FRAMING ABORIGINAL TITLE AS THE (MIS)RECOGNITION OF INDIGENOUS LAW

Matthew V. W. Moulton*

ABSTRACT

This paper makes the case that current Canadian political and legal frameworks are unable to fully recognize the inherent plurality in law, which includes Indigenous versions of law. In making this argument, the author uses the doctrine of Aboriginal title as a means to illustrate the conceptual and ideological hurdles that obstruct full recognition and Indigenous law. Some scholars call for the incorporation of Indigenous legal concepts within the common law, what is generally known as a weak form of legal pluralism. This paper discusses the internal limits of this weak form of legal pluralism, demonstrating the perversity of forms of recognition that force Indigenous claims through institutions that perpetuate their subjugation, as well as the ideological conscripts of Canadian legal institutions and discourse that continue the erasure of Indigenous law and organic Indigenous legal meaning. To do so, this paper illustrates the conceptual and ideological hurdles of a weak form of legal pluralism through the (mis)use of Indigenous law within the Aboriginal title paradigm. Given that the (mis)recognition of Indigenous law acts as a site for the reconstruction of colonialism, this paper argues instead for a transformative approach that respects Indigenous agency. In so doing, it argues that in order to fully respect and lay the foundations for the reconciliation of Indigenous legal orders, a strong legal pluralist model must be incorporated that decenters state law as law par excellence.

> Man is human only to the extent to which he tries to impose his existence on another man in order to be recognized by him. As long as he has not been effectively recognized by the other, that other will remain the theme of his actions. It is on that other being, on recognition by that other being, that his own human worth and reality depend. It is that other being in whom the meaning of his life is condensed.
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> – Frantz Fanon, *Black Skin, White Masks*[1]

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* B.A. (Memorial), J.D. (University of New Brunswick), LL.M. candidate (Schulich School of Law, Dalhousie University), and 2015-2016 Law Foundation of Nova Scotia Millennium Graduate Fellow. I would like to thank Professor Sheila Wildeman and Joshua Shaw for graciously offering their comments and suggestions on this paper. Moreover, I would also like to thank the two anonymous reviewers for their clear, thorough, and helpful suggestions. All errors and omissions remain mine alone. The opinions expressed in this article are my own and do not reflect the view of my employer.

[1] Frantz Fanon, *Black Skin, White Masks* (Boston: Grove Press, 1967) at 216–17 [Fanon].

I. INTRODUCTION

The epigraph offered above is illustrative of the recognition project within contemporary political and legal theory. Recognition is largely the organizing ethos of equality-seeking groups in current political struggles. Such groups aspire to be recognized in some formal sense by those holding political and social power. In this way, as the above passage demonstrates, "justice" for equality-seeking groups requires recognition of their equal worth, and this recognition is constitutive of group members' sense of self. This demonstrates the importance of recognition as a political act. History is rife with such struggles for equal worth, including those of feminists, sexual minorities, and cultural minorities. As such, in a normative sense, recognition imports a positive acknowledgement of an other as an equal; the marginalized have been transformed into equals by the actions of those who hold power. However, while debates over recognition spur interesting propositions about politics and social movements, given the title of this paper the reader may be wondering what this has to do with law, or, more specifically, Indigenous law.

The connection lies in legal pluralism. From a theoretical perspective, legal pluralism seeks to *recognize* the existence of two or more legal regimes operating within one geographical sphere.[2] In this paper, I seek to examine the relationship between two legal orders: Canadian state law and Indigenous law.[3] Specifically, I

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[2] This is a crude definition that does not take into account the complexities of the legal pluralist movement. For a sketch of the historical and contemporary moment, see Brian Tamanaha, "Understanding Legal Pluralism: Past to Present, Local to Global" (2008) 30 Sydney LR 375.

[3] I do not suggest that there are *only* two legal systems at play within the geographical area known as Canada. However, for the purposes of this paper I will only be examining two: Canadian law, which finds its source in the state, and Indigenous law, which finds its source in traditional Indigenous practices, culture, and history. I do not deny the existence of other legal orders, but such a discussion will implicate the complexities of the definitional argument within legal pluralism, which I am ill-equipped to discuss within the scope of this paper. In examining the interaction between these two legal orders, I make the explicit presumption (which largely may be uncontested) that Indigenous law meets some sort of definition of "law." While the theory of legal pluralism has had internal divides over what constitutes the legal in *legal* pluralism, as John Borrows has argued, Indigenous law is wide in scope and source: it encompasses sacred law, natural law, deliberative law, positivistic law, and customary law. See John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 23–55. I also wish to comment on my use of the word "law". While it may appear reductionist to use the term law, as it is a Western word with Western connotations, there is indeed much support for its use within Indigenous peoples themselves. For example, Hadley Friedland states:

> Indigenous law can be hard to see when we are used to seeing law as something the Canadian government or police make or do. Some people may even have been taught that Indigenous people did not have law before white people came here. This is a lie. Law can be found in how groups deal with safety, how they make decisions and solve problems together, and what we expect people "should" do in certain situations (their *obligations*).... They are often practiced and passed down through individuals, families, and ceremonies. This is why many still survive, after all the government's efforts to stop them and sneer at them.

Hadley Louise Friedland, The Wetiko (Windigo) Legal Principles: Responding to the Harmful People in Cree, Anishinabek and Saulteaux Societies – Past, Present and Future Uses, with a Focus on Contemporary Violence and Child Victimization Concerns (LLM Thesis, University of Alberta Faculty of Law, 2009) at 15–16. As an additional note to pre-empt controversy, I am sensitive to the fact that Canada is bijuridical, given the presence of the civil law tradition within Quebec. However, for the purposes of this paper, I lump the civil law tradition into a broad category known as "state law" as it

aim to analyze how Indigenous law can co-exist with Canadian law given that a recurring theme in the relationship between these two legal orders is the tension and miscommunication that often arises from Canadian state law's colonial and imperial claims of domination.[4] This tension reveals the struggle for Indigenous law to be recognized on a level with state law where neither is subjugated to, or dominated by, the other.

Given the tension that often exists between Indigenous and Canadian law, some scholars argue that Indigenous law must be incorporated into broader common law structures.[5] In exploring this proposition further, this paper illustrates the tensions inherent in the recognition of Indigenous law within Canadian institutions. In order to have a fruitful intercultural conversation about how to best move forward to ensure that the organic nature of Indigenous law is protected, this paper illustrates the incapacity of the current moment to effectively provide meaningful recognition to Indigenous law. In elucidating this point, this paper utilizes the doctrine of Aboriginal title as a means to deeper illustrate the types of transformations required – both ontological and epistemological – to move toward a more emancipatory, equal, and decolonized framework.

In this sense, the methodological choice that I have made is one of conscious-raising.[6] In examining the relationship of Indigenous and Canadian law through the doctrine of Aboriginal title, I am able to expose the problematic ideological, operational, and evidentiary conflicts that inevitably result in the process of translating Indigenous worldviews to something that can be (mis)recognized by the common law. In so doing, I hope to illustrate how deeply embedded and

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finds its root and authority from the dominant state legal and political institutions. As such, the focus of this paper is on state law (Canadian law) and one form of non-state law (Indigenous law). I utilize Indigenous law because of its saliency as both a political movement and its struggles within Canadian legal institutions.

[4] See e.g. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002). Moreover, reconciling Indigenous and Canadian legal orders is part of the reconciliation framework laid out by the Truth and Reconciliation Commission of Canada as a means to transcend colonialism. For example, part of Call to Action Number 45 is to "[r]econcile Aboriginal and Crown constitutional and legal orders to ensure that Aboriginal peoples are full partners in Confederation, including the recognition and integration of Indigenous laws and legal traditions in negotiation and implementation processes involving Treaties, land claims, and other constructive agreements." Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: Library and Archives Canada, 2015) at 199.

[5] See e.g. John Borrows, "With or Without You: First Nations Law in Canada" (1996) 41 McGill LJ 629; Lisa Chartrand, "Accommodating Indigenous Legal Traditions" (Discussion Paper prepared for the Indigenous Bar Association, 2005), online: <www.indigenousbar.ca/pdf/Indigenous%20Legal%20 Traditions.pdf>. I am not dismissing the arguments of or questioning the motives of these Indigenous scholars. Rather, I am reflecting on the barriers that exist in fostering this approach. There are many complexities involved in these propositions that need to be explored further. This paper is simply digging deeper conceptually as a means to explore fully the incorporation of a legal pluralist model in Canada that respects the inviolability and agency of Indigenous law.

[6] This was the methodology used in Richard Devlin, "Nomos and Thanatos (Part A). The Killing Fields: Modern Law and Legal Theory" (1990) 12 Dal LJ 298. Its use has been incorporated largely in critical legal studies as a means to bring awareness to the barriers that exist within current legal doctrine.

pervasive colonial doctrine operates in the current moment, which I argue illuminates space for the re-examination of the relationship between Canadian and Indigenous law. What results is, I hope, a self-conscious reflection on the barriers that exist in instituting legal pluralism within Canadian legal and political institutions, frameworks, and discourses.[7]

While I do tangentially address legal pluralism, this paper does not undertake any sort of theoretical exposition of, or make any stance on, legal pluralism, other than to note it as a fact.[8] Whether Canadian institutions wish to acknowledge it, by the very nature of Canada's colonial history parallel Indigenous legal regimes exist and operate within Indigenous communities. What my paper does attempt to do is move the legal pluralist conversation forward: it takes a critical first step in the campaign to incorporate and recognize Indigenous law to query how legal pluralism can be instituted within pre-existing legal and political structures. In other words, if Canada is legally plural, can current institutions – such as courts and legislatures – recognize Indigenous law *within them*?[9] This is important in confronting how to move forward on the legal pluralist project to value Indigenous law as something more than the "Aboriginal perspective".[10]

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[7] As Brenda Gunn argues, "[b]efore Indigenous legal systems can be recognized, the faults of the existing system must be exposed. Canadian jurisprudence based on liberal principles and rooted in doctrines such as the doctrine of discovery are unable to produce anything but racist legal principles." Brenda Gunn, "Protecting Indigenous Peoples' Lands: Making Room for the Application of Indigenous Peoples' Laws Within the Canadian Legal System" (2007) 6:1 Indigenous LJ 31 at 40 [Gunn].

[8] I take this from the work of John Griffiths in his seminal work on legal pluralism where he notes: "[l]egal pluralism is the fact. Legal centralism is a myth, an ideal, a claim, an illusion." John Griffiths, "What Is Legal Pluralism?" (1986) 18:24 J Leg Pluralism & Unofficial L 1 at 4 [Griffiths].

[9] My paper can be seen as a form of "weak" legal pluralism. As Natalie Oman suggests, a weak form of pluralism is one in which the legal system recognizes plurality insofar as there are distinct legal orders, but these legal orders are subsumed under the overarching state legal order. Plural legal regimes, then, find their source of authority through recognition by dominant legal and political institutions. See Natalie Oman, "The Role of Recognition in the Delgamuukw Case" in Jill Oakes et al, eds, *Sacred Lands: Aboriginal World Views Claims and Conflicts* (Edmonton: Canadian Circumpolar Institute, 1998) 243 at 250. This approach is intentional, but I do not normatively argue that our legal system should adopt a weak version of legal pluralism. I use this concept merely to help the reader understand the framework within which I am working, which is one where the dominant legal system attempts to recognize non-state law. Moreover, it couches my claims to legal pluralism. While legal pluralism inevitably forms part of this paper, and is its motivation, I am keen to restrict my analysis to this "weak" form as a preliminary discussion to whether this is possible within the Canadian moment, and without the need for transformative change.

