

Community Governance and Nation (Re)Building:
Centering Indigenous Learning and Research

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ABSTRACT:

In this paper, Professor Monture examines the legal research needs of First Nations communities. The analysis is centered on a methodology which respects the knowledge traditions and methods of inquiry of First Nations. Topics canvassed include: the tradition of story-telling; litigation strategies; concerns and cautions with the patterns now visible in Supreme Court of Canada reasonings; the purpose of sections 35(1); and, issues with the structure in which Aboriginal rights are litigated. Also included are discussions on treaty rights and the rights of women in self-government. The author's central point is that an analysis of power, of which colonialism is a form, is essential to the development of a successful legal research strategy.

¹ This paper has benefited from the comments of Kent McNeil, Micha Menczer, Maria Morellato, and Chris Robertson during the FNGC peer review process. I wish to acknowledge their commitment to the work of ensuring a better future for First Nations through the process of litigation and thank them for their helpful comments.

As I sat down to write this paper examining the ways to enhance the ability of First Nations² communities to be self-governing, I was reminded of a good story – an experience that had a profound influence on how I now think about First Nations governance. I had been asked by a First Nations child welfare authority to assist them in drafting some laws. During the course of this meeting, an Elder³ reflected upon his days as Chief of his community. He explained how he was always available to his people. He gave as an example settling marital disputes at all hours of the night. He explained that years ago when he was Chief, he was always there in the community. This former Chief explained he was not always gone on the road, to meetings. He was available to the people. I understood him to be commenting on the need to acknowledge the changes that our communities have experienced. His story struck me because it was not the usual example of the way in which colonialism, in this case imposed structures and practices of governance, had impacted on us. Imposed forms of governance have changed and challenged leadership practices and community expectations.

After listening to the Elder, I began to understand that the impact of an imposed form of government was more profound and extensive on our nations

² These are the original nations of the land – the Anishnabe, Cree, Maliseet, Saulteaux, Salish, Wet’suwet’en, Dene, Inuit, Haudenosaunee, to mention only a few of those nations. They are diverse nations who have had imposed on them a foreign system of belonging. First Nations citizens are those who identify as belonging to that nation *and are acknowledged by the community*. This usage has nothing to do with *Indian Act* impositions including the on and off reserve distinction. That distinction (the reserve) must be understood for what it is, another colonial imposition. Reserve residence is not a sole measure of Indigenous “authenticity” or authority.

³ I wish to acknowledge the late Sandy Beardy from the Cree community of Cross Lake.

than I had previously understood. There exists an unacknowledged gap between the governance expectations of the people as “Indians” and the requirements laid down upon us under the *Indian Act* system. It is not just a matter of two systems in conflict but a lack of awareness and opportunity for First Nations to understand both systems. The result is a lack of common community knowledge in which opinions about the ability of local governments to meet their needs is based. There is little written that reflects a need to understand the possible conflict⁴ and contradictions in expectations about the meaning of being self-governing. Education, then, is the first step in (re)building a shared community understanding of how to govern.

The difficulty for communities with being fully self-governing, in my mind, is thwarted by at least three significant internal factors.⁵ The first is identified in the story just told. There is often a conflict between what one expects as a First Nations citizen operating within a traditional value system, and what is expected of you from the imposed system. Much of the criticism our leaders face at the community level, I suspect, comes from this issue of value conflict and contradiction. Governance expectations are not clear and people do not often recognize the concurrent operation of two separate systems of expectation and

⁴ In differing ways, conflict was often the product of initial contact between First Nations and the newcomers. The patterns vary across the national geography as did settlement practices and over time conflict has become more complex. In some cases it is embedded in communities as though the citizens of those communities created the conflict, and the colonial past is then obscured.

⁵ In this paper, the lack of political will on the part of Canadian governments is not the focus. This is also a significant obstacle and one which First Nations have far less control over. My focus is on First Nations communities and what we can do and can do now.

behaviour. I believe this is a factor whether or not traditional governments are still active in the community. Over time the demarcation between the two systems has become less clear. This does not mean that First Nations have lost something or become less “Indian”. Often it means that the imposed systems are blended into the Indigenous ones and this blending may not always be consciously determined. The problem occurs precisely because that blending has often taken place over time and there is no express acknowledgement by the community of the changes, challenges and accomplishments.⁶ This is complicated by the fact that much of what happens in the community, at the band office, is determined by poverty and addiction⁷ leading to the crisis to crisis nature of life in far too many communities.

The second factor is an experience that I have had working with many, but certainly not all, First Nations communities. And it is a shared lack of understanding of the general and specific workings of the imposed system including the western legal framework. The most common example is the elevation of policy to that of law (firmly entrenched and finally decisive). Policy⁸ is then seen as a rigid set of rules rather than guidelines to inform the use of discretion by decision makers. Policy, therefore, is often cited in band decision

⁶ All cultures progress over time. First Nations have infrequently been allowed this natural development but are most often discussed in terms of their “pre-contact” practices.

⁷ I am using this term broadly to include not only substance abuse but the full series of destructive things we do to ourselves.

⁸ Here I am speaking solely to policy frameworks developed by First Nations. There is an equally important policy review – a review of Crown policy - that must be undertaken. As it stands now, Crown policy is just something that is made from far away and often used to diminish rather than enhance rights of First Nations.

making as a binding rule and discretion cannot be a consideration. This, in my view, is an interesting phenomenon based I believe in the fact that First Nations have often taken control in the policy area, written “rules” down after periods of consultation, and have a deep sense of ownership over them. Thus they are not seen as words intended to guide. They are attributed a greater authority because of the alienation First Nations experience from law and governance frameworks imposed on them. Other laws (often those imposed) are therefore logically disregarded, as they are not community owned and operate at a distance from local life.

Sometimes issues attributed to a lack of accountability actually stem from lack of clarity about the expectations of imposed structures of governance and law. An obvious example of the concurrent experience of conflict and contradiction would be the frequently heard concerns about nepotism. In a social system structured on objectivity and the distance of decision makers from the matters under review, it is not appropriate to hire family simply because they are family. All such hirings are at least suspicious if not wrong. However, in a social system that is structured on family and often clan as the primary component, decisions based on family and clan obligation and/or responsibility become characterized as something they are not, nepotism.⁹ This is often the outcome because the Indigenous reasons for the decision are often not express in the hiring process. This is not a justification of nepotism but rather a demonstration

⁹ I am not asserting that situations of nepotism (family hired for the wrong reasons) have not occurred.

of the degree to which “culture” conflict impacts on the analysis of good governance.

The entire policy framework and the manner First Nations rely upon it (both conditions of the imposed form of government) is also troublesome as the application of rigid systems of rules often produce unfairness as equality cannot be measured in same-ness. Hardships (and disgruntled community members) are often the outcome. Criticism of leadership and governance decision-making often becomes the norm. Through a system of education, the current inverse relationship where First Nations have control over policy type decisions but not law can be adjusted.¹⁰

The third factor involves an understanding of colonialism. Colonialism is the power to dispossess. But it is not just the power to take land and resources. It has also operated to strip First Nations of family, community, identity, ceremony, tradition and language. Within such a “culture” of dispossession people lose their ability to trust and respect. Certain people within the community find themselves raised into leadership positions and then have the power of the *Indian Act* vested in them. Paulo Friere wrote of this process:

In this situation the oppressed do not see the “new man” as the person to be born from the resolution of this contradiction, as oppression gives way to liberation. For them, the new man or woman themselves become oppressors. Their vision of the new man or woman is individualistic, because of their identification with the oppressor, they have no consciousness of themselves as persons or as members of an oppressed class. It is not to become free that they want agrarian reform, but in order to acquire land and thus

¹⁰ I am not suggesting that First Nations should pattern their forms of community governance structures and practices after the imposed ones. Indeed, in my view, First Nations practices and laws are more valid for First Nations than are the imposed forms.

become land owners – or, more precisely, bosses over other workers. It is a rare peasant who, once “promoted” to overseer, does not become more of a tyrant towards his former comrades than the owner himself. This is because the context of the peasant’s situation, that is, oppression, remains unchanged. *In this example, the overseer, in order to make sure of his job, must be as tough as the owner – and more so.* This is illustrated in our previous assertion that during the initial stage of their struggle the oppressed find in the oppressor their model of “manhood”.¹¹

The result is often clinging to the power of the *Indian Act* as solution.

The recognition of these three factors identify for me two basic needs of an institute¹² aimed at fostering the development, reclamation and enhancement of First Nations government systems and practices. There is the need to re-claim not just the knowledge of First Nations governance practices and systems but a need to educate people about those practices and systems so that they can be again exercised. There is often an identifiable gap between the knowledge of a community about who they are and how they looked after themselves and the ability to practice those traditions. For me that is the first need, a need which must acknowledge that cultural traditions are lived realities and neither express or analyzed.¹³ The second need requires community to have the knowledge of the

¹¹ Paulo Friere, *Pedagogy of the Oppressed* (New York: Continuum Publishing, 1996), 28.

¹² Such an institute, to best serve the needs of diverse First Nations communities, may not be best established in a single geographical location or under a single model or structure. Creativity will be the essential requirement to address the multiple needs, diversities and experiences of First Nations. Often cultural norms and values are most easily identifiable when they are called into question as a result of conflict with another culture’s norms and values.

¹³ That is to say First Nations do not sit down for “culture” lessons with their children once a week. Culture and tradition are the “assumptions” around which our lives are structured. The values and beliefs, which ground those traditions, are not as visible in every day life as are the practices that result.

