CALDER V. ATTORNEY GENERAL OF BRITISH COLUMBIA; ABORIGINAL CASE LAW IN AN ETHNOBIASED COURT

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Abstract / Résumé

In 1973 the Supreme Court of Canada rendered its judgment over *Calder v. Attorney General of British Columbia*, a case that ultimately was not decided in favor of the Nisga'a. This paper will examine the Calder case through anthropological concepts of cultural bias and cultural relativity, in an effort to explore how culture plays a role in judicial decision making.

En 1973, la Cour suprême du Canada a rendu un jugement dans la cause Calder c. Procureur général de la Colombie-Britannique qui n'a finalement pas été décidée en faveur des Nisga'a. Le présent article examine la cause Calder en ayant recours aux concepts anthropologiques de préjugé culturel et de relativité culturelle dans un effort d'exploration du rôle de la culture dans la prise de décision judiciaire.

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A Perspective on Case and Ethnobias

In 1973 the Supreme Court of Canada rendered its judgment over *Calder v. Attorney General of British Columbia*.[1] Although the Nisga'a narrowly lost their request for a judicial declaration that Aboriginal or Indian title to certain lands had never been lawfully extinguished, the judgment, nonetheless, was viewed as a landmark decision for Aboriginal rights. I was perhaps one of the first to write on the *Calder* case when in 1991, I devoted a chapter of my doctoral dissertation to an analysis of the *Calder* and *Paulette* cases. That chapter, "Canadian Legal Attitudes on Aboriginal Rights," was written to examine, at least in one particular example of the *Calder* case, how culture influenced an outcome in Canadian law regarding Aboriginal rights.[2]

In 1996, I submitted a more extensive version of the section of my dissertation that analyzed the *Calder* case to a Canadian journal for publication. Because the article involved analyses and interpretation of legal cases, individuals in the legal profession were selected to review the article. Rather than assess the logic and merit of the article, some reviewers seemed more concerned with matters of technical and structural substance. In the end, choosing to believe that members of the legal profession objectively stood above the influence of culture, and remaining fixed upon the idea that the *Calder* case had brought about change for First Nations Peoples, it was recommended that the article not be published. When informed of this decision by the journal's editor I explained how the nature of the reviewers' responses actually supported my article's position that Anglo-European law is bound by Anglo-European culture and that problems regarding the Aboriginal rights of First Nations peoples will continue to exist as long as members of a dominant "Eurocentric" culture sit in judgment over members of Indigenous cultures they don't understand. In other words, for the Court to objectively judge or assess the Aboriginal rights of Indigenous peoples in Canada it must embrace standards of *cultural relativity*. What this means is for true objectivity, the Court must be able to understand the issues relative to the values, and codes of ethic, that derive from the cultural standards of First Nations peoples rather than those of a settler society that immigrated to Canada from Europe. It is generally the case that most would see judging First Nations people outside of the values of a dominant Canadian culture as problematic. What they fail to see, however, is that because all human behavior occurs in context to its own particular culture, when judgments are rendered by Canadian courts regarding First Nations peoples those judgments are based on the ideals of its own culture and, because this usually translates to an idea of their own culture's superiority over that of First Nations people, this is

reason why judgments can rarely be objective in the absence of cultural relativity.

After some minor revisions the article was sent out for a second review. Unfortunately the second response was possibly worse than the first. What caught the attention of the editor, however, was that some reviewers focused more on personal attacks rather than commenting on the merits of the article itself. It was obvious to the editor that the article seemed to have struck some cultural nerve and was rubbing it the wrong way. In assessing this response, I agreed to write an article that presented a historical analysis of the Marshall cases as a precursor to the *Calder* article. That article, titled "In the Absence of Justice, Aboriginal Case Law and the Ethnocentrism of the Courts" was published in the *Canadian Journal of Native Studies*, XVII, 1 (1997): 1-31. Since the writing of that article, a turn of political events in British Columbia lends greater support to the position I presented in 1996 on the *Calder* case. This is represented by the Supreme Court, in *Van der Peet,* positioning Aboriginal rights as *sui generis* constitutional rights and outside the European concept of legal right from the liberal enlightenment (paras. 17-20).