[10] In cases involving Indigenous parties, the term "Aboriginal perspective" is often used as a heuristic device to insist courts give consideration to Indigenous laws, customs, and traditions in resolving conflicts. It was first used in *R v Sparrow*, [1990] 1 SCR 1075 at 1112, 70 DLR (4th) 385 where, in defining the scope of the Indigenous claimant's right to use traditional lands for fishing, Dickson CJ and La Forest J held that "[w]hile it is impossible to give an easy definition of fishing rights, it is possible, and, indeed, crucial, to be sensitive to the *[A]boriginal perspective itself* on the meaning of the rights at stake." [emphasis added] Herein we see that the judges are signalling that Indigenous legal meaning is to be given consideration, but as I will argue below, it is a shallow consideration. Indeed, the very fact that the judges refuse to at least use the word "law" or "legal custom" is indicative of how courts treat Indigenous law. I will elaborate on these ideas further in Section IV below.

First, I critically analyze recognition theory as a space to mediate Indigenous claims for recognition. This paper draws on both political theories of equality and difference that find their place in debates over multiculturalism in the 1990s and early 2000s with authors such as Nancy Fraser and Charles Taylor. I use these theories to affirm the continued importance of recognition theory in examining Indigenous claims for equality more broadly, as well as the nature of claims for the recognition of Indigenous law within Canadian institutional frameworks. This is important given the procedural imperative of recognition when Canadian legal institutions are presented with claims based on Indigenous law. Second, I expose the state's ideological commitments that run counter to Indigenous ways of being in the world. This paper adopts Roderick Macdonald's schema in arguing that Canadian institutions have adopted a largely positivist, statist, and monist conception of law that delegitimize Indigenous legalities.[11] Given this, I argue that Canada's legal institutions cannot recognize Indigenous law *qua* law if they adhere to a one-dimensional and monolithic vision of state law.

I begin this paper introducing the reader to the common law doctrine of Aboriginal title. I use this framework throughout to guide my analysis and to proffer a doctrinal framework within which I will couch my theoretical arguments. My broad argument is that when presented with a claim to title based on Indigenous law, Canada's current political-legal frameworks cannot recognize Indigenous law on its own terms; claimants have to reconstruct Indigenous legal concepts in a way to accord with dominant legal discourse. Indigenous law, then, must be shaped to fit the state's view of what "law" is which strips it of its distinct and organic legal character. Within the doctrine of Aboriginal title, Indigenous law is largely dismissed in any meaningful discussion of whether Aboriginal title exists. While a piece of the evidentiary puzzle, Indigenous law can only be recognized by courts when Indigenous law comports with the Canadian common law.[12] This necessitates a

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[11] See Roderick Macdonald, "The Legal Mediation of Social Diversity" in A Gagnon et al, eds, *The Conditions of Diversity in Multinational Democracies* (Montreal: Institute for Research on Public Policy, 2003) 85 at 87–8 [Macdonald, "Social Diversity"]. In Section IV, *infra*, I explain this approach to law which positions the state as the "judge and executioner" of law. Moreover, as Brenda Gunn argues, the dominant ideological framework of Canadian institutions is premised on liberalism. She states that

> [t]he Canadian legal system is based on liberal principles which emphasize individual rights, recognize limited Aboriginal title rights solely to put Indigenous peoples back in the place they were before colonization, and restrict the ability of Indigenous peoples' cultures to evolve. Within the Canadian legal system, Indigenous peoples have limited ability to define their rights; rather, the Canadian courts define the scope of "Aboriginal rights."

Gunn, *supra* note 7 at 34.

[12] In *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289 [*Van der Peet*], a case concerning the proper formulation of the test for Aboriginal rights under s 35 of the *Constitution Act, 1982*, Lamer CJ stated that courts must take into account "the perspectives of the Aboriginal peoples themselves." However, he qualifies this at paragraph 49 where he states:

> It must also be recognized, however, that <u>that perspective must be framed in terms cognizable to the Canadian legal and constitutional structure</u>. As has already been noted, one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty. Courts adjudicating aboriginal rights claims must, therefore, be sensitive to the aboriginal perspective, but they

rethinking of our sociopolitical frameworks if we are to fully institute pluralist praxis as a means to respect Indigenous law.

In examining the failure of political theories of recognition to adequately address the discordance between achieving recognition and existing colonial power structures, my paper is critical of attempts to recognize Indigenous law through state institutions. By clinging to an obscene legal ideology, Canadian legal institutions perpetuate the erasure of Indigenous law and legal meaning. In a systematic fashion, Indigenous law is devalued and stripped of its organic legal character for the purposes of maintaining hegemony. Thus, recognition through dominant institutions and discourse is a veritable *legerdemain* and a form of misrecognition that acts as a site for the reconstruction of colonialism. Rather, the key to reconciliation is for Indigenous law to emerge organically, seen as an alternate and valid source of legal authority for Indigenous peoples.

Given this bleak portrait of the current legal conjuncture, my paper seeks to begin the conversation on instituting pluralism by showing the deficiency of current frameworks. I argue that if Canadian institutions are to move forward on the legal pluralist challenge, they must discard their adherence to orthodox legal ideology. Therefore, as currently constituted, Canadian political and legal institutions are ill-equipped to deal with the reality of legal pluralism. I propose that the only way to break away from this monopoly is through a transformative remedy, reconceptualising how the state envisages law, thus breaking away from the grand narrative of a monolithic state law. My goal, then, is to move the conversation of legal pluralism along to give specific value and attention to Indigenous law.

This paper is divided into four further parts. Part II introduces the common law doctrine of Aboriginal title, and explains how Indigenous claimants must reshape their own law and legal traditions in order to translate it into something that courts can recognize. Part III moves on to examine contemporary theories of recognition within the precept of the "politics of recognition." While recognition has important political dimensions, for example, in assessing the inclusion of minorities within state borders, I argue that it is often used in legal discourse to assign status to legal subjects, concepts, and viewpoints. It provides a vehicle for gauging how, and to what extent, Indigenous law exists within Canadian political and legal institutions. In examining recognition theory, I draw upon the work of scholars who argue for the need to decenter settler dominance in recognition frameworks. Part IV then explores how legal centralism, as an ideology, emanates from Canada's political and legal frameworks and how this delegitimizes Indigenous legalities. Part V moves on to connect everything together to argue that Canada's political and legal systems cannot recognize Indigenous law *as law* within current frameworks. The lingering effects of colonialism remove the capacity for a diversity of legal understandings in such a way that devalues and renders invisible Indigenous law.

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must also be aware that aboriginal rights exist within the general legal system of Canada [emphasis added].

II. THE DOCTRINE OF ABORIGINAL TITLE AND COLONIAL DISMISSALS OF INDIGENOUS SOVEREIGNTY

I first wish to start out with a common law framework that I will use to guide my analysis: the doctrine of Aboriginal title. It provides an apt example of the misrecognition of Indigenous law by Canadian legal institutions. In offering this example, I hope to demonstrate two things: first, Canadian courts accept, *prima facie*, colonial assertions of Crown sovereignty. As such, Canadian courts require that the recognition of Indigenous law within state institutions must be made through a political and legal structure with fixed connotations of power that privilege state-based discourses. Second, Canadian legal institutions have adopted a monolithic ideology of state law which presumes dominance over defining law and setting the terms of legal discourse despite the jurisgenerative qualities inherent within Indigenous communities and ways of being in the world. In this way, Aboriginal title acts as a yardstick to answering my broader question: can Indigenous law can be recognized in Canadian law on its own terms?

Aboriginal title is a common law doctrine which has arisen from historic Indigenous occupation of the territory now known as Canada as against claims to Crown sovereignty. As Judson J claims in *Calder et al v Attorney-General of British Columbia*, Aboriginal title exists because "the fact is that when the settlers came, the Indians [*sic*] were [here], organized in societies and occupying the land as their forefathers had done for centuries."[13] So, Aboriginal title seeks to recognize that Indigenous societies have an exclusive right to occupy and use lands that have now been claimed by Canada.[14] Doctrinally, Aboriginal title is a relatively recent phenomenon, receiving judicial recognition in its current form in the 1970s.[15] Since then, the Supreme Court of Canada has had many occasions to shape and reshape the doctrine, most recently in 2014 in *Tsilhqot'in Nation v British Columbia*.[16] This

[13] Calder et al v Attorney-General of British Columbia, [1973] SCR 313 at 328, 34 DLR (3d) 145 [Calder].

[14] There is both judicial and scholarly debate over whether Aboriginal title vests proprietary rights (i.e., a form of property ownership) in the claimants, or territorial rights (which include jurisdictional rights over the land in question). See e.g. William W F Flanagan, "Piercing the Veil of Real Property Law: *Delgamuukw v British Columbia*" (1998) 24 Queen's LJ 279; Kent McNeil, "The Meaning of Aboriginal Title" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: University of British Columbia Press, 1997) 135.

[15] The modern conception of Aboriginal title as existing as a matter of law came to fruition in *Calder*, *supra* note 13. Prior to *Calder*, Aboriginal title was recognized in other forms: for example, a limited form of "Indian title" was recognized by the Judicial Committee of the Privy Council in *St Catharines Milling and Lumber Company v The Queen*, [1888] UKPC 70, 14 App Cas 46. As Brian Slattery notes, "[s]tarting with the *Calder* decision in 1973, and continuing with the decisions in *Guerin*, *Simon*, *Sparrow*, *Sioui, Van der Peet* and *Delgamuukw,* the Supreme Court has gradually elaborated a comprehensive scheme of [A]boriginal and treaty rights that recognizes them as legal rights and not merely rights held at the pleasure of the Crown." See Brian Slattery, "Some Thoughts on Aboriginal Title" (1999) 48 UNBLJ 19 at 20–21 [footnotes omitted]. Clearly, the doctrine of Aboriginal title has undergone significant judicial transformation since its inception.

[16] *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [2014] 2 SCR 257 [*Tsilhqot'in*]. I will use this case to frame the requirements for proving Aboriginal title because it is the most recent Supreme Court of Canada case on the matter, which serves as the most recent judicial pronouncement on the issues at hand. Moreover, the case adopts and builds on the doctrine as recognized in past cases, such as *Calder*,

section seeks to briefly outline how the doctrine has been conceptualized in Canadian law, and will trace the frameworks which courts have put in place to translate into reality the fact that Indigenous people were occupying Canadian lands when settlers arrived.

At first blush, the doctrine of Aboriginal title seems like a positive step in Indigenous-Canadian relations. It also appears to be an opening within the common law for Indigenous claimants to assert Indigenous law within Canadian courts. In order to recognize Aboriginal title, it would seem plausible that Indigenous litigants would have to lay claim to some basis for claiming title in their own Indigenous laws given the fact that Aboriginal title is seen as a *sui generis* right.[17] It is these precepts that McLachlin CJ undoubtedly referred to when she stated in *Tsilhqot'in* that the requirements for proving Aboriginal title must be read not in purely common law terms, but also import the "Aboriginal perspective".[18]

In order to ground a claim for Aboriginal title, there must be "occupation" of the disputed lands prior to the assertion of Canadian sovereignty. As McLachlin CJ notes in her judgment, the claim must be bounded by three "characteristics": the possession of the territory claimed must be sufficient, continuous (if a claimant seeks to ground a claim in current occupation), and exclusive.[19] As such, any claim to title

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supra note 13, and *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193 [*Delgamuukw*].