Canadian system of governance including the *Indian Act* system as it is through this knowledge that communities can make informed choices about how to move away from the *Indian Act* and take hold of their future. There are many critical decisions to be made; even the decision to codify Aboriginal laws is not without controversy.

This paper is purposefully not written from within the confines of western legal traditions or standard academic writing forms. Rather, the paper analyzes the degree to which legal decisions are meeting the expectations of First Nations and their communities. The ultimate goal, I believe, is measuring the amount of First Nations governance potential that has been realized (and also how much is still denied) in Canadian high court decisions. One measure of governance potential is the degree to which mutual respect and mutual prosperity is experienced by First Nations. This standard shifts the kind of legal research questions that must be asked. It requires a future looking process and not a process of legal precedent¹⁴ that looks to the past for solutions. As I am both professor and legally trained, this paper examines the areas of my experience (and hence expertise), both of law and of educational institutions.

Very much the legal research project before us involves the issue of identity of First Nations citizens, and the ability to stand on a strong footing knowing who you are. It is the work of critical race scholars who have buttressed my ability, my intellect and my courage in a way that I am able to think about the impositions First Nations identity faces in Canadian courtrooms from the

¹⁴ A precedent is a decision made in a court of law that is binding on future resolution of the same legal issue.

criminal trial or sentencing hearing to the Supreme Court articulating what an Aboriginal right is. Margaret Montoya wrote:

Stories by and about Outsiders resist the subordinating messages of the dominant culture by challenging stereotypes and presenting and representing people of colour as complex and heterogeneous. A primary feature of white supremacy is the identification of positive attributes – virtue, intelligence, beauty, sobriety, creativity – with white folks. Non-whites, as their foil, are associated with irrationality, dirtiness, vice, ugliness, lasciviousness, and intoxication. Even today, police practices, folklore, high art, popular culture, and marketing campaigns operate synergistically to create and maintain racist images of non-whites.

Outsider stories also explore the manner in which identity borders and boundaries are controlled, sometimes formally by the legal system and sometimes informally through popular culture. Insider-Outsider relations depend on a high level of awareness of how race-linked markers and behaviors are coded and decoded...

Autobiographical stories within legal discourse expose how the forces of domination are experienced at the individual level: how they are perceived from a given perspective, and how they make one feel. Jerome Culp writes about disclosing to his students that he holds advanced degrees from Harvard Law School and the University of Chicago along with the fact that he is a coal miner's son. His story works because he reveals what it feels like to be at once the impeccably credentialed insider and the unassimilable Outsider through colour and phenotype. These stories increase the understanding of the interpenetrations among the identities associated with race, color, gender, class, sexual orientation, nationality, and disability, and the interpenetrations of those identities with legal practices. These stories also increase our understanding of how identities are interlaced with legal discourse and legal practices.¹⁵

¹⁵ “Celebrating Racialized Legal Narratives” in *Crossroads, Directions, and a New Critical Race Theory* (Philadelphia: Temple University Press, 2002), 243 at 244-245.

In my view, the ability to code and de-code the findings of Canada's high court on Aboriginal and treaty rights is the essential legal project which needs to be undertaken at this time. It requires the telling of our stories in our ways.

THE LEGAL RESERCH NEEDS OF FIRST NATIONS COMMUNITIES

The study of law has long been an exercise in frustration for me. Perhaps, it was the goals I took with me to law school. Because of my background, from my early teenage years, I was aware of the over-representation of Aboriginal people in the Canadian criminal justice system (and the corresponding exclusions of Aboriginal people from other social venues, such as the corridors of my high school). To law school, I took with me a desire to decrease the numbers of my people confronted by the Canadian criminal justice system. Well before the end of my first year, and in particular because of my experience of both the content and the instructor of my Canadian criminal law class,¹⁶ I knew that systemic change in the Canadian criminal justice system would not be found in the recognized criminal courts of the land.¹⁷ I completed law school because I had started it not because I was still living my dream, chasing a vision or committed to a plan. This runs contrary to how I was raised. As an “Indian”, I was raised to believe that Creator gave us both gifts and a path to follow. And that path is comprised of a set of responsibilities that we are to live.

Over the years, it has been a struggle for me to remain engaged with Canadian law as my experience has shown me that I am an “outsider”, one who has absolutely lost faith in that system (the irony that I have lost faith in a system

¹⁶ A fuller version of this story is told in Patricia A. Monture, “Ka-nin-geh-heh-gah-e-sa-nonh-yah-gah” in *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995), 11-25 at 16-17.

¹⁷ The applications of section 718(2)(e) of Canada’s criminal code as discussed by the Supreme Court of Canada in *R. v. Gladue*, [1999] 1 S.C.R. 668 (S.C.C.) See also Mary Ellen Turpel-Lafond, “Sentencing within a Restorative Justice Framework, 2000 *Criminal Law Quarterly*.”

imposed on us has not escaped my acknowledgement). Although I know this is a systemic problem of exclusions, it is difficult not to sometimes feel that this inability to be “insider” is individual. It must be my failure to fit. And I believe this is a specific impact of colonialism in my life, that feeling despite my legal training and my publications, that my work is lesser as it is not conventional legal scholarship. I would not dream of describing myself as one of Canada’s leading authorities on “Aboriginal law”.¹⁸

One of the ways I strengthen myself is with the stories and teachings of my people. I do not remember who first shared this teaching with me. I do remember the context. It was in a meeting where we all agreed to proceed by consensus and all hell then broke loose! It is a lesson in forms of government. Like many others, I then understood the consensus form of government to be one of total agreement, unanimity. This, I believed, was an unrealistic goal in most circumstances but particularly in the realm of governance. It was explained to me that Haudenosaunee governance was comprised of three positions: I agree; I don’t agree but I won’t stand in the way; and, I am standing in the way.¹⁹ And those who stood in the way were greatly respected because the people acknowledged a principled “standing in the way”. Perhaps those people remembered or knew something the rest of us had forgotten or were not acknowledging. When someone stood in the way, each of us had the

¹⁸ This is a reference to law as it is delivered to Aboriginal people in the context of Canadian law. There is nothing, yet, truly Aboriginal about those laws.

¹⁹ I do wish to acknowledge another Mohawk woman, Sylvia Maracle, who does carry this teaching and has shared it with many.

responsibility to re-think our own positions. And this duty of self-reflection was especially so for the leaders. Understanding that place I have found myself often to be in as “standing against”²⁰ Canadian law has helped me stand more firmly.

During the course of the indigenized peer review process where FNGC papers were being scrutinized, I realized I was very different in my approach to the topic of needed legal research than were my colleagues, particularly the two “non-Aboriginal” practitioners who were part of our group. Each of my colleagues held a legal optimism I did not share and could not imagine. This led me to the realization that we know little about the impact of the study of Canadian law on citizens of First Nations. Not only does my position of “standing against” Canadian law inform the analysis in the following section of the paper, but this also exposes another gap in our knowledge. Is it safe to assume that the earning of a law degree guarantees an equal access to job and life satisfaction for Aboriginal persons?

My purpose in this section, which examines the legal research needs of First Nations, is not to create the research required to craft legal arguments that will provide successful opportunities to defend or assert Aboriginal rights in the court. That is not because I think that task is not worthy, I do. Rather, I write with the goal of caution. Litigation can be a dangerous game. The decision in *R. v Pamajewon*²¹ is the just one that immediately comes to my mind by way of

²⁰ See Patricia A. Monture, “Standing Against Canadian Law: Naming Omissions of Race, Culture and Gender” in Elizabeth Comack (editor), *Locating Law* (Halifax: Fernwood Publishing, 1999), 76-97.

²¹ *R. v Pamajewon*, [1996] 4 C.N.L.R. 164.

providing an example. In order to protect themselves, band members, from charges under the Canadian criminal code for the offence of keeping a common gaming house, the accused brought forward the defense of an Aboriginal right to self-government. To use a constitutionally protected, Aboriginal specific right to self-government on these facts, for some of us, is a poor choice. And this points to the reality that each individual community has very little control over how both what questions will be put to the judiciary and how Aboriginal and treaty rights will be constructed by the courts. And the outcome in *Pamajewon* is harmful to all First Nations as the court found that the right to self-government is not a general right but a discrete and narrow one.²² Because I recognize the potential for litigation in Canadian courts to result in a loss of rights, or a loss of belief in who we are, I write from a different place. This place is one that is committed to my people and where the standard is the protection of our own Creator given ways. It holds Canadian law accountable to the standards and principles I have learned to be what the Elders call “Indian law”.²³

Litigation as a Strategic Option:

Since the passage of the Aboriginal and treaty rights protection in the Canadian constitution in 1982, many First Nations communities have taken up the opportunity to take their claims to court. Section 35(1) created access to a grievance resolution process that did not previously exist.²⁴ Although many of

²² *Pamajewon*, (1996), page 171-172, paragraphs 24-26.

²³ Thank you Elder Jimmy Myo (Cree).

²⁴ The constitutional protection in section 35(1), recognizes and affirms the Aboriginal and treaty rights of the “Aboriginal peoples of Canada”. Aboriginal Peoples, those

these decisions, and in particular *Sparrow*,²⁵ *Badger*,²⁶ *Delgamuukw*²⁷ and *Marshall*,²⁸ have been hailed as significant victories, litigation is a costly and time-consuming option. It is often perceived by First Nations as a necessary option to protect the land or the rights of the people (perhaps revealing the level of powerlessness felt by individuals and communities in their relationships with the state). The nature and extent of the victories, in practical terms relevant at the community level rather than in legal terms, needs to be determined. For example, in the case of the Musqueam First Nation, the *Sparrow* litigation and concurrent community activism revived the community's interest in fishing, a core traditional practice of the people. As noted by one member of the Sparrow family, today, almost every family in the community has a boat in the water.²⁹ This is a meaningful success that would not be visible if the analysis of success was measured solely in legal terms. Formal studies have not been conducted in communities who have engaged in Supreme Court litigation to determine community impact, both positive and negative. Hence, there is a large gap in our knowledge base.

possessing these rights, are the "Indian, Inuit and Metis" as reflected in the definition in section 35(2). Despite the breadth of this definition, the focus in this paper (as in the case law) is on First Nations.

