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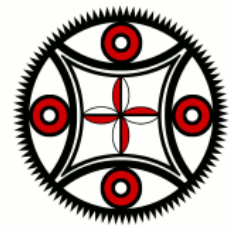

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This paper works from the assumption that the power of the state to determine and regulate debate around the reinvigoration of Indigenous legal traditions must be set aside, and that the path forward must be laid out by Indigenous peoples. Working out the implications of this assumption leads to ruminations on the roles that identity, colonialism, culture and self determination must play in structuring debate around the rebuilding of these legal traditions. The position that begins to emerge from these ruminations focuses attention on the need to control processes of identity formation. Given the historical and ongoing impacts of colonial policies and practices, regaining and exercising control over these processes will be challenging in its own right, but only through this sort of strategy will Indigenous nations find that their efforts hold promise of a 'post-colonial' world for subsequent generations.

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.

INDIGENOUS CHILDREN AND COLONIAL LAW

RESIDENTIAL SCHOOLS: DID THEY REALLY CLOSE OR JUST MORPH INTO CHILD WELFARE?

By Cindy Blackstock

Minister Jane Stewart made the Statement of Reconciliation in 1998, two years after the last residential school closed in 1996. This statement acknowledged the multigenerational harms arising from the forced placement of Aboriginal children in residential schools, thereby creating opportunities for restitution and, equally important, learning by government so it does not happen again. Ten years later, on February 23, 2007, National Chief Phil Fontaine announced that the Assembly of First Nations was joining with the First Nations Child and Family Caring Society of Canada to file a complaint with the Canadian Human Rights Commission to seek redress for Canada's inequitable funding policy that contributes to more First Nations children being in state care than at the height of residential schools. If reconciliation means not having to say sorry twice— Canada is failing. This article provides some background on the human rights complaint and sets out some of the evidence supporting the claim.

ENDING DISCRIMINATION AND PROTECTING EQUALITY: A CHALLENGE TO THE INAC FUNDING FORMULA OF FIRST NATIONS CHILD AND FAMILY SERVICE AGENCIES

By Sarah Clarke

Throughout history, First Nations children have been the subject of confused jurisdictional debates and unfair treatment by all levels of government. As a result, these children have been subjected to unspeakable harm, violence and neglect. In turn First Nations Child Welfare Agencies have attempted to address these issues and care for the children of their communities, bringing spiritual and cultural competence into the context of child protection. But the federal government has directly ensured their failure: unfair funding practices and unequal service provision has created a divide between the level of support and caring afforded to non-First Nations children and those children serviced by First Nations Child Welfare Agencies. This divide signifies a direct violation of a basic right often taken for granted by most Canadians: equality. Section 15 of the Charter of Rights and Freedoms exists to protect our rights as equal citizens of this nation; in this instance the federal government has simply chosen to ignore this basic tenet. The unequal funding structure created to support First Nations children is a volatile reminder that First Nations across our country continue to be marginalized and relegated to being second class citizens.

INDIGENOUS ISSUES IN CONTEXT: GUATEMALA, CANADA AND ISRAEL

BREACHING INDIGENOUS LAW: CANADIAN MINING IN GUATEMALA

By Shin Imai, Ladan Mehranvar and Jennifer Sander

This is a case study of a small Indigenous community in Guatemala that defied a powerful Canadian mining company by holding a community vote on whether to allow mining on its territory. The result of the vote—to stop mining activity on its territory—has not been honoured by the Canadian mining company. The dispute is being played out against a backdrop of intimidation and violence. The study reviews the major players in the dispute—the mining company, the Guatemalan government, the World Bank and the Canadian government—and concludes that they all have a stake in the profitability of the mine. There is a clear deficiency in the checks and balances needed to ensure that the Indigenous people are dealt with fairly. Drawing on ideas from the National Roundtables on Corporate Social Responsibility ("CSR") and the Canadian Extractive Industry in Developing Countries (released in March 2007), the study suggests that at the present time, Canadian courts may be the only forum capable of holding the major actors accountable for their actions.