[17] The *sui generis* character of Aboriginal rights stems from the fact that they are "not easily explicable in terms of ordinary western jurisprudential analysis or common law concepts." (*Delgamuukw*, *supra* note 16 at para 48.) Moreover, as the Court stated in *Delgamuukw*, "[w]hat makes aboriginal title *sui generis* is that it arises from possession before the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward". *Ibid* at para 114 [emphasis in original]. See also John Borrows & Leonard Rotman, "The Sui Generis Nature of Aboriginal Rights: Does it Make a Difference?" (1997) 36 Alta LR 5.

[18] *Tsilhqot'in*, *supra* note 16 at para 32. This is, of course, not the first instance of the incorporation of the "Aboriginal perspective" as an attempt in Canadian courts to reconcile the competing worldviews of Indigenous peoples and the Canadian state. Its use in Aboriginal rights and Aboriginal title cases requires courts to be sensitive to traditional Indigenous practices and customs. In *Van der Peet*, a case revolving around the nature of Aboriginal rights, Lamer J stressed that in adjudicating Aboriginal rights claims, courts are to be cognizant of the "Aboriginal perspective." Though, he later clarified this by stating:

> 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 aboriginal 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." [emphasis added]

Van der Peet, *supra* note 12 at para 49.

[19] *Tsilhqot'in, supra* note 16 at para 30. It should be noted that these doctrinal components were not created in *Tsilhqot'in* but rather stem from *Delgamuukw*, *supra* note 16, and have been expanded upon in subsequent Aboriginal title cases. I am using *Tsilhqot'in* given that it is the most recent pronouncement on the law of Aboriginal title. I am using it as an example of the ways in which Indigenous laws have to be molded and distorted in order to be recognized by courts in these cases.

of a particular tract of land brings with it evidentiary requirements in proving the claim. These requirements force claimants to prove that their occupation was not cursory, but a continuous event. This accords with the common law conception of property.[20]

McLachlin CJ took the occasion to elaborate on what these characteristics required of claimants. First, occupation by a group must be *sufficient*. This requirement became particularly important in the context of the *Tsilhqot'in* case given that the Tsilhqot'in peoples were semi-nomadic. The case centered on whether the claimant must show "regular and exclusive use of sites or territory" in order to ground their claim, or whether a more flexible standard would be sufficient. Largely, there are two competing standards of occupation in Aboriginal title litigation: site-specific occupation and territorial occupation.[21] In discussing these standards and the correct approach to Aboriginal title, McLachlin CJ conceptualized sufficiency of occupation as requiring not purely *physical occupation*, but also *control*. She translates this into requiring that:

> …the Aboriginal group in question must show that it has historically acted in a way that would communicate to third parties that it held the land for its own purposes. This standard does not demand notorious or visible use akin to proving a claim for adverse possession, but neither can the occupation be purely subjective or internal. There must be evidence of a strong presence on or over the land claimed, manifesting itself in acts of occupation that could reasonably be interpreted as demonstrating that the land in question belonged to, was controlled by, or was under the exclusive stewardship of the claimant group. As just discussed, the kinds of acts necessary to indicate a permanent presence and intention to hold and use the land for the group's purposes are dependent on the manner of life of the people and the nature of the land. Cultivated fields, constructed dwelling houses, invested labour, and a consistent presence on parts of the

[20] In making this claim, I am making reference to the common law doctrine of adverse possession whereby a claimant can ground a claim to ownership by showing a period of occupation of land which displaces a former owner. The test for sufficiency of that occupation is stated by Justice Boudreau most recently in the Nova Scotia case of *Pettipas v Hunter Noel Holdings Ltd*, 2015 NSSC 313. At paragraph 31, she states that "[t]he law of adverse possession is quite settled. A claimant must prove that he had actual possession for the necessary period; and that his possession intended to, and did, exclude the true owner from possession. A claimant must further show that his acts of possession were 'open, notorious, peaceful, adverse, exclusive, actual and continuous'" [emphasis added, citation omitted]. In this light, there are parallels to what is expected of Indigenous claimants in asserting Aboriginal title, which is demonstrative of the preoccupation with defining Indigenous law in common law terms.

[21] For a further discussion on these competing standards of occupation, see Kent McNeil, "Aboriginal Title in Canada: Site-Specific or Territorial?" (2014) 91 Can Bar Rev 745. For my purposes, it is sufficient to note that these standards were important in *Tsilhqot'in* because the claimants had a semi-nomadic history. In this vein, a site-specific conception is a purely common-law conception of occupation based on common law property claims. McNeil argues that the site-specific conception of title is "[a] purely proprietary approach, based on occupation of land and the effect given to occupation by the common law". On the other hand, a territorial approach to Aboriginal title notes that "Indigenous land rights are not limited to property rights…[i]nstead, Indigenous peoples have governmental authority (that is, political jurisdiction) over the territories occupied by them at the time of Crown assertion of sovereignty, in addition to rights to the lands and resources within those territories." In this way, territorial conceptions of occupation import both common law principles and Indigenous laws and governance. McNeil discusses a third conception of title that is wholly based on Indigenous law, but is not discussed in the case law (*ibid* at 746, 749 [citations omitted]).

> land may be sufficient, but are not essential to establish occupation. The notion of occupation must also reflect the way of life of the Aboriginal people, including those who were nomadic or semi-nomadic.[22]

Effectively, McLachlin CJ imports a standard whereby sufficiency must be proven on an external view of the Indigenous group's practices; merely believing one occupied a particular tract of land is insufficient as it must be communicated to third parties.

In adopting a territorial approach to sufficiency, McLachlin CJ held:

> There is no suggestion in the jurisprudence or scholarship that Aboriginal title is confined to specific village sites or farms …. Rather, a culturally sensitive approach suggests that regular use of territories for hunting, fishing, trapping and foraging is "sufficient" use to ground Aboriginal title, provided that such use, on the facts of a particular case, evinces an intention on the part of the Aboriginal group to hold or possess the land in a manner comparable to what would be required to establish title at common law.[23]

To ground a title claim, then, an Indigenous group will have to show patterns of occupation that comport with McLachlin CJ's conceptualization of possession at common law. In her judgment, McLachlin CJ cites with approval parts of Professor Kent McNeil's book, *Common Law Aboriginal Title*, in which Kent articulated that merely entering casually onto land would not ground occupancy. Acts such as mining, cultivating, warning off trespassers, among a host of other indicia, would generally prove occupancy. Accordingly, the level of occupancy cannot be transient, but rather there must be an expressed will to occupy.[24] The burden is on the claimant to prove positive acts of possession that amount to an intent to occupy the particular territory.

McLachlin CJ, in moving away from the site-specific approach, emphasized that courts have to be flexible in their application of the sufficiency principle. She argued for a "culturally sensitive" approach to analyzing acts of possession. Moreover, she states that:

> The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.[25]

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[22] *Tshilqot'in*, *supra* note 16 at para 38.

[23] *Ibid* at para 42.

[24] *Ibid* at para 39; Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989) at 198–200.

[25] *Tsilhqot'in*, *supra* note 16 at para 41.

What this quote suggests is that the Court is allowing some limited room for Indigenous law and legal discourse to permeate Aboriginal title claims. It recognizes, although superficially, that Indigenous ways of being in the world may run counter to state perspectives. On its face, it appears that there is an opportunity for the incorporation of Indigenous perspectives to play a role in settling land-based disputes. However, as will be argued below, this space is largely plagued by the constraints of colonial domination and power. Indigenous perspectives are incorporated only insofar as they are "cognizable" to the common law structure.[26]

Generally, *Tsilhqot'in* was seen as a positive development for Aboriginal title,[27] and a move away from the site-specific approach which had plagued Aboriginal title litigation.[28] However, there are key pieces of McLachlin CJ's characterization of sufficiency which implore further examination. Most importantly, the Chief Justice emphasizes that sufficient use must incorporate an intention to occupy land "in a manner comparable to what would be required to establish title at common law." As such, the approach in *Tsilhqot'in* seems to both militate for, and away from, the recognition of Indigenous law. While McLachlin CJ argues for a culturally sensitive approach, she does not begin to broach the topic of the full recognition of Indigenous law within Aboriginal title claims. Rather, she delegitimizes express Indigenous legalities by forcing Indigenous law to conform to common law terms. Indigenous practices are not read in light of their traditional understandings and settings, but rather are read in colonial terminologies such as "occupation" and "exclusivity." Consequently, while the doctrinal requirements must be read in light of cultural practices, this is far from the express recognition of Indigenous law. It is a shallow commitment that fails to move away from colonial assertions of sovereignty.

Claimants must satisfy two further criteria if they overcome the hurdle of proving sufficiency. The second requirement necessitates proof of *continuity* of possession if their title claim is to lands over which the group presently occupies. So, there must be a continuity between pre-sovereignty – or some time before European contact – and present day occupation.[29] Additionally, the requirement of *exclusivity*

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[26] *Van der Peet, supra* note 12.

[27] For example, Dwight Newman and Ken Coates have stated that "[w]hat the Supreme Court of Canada has highlighted at a fundamental level is that Aboriginal communities have a right to an equitable place at the table in relation to natural resource development in Canada. Their empowerment through Tsilhqot'in and earlier decisions has the potential to be immensely exciting as a means of further economic development in Aboriginal communities and prosperity for all." See Dwight Newman & Ken Coates, *The End is Not Nigh: Reason Over Alarmism in Analyzing the Tsilhqot'in Decision* (Ottawa: Macdonald-Laurier Institute, 2014) at 21.

[28] There has been much judicial wavering of the nature of Aboriginal title. Chief Justice McLachlin herself has been part of this judicial occlusion of the source of Aboriginal title. Her decision in *R v Marshall; R v Bernard*, 2005 SCC 43, [2005] 2 SCR 220 [*Marshall/Bernard*] relied heavily on the limited common law approach to Aboriginal title which required physical occupation of individual sites (see e.g. paras 48–51, 69–70, 78). This undoubtedly led the British Columbia Court of Appeal in the *Tsilhqot'in* case (see *William v British Columbia*, 2012 BCCA 285, [2012] 10 WWR 639) to rely on a site-specific approach. However, *Tsihqot'in* clears up – for now – this judicial occlusion.

[29] *Tsilhqot'in, supra* note 16 at para 45.

denotes "the intention and capacity to retain exclusive control" of land.[30] In analyzing this approach, McLachlin CJ specifies that, as with the requirement of sufficiency, exclusivity requires courts to approach this requirement "from both the common law and Aboriginal perspectives".[31] This, then, is another area in which it appears that Indigenous law and discourse could be recognized by the common law approach.