²⁵ *R. v. Sparrow*, [1990] 3 C.N.L.R. 160 (S.C.C.)

²⁶ *R. v. Badger*, [1996] 2 C.N.L.R. 77 (S.C.C.).

²⁷ *Delgamuukw v. British Columbia*, [1998] 1 C.N.L.R. 21 (S.C.C.).

²⁸ *R. v. Marshall*, [1999] 4 C.N.L.R. 161 (S.C.C.).

²⁹ Personal conversation with Leona Sparrow, May 1999.

The central question for consideration is whether the investment in legal processes advances the aspirations of First Nations in the area of “self-government”.³⁰ This question, and it is indeed a research question despite the fact that academics have yet to focus on it, has two aspects. It is a question important to the individual community. It is also a comparative question involving considerations about what has been gained for all First Nations. Examination of this question requires a close connection to community and an understanding of both the community’s defined goals and the understanding of the First Nation traditions specific to that community. It is a question that is best considered from an environment that acknowledges and respects the traditional ways and knowledge systems of First Nations.

Earlier Supreme Court of Canada decisions looked at what the courts perceive to be discrete rights (or activities),³¹ especially those involving hunting and fishing restrictions. It was not until the *Delgamuukw* decision in 1997 that the court was directly asked to contemplate the larger questions of Aboriginal title and self-government (originally pleaded as ownership and jurisdiction).³² Complexities involved in such an examination can be seen in the decision of the Supreme Court in the *Delgamuukw* decision. The first step in understanding the complexities is acknowledging that First Nations peoples had (and still have)

³⁰ Again, the definition of this term is not found in federal policy or other administrative acts.

³¹ *Van der Peet* (1996), page 201, paragraph 46.

³² *Delgamuukw* (1997), page 45, paragraph 74. In *R. v Pamajewon* (1996) self-government was argued in a narrow form providing the opportunity to regulate “high stakes gambling” on the reserve. The claim failed (page 171-172, paragraphs 24 to 27).

legal traditions and laws. The accomplishment in *Delgamuukw* is the court recognized this history of law and governance.³³ The difficulty lies in the fact that these legal systems are not conflict resolution systems. They are not adversarial. These systems focus on keeping the peace and thus, are more preventative in nature. There were practices utilized to resolve disputes, but these were not the focus of those legal traditions.³⁴ This complexity is not fully brought to the court's discussion of the rights associated with Aboriginal title despite the recognition that the purpose is to reconcile two different legal systems.³⁵

Analyzing *Delgamuukw* from the perspective of the Canadian legal tradition illuminates a number of areas where litigation of Aboriginal claims may have collateral consequences for First Peoples. In *Delgamuukw*, Lamer C.J.

³³ *Delgamuukw* (1997), page 74-75, paragraph 159.

³⁴ See Diane LeResche, (Guest Editor), *Mediation Quarterly: Native American Perspectives on Peacemaking*, Volume 10, Number 4, Summer 1993 (Special Issue) and Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice* (Toronto: Penguin Books, 1996).

³⁵ The court contemplates self-government under the protection of section 35(1) as a discrete and narrow right. Lamer C.J. notes in *Delgamuukw*:

The errors of fact made by the trial judge, and the resultant need for a new trial, make it impossible for this Court to determine whether the claim to self-government has been made out. Moreover, this is not the right case for the Court to lay down the legal principles to guide future litigation. The parties seem to have acknowledged this point, perhaps implicitly, by giving the arguments on self-government much less weight on appeal. One source of the decreased emphasis on the right to self-government on appeal is this Court's judgment *Pamajewon*. There, I held that rights to self-government, if they existed, cannot be framed in excessively general terms. The appellants did not have the benefit of my judgment at trial. Unsurprisingly, as counsel for the Wet'suwet'en specifically concedes, the appellants advance the right to self-government in very broad terms, and *therefore in a manner not cognizable under section 35(1)* (page 80, paragraph 170, emphasis added).

resolved the distance between the First Nation's position and the Crown's regarding the meaning in law of Aboriginal title as somewhere between the two positions.³⁶ In other words, a compromise was created. The creation of opportunities to reconcile will involve discussion between Canada and First Nations (negotiation if you will) but an imposed solution, judicial or otherwise, is in fact not a compromise. Judicial resolution has a particular structure and is not premised on finding a satisfactory way forward for all the parties.

The cause for First Nations' scrutiny³⁷ of the Supreme Court is evident in the court's determination regarding Aboriginal title.³⁸ Although it is indeed an accomplishment to have the legal nature³⁹ of Aboriginal title recognized within the Canadian system, the specifics of this definition raise some troubling conclusions. Lamer CJ noted:

See also the comments in *Pamajewon* (1996), where Lamer C.J. ruled:

In so far as they can be made under s. 35(1), claims to self-government are no different from other claims to the enjoyment of Aboriginal rights and must, as such be measured against the same standard (page 171, paragraph 24).

He then relies on the decision in *Van der Peet* re-entrenching the idea that Aboriginal rights are "activities".

³⁶ *Delgamuukw* (1997), page 57, paragraph 111.

³⁷ This scrutiny has proceeded in a piecemeal fashion as it is an analysis which has no institutional support other than through independent scholarship and the number of Aboriginal academics are still few in this country.

³⁸ Canadian jurisprudence on Aboriginal title is more progressive than in other jurisdictions. Analysis of the case law in Australia, for example, should highlight other areas of concerns for First Nations litigating in this country.

³⁹ The court uses traditional common law property language, such as "right in land" in the decision. *Delgamuukw* (1997), page 57, paragraph 111.

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves [A]boriginal rights. Rather, it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of [A]boriginal societies. Those activities do not constitute the right per se; rather, they are parasitic on the underlying title. However, that range of uses is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group's [A]boriginal title. This inherent limit, to be explained more fully below, flows from the definition of [A]boriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a fee simple.⁴⁰

Aboriginal title, essentially, becomes a right to engage in activities on the land.

Despite having a right to land, these uses cannot violate the attachment of the people to the land (such as turning hunting grounds into parking lots).⁴¹

This aspect of the court's decision is deeply troubling as a new form of external control, exercised by the judiciary, has been imposed on First Nations communities and their internal decision-making. The court has created an "inherent limit" and located that limit in the unique nature of Aboriginal title, its *sui generis* nature. Litigating Aboriginal rights often has this inside-out outcome.

A second example is also apparent in this quotation. As the court noted,

⁴⁰ *Delgamuukw* (1997), page 57, paragraph 111.

⁴¹ *Delgamuukw* (1997), page 63-64, paragraph 128.

This is an example that Lamer provided in the decision. It is offensive to suggest that First Nations would choose not to follow their traditions and, therefore, the court is obliged to create an opportunity for further external regulation of land uses in First Nations communities. In my view, this is a violation of existing governance relationships that communities already hold under the *Indian Act* system. – offensive in the extreme as *Indian Act* benefits are truly the minimal amount of control in First Nations hands regarding land us. It is a demonstration of the degree to which colonial responses (that is, First Nations are not capable or managing their own affairs) are still present day realities.

Aboriginal title is a “right in land”.⁴² This is the classical language of the common law of property. Celebrating the “elevation” of the relationship of First Nations to land, long recognized as not “ownership” must be subject to question.⁴³ This is contrary to the way in which a relationship to land is characterized in First Nations traditions. The form of “compromise” implicit in the court’s choice regarding the definition and form of Aboriginal title requires analysis. The degree to which the court’s definition of Aboriginal title creates both space and respect for First Nations ways must be part of that analysis.

Reading the *Delgamuukw* decision, and in particular the quotation above, as a person who respects, follows, practices and teaches traditional ways and values, I was deeply troubled by the courts rendering of Aboriginal title as a set of activities (or uses) exercised on the land, activities “parasitic”⁴⁴ on Aboriginal title. The underlying difficulty with the court’s rendering of the concept of Aboriginal title lies in the situating of that concept solely within a western legal paradigm as though this was an “improvement” to Aboriginal definitions of title. Even the areas of Canadian law where scholars of that tradition recognize positive results in the judicial findings, the benefit to Aboriginal Peoples is often unclear or contradictory.⁴⁵ This is especially true if the lens, which frames the analysis, is self-government.

⁴² *Delgamuukw* (1997), page 57, paragraph 111.

⁴³ Please see Harold Cardinal and Walter Hildebrandt, *Treaty Elders of Saskatchewan: Our Dream is that Our People will One Day be Clearly Recognized as Nations* (Calgary: University of Calgary Press, 2000).

⁴⁵ For a similar analysis of the court’s role in Aboriginal rights cases please see also, Gordon Christie, “Justifying the Principles of Treaty Interpretation”, (2000) 26 *Queen’s Law Journal*, 143-224.