TREATY COUNCILS AND MUTUAL RECONCILIATION UNDER SECTION 35

By Sara J. Mainville

The author has undertaken a historical research project on the Treaty between the Queen and her ancestors, the Anishinaabeg of Lake of the Woods and Rainy Lake in northwestern Ontario. The focus in this article is the balancing of the legality and legitimacy of the Anishinaabeg socialpolitical order today. The paper highlights how Section 35 cases on precontact rights and activities challenge the goal of protecting the inherent right to self-government of Aboriginal societies. Because of the problems with the status quo, the most important treaty right today is that the Queen's ear would always be available to the Anishinaabeg, in the form of the treaty councils established in the years following the October 3, 1873, treaty. Modern treaty councils should be the focus of a renewed treaty relationship with the Crown. The author, with her personal understanding of the oral tradition evidence of Treaty Three, insists that the parties must undertake reconciliation of the Anishinaabeg's pre-existing laws and institutions based on treaty principles solemnized in the treaty agreement.

ISRAELI ARABS: BETWEEN THE NATION AND THE STATE

By Mohammed Saif-Alden Wattad

The article addresses the case of Israeli Arabs as a touchstone case for national minorities who live in constitutional democracies. The author argues that Israeli Arabs may not identify themselves as Palestinians but rather as Israelis, for being Palestinian is a matter of citizenship, while Israeli Arabs are citizens only of the state of Israel. However, acknowledging the hybrid identity of Israeli Arabs, namely, being part of the Arab nation as well as legal citizens of the state of Israel, the author structures a conceptual distinction between nationhood and statehood. It is the author's view that while nationhood reflects the notion of family-hood, statehood reflects the mere existence of a political entity. Following the logical theory underlying the above-mentioned distinction, the author inquires into its practicalities. He

contends that while nationhood requires patriotism, statehood demands loyalty. It is his view that the national identity of Israeli Arabs does not and must not undermine their citizenship identity as Israelis.

Furthermore, the author asserts that Israeli Arabs, as a national minority, should be entitled to collective group-based rights, which enable them to preserve their national identity. On the one hand, he acknowledges the inherent correlation between rights and duties, thus asserting that Israeli Arabs must express their loyalty through inter alia military service and symbols of the state. On the other hand, the author calls on the state of Israel to adapt its official symbols, such as the flag and the anthem, in a manner that expresses the Israeli features of the state rather than its Jewish characteristics.

LOOKING FORWARD: PATHS TO A NEW RELATIONSHIP

THE ETHICAL SPACE OF ENGAGEMENT

By Willie Ermine

The "ethical space" is formed when two societies, with disparate worldviews, are poised to engage each other. It is the thought about diverse societies and the space in between them that contributes to the development of a framework for dialogue between human communities. The ethical space of engagement proposes a framework as a way of examining the diversity and positioning of Indigenous peoples and Western society in the pursuit of a relevant discussion on Indigenous legal issues and particularly to the fragile intersection of Indigenous law and Canadian legal systems. Ethical standards and the emergence of new rules of engagement through recent Supreme Court rulings call for a new approach to Indigenous-Western dealings. The new partnership model of the ethical space, in a cooperative spirit between Indigenous peoples and Western institutions, will create new currents of thought that flow in different directions of legal discourse and overrun the archaic ways of interaction.

PROTECTING INDIGENOUS PEOPLES THROUGH SOCIALLY RESPONSIBLE INVESTMENT

By Benjamin J. Richardson

This paper canvasses a new approach to protecting Indigenous peoples that targets the institutions that financially sponsor the development projects and companies that can often harm Indigenous livelihoods. To revitalize and protect their communities and legal systems, Indigenous peoples must reckon with the power of financial markets. Encouragingly, through the movement for socially responsible investment, which has had earlier successes such as its campaign against investment in apartheid South Africa, some financiers are beginning to respect Indigenous rights and interests. Some mutual funds remove companies that violate Indigenous rights from their investment portfolios, while other investors seek change through shareholder activism. Much more needs to be done, however, if SRI is to have an impact. Some states have started to introduce informational and incentive based policy mechanisms to promote SRI, which may eventually enable the financial sector to be a source of support rather than an obstacle to Indigenous self-determination.