If a claimant meets the requirements of sufficiency, continuity, and exclusivity, the doctrine of Aboriginal title then allows the Crown to "extinguish" title, either by treaty or legislation. I will not discuss this aspect of the doctrine as it is not necessary for this paper and my analysis of the aforementioned three components which must be proven by the claimant. While the doctrinal components, on their face, seem to allow for the recognition of Indigenous laws and legal meaning in any assessment of title claims, it is a weak recognition.[32] It is a hollow commitment to take Indigenous laws and culture seriously. Courts have predicated their understanding of Indigenous law only insofar as it comports with a similar understanding or conceptualization within the common law. As James [Sákéj] Youngblood Henderson writes:

> The vast depth and discourses of First Nations [laws] makes communication difficult outside its languages. Its distinct processes and languages have made it difficult for Canadian jurisprudence to comprehend these sources of jurisprudence. The translation of First Nations jurisprudence and rights into common or civil law categories often brings with a corruption, which favours the hardened prejudices against First Nations jurisprudence. In most translation processes, courts have to violate the fundamental assumptions and premises of First Nations jurisprudence, in order to maintain fidelity to the essential characteristics and patterns of common law jurisprudence. Any translation of First Nations jurisprudence into the common or civil law traditions thus transforms First Nations jurisprudence.[33]

This transformation process to which Henderson refers is the transformation away from organic Indigenous meaning as courts fail in their attempts to understand Indigenous laws and practices, causing them to be de-contextualized from their place of importance in Indigenous life. What results from this transformation is a privileging of state-based discourses which serve to subjugate Indigenous ways of life within Canadian legal and political institutions.

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[30] *Ibid* at para 47.

[31] *Ibid* at para 49.

[32] In reference to a prior case on Aboriginal title, *Marshall/Bernard*, *supra* note 28, Nigel Bankes argues that within the "Aboriginal perspective", courts largely play only lip-service to Indigenous-based ways of being in the world. As a result, these court decisions "decontextualize… the [A]boriginal practices from their normative setting." Nigel Bankes, "*Marshall and Bernard*: Ignoring the Relevance of Customary Property Laws" (2006) 55 UNBLJ 120 at 127.

[33] James [Sákéj] Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Native Law Centre, University of Saskatchewan, 2006) at 120 [Henderson, *First Nations Jurisprudence*].

Accordingly, the requirements which allow for the importation of the "Aboriginal perspective" fail to allow for the recognition of Indigenous law on its own terms, rooted in traditional Indigenous meaning and practices. Courts will only "recognize" Indigenous law in ways which transform Indigenous law away from its traditional settings and meanings. Going forward, I will utilize the example of Aboriginal title to guide the reader down two theoretical paths to prove my broader argument. First, I will explore critical theories of recognition in political theory, connecting it back to legal recognition, to show how the lasting effects of colonialism have preset institutional frameworks with fixed connotations of power and dominance. Second, I will move to examine the prevailing ideological commitments of the Canadian state, and expose problematic assumptions about the nature, form, and source of "law".

III. RECOGNITION: POLITICAL THEORY, RESPECT FOR CULTURAL DIFFERENCE, AND PERPETUAL COLONIALISM

I begin this section by explicating recognition within the bounds of political theory, given that one of the struggles *du jour* is the equal recognition of minority cultural and social groups within broader state apparatuses. Moreover, recognition theory has received criticism from Indigenous scholars for its failure to account for the violent and coercive function of colonialism.[34] In its broadest form, recognition takes many forms: from the recognition of cultural norms and rights, to the status as legal and political actors. In debates over multiculturalism in the 1990s, Charles Taylor coined this struggle "the politics of recognition."[35] Taylor underscores the importance of recognition because of its links to identity. That is, recognition serves a psychological purpose in helping to define a group's internal and external identity vis-à-vis the state.[36] While the discussion that follows will be drawn from political theory, I will focus on how recognition is connected to the status given to Indigenous law by Canadian courts. Accordingly, it is a political-*legal* theory of recognition. Said another way, the concept of legal recognition is nevertheless connected to, and influenced by, the recognition of culture within broader social, political, and legal institutions.[37] Accordingly, this section takes a *coup d'œil* at political theory in search of an explanation for the (mis)recognition of Indigenous law by Canadian institutions.

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[34] For an excellent resource on this topic, see Glenn Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

[35] Charles Taylor, "The Politics of Recognition" in Amy Guttman, ed, *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25 [Taylor].

[36] This is a large part of the importance of recognition given in the theory of Charles Taylor. He sees the politics of recognition as helping to define a person's understanding of who they are. Thus, recognition has positive psychological effects while misrecognition has negative psychological effects. Taylor seeks to justify recognition partly on the idea that what is good and just is allowing for full self-realization.

[37] What I mean by this is that political recognition and legal recognition are interconnected. Recognition in the political sphere and the legal sphere play out in largely the same ways.

The relationship of Indigenous people and the Canadian state is rooted in a complex power dynamic, exacerbated by the lingering effects of colonialism. As Melissa Williams notes in her introduction to the text *Recognition versus Self-Determination*, "state recognition practices have as often been a vehicle for sustaining structures of domination over indigenous people and subaltern groups as an instrument by which justice is served."[38] In this vein, scholars have argued that within colonized societies, the terms of the game have been pre-set by the colonizer; the colonized are forced to seek recognition on the terms of the colonizer.[39] This is what Kirsten Anker coins the "pathologies of recognition" whereby Indigenous peoples seek recognition within the very structures and ideologies that perpetuate their subjugation.[40]

In working through recognition theory, I will first draw upon the work of prominent political scientist Charles Taylor. While there are many theories of recognition, and the work of Axel Honneth and Nancy Fraser is instructive,[41] elaboration is not needed for the purposes of this paper. I seek only to provide a brief insight into how recognition theory plays out generally, and I find Taylor's theory appropriate given that his theory has been highly influential within the field of the politics of recognition. Moreover, his work in the Canadian field makes his work directly accessible for the Canadian experience.

I briefly flesh out Taylor's theory to show how contemporary recognition discourses attempt to strengthen the multicultural and plural nature of society by recognizing the inherent worth of social and cultural minorities. However, through the use of critical scholars, I will show that dominant conceptions of recognition are inadequate to face the challenges that exist in colonial societies. As such, I draw on the work of critical scholars such as Frantz Fanon and Glen Coulthard in critiquing contemporary political theory's failure to account for the dynamics of colonialism inherent in state frameworks. Without disturbing the asymmetrical relationship in colonial states, recognition regenerates the effects of colonization which situates the need to displace the homogenizing force of the liberal state.

A. Charles Taylor and the "Politics of Recognition"

Charles Taylor first published his article, "The Politics of Recognition," in 1994. Since then it has become one of the seminal works of recognition theory within Western liberal thought. He sought to explain why political discourse at the time was dominated by demands from groups such as feminists and visible minorities for

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[38] Melissa S Williams, "Introduction: On the Use and Abuse of Recognition in Politics," in Avigail Eisenberg et al, eds, *Recognition versus Self-Determination: Dilemmas of Emancipatory Politics* (Vancouver: UBC Press, 2014) at 5 [Eisenberg et al].

[39] See e.g. Fanon, *supra* note 1.

[40] Kirsten Anker, *Declarations of Interdependence: A Legal Pluralist Approach to Indigenous Rights* (Burlington, VT: Ashgate, 2014) at 99 [Anker, *Declarations of Interdependence*].

[41] See Nancy Fraser & Axel Honneth, *Redistribution or Recognition: A Political-Philosophical Exchange* (London: Verso, 2003) [Fraser & Honneth].

recognition of their relative identities in seeking justice from the state and how this form of justice could be attained.[42] Taylor's theory is premised on the Hegelian master/slave dialectic wherein the slave's sense of self-identity is formed through his or her interactions with the master. In this way, Taylor connects recognition by the state to the formation of identity by social groups: their sense of self or "originality" is formed in relation to others.[43] Taylor goes so far as to describe recognition as a "vital human need."[44] Taylor emphasizes the significance of recognition to our very basic identity as human beings. But, as Taylor sees it, it is the recognition of our *difference* – or our *originality* – which is important. Taylor coins his theory of recognition the "politics of difference,"[45] and, in so doing, he argues against the "melting pot" theory of multiculturalism as assimilationist, calling assimilation the "cardinal sin against the ideal of authenticity."[46]

Taylor's work underscores the importance of difference because, as he sees it, society must be wary of hegemonic attempts to define other cultures by Eurocentric standards. As Taylor notes, "[t]he peremptory demand for favorable judgments of worth is paradoxically—perhaps one should say tragically—homogenizing."[47] As such, Taylor cautions against a vision of multiculturalism wherein those seeking recognition have the worth of their cultures judged by those in power. For Taylor, exalting difference is the key to multiculturalism avoiding ethnocentricity.[48] Connecting recognition back to psychology, Taylor argues that a person's sense of self becomes actualized through their positive recognition by the state and dominant political culture. For Taylor, this is a universal quality and he warns against essentializing culture or attempting to constrain recognition based on dominant or hegemonic discourse.

In this vein, Taylor's theory appeals to those seeking recognition as it celebrates an inclusive vision of multiculturalism. But, as will be described below, his theory fails to account for, or is blind to, the injustice of colonial power structures. The center of Taylor's theory is the liberal Western political framework, which is inevitably controlled by settlers with power, and, as Avril Bell argues, "[Taylor's] prescription fails to work as a practice of decentering settler dominance."[49] While Taylor's theory effectively and persuasively displaces the

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[42] Taylor, *supra* note 35 at 25–26.

[43] *Ibid* at 25 where Taylor states: "The thesis [of the paper] is that our identity is partly shaped by recognition or its absence, often by the *mis*recognition of others, and so a person or group of people can suffer real damage, real distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves."

[44] *Ibid* at 26.

[45] *Ibid* at 38.

[46] *Ibid*.

[47] *Ibid* at 71.

[48] *Ibid.*

[49] Avril Bell, "Recognition or Ethics? De/centering and the Legacy of Settler Colonialism" (2008) 22:6 Cultural Studies 850 at 853 [Bell].

universalizing tendencies of the politics of equal worth,[50] or liberal conceptions of formal "equality", he fails to actively engage with deconstructing the power structures that enforce the devaluation of colonized societies. Effectively, Taylor's credo is self-actualizing: in seeking to displace hegemony, he may be keeping intact the very power structures which devalue and push colonized peoples to the margins.

While the politics of recognition speaks to the broader recognition of culture, within this precept is inevitably the recognition of non-state legal traditions that are connected to cultural minorities. In this sense, the recognition of non-state legal traditions (in this case Indigenous law) faces the same "pathologies of recognition." The organizing principle for pursuing critical versions of recognition theory is to show that the recognition of Indigenous law *as law* is a particularly arduous task because of how the colonial history of Canada has entrenched settler dominance in political and legal discourse. As such, recognition of the colonized is a threat to the dominance of the state which attenuates the potential of recognition discourse. The colonizer requires that the colonized seek recognition within the same structures that have been entrenched because of the imperial quest for wealth and power and the subsequent dispossession of Indigenous lands, cultures, and resources.[51] In the next section I will draw upon the work of critical theorists who argue just this: the legacy of colonialism has skewed the quest for recognition in ways that help to re-entrench the hegemonic position of the state as against colonized peoples.

B. Critiques of Recognition: Perpetual Colonialism?

As a political ethos, recognition imports normative presumptions of justice. In other words, a group will be seen to have achieved some form of justice in attaining recognition. For Canada's Indigenous peoples, this recognition is as important to cultural survival as it is for inclusion in political and legal spheres. Indigenous peoples have a particularly potent claim for recognition given Canada's colonial past – they have been dispossessed of their cultures, traditions, and lands.[52] Because of this, the recognition of Indigenous peoples, cultures, and laws is particularly threating to the state in that it seeks to destabilize or decenter the state, and, indeed, settler dominance.[53] This project of "decentering" or "destabilizing" the center of

[50] See e.g. Taylor, *supra* note 35 at 39 where Taylor attempts to distinguish the politics of difference from the politics of equal dignity. The latter, he argues, is about universalism: all people are treated equally. The politics of equal dignity, on the other hand, strives to be "blind" to differences.