In the western legal tradition, ownership of land is the paramount relationship. It is a hierarchical relationship. It is the owner that has control over the land in such a way that the land is merely object. This is not the structure of First Nations relationships with the land. “Mother Earth” has become a common symbol among many First Nations. Examination of that symbolism reveals traditions, which acknowledge that the earth sustains all aspects of our lives. She provides sustenance (foods and water). She provides the materials from which we secure warmth, shelter and clothing. From the earth we take the medicines necessary for holistic health – body, mind and spirit. Knowledge of the natural systems of the earth provides the underpinnings for systems of both law and governance. The four seasons and thinking in cycles, as well as clan systems ground those traditions. Those clans are often represented by animals and all life figures prominently in systems of Indigenous learning. In the way that I understand who I am and how I fit into Haudenosaunee tradition, the land cannot be separated from the knowledge and practice of governance or law. Connection of humans to the natural world is the paramount relationship that sustains us.

The court’s construction of the definition of the Aboriginal title also points to the problem of relying on dispute resolution mechanisms that are built on different presumptions about the world such as those between owning land and owing a responsibility to land. This not only further denies Aboriginal understandings but takes us further away from dispute resolution practices that share the same cultural premises. The difficulty here is, both within communities and externally, little effort has been placed on the formal acknowledgement of

those Indigenous dispute resolution systems. The potlatch for example is a ceremony, which among other things, acknowledges land relationships and thereby prevents disputes. Separation of institutions and activities such as the separation of government functions from church and dispute resolution is not the value that grounds First Nation systems. Connection does.

Returning to the court's ability to comprehend Aboriginal beliefs including our understanding of the inherent right to self-government, the lengthy trial decision in the *Delgamuukw* case demonstrates the need to question the degree that Canadian courts can think beyond their own cultural frameworks. The Supreme Court characterized the interpretation of McEachern CJ to the claim to jurisdiction as a claim to govern the territories, the high court's summary of the trial decision proceeds as follows:

This would include the right to enforce existing Aboriginal law, as well as make and enforce new laws, as required for the governance of the people and their land. Most notably, this would also include a right to supersede the laws of British Columbia if the two were in conflict. McEachern C.J. rejected the appellants' claim for a right of self-government, relying on both the sovereignty of the Crown at common law, *and what he considered to be the relative paucity of evidence regarding an established governance structure*. First he stated, that when British Columbia was united with Canada, "all legislative jurisdiction was divided between Canada and the province, *and there was no room for [A]boriginal jurisdiction or sovereignty which would be recognized by the law or the courts.*" Second, he characterized the Gitksan and Wet'suwet'en legal system, as a "*most uncertain and highly flexible set of customs which are frequently not followed by the Indians themselves*" (emphasis added).⁴⁶

Perhaps not the subtlest choice of example, McEachern's view demonstrates the degree to which courts are more comfortable when issues do not pull them

⁴⁶ *Delgamuukw* (1997), page 27, paragraph 20.

outside the framework they are accustomed to. This ignores the fact that section 35(1) is part of Canada's constitution (and hence the same framework). It is supreme law. It is clear the degree to which the court (or at least McEachern) is threatened by any claim, which touches on the sovereign position of Canada.⁴⁷ Unfortunately, one view of the Aboriginal rights decisions of the Supreme Court focuses on the potential in section 35(1) that has been lost.

Equally troublesome is the opportunity McEachern took to judge the worth of Aboriginal legal traditions (a job persons trained in Canadian law have not necessarily committed to developing excellence at). McEachern CJ's words in the trial decision were more specific:

I heard many instances of prominent Chiefs conducting themselves other than in accordance with these rules, such as logging or trapping on another [C]hief's territory, although there always seemed to be an Aboriginal exception⁴⁸ which made almost any departure from Aboriginal rules permissible. In my judgement,

⁴⁷ The decision in *Mitchell v M.N.R.*, [2001] 3 C.N.L.R. 122 also demonstrates the need to examine the concern about lost potential. At trial, McKeown J. found that the Mohawk people, as argued by Grand Chief Mike Mitchell, had an Aboriginal right to bring goods across the international border between Canada and the United States without having to pay duty (paragraph 128). The Supreme Court of Canada (McLachlin C.J. writing for the majority) overturned the trial court's finding asserting that "clear and palpable error" was made by the trial judge with respect to the sufficiency of the evidence of historical trade by Mohawks across the international border (paragraph 51). My reading of the case suggests that the high court was responding to the threat they perceived to be embedded in the case to Canadian sovereignty (assuming that Mohawk sovereignty and Canada sovereignty are competitive concepts) (paragraphs 61 –64). The assumption that sovereignty means only one thing (and the Canadian definition is correct) leads to a narrowing of the potential held in section 35(1). The *Mitchell* case is discussed further later in this paper.

⁴⁸ The study of the exceptions to rules presents an irony for those who have studied "real property law" in the Euro-Canadian tradition. That field of law is indeed the study of exceptions to rules.

these rules are so flexible and uncertain that they cannot be classified as laws.⁴⁹

Forming a judgement, as did McEachern, without a full understanding of that which is being judged (here Aboriginal rules/laws and traditions), creates the certainty that those systems will be judged lacking because they sit within legal structures that are not easily recognizable to Canadian courts (that is they are not systems of punishment and rights; nor are they adversarial). This likelihood, which looks very much like bias, in the judicial process, is one that requires consideration of how judicial findings are made and whether claims to self-government will be advanced by further actions in the courts. An examination of what opportunities exist to provide sufficient access to Aboriginal ways to allow the court to exercise their decision-making power is also a pressing research question. Courts must be aware of when the right to decide a matter imposes on the internal relationships of First Nations communities.

This discussion exposes another necessary research strategy. What degree are the abilities of First Nations to practice their distinct traditions affected by the Court's collapsing of complex relationships of interconnection into single linear relationships such as, for example, fee simple or Aboriginal title? This is a central issue because there is potential for courts to, perhaps unwittingly, further damage the opportunities of First Nations to re-implement those traditions. Exerting rights to self-government, in my view, is the essence of the majority of litigation advanced by First Nations. Essential then to the research agenda, or an institute

⁴⁹ Cited in *Delgamuukw* (1997), page 27, paragraph 20. Imagine for a moment how these comments would be heard and felt by the citizens of the Gitksan and Wet'suwet'en nations.

like the First Nations Governance Center, is the ability to adopt a research structure that reflects the complexity of the inter-connections between land, law and governance in the diverse traditions of First Nations.

The Court's Vision of the Purpose of Section 35(1): Reconciliation

In 1982 with the passage of the second part of Canada's constitution, many scholars of law and politics wrote about the potential held in this constitutional acknowledgement of the rights of Aboriginal Peoples. Noel Lyon was one of those scholars and his words were relied upon by Justices Dickson and LaForest in the judgment in the *Sparrow* case:

Section 35 calls for a just settlement for [A]boriginal peoples. It renounces the old rules of the game under which the Crown established courts of law and denied those courts the authority to question sovereign claims made by the Crown.⁵⁰

From a First Nations vantage point, it seems clear that the old rules, in part, may be described as colonialism. And the question that becomes paramount is the degree to which the judicial system in this country can indeed see beyond colonialism and participate in establishing a new constitutional order which is inclusive of First Nations and their political, social and legal systems. In other words, is it reasonable to expect judges to participate in and commit to practicing decolonization? It must also be recognized that decolonization is not a full and final answer. It is, however, First Nations who must construct their own future. To approach this from any other position runs the very real risk of reinventing colonial relationships.

⁵⁰ *Sparrow* (1990), page 178.

Examining the judicial pronouncements made under the constitutional protection of Aboriginal and treaty rights illuminates the need to understand the degree to which First Nations have truly benefited from the constitutional revisions.⁵¹ The degree to which the constitutional protections and the litigation arising from those provisions offers the opportunity to progress towards a settling of outstanding grievances, in other words reconciliation, is of central importance. The scope of the court's ability to accomplish reconciliation is another aspect of the necessary research agenda.

In the first case where Supreme Court of Canada considered the meaning of section 35(1), reconciliation was a new theme that is introduced to Aboriginal rights discourse. In this unanimous decision, *Sparrow*, Dickson and LaForest wrote:

Federal legislative powers continue, including of course the right to legislate with respect to Indians pursuant to s. 91(24) of the *Constitution Act, 1867*. These powers must, however, now be read together with s. 35(1). In other words, federal power must be *reconciled* with federal duty and the best way to achieve that *reconciliation* is to demand the justification of any government regulation that infringes upon or denies [A]boriginal rights (emphasis added).⁵²

The reconciliation the court mentions here is not with First Nations. It is the reconciliation of federal power with federal duty. It is about the "honour of the

⁵¹ For a detailed analysis, please see Patricia A. Monture-Angus, *Journey Forward: Dreaming First Nations Independence* (Halifax: Fernwood Publishing, 1999).

⁵² *Sparrow* (1990), page 181. In *Badger* the court notes a second kind of reconciliation may be required when treaty provisions compete with provincial laws (page 85, paragraph 14).

Crown.” Additionally, it is the acknowledgement of a fiduciary duty⁵³ owed to First Nations by the Crown.⁵⁴

⁵³ For definitions and analysis about the scope of the fiduciary duty please see the Law Commission of Canada and Association of Iroquois and Allied Indians, *In Whom We Trust: A Forum on Fiduciary Relationships* (Toronto: Irwin Law, 2002) as well as Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996) and *Guerin v. The Queen*, [1985] 1 C.N.L.R. 120 (S.C.C.).

Courts have been more regularly asked to consider the fiduciary relationship and have in some cases been limiting the legal potential in that concept. It is interesting to note that both reconciliation and fiduciary duty arise in the same paragraph of the decision in *Sparrow*.