In 2003, I was asked to submit an article in a book to honor Michael Asch and decided to submit the Calder article. As fate would have it, it was reviewed again by one of the reviewers from 1996, who again got personal. Now very puzzled by this, I immediately sent the article out to Professor John Borrows, faculty of Law at the University of Victoria, and Professor Sakej Henderson, Native Law Centre at the University of Saskatchewan, both recognized nationally as top legal scholars, with a request to assess the accuracy and merit of the article, along with the reviewer's criticisms, and advise me on how to best address the issues raised. Responses from John and Sakej were that the article was sound and needed only minor revisions. To this end I would like to personally thank both John Borrows for his supportive comments, and Sakej Henderson for his careful reading of the article, edits and revisions.

The primary focus, and indeed significant portions, of this paper is to present insight and discussion on how culture can influence decisions and policy emanating from the courts. Another focus is to show how an element of cultural ethnocentrism in Canadian law, coupled with a misapplication and possibly an inadequate understanding of the Marshall cases, culminated in the Canadian Supreme Court making an ethnobiased decision in the *Calder* case. My use of the term ethnobias is intended to represent a decision based upon the ethnopolitical values and standards of a dominant ruling power that overshadows the cultural values and standards of the First Nations people of whom the Court

sat in judgment. This can also be viewed from a perspective of the Court lacking a sense of cultural relativism to render decisions that can truly be viewed as objective when dealing with those peoples of cultures indigenous to Canada. This was ever so apparent during the 2002 Referendum to determine whether the citizens of British Columbia wanted a voice in negotiating treaties with First Nations peoples. In an effort to prevent the mailing out of the ballots, First Nations peoples brought their concerns to court. One of the concerns voiced was that the ballot would cause irreparable harm for First Nations peoples. I was in court when the Judge gave his decision. The Judge ruled that because there was no way one could determine the mailing out of ballots would cause irreparable harm to First Nations people, the ballots would be mailed out. In effect he was saying we are not able to determine that irreparable harm will occur until we see the harm done. Unfortunately by that time it would be too late.

The concern over the issue of Aboriginal rights and the law reached such a level among some scholars that in 1997 Michael Asch edited a volume titled *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, in which he noted that while some of the influences of *Calder* were still in play, it had also become clear that the law had

> pulled back from the challenge to forge new ways of understanding relations between Aboriginal peoples and Canada as first articulated in *Calder* and…instead, courts and legislatures have returned to a reliance on models of understanding that find their firm footing in the legacy of the British colonial legal system.[3]

In a subsequent article Michael further noted, "where Aboriginal rights are concerned, the principles of cultural relativism must play an influential role in shaping the exercise power."[4]

The Blindness of Eurocentric Perspectives

The propensity for perceiving one's own culture as superior was perhaps most prevalently displayed among the Christian cultures of Europe. Thus, in the affairs of eighteenth century world politics, all the kingdoms of the world were of little consequence, for "the powers of the earth—the arbiters, the policy makers, the grantors of status—were [all] located in Europe."[5] Perhaps because theories of sovereignty were written by European scholars, European leaders and policy makers of influence became so blinded by their own ethnocentrism that they failed to realize concepts of sovereignty could be found among many non-European cultures.

Today the question of Aboriginal land title continues to be a theoretical issue of political and legal consequence that threatens to remain unresolved, irrespective of the fact that the Courts have had more than a century and a half to bring forth a solution. The opinion that Aboriginal land title is merely a right of occupancy reflects an ethnobias that stands in direct contradiction with the fact that many of the treaties negotiated with Indigenous nations were made as a result and affirmation of the military strength and political status of Indigenous confederacies that interacted with Anglo-European foreign powers.

European political actions and decisions, with regard to the rights of Indigenous peoples, have historically functioned on ethnocentric principles. More specifically, European political assertions have functioned on an overbearing belief that the Christian cultures of Europe were superior to the Indigenous cultures of North America. Driven by a desire to obtain new lands and wealth, Europeans grabbed at whatever logic they could in order to justify their actions. Albert Weinburg observed that the American Declaration of Independence was followed by a war not just for independence, but also for its own extension of power. As a result, "America's affirmation of equality and the foundation of government on consent was mocked in less than three decades by the extension of its rule over an alien people without their consent…. [Thus], the very peoples who had drunk most deeply of the new humanitarian nationalism succumbed most readily to the expansionist intoxication which led into the age of imperialism."[6]

Aboriginal Case Law in Eurocentric Courts

Some of the earliest cases that attempted to address Aboriginal rights issues in North America occurred between 1810 and 1832. It was during this time period that a United States Supreme Court endeavored to establish legal precedent on certain issues concerning Aboriginal land title through decisions frequently referred to as the Marshall Cases. Since the period of these cases, the Marshall rulings have been cited as representing a definitive statement that has empowered governments with the legal justification and ability to alienate land and sovereign rights from Indigenous peoples.