[51] As Brenda Gunn argues, "[i]n order to provide adequate protection of Aboriginal peoples' land, we must move away from the recognition based on these liberal concepts towards basing these rights on Indigenous legal traditions." Gunn, *supra* note 7 at 48.

[52] See e.g. the conclusions reached in the Royal Commission on Aboriginal Peoples: Canada. *Report of the Royal Commission on Aboriginal Peoples*, 5 vols (Ottawa: Minister of Supply and Services Canada, 1996).

[53] We see this thought emanating through critical interpretations of the politics of difference. As S Sayyid states, multiculturalism is in its purest form an attempt to decenter the West. S Sayyid, "Bad faith: anti-essentialism, universalism and Islamism" in A Brah & AE Coombes, eds, *Hybridity and Its Discontents: Politics, Science, Culture* (London and New York: Routledge, 2000) 257 at 268.

power and control – the state – imports an imperative dynamic to the politics of recognition. The politics of recognition must go further than recognizing difference as it must actively engage with the very real asymmetrical power relations inherent in settler dominance.

Avril Bell notes that the project of decentering hegemony is an important part of Indigenous claims for recognition.[54] Indeed, it is a challenge to the universality, monism, and centrality of those who have historically maintained political and social control. Contemporary theories of recognition should account for this reality; recognition discourse must be a deconstructive project, rather than one of fitting unlike pieces together under the liberal framework. Accordingly, I, as have other scholars, argue that contemporary theories of recognition fail to successfully decenter the settler paradigm.[55] This has implications for whether colonized groups are able to successfully achieve meaningful recognition, or whether they must couch their recognition claims in a framework that has devalued their history and culture and stripped them of their lands.

In critiquing Taylor, Bell raises a number of arguments that center on Taylor's positioning of the dominant subjectfct to this eloquent passage. buminoritiesizes thattions.function of colonialismial snsuring that potential purchasers recieve within the recognition paradigm. Taylor's focus is on how the claimant – someone claiming recognition – comes into dominant state frameworks that shape their experience and sense of self. The power dynamics and ideological constructions of these institutional frameworks are predetermined. Consequently, the discursive relationship is unequal from the outset. At no point does Taylor challenge the dominant subject's sense of self, their view of the world, or the socio-political framework in which the claimant is seeking recognition. As Bell notes:

> Nowhere does Taylor suggest the possibility of any fundamental challenges arising for the liberal, western subject in this exchange. Although Taylor talks of 'a willingness to be open to comparative cultural study of the kind that must *displace* our horizons in the resulting fusions', the asymmetry of the relationship suggests that the only 'displacements' likely to occur for liberal, western subjects in this exchange will be freely chosen expansions of their existing 'horizon of value'. Anything too discomforting would result in the claimants' case being rejected.[56]

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[54] She states: "White settlers have historically centered themselves through myriad institutional arrangements, discourses and practices of domination and marginalization of indigenous peoples. The challenge now is to modify our modes of relating to make way for, or give way to, the indigenous project of recentering." Bell, *supra* note 49 at 852 [footnote omitted].

[55] I do note, however, the work of scholars such as Nancy Fraser who do call for a transformative approach to justice. See e.g. Fraser & Honneth, *supra* note 41. However, I argue Fraser's theories are oblique in decentering hegemony in this regard, and are not readily transferable to instances of colonization; it fails to account for a narrative where those seeking recognition are not seeking recognition *as part of* the broader state, but their very call for recognition destabilizes the entire regime.

[56] Bell, *supra* note 49 at 854 [citation omitted, emphasis in original].

The fundamental point in Bell's critique is that while Taylor argues for multiculturalism, it is parochial in its acceptance of an already pre-existing, and unequal, socio-political framework. Thus, claimants' demands for recognition may be readily unheeded.

Bell also makes this point clear in the context of the lingering effects of colonialism. The Indigenous person, then, will be seeking recognition within a framework that has already subjected them as primitive and dispossessed them of their lands and culture. As Bell notes, Taylor's theory "sounds suspiciously like assimilation and the continuing loss of culture and identity already familiar after centuries of colonialism and domination."[57] If one is to accept Taylor's theory, any Indigenous claims of recognition will have to present themselves within a liberal framework that has fundamentally disregarded their culture and ways of life in coercive and violent ways. In a similar vein, Glen Coulthard, a prominent Indigenous scholar, argues against contemporary theories of recognition because of the uneven power relationship between Indigenous peoples and the Canadian state that has resulted from the entrenchment of colonialism. More specifically, Coulthard argues that Taylor's theory allows the dominant subject the discretion to "grant" or "accord" recognition, which ascribes an ability to set the rules of the game, thus entrenching an unequal power relationship.[58]

Coulthard draws extensively upon the work of Frantz Fanon, which explores the psychological implications of colonial societies. Fanon argues that the support for colonial domination "rests on its ability to entice Indigenous peoples to come to *identify*, either implicitly or explicitly, with the profoundly *asymmetrical* and *non-reciprocal* forms of recognition either imposed on or granted to them by the colonial-state and society."[59] Therefore, successful colonization rests on having Indigenous societies come to implicitly accept the dominion of the social and legal institutions that have been imposed upon them. As such, Fanon argues that the success of colonization depends on the colonized internalizing forms of misrecognition that perpetuate unequal power relations;[60] or, as Coulthard puts it, they become "*subjects* of imperial rule."[61] As subjects of the empire, Indigenous people form their subjective identity *through* this unequal power relationship. Misrecognition becomes the norm through which Indigenous people form their attitudes to, and commitments and relationships with, the colonial power. As Fanon explains, racism and degradation form external determinations of one's sense of

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[57] *Ibid* at 855.

[58] Glen S Coultard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 Contemporary Political Theory 437 at 442–443 [Coulthard]. The work of Taiaiake Alfred is also helpful in understanding the skewed impacts of the recognition project. See Taiaike Alfred, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005).

[59] Coulthard, *supra* note 58 at 439 [emphasis in original].

[60] Fanon, *supra* note 1 at 113–116.

[61] Coulthard, *supra* note 58 at 443 [emphasis in original].

self.[62] Fanon's point becomes poignant when he talks of how the "the black man" forms his sense of identity, and comes to internalize the very characteristics of his blackness.[63]

Coulthard applies Fanon's work to critique the politics of recognition in the colonial context. His ultimate conclusions mirror those of other scholarly works which have been mentioned: the politics of recognition fails to deconstruct or decenter the settler paradigm in the colonial relationship. Moreover, Fanon's work illuminates the need eschew the underlying political structure which maintains colonialism. Ignoring these structures fashions a colonized sense of self whereby Indigenous subjects come to internalize these rejections of their culture and traditions. In other words, the colonized come to identify with the very power structures that subjugate them.[64] Recognition through the dominant discourse and polity, accordingly, is not recognition at all, but a form of misrecognition that immortalizes the status of Indigenous peoples as "subjects of empire".[65]

C. Aboriginal Title, the Legal Fiction of Crown Sovereignty, and Setting the Rules of the Game

To this point, this section has largely been a review of current scholarship. Taylors' astute attempt to implicate multiculturalism appears to privilege plurality. Taylor argues that a multicultural society need not assimilate new cultures, but should allow them to operate based on their own worldviews. I adopt the arguments of Bell, Coulthard, and Fanon in emphasizing that colonial power structures seek the erasure of the culture and identities of the colonized. However, I seek to apply their concerns about the asymmetrical power relations inherent in political frameworks to *law* and *legal* discourse.

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[62] Fanon notes an encounter where a child exclaimed that she was afraid when she saw Fanon, who was a "Negro". Initially amused by the encounter, Fanon went on to objectively examine his reaction:

> I subjected myself to an objective examination, I discovered my blackness, my ethnic characteristics; and I was battered down by tom-toms, cannibalism, intellectual deficiency, fetichism, racial defects, slave-ships, and above all else, above all: "Sho' good eatin'."
>
> On that day, completely dislocated, unable to be abroad with the other, the white man, who unmercifully imprisoned me, I took myself far off from my own presence, far indeed, and made myself an object. What else could it be for me but an amputation, an excision, a hemorrhage that spattered my whole body with black blood?

Fanon, *supra* note 1 at 112.

[63] *Ibid* at 119–20.

[64] As Coulthard notes, this is not to say that Indigenous people are passive recipients of imperial power. They may indeed assert, quite forcefully, their claims. But, the manner through which these claims are driven comes to be defined by the colonized power structures. Coulthard and Fanon's point is that when resistance is carried out in such a way that it does not challenge the underlying institutions and structures that perpetuate colonialism, then the best they can hope for, as Fanon characterizes it, is "white liberty and white justice; that is, values secreted by [their] masters". *Ibid* at 221; Coulthard, *supra* note 58 at 449.

[65] I draw this phrase from the title of Coulthard's article, *ibid.*

Not only does the unequal structural relationship have effects on social ordering and claims for cultural recognition, but it also affects claims for Indigenous law to be recognized within Canadian legal institutions. At the current moment, claims for land-based rights are often funneled through the Aboriginal title regime. As such, in attempting to articulate their own understanding of the nature and source of their legal obligations to the land, Indigenous claimants must distort the organic character of their traditional laws and ways of being in the world so that they are "cognizable" to the common law. Critical recognition theory provides us a space to understand this phenomenon and how the Aboriginal title doctrine illuminates the imbalance that is already heavily coded into the institutional mindset.

As a precursory note, this is but one instance of the very negative impact that Canadian law has on subjugating Indigenous peoples. Patrick Macklem notes how law has been used to further the reach of imperialist thought through the systematic dispossession of Indigenous territory. He notes:

> [L]aw was instrumental in legitimating colonization and imperial expansion in two key respects. The law accepted the legitimacy of assertions of Crown sovereignty, thereby excluding or at least containing Canadian legal expression of Aboriginal sovereignty. And the law accepted the legitimacy of assertions of underlying Crown title, thereby excluding or at least containing Canadian legal expression of Aboriginal territorial interests.[66]

As such, law aids in colonial domination. As can be seen from the doctrine of Aboriginal title, in attempting to reconcile an Aboriginal interest in traditional territory with Crown sovereignty, Indigenous claimants inevitably must present their own worldviews to the court in order to ground how they have historically used and made sense of their relationship to the land. However, the ways in which Indigenous peoples are able to assert and represent their traditional laws and ways of being in the world are obstructed by the colonial parameters of legal discourse.

Because the Crown presumes it has adequately asserted sovereignty over all Canadian lands upon successful European colonization, it posits that its law is the "superior" or "final" law, and as a result, in order to seek recognition of their claims, Indigenous claimants must come to the table in ways that the colonizer's courts can understand.[67] However, the assertion of Crown sovereignty is predicated on a myth. It is a legal fiction erected to maintain colonial domination, ignoring pre-existing Indigenous societies.[68] This conundrum generates a legal framework wherein

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[66] Patrick Macklem, "What's Law Got to Do with It?: The Protection of Aboriginal Title in Canada" (1997) 35:1 Osgoode Hall LJ 125 at 134 [Macklem].