For judicial consideration of the fiduciary duty please see *B.C. Native Women's Society v. Canada*, [2000] 3 C.N.L.R. 4 (F.C.T.D.); *Bear Island Foundation v. Ontario*, [2000] 2 C.N.L.R. (Ont. C.A.); *Bonaparate v. Canada (Attorney General)*, [2003] 2 C.N.L.R. 43 (Ont. C.A.); *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2002] 1 C.N.L.R. 57 (B.C.C.A.); *Buffalo v. Canada (Minister of Indian Affairs and Northern Development)*, [2003] 1 C.N.L.R. 1 (F.C.T.D.); *Canada (Minister of National Revenue) v. Ochapowace Ski Resort Inc.*, [2002] 4 C.N.L.R. 76 (Sask. Prov. Ct.); *Chingee v. British Columbia*, [2003] 1 C.N.L.R. 24 (B.C.S.C.); *Chippewyan Prairie First Nation (Re)*, [2003] 2 C.N.L.R. 61 (Alta. Env. App. Bd.); *Chippewas of Nawash First Nation v. Canada (Minister of Fisheries and Oceans)*, [2001] 1 C.N.L.R. 20 (F.C.T.D.), [2003] 2 C.N.L.R. 78 (F.C.A.); *Gitksan First Nation v. British Columbia (Minister of Forests)*, [2003] 2 C.N.L.R. 142 (B.C.S.C.); *Haida Nation v. British Columbia*, [2001] 2 C.N.L.R. 83 (B.C.S.C.), [2002] 2 C.N.L.R. 121, (B.C.C.A.), [2002] 4 C.N.L.R. 117 (B.C.C.A.); *Klahoose First Nation v. Cortes Ecoforestry Society*, [2003] 3 C.N.L.R. 130 (B.C.S.C.); *Lac La Ronge Indian Band v. Canada*, [2000] 1 C.N.L.R. 245 (Sask. Q.B.), [2001] 4 C.N.L.R. 120 (Sask. C.A.); *Liidlii Kue First Nation v. Canada*, [2000] 4 C.N.L.R. 123 (F.C.T.D.); *Mikisew Cree First Nation v. Canada (Minister of Heritage)*, [2002] 1 C.N.L.R. 169 (F.C.T.D.); *Osoyoos Indian Band v. Oliver Town*, [2002] 1 C.N.L.R. 271 (S.C.C.); *R. v. Bernard*, [2000] 2 C.N.L.R. 97 (N.S. Prov. Ct.); *R. v. Seward*, [2001] 4 C.N.L.R. 274 (B.C. Prov. Ct.); *Roberts v. Canada*, [2000] 3 C.N.L.R. (F.C.A.); *Raine v. Louis Bull Indian Band Council*, [2000] 1 C.N.L.R. 205 (F.C.T.D.); *Sumas Indian Band v. Ned*, [2002] 4 C.N.L.R. 280 (B.C.S.C.); *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2002] 2 C.N.L.R. 312 (B.C.C.A.); *Treaty Eight First Nations v. Canada*, [2003] 4 C.N.L.R. 349 (F.C.T.C.); *Westbank First Nation v. British Columbia (Minister of Forests)*, [2001] 1 C.N.L.R. 361 (B.C.S.C.); *Wewaykum Indian Band v. Canada*, [2003] 1 C.N.L.R. 341 (S.C.C.); *Williams v. Squamish Indian Band*, [2003] 2 C.N.L.R. 390 (F.C.T.D.); and, *Xeni Gwet'in First Nation v. British Columbia*, [2004] 2 C.N.L.R. 391 (B.C.C.A.).

⁵⁴ This is also an area recommended for further research. As I noted previously:

No matter how offensive the idea of “wardship” or the evolved and modern notion of “dependency” is to me, the fact of the matter is that

In *Van der Peet*, the court reshapes reconciliation noting that the purpose of section 35 is to “balance” the “pre-existence of [A]boriginal societies with the sovereignty of the Crown”.⁵⁵ The Court said:

... the Aboriginal rights recognized and affirmed by s. 35(1) are best understood as, first, the means by which the Constitution recognizes the fact that prior to the arrival of the Europeans in North America the land was already occupied by distinctive Aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory. The content of Aboriginal rights must be directed at fulfilling these purposes...⁵⁶

This is a very different form of reconciliation than the one discussed in *Sparrow*. It moves the emphasis onto First Nations and away from the “honour of the Crown”. Subsequent cases continue to affirm this assertion.⁵⁷ It is this form of reconciliation that must be paid careful attention. It is an inversion of the earlier discourse. It marks a shift in the court’s scrutiny of the honour of the crown to their willingness to define the essence of Aboriginal Peoples’ ways that requires further analysis. This shift has the potential to create further impositions on First

there is a relationship of dependency between First Nations and the Crown. This is the reality that is the result of colonialism. As the ability to move away from these dependent and colonially inspired relations will not happen overnight, the fiduciary duty remains an interesting legal concept that might prove beneficial to First Nations’ efforts to move toward truly independent and self-sustaining relationships with Canada.

Supra, *Journeying*, 44-45.

Despite the importance of this topic, it is not within the parameters of a paper that focuses on the legal needs of First Nations communities from an inward looking position.

⁵⁵ *R. v. Van der Peet*, [1996] 4 C.N.L.R. 177 at 192, paragraph 31.

⁵⁶ *Van der Peet*, (1996) page 200, paragraph 43.

⁵⁷ *Mitchell v. M.N.R.*, [2000] 3 C.N.L.R., page 131, paragraph 12.

Nations identities (and as such follows the pattern of colonialism established centuries ago).

There are a number of reasons why the decisions of the courts raise concern about further impositions on First Nations societies and citizens. A second cause for concern is also found in the *Van der Peet* decision. The court establishes:

In order to fulfill the purpose underlying s. 35(1) -- i.e., the protection and reconciliation of the interests which arise from the fact that prior to the arrival of Europeans in North America [A]boriginal peoples lived on the land in distinctive societies, with their own practices, customs and traditions -- the test for identifying the [A]boriginal rights recognized and affirmed by s. 35(1) *must be directed at identifying the crucial elements of those pre-existing distinctive societies.* It must, in other words, aim at identifying the practices, traditions and customs central to the [A]boriginal societies that existed in North America prior to contact with the Europeans (emphasis added).⁵⁸

In this approach, it is the courts that have the authority to define who Aboriginal people are and what is important to them. This process is a comparative one with the relevant date of inquiry being that of contact. This centers the settler's view of the world in the process of defining Aboriginal rights as opposed to acknowledging Aboriginal understandings and historical time frames. It holds the potential to move us further away from reconciliation rather than closer to it.

It is not that the court does not acknowledge that Aboriginal Peoples have their own "perspective".⁵⁹ Lamer CJ wrote:

⁵⁸ *Van der Peet* (1996), page 200, paragraph 44.

⁵⁹ The word perspective should be used with some care. It should not be used when reference is being made to Indigenous knowledge systems as the use of the word "perspective" as descriptive of those systems diminishes both the status and legitimacy of those systems.

In assessing a claim for the existence of an [A]boriginal right, a court must take into account the perspective of the [A]boriginal people claiming the right. In *Sparrow*, supra, Dickson C.J. and La Forest J. held, at p. 1112, that it is "crucial to be sensitive to the [A]boriginal perspective itself on the meaning of the rights at stake". *It must also be recognized, however, that that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure.* As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive [A]boriginal societies with the assertion of Crown sovereignty. Courts adjudicating *[A]boriginal rights claims must, therefore, be sensitive to the [A]boriginal perspective, but they must also be aware that [A]boriginal rights exist within the general legal system of Canada*⁶⁰ (emphasis added).

Perspective is not an acknowledgement of Indigenous ways of knowing (that is Indigenous knowledge systems). Forcing Aboriginal knowledge into the "general" legal system rather than accepting that the "general" legal system of Canada might also bend remains a problematic aspect of the court's approach in this case as well.

As the last quotation from *Van der Peet* demonstrates, paramount in determining a claim to Aboriginal (and presumably treaty) rights is an expression of rights in the "dominant" culture in a manner, which does not disturb existing constitutional patterns and governance structures. The courts are predictably and clearly comfortable with their own ways and see no need for change. Research could be conducted to determine how First Nations can develop their claims in a way that courts can understand and accept. This will assist First Nations in achieving a reconciliation that fits for them or in determining which claims should not be placed before the courts.

⁶⁰ *Van der Peet* (1996), page 201-202, paragraph 49.

Reconciliation is not the only concept or outcome that requires scrutiny. A brief examination of Supreme Court of Canada cases has disclosed further concerns when the lens is the aspirations of First Nations. All the concerns are grounded in an assessment of the degree to which First Nations can reach the often-articulated goal of self-determination. The courts have failed to make clear that colonialism is not just a past reality but is a present experience of First Nations as well. The majority of litigation has proceeded on the basis of discrete Aboriginal rights such as hunting and fishing. Discrete Aboriginal rights may actually be a way to limit the reach of section 35(1) as broader claims to jurisdiction and sovereignty seem to challenge the court's imagination. One of the outcomes of Aboriginal rights litigation has been to increase the external control in areas of recognized First Nations decision-making under the *Indian Act*. In *Delgamuukw*, the court opined that traditional hunting territories could not be turned into parking lots. Section 35(1) may still hold the potential to advance claims to self-determination, but identifying the court-erected obstacles must be a priority consideration.

Canadian Courts: Issues of Process and Structure

The purpose of section 35(1) is now firmly stated by the Supreme Court of Canada to be reconciliation. And reconciliation requires a consideration of the differences between cultures. This is an area where the courts of Canada may struggle. Training in Aboriginal legal traditions is sporadic at best among the

legal profession (either at law school or in professional accreditation programs).