When issues regarding Canadian Indigenous sovereign rights and American Indigenous sovereign rights are compared one significant difference should be noted. Political traditions regarding sovereign rights of Indigenous peoples in the United States, as one example, evolved through several United States Supreme Court cases which ultimately brought the Court to reject the principle of discovery.[7] In Canada, on the other hand, issues regarding Native sovereignty, as made evident by the

Indian Act, has to some degree remained grounded in a doctrine of discovery as a rationale used to justify dominion over the peoples indigenous to Canada. This doctrine, founded upon deeply rooted Eurocentric beliefs in the supremacy and right of Christian-bearing cultures to subjugate and claim dominion over non-Christian cultures, still continues to maintain its hold over political leadership, legal theory, and quite possibly the minds of jurists to present day. While Canadian courts have referred to discovery, they have made efforts to shift away from this international principle. This statement finds support by noting how British Columbia's Court of Appeals in part justified the dismissal of the Delgamuukw case on the basis of claims that the Delgamuukw at the time of contact had not been high enough on the scale of civilization to be extended any political rights. Fortunately this was rejected in the Supreme Court's decision, when the Court stated that Aboriginal title arises out of prior occupation of land or pre-existing systems of Aboriginal law by Aboriginal peoples and out of the relationship between the common law. When the British sovereign asserted sovereignty over Aboriginal lands, the sui generis Aboriginal title and rights crystallized as legal rights that became a burden on the Crown's underlying title and actions (paras. 144-45).

Calder V. *Attorney General of British Columbia*; Case Background

The *Calder* case was first brought before the Court of British Columbia in April of 1969. Justice Gould was of the opinion that sovereignty over the area of British Columbia flowed from the Imperial Crown of England and, if the Nisga'a had ever possessed any rights they were extinguished by the Imperial government. The Judges unanimously ruled for a dismissal on the grounds that at the time of the Royal Proclamation of 1763, the Nass valley was *terra incognita*, asserting that the land was not recognized under the system of British law and thus, the Nisga'a could not claim protection under the Proclamation.

The Nisga'a next brought their case before the British Columbia Court of Appeal in November of 1971. The British Columbia Court of Appeal dismissed this case on the grounds that the Nisga'a were too primitive a people to justify official recognition by the Crown. The Nisga'a continued to press their issue and in January of 1973 the case reached the Supreme Court of Canada. Lawyers Berger, Rosenbloom and Baigent represented the Nisga'a in the case *Calder* and Brown and Hobbs represented the respondent, the Attorney General of British Columbia. The opinion of Martland, Judson and Ritchie was delivered as judgment by Justice Judson, and the dissenting opinion of Hall, Spenser and Laskin,

was delivered by Justice Hall. The case was argued for the Nisga'a on a point that sought to establish that in the absence of any legislation, treaty or purchase made for the expressed purpose of extinguishing Nisga'a entitlement to their land, the extinguishment of Aboriginal rights to the land could not occur as a matter of fact.

Discovery Rights vs. Aboriginal Rights

In examining aspects of the case's logic, a point of departure for the presiding Justices was whether an Aboriginal title could continue to exist before the force of colonial legislation, even though that legislation had not specifically set itself out to extinguish Aboriginal title. In light of the province's stance, rooted in a belief of the political and cultural superiority of Europeans which represents an ethnobias, and biased evidence on the part of the province to support its position, it is worth reexamining the case.

Among the cases used to argue the Attorney General's position were the following; *St. Catherine's Milling and Lumber Company v. the Queen*,[8] *Johnson v. McIntosh*,[9] *Worcester v. Georgia*,[10] and *Beecher v. Whetherby*.[11] I believe the last three cases are particularly important because of how they were used to support a position which attempts to deny the existence of Aboriginal rights on a premise that both Aboriginal people and culture are inferior to the Christian bearing cultures of Anglo-Europeans. I decided to begin with the United States Supreme Court case, *Johnson v. McIntosh* because I found it puzzling that the respondents for the Attorney General chose to use a secondary source, *Beecher v. Wetherby*, instead of the original case, to cite what they claimed United States Supreme Court Chief Justice John Marshall had delivered as opinion in the Johnson case.

