.2/1994/56/ (26 August 1994) at 105, article 30.

provides for greater flexibility within the right to land to reflect each community's specific land laws. It is through this process of self-definition and providing for the application of Indigenous peoples' own laws regulating land use that their traditional lands and territories will be afforded the protection required to maintain their connection and allow Indigenous peoples to fulfill their obligation as guardians of the land.

As Indigenous peoples have been actively involved in the process of articulating the content and scope of their land rights, the protections received in international law generally reflect their own understandings of rights. While I am not contending that international law perfectly reflects the goal of the postcolonial legal consciousness, it is one example of breaking down dichotomies and recognizing diversity because it moves from the either/or framework of dichotomies towards a more inclusive both/and pluralist understanding of Indigenous peoples' rights to their lands. International law of Indigenous peoples' land rights is a body of law defined with the participation of Indigenous peoples and incorporated into the laws of nation-states.

## VI CONCLUSIONS

Through the colonial process, Indigenous peoples were removed from their lands and stripped of the recognized authority to govern their lands. This process of dispossession was a key tool of colonization. Indigenous peoples have been working to regain the *de jure* recognition of their power and authority over their lands. However, Indigenous peoples in Canada have had limited success in achieving this goal, especially the application of their own Indigenous laws to govern their lands.

Applying the process outlined by Sákéj Henderson to achieve the postcolonial legal consciousness, this paper argues the need for Indigenous peoples' lands to be governed by their own laws. The liberal values underpinning the Canadian system often clash with the values of the Indigenous peoples. The application of these liberal values in Aboriginal title jurisprudence has limited the type and extent of protection afforded under Canadian law to Indigenous peoples' lands. Through the process of decolonizing Aboriginal title precedents, the deficiencies within that line of case law have been identified. The deconstruction process has identified the inherent limitation of the liberal-based Canadian legal system to adequately protect Indigenous peoples' lands.

Given the inherent limitation within the existing Canadian common law rules, the rules must be obtained from other sources. As Indigenous peoples have always had laws governing their land use, these laws must now be

utilized and recognized as the laws governing Indigenous peoples' lands. These laws are based on Indigenous peoples' ecological knowledge and are grounded in other values. The inclusion of these values within Indigenous peoples' land laws has created legal regimes that recognize that humans are not the only beings with rights to the land. Further, the "rights" Indigenous peoples have to the lands is closer to a guardian/trustee relationship, than what is often viewed more as ownership rights under Western legal systems. These values also infused a more holistic or systemic approach to land use regulation, which focuses on the interrelations between all living beings.

The recognition of Indigenous peoples' land rights in international law legitimizes or recognizes the status quo in Canada. As stated earlier, John Borrows argues that Indigenous legal traditions continue in Canada. It could be argued that international law is just giving *de jure* recognition to the *de facto* reality in Canada. If Indigenous peoples continue to pursue legal avenues to protect their lands, there must also be a continued push for the recognition of their rights on their own terms by showing the racist nature of the existing jurisprudence and providing a more appropriate alternative—through Indigenous legal traditions. International law provides one potential framework for legal rights and concepts that may be more cognizable to the Canadian legal system, while maintaining the integrity of Indigenous peoples' connections to their lands. The co-existence of Indigenous laws and the common and civil laws occurs through a process of recognizing diversity. One example where this diversity is recognized is international law, which has identified international laws and norms binding on states, which promote the protection of Indigenous peoples' lands in accordance with their own laws. Through their active participation in the articulation of these international norms, Indigenous peoples have been able to formulate the law in a way that coincides with their own value systems and is cognizable to Canadian common law. The norms in international law do not set out a specific content or form of "Aboriginal title" to be protected. Rather, international law recognizes that Indigenous peoples' lands are to be identified and protected in accordance with Indigenous peoples' own legal systems. Following the postcolonial legal consciousness methodology, there is a process to create space within the Canadian legal system to recognize the pluralist nature of Canada and for Indigenous peoples to govern their lands via their own laws and customs.