[67] This, Christine Black states, is "that mindless habit of the empires of the past of raising flags and assuming all was good for one and all, even if it took a few massacres to convince the local population." Christine Black, "Maturing Australia Through Australian Narrative Law" (2011) 110:2 South Atlantic Quarterly 347 at 349.

[68] For a brief history of this legal fiction, see Macklem, *supra* note 66 at 133. However, as has been pointed out in the case law, there has been some judicial concession that the assertion of sovereignty was *de facto* and not *de jure* sovereignty. For example, in discussing the *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511 case, Mark Walters observes that the

Indigenous claimants have to assert adequate evidence of occupation to displace the presumption of Crown sovereignty. As Kent McNeil asks, "[w]hy does the known fact of the Aboriginal presence not take precedence over a presumption based on this largely out-dated doctrine?"[69] Effectively, colonial assertions of sovereignty have predetermined the frameworks through which Indigenous claims must be made.

What results is that state law processes become objective truths: claims based on Indigenous law must be adjudged as against the common law. As Kirsten Anker notes:

> [I]n arguments influenced by postcolonial theory, the process of native title claims is said to require Indigenous ways to be judged – as law, as tradition, as truth – by the non-Indigenous system in a way that submits them to universalising European discourses; because translations can never accurately reflect "Indigenous perspectives" then recognition is said to be always and already a failure of justice.[70]

In this sense, the terms of discourse in negotiating Aboriginal title are preset against the Indigenous claimants insofar as it relates to their own organic and community-based understandings of their law.[71] These predetermined conditions are constitutive of what Coulthard and Fanon refer to when they speak of how Indigenous claims are made through nebulous and non-reciprocal institutional frameworks.[72] Any

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Supreme Court of Canada seems to be coming to terms with the fact that Indigenous sovereignty is an unimpeachable aspect of reconciliation. He states that "[t]he manner in which [McLachlin CJ in *Haida Nation*] structures reconciliation is still one-sided, but for the first time, the Court has recognized that it is "Aboriginal sovereignty," not just distinctive [A]boriginal societies or [A]boriginal occupation, that must be reconciled with Crown sovereignty. This recognition is essential for genuine reconciliation." Mark D Walters, "The Morality of Aboriginal Law" (2006) 31 Queen's LJ 470 at 514 [footnote omitted]. However, I argue that it does not necessarily restrain the pervasiveness of the doctrine of Crown sovereignty in subjugating Indigenous normative worlds.

[69] Kent McNeil, "The Onus of Proof of Aboriginal Title" (1999) 37:4 Osgoode Hall LJ 775 at 779.

[70] Kirsten Anker, "The Law of the Other: Exploring the Paradox of Legal Pluralism in Australian Native Title" in Pierre Lagayette, ed, *Dealing with the Other: Australia's Faces and Interfaces* (Paris: Sorbonne University Press, 2008), online: <papers.ssrn.com/sol3/papers.cfm?abstract_id=1606967> at 2 [Anker, "Law of the Other"].

[71] Sally Humphreys argues that there cannot be any definitional boundaries around the concept of "law" as the concept, in different times and in different locations, varies from group to group and from place to place. Sally Humphreys, "Law as Discourse" (1985) 1:2 History and Anthropology 239. The point here is that Indigenous laws are not predicated on any one particular function or definition perhaps in the same way as state-based discourses. As such, the organic meaning is lost in the process of transforming Indigenous legalities into common law "categories." For example, Sakéj Henderson notes that Indigenous laws are not solely rooted in text and can arise and be interpreted in non-traditional ways, including the "entire sensory spectrum". Thus, law can emerge from sight, sound, and touch, which are foreign to the Western legal experience. Henderson, *First Nations Jurisprudence*, *supra* note 33 at 165–66. What is lost in the translation process is the ways in which Indigenous laws are rooted in historical and community practices rather than captured and written in legislation and court decisions.

[72] Glen Coulthard argues that "today it appears…that colonial powers will only recognize the collective rights and identities of Indigenous peoples insofar as this recognition does not throw into question the background legal, political and economic framework of the colonial relationship itself". Coulthard, *supra* note 58 at 451.

translation of Indigenous law to the courts must be done in such a way that it comports with common law conceptions such as "property" and "ownership", which may be antithetical to Indigenous ways of being in the world.[73] However, the power of colonialism is such that Indigenous claimants must make claims within these frameworks that have already dismissed to their detriment pre-existing Indigenous sovereignty and occupation of territory.

Inevitably, in any land-based conflict between Indigenous peoples and the state, there will be a process of translation that requires mutual understanding of differing ways of being in the world. For Indigenous peoples, the pervasive function of the common law has succeeded in this regard, so the question is how Indigenous peoples translate their own legal understandings of the world around them so that they may be understood. Currently, as we see with the Aboriginal title doctrine, "it is an act of translation in a metaphorical sense which instantaneously and incorporeally transforms foreign peoples into heathen souls which must be saved, or into the political subjects of some far off European crown. At this stage, colonization is an act of pure violence that appears first in linguistic form."[74]

When approaching the interaction of Indigenous and Canadian law, the key conundrum is what Anker calls "mirrors" and "boxing". If we understand translation as a mirror, then Indigenous peoples attempt to draw out the organic quality of their law or legal obligation. In the mirroring context, translation provides a process of capturing meaning; the translation is catching "something that is unique to, and reflective of, the way Indigenous people organize their relationships to the land."[75] However, the current moment in Aboriginal title is predicated on a phenomena of boxing. In this way, translations do not emerge from and become constitutive of organic meaning. Rather, Indigenous concepts must be "boxed" into something that

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[73] This is indicative of the pervasive nature of liberalism in Western democratic institutions. Brenda Gunn argues that:

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

Gunn, *supra* note 7 at 47. See also Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 Indigenous LJ 67. Moreover, Kirsten Anker argues that "[r]ecognition through translation then implies more than affixing a common law sticky label on to a fact of Indigenous law: it is a productive moment for both sides. As with literature, it is the reading that makes a text into a unity." Anker, "Law of the Other," *supra* note 70 at 13. In this way, Anker views the interaction and translation of Indigenous concepts as discursive opportunities where new legal meanings arise in the context of an intercultural conversation.

[74] Paul Patton, "The Translation of Indigenous Land into Property: The Mere Analogy of English Jurisprudence..." (2000) 6:1 Parallax 25 at 25.

[75] Anker, *Declarations of Interdependence, supra* note 40 at 106.

resembles the common law.[76] It requires that there be something that resembles a "one-to-one" mapping so that the common law may make "sense" of it.

This "violence of equivalency" is an attempt to equate two ways of being in the world that are fundamentally different from each other.[77] To avoid this process we must accept that in Aboriginal title litigation, Indigenous representations of law are not stand-ins for common law terms. Rather, they are an expression of their organic quality, rooted in the traditions of Indigenous peoples and how they perceive and interact with the world around them. However, recognition frameworks, as currently constituted, are premised on settler control and conceptual domination. It is questionable, then, how meaningful recognition can be achieved without displacing settler dominance. Crown assertions to sovereignty make claims for the recognition of Indigenous law particularly spurious. John Borrows notes this inherent tension in Aboriginal title jurisprudence: Indigenous claimants are being asked to reconcile their laws and customs with Crown assertions of sovereignty to which they did not agree. As Borrows notes, "[a]s current jurisprudence stands, Aboriginal peoples are being asked to harmonize their perspectives with the notion that they are conquered."[78]

This assertion underlies the tension in recognizing Indigenous law in Aboriginal title litigation: the current framework cannot recognize Indigenous laws as a source of legal authority in the same manner as state law, as it goes to the heart of the sovereignty and domination which the courts are trying to uphold. Colonization has foreordained the terms of political and legal discourse to the detriment of Indigenous peoples as it requires Indigenous law to comport with common law conceptualizations.[79] This favours what Henderson calls the "hardened prejudices against First Nations jurisprudence."[80]

It is necessary, then, to re-conceptualize the relationship of Indigenous and Canadian law in an attempt to escape the "cognitive imprisonment" that delegitimizes and erases Indigenous legalities.[81] What I have attempted to demonstrate here is the inability of Indigenous discourses to emerge organically within the context of Aboriginal title. Rather than allowing Indigenous claimants to

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[76] *Ibid* at 109.

[77] *Ibid* at 124.

[78] John Borrows, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall LJ 537 at 566.

[79] This is also a result of the process of "cultural imperialism," a concept coined by noted political theorist Iris Marion Young. Young argues that the dominant culture's experiences and knowledges are universalized; their culture becomes normalized to the detriment of non-dominant cultures. As she states, "[o]ften without noticing they do so, the dominant groups project their own experience as representative of humanity as such." Iris Marion Young, *Justice and the Politics of Difference* (Lawrenceville: Princeton University Press, 1990) at 58–9.

[80] Henderson, *First Nations Jurisprudence, supra* note 33 at 120.

[81] James [Sákéj] Youngblood Henderson, "Postcolonial Indigenous Legal Consciousness" (2002) 1 Indigenous LJ 1 at 14.

display how they understand their own relationships to the land and the world around them – such as, for example, the concept of *netukulimk* for the Mi'kmaq of Atlantic Canada[82] – colonial law forces Indigenous claimants into the boxing of their traditional understandings that are then transformed away from their original and organic meaning.

Consequently, moving beyond colonial tropes – for example, the assertion of Crown sovereignty in Aboriginal title claims – is required to fully recognize Indigenous law and escape the ideological chains that wed Canadian state apparatuses to imperialist thought. As Bell suggests, this requires a decentering of the settler paradigm and a destabilization of the power structures that have propagated and sustained latent or explicit colonialism.[83] These frameworks delegitimize Indigenous law and legal life. Moreover, the frameworks restrain the legal agency of Indigenous peoples to cultivate, express, and live their legal traditions.[84] Given the reality of the "cognitive imprisonment" heralded by Aboriginal title doctrine, new paths must be foraged that require the decentering of settler-based forms of life.

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[82] As Jane McMillan states:

> Within the concept of netukulimk were practices aimed at co-existence. These practices reflect the holistic interconnectedness of Mi'kmaq life ways embedded in their tribal consciousness, and governing their behavior, particularly in relation to establishing means for survival, such as sharing, providing, and honouring skills…netukulimk denotes the proper customary practice of seeking bounty provided by the Creator for the self-support and well-being of the individual, and the nation, and thus is intimately tied to traditional jural rights both individually and communally.

Leslie Jane McMillan, *Koqqwaja'ltimk: Mi'kmaq Legal Consciousness* (PhD Dissertation, University of British Columbia Faculty of Anthropology, 2002) [unpublished] at 29–30. As is clear from this brief synopsis of a complex Indigenous worldview, it does not easily fit into positivistic boxes that flow from declarations, rules, and regulations *qua* state law. Thus, Indigenous claimants, if asserting this principle for example, would find that the transformations that would ensue would transform the traditional and cultural knowledge implicit in this worldview.

[83] Bell, *supra* note 49 at 865.

[84] In speaking of the importance of Indigenous agency, Tracey Lindberg, speaking as an Indigenous person, argues:

> It is therefore important that we endeavour not just to respond to colonial action, inaction and thought. We must be sure that we are actors. The task then requires us to participate in a meaningful exercise which shifts the dialogue and paradigm to one predicated on the mutuality of obligation and continuing relationship of colonizers and Indigenous peoples. In this way we will see a shift in which colonizers have to respond to our nations, our actions and inactions…Resistance and renewal will allow us to not only re-frame our continuing relationship with colonizers; it will facilitate meaningfully addressing and resisting sub-oppression, lateral violence and acts of omission.