In *Beecher v. Wetherby* it was claimed that Marshall had stated that

> "the exclusive right of the United States to extinguish" Indian title has never been doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise, its *justness* is not open to inquiry in the courts. (Beecher v. Wetherby, 95 U.S. 517, 525)[12]

This statement is interesting because of its deceptiveness. The statement is deceptive on two counts the first of which is the appearance that the Court stands as a legal medium for the sanctioning of unjust acts. If this is in fact the intended message, then the question that must rightly follow is: If it is not the Court's responsibility to administer "justness" through a process of inquiry whereby the unjustness of acts might be exposed and justly dealt with, then where is this process supposed

to occur? The other reason why the passage is deception is because Marshall never made the statement as quoted.

After a very careful reading of *Johnson v. McIntosh*, one will discover that Marshall asserted "discovery gave an exclusive right to extinguish the Indian title of occupancy, either by purchase or by conquest."[13] Nowhere within the case report can Marshall be found to have claimed that the justness in extinguishing Indian title was not open to inquiry within the courts. What the case does actually report Marshall as having stated was that conquest gives a title "which the courts of the conqueror cannot deny, whatever the private and speculative opinions of individuals may be, respecting the original justice of the claim which has successfully been asserted."[14] Regardless of the validity of this claim in instances where a people have been conquered in war, it nevertheless does not address situations where a people have asserted dominion over another people, and alienated them from their lands, simply on the basis of an ethnocentric belief in their own cultural superiority. Also largely overlooked is the fact that in Johnson v. McIntosh the Court affirmed that discovery only gave a *potential* for acquiring a title that "*might* be consummated by *possession.*"[15] From this juncture Marshall went on to state that the exclusion of all other European governments was a necessity that granted the nation making the discovery "the sole right of *acquiring* the soil from the Natives…[and asserted]: Those relations that were to exist between the discoverer and the Natives, were to be regulated by themselves."[16] What is most surprising about the quote taken from *Beecher v. Wetherby* is that as quoted it was never stated as such in the Beecher case. What one will find stated in that case is: "The right of the United States to dispose of the fee of lands occupied by them has always been recognized by this court…. It was so ruled in *Johnson v. McIntosh…*" [original emphasis].[17] When reading the wording of the quote, significant differences are easily spotted. One of those differences is that the passage; "the exclusive right of the United States," which lawyers defending the Attorney General of British Columbia claimed came from the Johnson case, cannot be found anywhere in *Johnson v. McIntosh.* Another difference is between the claimed wording of "has never been doubted," and that of the actual wording used in the Johnson case which states, "has always been recognized."

While some Jurists have interpreted Johnson v. McIntosh as reducing, or entirely denying Aboriginal rights to land, evidence would indicate this to be a biased assumption. If we accept Marshall's statement that in "…establishing those relations, the rights of the original inhabitants were, in no instance, entirely disregarded…. They were admitted to be the rightful occupants of the soil, with a **legal** and **just** claim to retain

possession of it…,"[18] then the Johnson case actually recognized Aboriginal title and rights as a legitimate legal claim. From this it logically follows that a government's interests in the soil can only amount to an entitlement made complete after underlying Aboriginal title is extinguished either through purchase or when a "…title by conquest is acquired and maintained by force."[19] Additionally, given instances where war did result in conquest, the Johnson case also supports the principle that "the rights of the conquered to [their] property should remain unimpaired…."[20]

In arguing that the *Calder* case be dismissed on the basis that if Aboriginal title existed it could not continue to exist before the force of colonial legislation, lawyers for the Attorney General pointed out that between 1858 and 1863, James Douglas, the Governor of the Vancouver Island colony, had issued a series of proclamations, followed by the enactment of four ordinances between 1865 and 1870. This was interpreted as reflecting both the intention to exercise and the actual legislative exercising of absolute sovereignty over the lands of British Columbia, which meant "Aboriginal title" conflicted with these interests. It remains difficult, however, to interpret that the intention of these legislative acts was to extinguish Aboriginal title when, as dissenting Justice Hall pointed out, intent had not specifically been expressed. It has further been observed by Michael Asch (1984) that documentary evidence for the period indicates that colonial authorities had neither acquired the power nor the authority to extinguish Indian title.[21]