⁶¹ In the words of Professor Walters (as affirmed by the Supreme Court):

The challenge of defining [A]boriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures; consequently there will always be a question about which legal culture is to provide the vantage point from which rights are to be defined. ... a morally and politically defensible conception of [A]boriginal rights will incorporate both legal perspectives.⁶²

The trouble embedded in this position is the place where it locates reconciliation.

The challenge, according to Walters, is in the meeting of the *rights* of two cultures. It is not the two cultures that must be reconciled but rather the relationship (including law and governance) between the parties. This may be accomplished through a rights paradigm but that paradigm may not necessarily be the best way to achieve reconciliation. Rights embedded in a country's constitution carry a set of presumptions often unarticulated by those trained in that tradition.

Reconciliation is a concept (and a process), which must be defined as it is the goal of judicial resolution. To fully answer the question on the meaning of reconciliation likely requires training in western legal traditions and at least one First Nation tradition. Reconciliation must move beyond the mere recognition of difference. Reconciliation is a good example through which to consider the skills an average Canadian court possesses to step up to the challenge of defining Aboriginal rights. A clear articulation of the expectations of First Nations with

⁶¹ For example, Aboriginal rights classes in law school still tend to focus solely on the Canadian legal structure and ignore opportunities to introduce Aboriginal law.

⁶² *Van der Peet* (1996), page 199 paragraph 42.

regard to this term is a requirement. To accomplish this goal, reconciling Canada with First Nations or First Nations with Canada, requires a clarity of direction. Turning to the dictionary, I learned that reconciliation means to “make friendly again” especially after an estrangement.⁶³ This immediately provided clarity.

It is easy to understand, from a First Nations’ standpoint, the concept of “making friendly” as it sits at the core of First Nations social organization. The task is simply about making good relations. In human terms, we understand that when one is wronged that “making friendly” is a process. The first step is an acknowledgement of the wrong and then making an assessment the amount of damage that you have caused. Next comes acting to amend that damage as best as one can. This is a very large proposal when you understand the scope of the wrongs committed against First Peoples. It must be understood that for many First Nations the wrong is not seen as historical only, but ongoing. Examples of the wrongs include the taking of lands and thereby livelihood, the violation of treaty provisions that required we have “good relations”;⁶⁴ the taking of children by both child welfare and justice systems, the over-representation of Aboriginal peoples in the Canadian criminal justice system and the appropriations of culture, goods and even pain. The act of repairing is a precondition to being able to consider “being friendly”.

Canadian courts follow an adversarial process to resolve disputes.

Reconciliation, as it has been here defined, is not the usual goal of an adversarial

⁶³ H.N. Fowler and F.G. Fowler, *The Concise Oxford Dictionary* (Oxford: Clarendon Press, 1974), 1034.

⁶⁴ Cardinal and Hildebrandt (2000), page 14-17.

process. Although reconciliation is an admirable goal, judicial process may not be the best forum for finding the pathway towards a true reconciliation between First Nations and the Crown. The court's view is that reconciliation amounts to a balancing of two legal traditions and only to the extent that the Canadian legal order is not strained.⁶⁵ But, reconciliation is about more than process. It is also about impact and outcome. It is impossible to repair all the colonial losses and harms. So outcome becomes about equal access to future opportunities, prosperity and a good life.

First Nations do not tend to voluntarily engage the courts. But by engaging the courts, First Nations agree to engage in a process where their traditions could be imposed upon, misinterpreted or simply ignored. As the purpose of section 35 (1) is balancing the two legal traditions that requires a compromise and it is often First Nations traditions that are compromised in this formal process. This particular form and structure of judicial compromise does not require specific First Nations consent, only the general consent to participate in the process of litigating rights. Because far too little is documented in written form⁶⁶ about First Nations legal traditions and processes it is impossible to articulate the precise sacrifice in engaging in judicial processes. Therefore, research on First Nations legal traditions (by region and nation) and the dissemination of the results is essential to forward progress. Without feeling you

⁶⁵ *Delgamuukw* (1998), page 48, paragraph 82.

⁶⁶ It should be clear that such a requirement is another imposition.

are making informed choices, even reconciliation can feel offensive. And it is often perception that determines a sense of justice achieved.

The documentation of First Nations legal traditions serves multiple purposes. Opportunities for the development of legal traditions, which do not rely on adversarial processes is one such further outcome. The options could include anything from tribal “courts”⁶⁷ to other dispute resolution systems in the community to further accommodations, such as sentencing circles with the Canadian criminal justice system. Such accommodation options often benefit more than Aboriginal peoples. It is also well recognized that prevention is far less costly in both financial and human terms.

As we have already experienced, the development of Aboriginal “options” (note these are not appropriately called alternatives) often results in backlash. The most familiar is “what about Charter rights?” Research into Aboriginal justice practices should also examine the “rights” of victims and the “rights” of the “accused”.⁶⁸ Of course, a system that does not impose or punish may operate on a different set of assumptions and protections. And a set of legal rights such as those found in the Canadian Charter may actually result in harm and reinforce injustice and inequality when applied to a system, which operates on different assumptions. This is an area that research is required.

⁶⁷ Words, which do not really fit, appear in quotation marks. Despite the establishment of tribal courts in the United States, this institution is foreign to Aboriginal process of dispute resolution.

⁶⁸ These are appropriate terms in a system that relies on the philosophy of punishment. This is not the basis for Aboriginal justice systems. The use of such terms in a First Nations system, may skew the structure and values which underpin those practices.

Treaty Rights:

The treaty relationship between First Nations and the Crown takes many forms.⁶⁹ The nature of the treaty relationship is sometimes defined by the period when the agreement was made. Treaties, often referred in the legal and historical literature as pre-confederation treaties, focused on peace and friendship. There is then a progression of written terms traceable both geographically (from east to west) which culminates in the numbered treaties of the western Canada. These are often characterized as treaties with the sole purpose of land cession. And of course, there are the modern day treaties. Work to develop a theoretical framework for the diversity of treaty relationships that exists, as First Nations understand them is also an area where further work is required.

This characterization of the many kinds of treaty arrangements which exist in what is now known as Canada fails to consider the First Nations understanding of those arrangements. For example, characterizing a treaty as merely an arrangement that created a giving up of land for certain benefits, however, violates the understanding that First Nations in those territories hold.⁷⁰ As First Nations understand them, these agreements all hold one thing in common. They are sacred promises. The parties are the Crown, First Nations and the Creator. These treaty relationships cannot be understood without first understanding the laws and was of the First Nations which participated in the negotiations. The late

⁶⁹ For an examination of the court's imagination regarding what a treaty is, please see *R. v Sioui*, [1990] 3 C.N.L.R. 127 (S.C.C.)

⁷⁰ For a full discussion see, Cardinal and Hildebrandt (2000).

Elder Norman Sunchild (Cree) explained to the Office of the Treaty Commission in Saskatchewan:

Our ancestors spent their lifetime studying, mediating, and living the way of life required to understand those traditions, teachings, and laws in which the treaties are rooted. In their study, they rooted their physical and spiritual beings directly on Mother Earth as a way of establishing a connectedness to the Creator and His⁷¹ Creation. Through that connectedness, they received the conceptual knowledge they required and the capacity to verbalize and describe the many blessings bestowed on them by Creator. They were meticulous in following the disciplines, processes, and procedures required for such an endeavour.⁷²

As Elder Sunchild notes, the people are always connected to the land. First Nations systems of governance (including those relationships reflected in the treaties) cannot be separated from the land either. Nor can the laws of First Nations been seen in isolation from governance, land and the sustenance Mother Earth provided.

The typology we use to understand the treaty relationship significantly impacts on what we find the treaties to mean. Little written work exists that allows for interested individuals to understand the meaning First Nations attach to these agreements. To start an exercise aimed at defining the treaty agreements with the written text of the treaty is to start the definition process in the middle. The text of the treaty, particularly a treaty negotiated decades ago, remains a unilateral reflection of the relationship. This is important to remember when

⁷¹ Please note that in Cree pronouns are not gendered. Thus, he and she, his and her are not accurate translations. Creator would be recognized as both he and she as the gift of creation is energy not gender.

⁷² Cardinal and Hildebrandt, (2000), page 1.

developing a research agenda that examines or leans up against treaty relationships.

Examining the case law on treaty rights cannot, therefore, be attributed to fully canvassing the knowledge that First Nations need to successfully develop governing strategies and structures based on the treaty agreements. Looking at court decisions is a task that identifies how helpful litigation might be to securing opportunities for First Nations to govern themselves more fully and independently.

Cory J delivered an important treaty rights decision of the Supreme Court of Canada in the *Badger* case.⁷³ This case involved the hunting rights in the Treaty 8 territory.⁷⁴ In this decision, the court accepted that the test for determining if there had been an infringement of an Aboriginal right in *Sparrow* would also be appropriately applied in the case of treaty rights.⁷⁵ One aspect of the decision affirmed the finding of earlier cases⁷⁶ that held the National Resources Transfer Agreement (NRTA) had modified treaty rights. Clearly an issue for those western (often prairie) First Nations that took a numbered treaty is the impact of the National Resources Transfer Agreement. This agreement

⁷³ See also *R. v Sioui*, [1990] 3 C.N.L.R. 127. Although not litigation under section 35(1), see *R. v Simon*, [1986] 1 C.N.L.R. 153.

⁷⁴ There are a vast number of hunting and fishing rights cases. This narrows the scope of the rights and responsibilities of First Nations. Gathering and growing were also important aspects of the well being of our nations. The forgotten rights to gather and grow are primarily women's responsibilities.

⁷⁵ *Badger* (1996), page 104, paragraph 73.