Tracey Lindberg, *Critical Indigenous Legal Theory* (LLD Dissertation, University of Ottawa Faculty of Law, 2007) [unpublished] at 12 [Lindberg].

IV. STATE IDEOLOGY: THE "LEGAL-REPUBLICAN CONSENSUS" OF LAW IN CANADA

The first path in this paper examined the "cognitive imprisonment" of Indigenous legalities given the pervasive nature of the colonial misrecognition of Indigenous law. Oppressive patterns of "recognition" require Indigenous law to be funneled through common law understandings for recognition, which erase its organic quality. Aboriginal title doctrine illuminates this as it forces title claims to be made through frameworks that have already accepted colonial assertions of sovereignty. In unpacking this condition even further, the second path in this paper explores briefly the ideological commitments of the Canadian state as a further means to illustrate the ideological and conceptual hurdles to the full recognition and treatment of Indigenous law as law within Canadian legal and political institutions.

In this section, I look explicitly to broader institutional ideological frameworks.[85] In so doing, I theorize about how law is built and sustained at the very root level. In exposing the state's flawed and oppressive ideological commitments, I build on the notion of decentering colonial domination. I connect the need to decenter hegemonic discourse back to law and legal discourse as I expose a normative commitment on the part of legal institutions in Canada in defining what law *is* and what law *is not*. I aim to show how this ideological function hinders full recognition of Indigenous law and sustains colonial assertions of dominance over law and legal meaning.

A. The Amorphous Claim of Legal Centralism

From an ideological basis, official legal institutions are seen to hold a monopoly over creating law and ascribing legal meaning. Law which emanates from the state is law *par excellence*. In exploring the Canadian state's ideological commitments, I adopt Roderick Macdonald's "legal-republican consensus."[86] As state entities, Canadian legal institutions presume dominance; they presume a monolithic and one-dimensional conception of law as being only that which flows from official state institutions – notably, courts and legislatures.[87] Law is what the state says it is. Any attempts outside of this paradigm to ground legal status are seen as flawed; they

[85] In using the word ideology, I use it in the sense that it is an operationalization of how social order is created and sustained. In tightening up my use of this term, I draw upon the work of Richard Devlin in this regard when he remarks that: "[i]deologies are not the tinted glasses through which we see the world, but rather they are the ways in which the world operates. By descending into the arena of social relations they become active determinants of social interaction. They are both creations and creators of social exchange." Richard F Devlin, "Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence" (1989) 27 Osgoode Hall LJ 219 at 232. Moreover, Devlin uses the term "dominant ideology" when he states: "[a]s a lived relation, ideology directly intervenes in the reproduction of the relations of production. The dominant ideology fulfills a practical social function in that it cements and unifies a whole social block within each political-historical conjuncture." (*Ibid* at 233.)

[86] Macdonald, "Social Diversity," *supra* note 11 at 87–8.

[87] In his seminal essay on legal pluralism, this is what John Griffiths refers to as "legal centralism". Griffiths, *supra* note 8 at 3–4.

cannot be law, but only patterns of normative behaviour. Given this reality, groups or actors seeking recognition of their law *as law recognized by the state* must flow their claims through these "official" legal institutions.[88]

Macdonald posits that mainstream legal ideology – including, largely, the ideological backdrop of the Canadian legal system – hinges on three enduring assumptions. First, any conceptualization of law is a normative product of the state. Any attempt to define what "law" is must be done by official legal institutions. This is indicative of positivism. Second, in any given geographic territory or state, there can only be one legal order. In Canada, this can be seen from the constitution which recognizes one single constitutional legal order, whether it be federal or provincial, but ultimately holds all legal authority.[89] This points to the third presumption: law is the product of official institutions. Courts, legislatures, and other official institutions make law.[90] These are the tenants of a "republican" consensus about law.[91]

Macdonald's assessment of legal centralism – or what he calls "legal republicanism" – aligns with a wide range of positivist legal scholarship dating back to the early 20th century with authors such as HLA Hart and John Austin.[92] It presumes one exclusive legal order. The source and authority for law begins and ends with the state.[93] In this vein, Canadian legal ideology requires that law is

[88] John Griffiths adopts a typography of legal pluralism, militating from "weak" to "strong". Weak pluralism, he posits, is an attempt to displace the hegemonic power of the state, but plural law exists only insofar as the state recognizes it as such. So, even if we are to ascribe a weak pluralist position to the Canadian legal tradition, Griffiths would argue that in this tradition, recognition of alternative systems of law must flow through the state. *Ibid* at 5.

[89] While Canada is a federal state that divides power between the federal state and the provinces, the state is inevitably the source of their power and control. The "legal order" I refer to here is that which emanates from the state, whether the federal state or the province.

[90] Whether judges or legislatures "find" or "make" law has been subject to intense jurisprudential analysis. The crux of Macdonald's theory is simply that official institutions are the keepers of law; it is only through these institutions that law can be "found" or "made", whichever it is.

[91] See Macdonald, "Social Diversity," *supra* note 11 at 87–8. Macdonald doesn't presume that this state of affairs has come about by chance. He notes a political and social climate permeating from the 18th and 19th centuries that allowed this form of legal-republicanism to burgeon. Moreover, there are those who argue that this form of law is linked back to the principle of territoriality, which has allowed monism to ferment and structure our legal frameworks. In this way, according to Ghislain Otis, "territoriality is characterized by its function of grounding exclusive and plenary sovereignty in a formally delineated physical space." Given this, legal centralism is linked to the spatial limits of sovereignty. See Ghislain Otis, "Custom and Indigenous Self Determination: Reflections on 'Post-Territoriality'" in Eisenberg et al, *supra* note 38, 251 at 253. For more discussions of Macdonald's propositions on law, see Roderick Macdonald, "Unitary Law Re-form, Pluralistic Law Re-Substance: Illuminating Legal Change" (2007) 67:4 Louisiana LR 1113.

[92] See e.g. HLA Hart, *The Concept of Law* (London: Oxford University Press, 1961). While a complete undertaking of the legal positivist tradition is outside the scope of this paper, and, indeed, unnecessary for my purposes, it is worth noting in broad strokes. Generally, positivists postulate that law is a social fact; it is something objectively identifiable. Largely, it is an intellectual tradition that ascends from the rise of the modern state, and international law notions of sovereignty. Law is only contingently connected to morality; its quality and existence does not depend on moral claims.

[93] John Austin, *Lectures on Jurisprudence and the Philosophy of Positive Law* (St Clair Shores, MI: Scholarly Press, 1977).

distinct from other forms of social behaviour because it is recognized as such by the state or its official institutions not because of its inherent normativity. This reflects a normative position inherent in this theory of law as well: law is hegemonic. Other conceptions of law cannot be "law" unless the state recognizes them as such. It is through this normative theory of law that recognition claims must be funneled. Thus, to have Indigenous law recognized by Canadian courts, such a claim must be funneled through the state or its institutions for official recognition. This raises the question: is it possible to gain recognition of Indigenous law *qua* law through this paradigm?

B. Aboriginal Title and the Legal Republican Approach

As Emmanuel Melissaris notes:

> According to the positivistic understanding of the law, legal systems are hermetically closed and not able to make sense of any other normative order as such *unless it is reduced to their own source of validity*. Therefore, communication between legal orders is impossible unless they are merged into one. In other words, when such communication looks possible, it is really a case of disagreement *about the law from within it* rather than a conflict of different legal orders. They share their ultimate source of validity both in content and form, be that a practice, a *Grundnorm* or a sovereign.[94]

Melissaris notes the tension involved in positivist ideology. Rather than acknowledge the existence of more than one legal order – or an alternate legal order that does not emanate from the state – positivism subsumes legal definition. That is, it does not allow space for a plurality of legal orders, but forces all claims to law to those which are formally recognized by the state. In this way, the state is the arbiter of validity.

The insights offered by Melissaris hint at a further conundrum: if it *can* be recognized by the state, does non-state law remain on its own terms, or is it then molded, sculpted, and ultimately altered through official state processes? If so, this speaks to a more normative concern with recognition as it does not seek to import difference or plurality but seeks to import sameness. It seeks to import one fixed definition of law through which all other claims must be judged. I argue that Canadian legal ideology seeks to recognize non-state law – if it chooses to recognize it at all – in a way that the state can understand, and in a way that it can process it through its institutions. This is a form of "weak" legal pluralism, as John Griffiths points out: it is not a plurality *of* law, but a plurality *in* law.[95] And, given Canada's

[94] Emmanuel Melissaris, "The More the Merrier? A New Take on Legal Pluralism" (2004) 13:1 Soc & Leg Stud 57 at 69 [emphasis in original].

[95] Griffiths, *supra* note 8 at 5.

colonial history, adherence to the idea that there is a single legal order is a false consciousness.[96]

As has been previously stated, Aboriginal title acknowledges the fact that Indigenous peoples were occupying lands in their traditional ways before settlers arrived in Canada. It seeks to translate this reality into something legally cognizable when Indigenous peoples claim ownership of or rights to land. The Supreme Court of Canada has stipulated a strict test to prove title, but its treatment of Indigenous law within the title framework is tenuous. The framework fails to allow for the direct importation of Indigenous law, similar to a court taking notice of the law of a foreign jurisdiction. Rather, Indigenous law is part of the "Aboriginal perspective" which must be balanced against common law elucidations of property. Indigenous claimants must show a pattern of ownership in a way that conflates their historical actions with common law declarations of "ownership". At no point does the court directly ask how the particular Indigenous group envisages their relationship to land based on traditional laws and customs. In discussing an earlier Aboriginal title case, *Marshall/Bernard*, Kent McNeil argues that: "[w]hile [McLachlin CJ] stressed the importance of Aboriginal perspectives in evaluating Aboriginal practices, the Chief Justice did not explicitly consider Aboriginal law in her analysis."[97]

While the Supreme Court of Canada has stated that Indigenous laws serve some relevance in determining whether title exists, they are by no means determinative. As the Court stated in *Delgamuukw*:

> [T]he [A]boriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of [A]boriginal peoples. ... As a result, if, at the time of sovereignty, an [A]boriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for [A]boriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.[98]

This creates a framework in which Indigenous law is a "perspective". This framework does not invite a contest of competing jurisdictions between Canadian law and Indigenous law as to perspective and worldviews on the parties' respective relationships to the land. Rather, Indigenous claimants must direct their traditional

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[96] I do not mean that federalism is a false consciousness. I am referring to the state's ability to "recognize" non-state law *within* its own legal discourse. As such, the state legal order cannot recognize other forms of law *as law*, but as something which fits into the dominant framework as it still presumes the state's hegemony over law and legal discourse.

[97] Kent McNeil, "Aboriginal Title and the Supreme Court: What's Happening?" (2006) 69 Sask L Rev 281 at 298.