The several letters of correspondence between Governor Douglas and the Colonial Office are very enlightening and reveal a Governor sensitive to the needs of the region's Indigenous people. In his first letter, Douglas expressed strong opposition to any arbitrary or oppressive measures toward the Indians. He also urged the Colonial Office to "pay every regard to the interests of the Natives."[22] Douglas went on to write that treaties should be conducted with the Natives for the purpose of "the cession of lands possessed by them."[23] In his last letter, dated March 25, 1861, Douglas requested the aid of the Imperial government in extinguishing Indian title in public lands. This aid was specifically put in the form of a request for a loan of 3,000 sterling pounds in order to purchase "Native rights" in the land from the Natives themselves. Douglas made a point of informing the Colonial Office that up to 1859, he had been in the practice of purchasing *Native title* "…in every case prior to the settlement of any district."[24] Commenting on Native concepts of property, Douglas had observed:

> As the Native Indian population of Vancouver Island have distinct ideas of property in land, and mutually recognize

> their several exclusive possessory rights in certain districts, they would not fail to regard the occupation of such portions of the Colony by White settlers, unless with the full consent of the propriety tribes, as national wrongs.[25]

Douglas' comments did not derive from casual observation but on the fact that when whites began to move onto Nisga'a land many were faced with the reality of Nisga'a ownership.

> I came to the Nass…to look out and pre-empt a piece of land…but I found the idea of ownership so strong among the Indians that I had to give that project up. I soon found that this feeling was general. Every mountain, every valley, every stream was named, and every piece belonged to some particular family. [26]

Alfred Green, a missionary in the area, expressed that the concept of individual ownership was so strong a belief among the Nisga'a that all whites recognized the claim. In fact, some whites gave such deference toward Nisga'a ownership that they regularly paid a rent to individual Nisga'a for the privilege of having small fishing sites set aside for their use.

The concept of ownership ran deep within the fabric of Nisga'a culture itself. Prominent families raised elaborate totem poles bearing images, or more appropriately crests, symbolizing the several households of a matrilineal group named after their most prominent chief. Each crest represented the embodiment of the exclusive rights of each lineage to exploit specific resource districts. Thus ownership of rights over fishing, hunting, berry picking, etc. that fell within geographically defined and validated territories were treated as the exclusive property of ones lineage, and could be passed on as private property. Rights to territories established through use and occupancy were properly validated with speeches and extensive gift giving at Native festivals called potlatch ceremonies. By the time Europeans had arrived, all land and sea food resources important to the Native economy could be claimed and accounted for by various individual lineages. "Not only were lands and beaches listed by the Indians as lineage property, but also offshore cod and halibut banks, and seal and sea-lion rocks."[27]

The government's official response, written in October 1961, acknowledged the great importance in purchasing Native title to the soil, but expressed that the government would not supply money for a title that was purely of a colonial interest. Here Chris Arnet offers the following explanation for this lack of support. "The real reason that land sale agreements were not made was because many Cowichan, Halalt, Lamalcha, Penelakut, Chemanius and other si'em would not sell their peoples' land

at any price. The Aboriginal system of land tenure, whereby families owned houses in permanent villages and distant food and resource gathering areas…made negotiations impossible."[28] Arnet notes another interesting fact.

> Hul'qumi'num First Nations in the Chemanius Valley had set aside portions of ***their*** land for hwunitum [white] settlement, but the land was considered neither big enough nor good enough to satisfy the hwunitum. The Colony of Vancouver Island was obliged to look at other strategies to alienate hwulmuhlw lands.[29]

Douglas' observation of families claiming ownership over resources, as well as ownership of houses in permanent villages, coupled with others, including settlers, who often paid a percentage of yields taken in Native resource areas to those area's owners, contradicts the stereotypic notion that there was no Native concept of private ownership.

When taking into account observations and the spirit of Governor Douglas' letters, they work to produce a very different image from what the Attorney General presented as the intent of the proclamations:

1. Douglas' letters and proclamations were written during the same time frame.
2. The proclamations never disclosed any intention to extinguish Indian title.
3. Douglas had expressed the importance of extinguishing Indian title only through purchase.
4. Although Douglas had introduced his proclamations he still continued to make purchases of Native land as a means of extinguishing Indian title.

If one is to believe the Attorney General's claim that Indian title did not exist in British Columbia and, if it ever did exist it was extinguished as a result of Douglas' proclamations, then one must ask why Douglas continued to make purchases for the explicit purpose of extinguishing Aboriginal title, even though he had begun implementing his proclamations. In addition to this it could also be asked why the Imperial government made an official acknowledgment of the importance of purchasing Native title to the soil, even though eight of these proclamations had already been implemented?