⁷⁶ *Frank v. the Queen*, [1978] 1 S.C.R. 95 (S.C.C.) and *R. v. Horseman*, [1990] 3 C.N.L.R. 95.

removed the right to hunt or fish commercially without the consent of the First Nation signatories.⁷⁷ Research in this area has been ongoing.

In *Badger*, the land on which hunting took place is of primary importance. Was it visibly occupied land or not?⁷⁸ In *Sundown*, rights incidental to the right to hunt, such as the building of a cabin, are protected under the treaty.⁷⁹ The courts, in *Marshall*, recognized a right to fish for a moderate livelihood.⁸⁰ Each of these fragments is important to First Nations, but they are not the essence of treaty relationships as First Nations understand them. Protecting the sacred nature of treaty rights is of paramount importance. Research must be focused on collecting First Nation treaty understandings and sharing that knowledge in written form. This is a priority area of research to protect the legal notion of treaty from further fragmentation.

The relationship between Aboriginal rights and treaty rights has not yet been made clear in the case law. Based on an Aboriginal understanding, the “right” to be in the territory, living as nations (governing ourselves) was a Creator given right. It is the right that gave the authority to participate in treaty processes with other nations (including those alliances made among First Nations). If these Creator given rights are characterized in Canadian law as Aboriginal rights and/or Aboriginal title, they are the foundation on which treaty

⁷⁷ *Badger* (1996), page 90, paragraph 37.

⁷⁸ *Badger* (1996), page 102, paragraph 67.

⁷⁹ *R. v. Sundown*, [1999] 2 C.N.L.R. 289 (S.C.C.) at page 299, paragraph 28 and page 301, paragraph 35.

⁸⁰ *Marshall* (1999), page 192, paragraph 59.

rights rest. This then poses another area which research will be an essential element of litigation and claims resolution.

As troubling as the pattern that can be found in the determination of Aboriginal rights by Canadian courts, treaty rights also must be approached from the same cautionary position. In one of the most unsettling decisions of the Supreme Court of Canada, Justice Binnie wrote a concurring decision. In his “reasoning”, he unilaterally amended a treaty relationship between several states and my people, the Haudenausonee, despite acknowledging that the treaty rights argument was not part of the appeal.⁸¹ He stated, after citing the explanation provided on the cover of the 1984 Report of the Parliamentary Special Committee on Indian Self-Government (the Penner Report):

Thus, in the “two-row” wampum concept, in one path travels the Aboriginal canoe. In the other path travels the European ship. The two vessels co-exist but they never touch. Each is the sovereign of its own destiny.

The modern embodiment of the “two-row” wampum concept, modified to reflect some of *the realities of a modern state*, is the idea of a “merged” or “shared” sovereignty. “Merged sovereignty” asserts that First Nations were not wholly subordinated to non-Aboriginal sovereignty but over time became merger partners (emphasis added) ⁸²

This is a unilateral amendment of the treaty relationship, one that does not have the consent of the Haudenosaunee. It does not appear to be founded in any tradition, only the mind of Justice Binnie. It is a serious transgression of a sacred relationship. At a minimum, the *Mitchell* case must serve as a reminder that the judiciary may not approach the topic of treaties from the same understanding

⁸¹ *Mitchell*(2001),page 162 ,paragraph 120.

that First Nations possess. This recognition is complicated by the diversity of forms of treaty relationships.

Speaking generally, First Nations view treaties as not simply a legal relationship. They are also sacred agreements. Many, if not all, the processes that resulted in treaty agreements involved ceremonial practices of First Nations. From this standpoint, the treaties involve three parties. The Crown and First Nations are the two that are generally recognized. The promises were made before the Creator, and therefore, Creator should also be viewed as a treaty party. This demonstrates why the unilateral amendment of the meaning of a treaty by courts is so offensive to First Nations.

Research in this area must also include a public education function. Canadians do not understand that they are part of the treaty and in fact hold treaty rights. These rights include the right to share the land, their own practices of government and education, and their own religions. Further study must also be made of the rights of all parties, especially Canadians, in the agreements.

⁸² *Mitchell*, (2001) page 164, paragraph 128-129.

ADDITIONAL RESEARCH CONSIDERATIONS

Women and Self-Government:

These concerns about women and self-government expressed here are not situated in a feminist methodology or practice, which concerns itself centrally with rights to equality. The issue, which requires examination is the degree to which imposed ideologies have disrupted gender relationships in First Nations communities. This is, therefore, a specific not general review of the topic of women and self-government.

There is no dispute that the victimization of First Nations women and children, far too often at the hands of our men, is an issue of significant proportion. This violence against women and children is not a phenomenon restricted to reserves and in urban centers often also involves racial hatred. In this paper, there is no attempt to deny that these are not pressing issues for First Nations governments, as they should be for all governments. This, however, is not an independent research need as much has been written on this topic.⁸³ It is not an area for study, but rather, action.

⁸³ For example please see Kim Anderson, *A Recognition of Being: Reconstructing Native Womanhood* (Toronto: Second Story Press, 2000); Cynthia Baskin, "From Victims to Leaders: Activism against Violence towards Women" in Kim Anderson and Bonita Lawrence, *Strong Women Stories* (Toronto: Sumach Press, 2003), 213-227; Emma LaRocque, "Re-examining Culturally Appropriate Models in Criminal Justice Applications" in Michael Asch (editor), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference* (Vancouver: UBC Press, 1997); Anne McGillvary and Brenda Comaskey, *Black Eyes All the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999); Patricia Monture-Angus, *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Ferwood Publishing, 1996); and Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998). For a discussion of the gendered violence of racism, please see, Janice Acoose, *Iskwewak. Kah'Ki Yaw Ni Wahko-makanak: Neither Indian Princess nor Easy Squaws* (Toronto: Women's Press, 1995) and Mary Ellen Turpel, "Patriarchy

The issue of priority, not unconnected to the issue of violence, is the opportunity to examine from within specific First Nations tradition, the gendered relationships which support governance and legal structures. Gendered relationships are part of First Nations social systems. The Haudenosaunee have the three sisters – corn, beans and squash – which provide sustenance for the people. In many of the agricultural tribes, women’s relationships and responsibility to land was central. This relationship has often been turned inside-out in the written historical record. A further example of the kind of difficulty (and there are many other examples) that the historical record presents is discussed by Martha Harroun Foster in her work on “Iroquois” women:

Parker’s handling of the position and roles of women is illustrated by his short sections on “Seneca Agriculture” and the “Rights of Seneca Women.” In each he listed some of their rights and duties. He mentioned that the Seneca people’s “whole life” depended on agriculture; however, the significance of this information is not clear until several pages later, where he revealed that women were “mistresses of the vegetable supplies.” Nowhere did Parker suggest the Seneca’s “whole life” depended upon the productivity of women. In another passage on “Seneca Agriculture,” women’s horticultural importance was obscured by Parker’s use of language. He maintained that the Iroquois grew crops in “extensive communal fields, in which the clanswomen were *required* to work under the supervision of a field matron.” Parker did not mention that the fields belonged to these women who were “required” to work them. And we find that, even though women are exclusively the gardeners and have complete control over the products of the garden, “any individual might have *his* own garden and reserve its

and Paternalism: The Legacy of the Canadian State for First Nations Women” in 6 *Canadian Journal of Women and the Law*, 1993, 174-192.

fruits for *himself*, always providing that a *clansman* might take what *he* needed (italics the authors).⁸⁴

Studies have not focused on documenting the traditional governance and legal responsibilities of First Nations women. The responsibilities are diverse across the cultures.

Other examples of gender specific responsibilities are also present in child rearing practices,⁸⁵ governance structures,⁸⁶ the structure of family,⁸⁷ the ways of teaching culture and in First Nations legal systems. For example, in Haudenosaunee traditions it is the clan mothers' responsibility to depose a Chief.

One concern with the shape litigation has taken directly involves the relationship women have to land. Many Aboriginal rights cases, as has already been noted, involve rights to hunt and fish. This forgets women's place in traditional practices, which fed the people. Women's responsibilities were often for gathering and growing, and this has been wiped clean from the Canadian legal

⁸⁴ "Lost Women of the Matriarchy: Iroquois Women and the Historical Literature" 19:3 *American Indian Culture and Research Journal* (1995), 121 at 125-126. See also: Laura Peers, "Subsistence, Secondary Literature, and Gender Bias: The Saulteaux" in Christine Miller and Patricia Cuchryk, *Women of the First Nations: Power, Wisdom and Strength* (Winnipeg: University of Manitoba Press, 1996), 39-50.

⁸⁵ See Joanne Fiske, "Child of the State, Mother of the Nation: Aboriginal Women and the Ideology of Motherhood" in 12(1) *Culture*, 1993, 17-35.

⁸⁶ See, for example, Patricia Albers and Beatrice Medicine (editors), *The Hidden Half: Studies of Plains Indian Women* (New York: University Press of America 1983; Somer Brodribb, "Traditional Roles of Native Women in Canada and the Impact of Colonization" in 4(1) *Canadian Journal of Native Studies*, 1984, 85-103; Laura F. Klein and Lillian A. Ackerman (editors), *Women and Power in Native North America* (Norman and London: University of Oklahoma Press, 1995); W.G. Spittal, *Iroquois Women: An Anthology* (Ohsweken: Irocrafts, 1990)

⁸⁷ See note 86.

record. It is also not apparent in the written version of the numbered treaties, which in part explains the disappearance of women.