[98] *Delgamuukw*, *supra* note 16 at para 148 [emphasis added]. This approach was subsequently diminished in *Marshall/Bernard*, *supra* note 28. It is also interesting to note how the Supreme Court uses examples of common law based property regimes, such as land tenure, to attempt to illustrate what sorts of "traditional laws" would be evidence of occupation.

understandings of their relationship to the land, and how they exercised use over that property, into something cognizable to the court in order to satisfy a common law definition of ownership.[99]

While a holistic review of Indigenous laws relating Indigenous people to the land is largely outside of the scope of this paper, it is useful to bring in an example to demonstrate my point. Senwung Luk uses the example of a hypothetical Indigenous group attempting to ground a title claim where part of the territory over which they claim title is a burial ground.[100] Traditional Indigenous law has a strict prohibition against disturbing a burial ground, so members avoid and ignore the site.[101] He asks how the common law doctrine of Aboriginal title would treat this law in a title claim to such a territory. Luk suggests that there is some support in the jurisprudence that Anishinaabe claimants can argue that their communication to third parties that they cannot enter the burial ground may be sufficient in the common law to ground a title claim.[102] Luk's example demonstrates my point: if this dispute found its way to court, a claimant could not simply assert Anishinaabe law whereby they must ignore and not disturb that tract of land and expect that it will be enough to ground a claim to title. Rather, Anishinaabe law must be distorted into something the common law understands: communication to third parties. In other terms, claimants must prove possession in a way that comports with the common law.

The above example might not, on its face, seem problematic. Given the potential to show that the Anishinaabe law is in fact a communication to third parties that they are not to enter upon the land, the title claim could be proven.[103] What is problematic is the fact that the Anishinaabe law cannot be asserted *in its own right* with due recognition given to the core Indigenous legal meaning. As stated, it is one piece of the Aboriginal perspective, evidence to be weighed in a common law puzzle. This is problematic on a number of fronts, but, most importantly, it is indicative of a largely legal centralist ideology grounded on the presumption of Crown sovereignty.

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[99] Indeed, I may be oversimplifying the terms of Indigenous understandings of property ownership. However, my goal is only to speak in broad terms about how Indigenous legal meanings may be imported. In order to make this claim, I draw back to the Mi'kmaq conception of *Netukulimk*, which provide significant legal obligations to the Mi'kmaq but cannot be easily reconciled with private land use. Thus, a Court may largely dismiss this principle because of its foreignness to Canadian and Western understandings of law.

[100] Sengwung Luk, "The Law of the Land: New Jurisprudence on Aboriginal Title" (2014) 67 SCLR 289 at 307 [Luk].

[101] Luk suggests that this is the case in Anishinaabe law: "It is the obligation of the Living to ensure that their relatives are buried in the proper manner and in the proper place and to protect them from disturbance or desecration. Failure to perform this duty harms not only the Dead but also the Living." See *ibid* at 307, n83, quoting Darlene Johnston, "Respecting and Protecting the Sacred", paper prepared for the Ipperwash Inquiry (Toronto: Ministry of the Attorney General, 2006) at 6.

[102] Luk, *supra* note 100 at 308.

[103] This is a reference to the requirement in title claims to proof of exclusive possession.

Consequently, Indigenous law is seen as an evidentiary burden, to be imported through evidentiary rules and procedures, to be gathered and collected, and to be proven by claimants. This is not the recognition of law *as law*. As such, Indigenous law is devalued and relegated to the margins of legal discourse. The current Aboriginal title doctrine insists that claimants surmount significant evidentiary hurdles to achieve recognition of their pre-existing occupation and relationships to the land before the very institutions that perpetuate their subjugation. Indigenous laws and legal meaning are not taken on their own terms, nor are Indigenous legal institutions seen as equal partners in a jurisdictional dispute. Rather, it is merely one piece of evidence to be adduced that may or may not be recognized by a court. It is, after all, only the "Aboriginal perspective."

V. COMPETING VISIONS, DIVERGENT PATHS

This paper attempts to move forward the conversation on the reconciliation of Indigenous law and Canadian law. It also seeks to bring legal pluralism to the forefront to ask if presently-situated legal institutions and discourse can institute plurality. It does not prescribe how to implement pluralism; rather, it is a self-conscious critique of the limitations of the current conjecture in instituting pluralism. As such, the only claim made is that the recognition of Indigenous law in the current Canadian moment is unworkable because of Canada's dominant political (the Western liberal paradigm) and legal frameworks (the legal-republican ideology). When lawyers or scholars talk of "incorporating" or "recognizing" Indigenous legal principles within the common law, the reality is that Canada's colonial past and its adherence to a hegemonic and monolithic conception of law are co-constitutive of a process whereby the recognition of Indigenous law will always demand conformity with dominant political and legal discourses.

Consequently, contemporary legal ideology legitimatizes the continued degradation of Indigenous peoples, culture, and legal traditions. Perhaps not blatantly, but in any case implicitly, Canadian legal ideology rejects the idea that Indigenous law is law; it rejects the notion that Canada has a plurality of legal regimes and meaning. Accepting such an idea would disrupt settler dominance. Indigenous law is given aberrational status, seen only as part of an evidentiary puzzle. Claimants are forced into a cyclical process whereby they must twist, mold, and reconfigure their Indigenous legal knowledge into patterns that can be recognized by the very institutions that maintain their subjugation.[104]

Aboriginal title doctrine provides an apt example of the singularity of Canadian legal ideology. In asserting a claim to title, based on historical occupation that predates the imperial arrival of European settlers, Indigenous claimants are forced to produce reams of evidence in order to frame their historical relationship to

[104] As Tracey Lindberg notes, "[p]art of the paradigmatic shift that we [as Indigenous peoples] must address involves contemporary Indigenous emancipation with an understanding of not just the context and impact of Canadian law, but also its prejudices and role in the ongoing attempted colonization of Indigenous peoples." Lindberg, *supra* note 84 at 17.

their land within three categories that are defined by common law property. The result is a systematic attempt to devalue Indigenous law, which perpetuates the colonial status quo. Aboriginal title doctrine is also illustrative of the necessity for complex litigation in asserting a "right" to what has been historically settled patterns of ownership. Indigenous litigants face significant hurdles in the assertion of such claims, including complex legal arguments and copious amounts of capital, political and economic.[105] It is a difficult, tenuous, and expensive process that is symptomatic of a wider problem, but illustrative of the point I am making here.

If current legal and doctrinal ideology maintains its commitment to reconstructing patterns of colonial oppression, then it necessitates a fresh vision. In bringing together the voices of various scholars, I have attempted to prove one key point: the status quo is doing more harm to a group of people who have already been subjugated in explicit and violent forms. By denying Indigenous law its very status as such and relegating Indigenous law and legal traditions to pieces of evidence to be proven in a piece of litigation, Canadian legal institutions are working against proper recognition. While there may be a plethora of possible visions of how to rectify this situation, and offering a full framework is outside of the scope of this paper, I would like to note some broad strokes to possibly spur dialogue on the prospect of plurality – a plurality of legal sources, meanings, and discourses.

In her critique of the legal-republican consensus, Kirsten Anker calls for a reframing of how legal institutions conceptualize law to allow for plural legal meanings to flourish.[106] She is critical of both the law's epistemological and ontological foundations, and argues that Indigenous and state law are interrelated, intertwined, and interdependent. To resolve this issue in a way that is sensitive to the unequal power relations inherent in the Canadian system, legal institutions need to perform a *volte-face*, reconceptualising how law is viewed and defined. Ultimately, she argues for a conceptualization of law that is discursive, and allows for dialogue across contexts. In advocating for legal pluralism, then, she is advocating for a transformative approach to the fundamental theoretical underpinnings of law's orthodoxy.

Moreover, if courts were to recognize Indigenous law on its own terms and allow for the importation of a pluralist regime, then the battle for Aboriginal title would be seen as a jurisdictional dispute between two competing levels of government.[107] As such, Indigenous law would be seen as worthy of competing in the public sphere for jurisdiction over certain matters. In saying this, I do not mean

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[105] See e.g. Michael Asch & Catherine Bell, "Definition and Interpretation of Fact in Canadian Aboriginal Title Litigation: An Analysis of Delgamuukw" (1993) 19 Queen's LJ 503.

[106] Anker, *Declarations of Interdependence*, *supra* note 40.

[107] I adopt this argument from my reading of Hester Lessard's view of jurisdictional justice in the Insite case. See Hester Lessard, "Jurisdictional Justice, Democracy and the Story of Insite" (2011) 19:2 Const Forum Const 93 [Lessard]. I argue recognition of Indigenous law would provide for an additional jurisdictional sphere in the Canadian federal regime. If this were the case, competitions over such things as title would be seen as a competition between two equal jurisdictional compartments.

neat and clean "watertight compartments", but messy and conflicting equals battling for jurisdiction over land – a "critical oppositional politics."[108]

While a full discussion of what a "critical oppositional politics" may look like is outside the scope of this paper, the point is that a vision of pluralism that satisfactorily dispenses with hegemonic power discourses *must* view Indigenous law as an equal in form, substance, and jurisdiction with Canadian law. As noted above, Anker stresses that both systems of law are intertwined and interdependent. Indigenous law cannot be *prima facie* dismissed, or forced to fit the Eurocentric mold of the common law. Viewing both as equals, then, supports the thesis of this paper in moving pluralism forward.

Allan Cairns argues that Canadian society needs a "pluralistic solidarity" between Indigenous and non-Indigenous peoples. In this vision, Cairns claims that we need arrangements that "give us our own space and simultaneously bind us to each other. Both our separateness and our togetherness need to be institutionally supported if the overall Canadian community is to survive."[109] His point is that the process of recreating the relationship between Indigenous and non-indigenous societies must respect Indigenous peoples as part of broader Canadian society without wiping out Indigenous difference in search of homogeneity. Consequently, the Canadian state needs to transcend its centralist and monist roots to deconstruct its repressive fixation on the state as the source of legal meaning. How it encounters law and what it perceives as important in law requires a foundational shift. Only then can Indigenous law be valued for its discursive and dialogical content, rather than obliquely subsumed by the Canadian state.

The clear take-away from this paper is that the institution of a legal pluralist framework that ascribes value to and recognizes the agency of Indigenous legalities requires a deconstructive approach to Canadian political-legal institutions and the ideologies that underlie them. As such, I offer a challenge to both the nature of law itself, as well as how we *do* law. This would inevitably involve displacing colonial assertions of sovereignty – a difficult, perhaps impossible, task given the threat it imposes to the Canadian state's hegemony. In drawing on critical scholars in this paper, I note that there is a diversity of remedies for this situation: Fanon advocates violence, Bell advocates decentering and recentering as methodological approaches to recognizing difference, and Coulthard argues for self-affirmation for Indigenous groups, which turns inferiority into self-empowerment. Whatever the approach, the

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[108] Lessard argues for democracy in a vision of jurisdictional justice, and adopts the views of scholars such as Iris Marion Young and Wendy Brown who argue for a messy conception of democracy. They argue that our representative institutions perpetuate structural inequality. Lessard argues that Young insists that "we [must] create space for a critical oppositional politics because of its disruption of hegemonic discourses that, under conditions of structural inequality, render the conditions of that inequality as natural or inevitable features of life. Such discursive constraints on social and political change operate in a subtler way, placing limits on the possible at a normative and conceptual level." *Ibid* at 106. I do not mean jurisdiction in the orthodox sense, but battles that allow for the breaking down of hegemonic presumptions of sovereignty and domination over legal discourse and meaning.

[109] Allan C Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000) at 212.

pluralist project requires a reconceptualization of the very foundations of Canadian law and legal institutions. I have sought in this paper to move this conversation forward. Transcending the "Aboriginal perspective" is a worthy cause. Maintaining the current legal centralist narrative is perpetuating the violence of imperial rule, and it may move Canadian-Indigenous relations further away from the goal of reconciliation, rather than toward it.