Blind Judgments and Eurocentric Justice

Reasons for judgment in the *Calder* case were stated to be strongly influenced by United States Supreme Court decisions emanating from Johnson v. McIntosh, and Worcester v. Georgia. Although Judson, Martland, and Ritchie, in part, justified their position by citing St. Catherine

Millings as having established the basis for interpreting the nature of Indian title in Canada, they sought primary support from the Johnson decision, which had ruled that United States Courts could not recognize title to lands made by Indian Nations to individuals. This was then followed with a brief statement, that did nothing more than describe an issue under contention in the Worcester case. After stating that both of these cases raised the question of Aboriginal title to land, the Justices claimed that the passages cited from "8 Wheaton, pp. 587-8," gave a clear summary of Marshall's views. This claim represents nothing less then either ignorance or deception, as the following paragraphs disclose.

In understanding the Marshall cases it is important to realize that the doctrine on Aboriginal rights, as developed by Marshall, had evolved through a series of cases that began with Fletcher v. Peck in 1810, and ended with Worcester v. Georgia in 1832. The significance of this fact, it would seem, had not been given any consideration before the Eurocentric view of Justices Judson, Martland and Ritchie, who chose instead to present the Wheaton passages as Marshall's definitive statement on Aboriginal rights. The use of the passages as reported in Wheaton was quite deceptive because they represented an earlier and less developed stage in the evolution of Marshall's doctrine, and took the Court a step backwards; a necessary requirement to better support the Attorney General's position. But even in citing from the Johnson v. McIntosh case the respondents erred.

While the passage at page 587 does claim discovery gave an exclusive right to extinguish Indian title, Marshall qualified this by stating that the legal extinguishment of Indian title was done "either by purchase or by conquest."[30] The point of contention is that the Attorney General of Canada in fact never argued extinguishment of Indian title by reasons of purchase or conquest, but rather argued extinguishment as a right of discovery, insisting that Aboriginal title never existed. If that were the case then one must question why Governor Douglas had spent money to purchase a supposed nonexistent title from the Nisga'a. The Attorney General's argument is further weakened by observations from the 1823 Johnson case itself, wherein it was pointed out how actual conditions demanded Europeans to either abandon the country, and relinquish their "pompous claims to it," or enforce their claims by the sword.[31] While Marshall offered these comments in support of acquiring title based upon conquest, his subsequent statements illustrate that the enforcement of European claims by the sword was not what necessarily occurred.

> European policy, numbers and skills prevailed, as the white population advanced, that of the Indians necessarily receded;

> the country in the immediate neighborhood of agriculturists became unfit for them; the game fled into thicker and more unbroken forests, and the Indians followed. The soil…being no longer occupied by its ancient inhabitants was parceled out according to the will of the sovereign power.[32]

A careful reading of the Johnson case also discloses that Marshall had interpreted ultimate title to be subject upon the extinguishment of Indian title, a title that only the discoverer possessed an exclusive right to acquire,[33] a point which many jurists have tended to overlook. Careful analysis of Johnson v. McIntosh will also lead one to discover that it goes beyond simply acknowledging the existence of Aboriginal title, as illustrated by the following passage.

> Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands…and hold it in severalty, still it is a part of their territory, and is held…by a title dependent on their laws. The grant derives from their will; and, if they choose to resume it…the court of the United States cannot interpose for the protection of the title. The person who incorporates himself with them…holds their title under their protection, and subject to their laws.[34]

In arguing that an individual could not alienate Aboriginal land held under Aboriginal title, but rather incorporated himself under Aboriginal laws, Marshall presented an argument that acknowledged Aboriginal nationhood. Furthermore, Marshall went on to endorse the right of Aboriginal nations to exercise their national prerogative: "These nations were at war with the United States, and had an unquestionable right to annul any grant they had made to American citizens."[35] Recognizing that John Marshall's doctrine on Aboriginal rights culminated with Worcester v. Georgia can explain why his earlier cases are so frequently cited by governments arguing against Aboriginal rights, while the later Worcester case is carefully and very selectively manipulated.

As noted earlier, the Wheaton passages were cited as a summary of Marshall's views on Indian title. It is important to observe however, that the views taken from those passages pertain to the Johnson case only and by no means should be construed as offering a clear summary of Marshall's final views on the subject of Aboriginal rights. For this reason, if the Marshall cases are used to address questions on Aboriginal rights, and by extension we are interested in Marshall's final views, we must then turn to what he expressed in his final case, Worcester v. Georgia.