The written historical record compounds the difficulties in discerning women's traditional responsibilities. Gunlog Fog writes:

“Indian history” has largely painted images of forests peopled only by men, momentous councils visited only by white and red males, or battles in which warriors performed feats of courage. This is barely more historically justifiable than an older tradition of “Indian history” in which every event had a European or white American originator. We know now that the sources are one-sided and formed in a European patriarchal perspective and that this is a major reason why women are invisible. But it is not sufficient to note that. The theoretical question must be, somewhat flippantly, What did women do when men made history? Women were somewhere and they were decidedly active: they did not exist suspended in a timeless vacuum awaiting the return of the men with the meat and the treaty...⁸⁸

Obviously women were involved in their communities. But because of the gendered bias in the historical record a source of validation to put before the courts of First Nations women's governance responsibilities is lost. Research in this area will have to not only involve women who follow the traditions but also must primarily rely on oral histories.

⁸⁸ “Some Women Are Wiser than Some Men: Gender and Native American History in Nancy Shoemaker (editor), *Clearing a Path: Theorizing the Past in Native American Studies* (New York: Routledge, 2002), 75-103 at 76.

Preparing for the Future: The Present Education System:

A training and research centre, such as the First Nations Governance Center, must provide opportunities for the development of the skills of First Nations citizens and must be founded on the principle of equity. The credentialing of First Nations citizens must be acknowledged not only within our communities but in the larger Canadian society as well. This poses a number of challenges.

The measure of a successful educational system is the degree to which it is able to prepare students for future careers. This is the degree to which education is meaningful. First Nations, particularly at the post-secondary level, participate in an education system, which was not imagined on their life experiences, the needs of their communities or their cultures and traditions. Simply put, the educational system provides few opportunities for students to understand a commitment to decolonization. Development of real opportunities to think practically about issues of self-government is also most often not available to students in university.

A glance at the Native Studies curriculum in the universities of Canada reveals several structural obstacles. First, the understanding that is taught is often historical. This falls into the same trap as the courts who define, as previously discussed, the moment in time of the last true “Indian” is contact. In the institution in which I teach, in the center of Treaty Six, there is no regularized treaty course offered. Courses that deal with the present are often presented as “contemporary issues” or “special topics”. Within the discipline, several misconceptions of First Nations people are perpetuated. Aboriginal peoples are

constructed as either historical beings or current problems. This is not an accurate reflection of who we are.

There is no single post-secondary institution on which the First Nations Governance Center can rely on as a partner. First, Native Studies programs and departments across the country are, as already noted, fairly generic. There are courses in history, language, justice and law, economic development, literature, art and politics in most of these programs of study. No Native Studies department has developed a concentrated focus in particular areas of expertise, such as justice, law or governance. Often missing from the curriculum are courses based in Aboriginal scientific knowledge. This is clearly an area where research is required to determine precisely what is available and where. In addition, gaps in training and educational opportunities must be noted and plans to address the shortages established.

There is a further issue of the training of researchers in both the methodologies of western social science and Indigenous knowledge systems.⁸⁹ Although some university methods courses look at oral history, the full range of Aboriginal research and knowledge structures remains unexamined. The result is that researchers are sometimes still ill-equipped to provide research products that are fully satisfying to First Nation communities. Addressing this gap in

⁸⁹ For an examination of this issue please see, Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (London and New York: Zed Books, 1999).

education and training must be a priority. It can be addressed, in part, through the development of graduate opportunities for First Nation students.⁹⁰

University structures tend to be quite rigid. Courses are offered on the main campus, at satellite centers and by distance education. Few courses have been delivered in First Nations communities. This creates a lost opportunity as courses are generally offered far from the knowledge holders of First Nations societies. The realities require a structural analysis of the institutional obstacles to creating meaningful education opportunities for First Nations citizens. None of the structural obstacles are insurmountable but merely require the opportunity to think creatively about the difficulties and obstacles. Bringing together a group of First Nations scholars to discuss this topic will yield considerable results.⁹¹

Bringing Elders to campus has been embraced by a number of programs, departments and institutions. However, this is an insufficient step, which can actually be harmful to First Nations traditions. Drawing from my own experiences in the university classroom, it is clear that some Aboriginal students enrolled in post-secondary programs have no experience with their traditions and have had little opportunity to spend time with traditional teachers. As the professor, when I go to an Elder and offer up the appropriate gifts to invite the man or woman to class, I am actually denying my students a learning opportunity. The first time you put that tobacco and go to an Elder and say, I need help, it is very difficult. It may take days or weeks or even months before

⁹⁰ As many communities no longer have the funds available to provide student assistance at the graduate level, this is also connected to a funding issue.

⁹¹ FNGC hosted such a meeting on September 28 and 29, 2004 in Saskatoon, Saskatchewan.

you find that courage to reach out for yourself. This is an important teaching necessary to the traditional ways of many First Nations. It is not easily accommodated within the university structure. An additional obstacle is the traditional obligation to go to your teachers, not requiring them to come to you. Some of the most significant teachings I have been received were gained as I helped the Elders picking medicines, chopping wood or making bannock. They were also learned in cars as I chauffeured Elders from prison to prison. The university environment has not yet found ways to include preferred First Nations learning environments and structures that facilitate the honouring of essential protocols.

Course structures are also unnecessarily rigid in the university. A course at my institution is defined as 39 hours of instruction over 13 weeks (or three hours per week). This structure allows students to accumulate three credit units. This definition of a course envisions a course being taught in a single place on a regular basis week-to-week. There is no necessity in any of these restrictions. Thirty-nine hours of course instruction can be offered in a number of ways which would facilitate not only First Nations participation but also enable the participation of communities.

Although progress has certainly been made in the last decades, Aboriginal people are still under-represented in the faculty ranks at Canadian universities. Identifying institutions where a critical mass of Aboriginal scholars are presently employed is a process which will help us find innovative solutions. At the same time, it is important to address issues of qualifications, recruitment and retention of Aboriginal scholars. Possessing Indigenous knowledge is not a quality that

universities presently acknowledge. This presents significant obstacles. And in our efforts to recruit more Aboriginal scholars to Canadian universities, it is very important that we create structures that allow them to reach their full potential. This will require tenure and promotion processes to reflect the importance of Indigenous knowledges.⁹²

A logical starting place is to inventory First Nations education programs presently available in the country. This inventory should also look to discover the innovative efforts that will have taken place in isolated pockets attached to individual faculty members initiative. From here, Aboriginal scholars can easily participate in developing an educational plan that would facilitate the accumulation of skills and knowledge that would assist our communities in reaching their governance goals.

Concluding Thoughts:

There are a number of recommendations for further research made in this paper. When setting research agendas in this area it is important to recognize that the needs are many. It may in fact be impossible to address all the issues that are presented to FNGC. The research structure must allow for the FNGC to set priorities.

Equally important to the need to assess priority, is to set an agenda in a flexible framework. The ability to reflect on the legal research needs of First

⁹² For a personal examination of these issues please see Patricia Monture, "On Being Homeless: One Aboriginal Woman's "Conquest" of Canadian Universities, 1989-98" in Francisco Valdes, Jerome McCristal Culp, and Angela P. Harris (editors), *Crossroads, Directions, and a New Critical Race Theory* (Philadelphia: Temple University Press, 2002), 274-287 as well as the introduction in the same volume by Margaret E. Montoya, "Celebrating Racialized Legal Narratives", 253-250.

Nations communities and adapt the agenda as further information is collected will be essential to the success of the endeavor. This is a time of rapid transition for First Nations and their governance structures and a structure that can meet the needs as they evolve is essential.

In completing legal research, it is important to ensure that both the traditions of First Nations people and the western legal tradition are represented. In the past, far too often the contours accepted of western legal scholarship have formed the recognized boundaries. These conventional boundaries in the western tradition do not advance our ability to meet the court's articulated objective of balancing two legal distinct legal traditions. It should be recognized that, at present, it is more likely that a First Nations legal scholar will be versed in both distinct legal traditions.⁹³ This means that *only* First Nations are likely able to speak to and in both legal traditions. This is an imbalance in the sharing of responsibility that reconciling the two distinct legal traditions requires.⁹⁴ It is also a recognition of who holds legal power and who does not. First Nations carry

⁹³ This may also involve the skill of listening. Listening to First Nations speak when preparing a case means you listen for facts and issues. Listening to Elders when they are sharing teaching is a different kind of teaching built on the duty to reflect and self-reflect.

⁹⁴ One of the reviewers of this paper suggested that the paper read as though there were really two papers rolled into one. I agree. I gave this comment considerable thought as I re-edited the paper just one last time. I think this is the result of approaching the topic of legal research needs both as a citizen of a First Nation and as someone who has western legal training. A colleague of mine, Sakej Henderson refers to this as “split-headed”. Sadly, I cannot yet reconcile my being First Nations and my training in western law such that I am a First Nations lawyer, not a lawyer who happens to also be First Nations. I do not see this so much as a personal short-coming, but an acknowledgement of the ways in which First Nations' legal traditions have been disenfranchised.

a burden, a not often acknowledged burden, which non-First Nations do not.⁹⁵

As this paper is about the legal needs of First Nations, the gap in what non-First Nations understand and the possible remedies required in Canadian educational institutions is not addressed. Equally as important, the research focus must include an opportunity to assess the impact of litigation, and types of litigation, on First Nations communities.

First Nations research needs *as we define them*, have not been the focal point of any structured research program. Reflecting on needs, but also proceeding with vision and hope, are all keys to success. Working under the guidance of the Elders is also foundational.

⁹⁵ Both my teachers and my community(s) will hold me accountable to my responsibilities as a First Nations citizen. I will be held accountable to breaches of Indian law. There is no mechanism in place in Canadian society for First Nations to hold accountable those who do not follow our ways but become involved in judging them.