When Marshall's views are summarized from the Worcester case the final picture that emerges is dramatically different from the picture

that Martland, Judson and Ritchie would attempt to paint. Quite early within the Court's delivered opinion, Marshall affirmed that the United States acknowledged the Cherokee as a sovereign nation, fully authorized to govern themselves as well as any and all persons who had settled within their territory.[36] What is significantly important here is that Marshall had acknowledged that the Cherokee, as a sovereign nation, were "free from any right of legislative interference by the several states composing the United States of America."[37] Marshall had also clarified that the discovery principle was not able to annul any previous rights of those who had not agreed to the principle. Thus, if we look to the Worcester case for a final summary of Marshall's views, the following passage would better serve the purpose:

> This soil was occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea, that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title, that according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the Natives were willing to sell. The crown could not be understood to grant what the crown did not affect to claim; nor was it so understood.
>
> These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the Natives were concerned.[38]

By misconstruing the Johnson case, Justices Judson, Martland and Ritchie managed to alienate the judicial system from the same process that has allowed the system growth, and effectively held justice in abeyance. Of equal importance to this and subsequent cases regarding the rights of Canadian First Nation Peoples, is that by postulating Indian title is not capable of judicial recognition without a specific governmental edict to that effect, the Court cleverly nullified the plaintiffs' legal rights by incorrectly converting a procedural impediment into a substantive rule of law.[39]

The Court decision, on the basis of a technicality, ultimately went against the Nisga'a request for *a declaration* by a 4 to 3 margin. How-

ever, for the first time in Canada's legal history the Court acknowledged that a Native people at the time of contact had possessed rights and a code of law considered reconcilable with English law and tradition. While this acknowledgment is significant, it still remains to be seen whether a legal door has been opened, and will remain open, through which First Nations Peoples of Canada may in time present claims that pertain to Aboriginal rights that Canadian courts will recognize and uphold, or whether the political leadership of a dominant Eurocentric culture will find ways to diminish this ruling.

Post Script;

In August 1998, political leaders representing the Government of Canada, the Nisga'a Tribal Council and the Province of British Columbia signed off on the Nisga'a Final Agreement in a ceremony in the Nass Valley. Signatories of the Province resulted from a stipulation that required signatures from all three parties for the Nisga'a agreement to be ratified and recognized as a legitimate treaty. While this modern treaty appears to be a progressive step toward protecting Aboriginal rights, Chief Justice McEachern's verbose and Eurocentric opinion, in the 1991 Delgamuukw decision, seemed to send a message to not expect much change in the future.

His basic message implied that neither the Court nor the Canadian government are likely to end their control over Indigenous people. This colonial control, wielded by a white majority population and white leadership, led Taiaiake Alfred to state that white society has effectively "staked a claim against history, morality, and the rights of [I]ndigenous peoples…."[40]

I would generally agree with this statement on the basis of the following observations. The Canadian government, and to a major extent its legal systems, holds to its claim of absolute sovereignty over Indigenous peoples by alternating from positions of political strength and legal power, that ultimately are products of its own creation and from which emerges a picture of an authority that is moral and just. To this regard Michael Asch exposes this by noting that while the Calder case brought about significant gains of social justice for Indigenous peoples from the period between the Calder and Van Der Peet cases, in the period following the Van Der Peet decision, "the State has taken a step backwards and affirmed an ideology most reflective to the period prior to Calder.[41]

Asch's statement is further strengthened in light of a 1990 survey conducted during the period between the Calder and Van Der Peet cases by the Angus Reid Group Inc. in which the group polled expressed that

Canadians were willing to give up one-fifth of Canada to settle Native land claims, thus suggesting that Canada seemed ready for change.[42]

Conclusion

Irrespective of factors that *signal* change, if relevant and lasting change is to occur then the powers that govern must reach a point where issues regarding the rights of Indigenous peoples can be approached both politically and socially from a culture-relativistic perspective. With regard to the call for relevant and lasting change, it is quite ironic that Canada can attribute a somewhat smooth transition from colonies to commonwealth to nationhood because Britain played a disappearing role as an Imperial government, and by so doing contributed to Canada's steady growth toward independence. If Canada, who now having assumed Britain's role as an Imperial government over Indigenous First Nations, is to follow the example set by Britain, then the leadership that governs Canada must find the vision and strength to move beyond its own ethnocentrism to allow Indigenous First Nations to again be self-determining. Anything less can only be regarded as the continued denial of the inherent Aboriginal and political rights of Canada's First Nations peoples.

Notes

1. Calder vs. Attorney General of British Columbia 4, Western Weekly Reports 1 (1973). This case is named after Nisga'a leader Frank Calder. Calder brought the case forward to challenge the Canadian government's long standing political position that denied the existence of Aboriginal rights and Aboriginal title over lands originally settled by Nisga'a peoples prior to European intrusion into the area Europeans named British Columbia.
2. See Stephen Greymorning, *Indigenous North Americans and the Ethnocentrism of the Courts: A Cross Analysis of American Culture and Law with Canadian Culture and Law*, Ph.D. dissertation (Norman: Oklahoma University, 1992).
3. Michael Asch, ed. *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press 1997), p. X.
4. Michael Asch, "From Calder to Van Der Peet; Aboriginal Rights and Canadian Law,1973-96" in *Indigenous Peoples' Rights in Australia, Canada & New Zealand*, Paul Havermann, ed. (Oxford: Oxford Press, 1999), p. 440.

5. Charles Marshall, *The Exercise of Sovereignty, Papers on Foreign Policy* (Baltimore, Maryland: The John Hopkins Press, 1965), p. 205 [brackets mine].
6. Albert Weinburg, *Manifest Destiny: A Study of Nationalist Expansionism in American History* (Baltimore: John Hopkins Press, 1935), pp. 11-12.
7. Johnson v. McIntosh represents the case in which Chief Justice John Marshall first expounded upon the principle of "discovery." Nine years after the Johnson decision Marshall's thoughts regarding the principle had radically altered. This change was reflected by his arguing against this principle in his Worcester v. Georgia decision (1832).
8. St. Catherine's Milling and Lumber Company v. The Queen, 14 Appeals case 46, VOl. XIV (House of Lords and Privy Council, 1888).
9. Johnson and Graham's Lessee v. William McIntosh, 21 US (8 Wheaton, 1823).
10. Worcester v. The State of Georgia. 31, US (6 Peters 515, 1832).
11. Beecher v. Wetherby," 95 U.S. (5 Otto, 1877). Reported by William Otto in *Reports of Cases Argued and Judged in the Supreme Court of the United States*, vol. V, (New York: Banks & Brothers, Law Publishers, 1890).
12. 4 Western Weekly Report 1 (1973), 335 [emphasis mine].
13. Johnson and Graham's Lessee v. William McIntosh, 21 US (8 Wheaton, 1823), at 587.
14. Ibid., at 588.
15. Ibid., at 573, [emphasis mine].
16. Ibid. [emphasis and brackets mine].
17. 95 U.S. (Otto, 1877), p. 525.
18. 21 U.S. (8 Wheat. 1823), at 574 [emphasis mine].
19. Ibid. at 589.
20. 21 U.S. (8 Wheat. 1823), at 589 [brackets mine].
21. Michael Asch, *Home and Native Land* (Toronto: Methuen Publications, 1984).
22. 4 Western Weekly Report 1 (1973), p. 329.
23. Ibid. , p. 330.
24. Ibid.
25. Ibid.
26. Daniel Raunet, *Without Surrender Without Consent* (Vancouver: Douglas & McIntire, 1984).
27. See Viola E. Garfield and Paul S. Wingert *The Tsimshian Indians and Their Arts*, (Seattle and London: University of Washington Press, n. d.)., p. 15.

28. Chris Arnet, *The Terror of the Coast; Land Alienation and Colonial War on Vancouver Island and the Gulf Islands 1849-1863* (Toronto: Talon Books, 1999), p. 98, [emphasis and brackets mine].
29. Ibid.
30. 21 U.S. (8 Wheat. 1823), at 587.
31. Ibid at 590.
32. Ibid.
33. Ibid. at 593.
34. Ibid.
35. Ibid at 594.
36. Worcester v. The State of Georgia. 31, US (6 Peters 515, 1832).
37. Ibid, at 538-539.
38. Ibid at 544-546.
39. Peter Cumming and Neil H. Mickenberg, Eds. *Native Rights in Canada* (Toronto: The Indian-Eskimo Association of Canada in association with the General Publishing Co. Limited, 1972), p. 36.
40. Taiaiake Alfred, *Peace, Power, Righteousness, an Indigenous Manifesto* (Oxford: Oxford University Press, 1999) p. 118 [brackets mine].
41. Michael Asch "From Calder to Van Der Peet; Aboriginal Rights and Canadian Law,1973-96" in *Indigenous Peoples' Rights in Australia*, Canada & New Zealand, Paul Havermann, ed. (Oxford: Oxford Press, 1999), p. 438.
42. See "Canadians Willing to Give Up Land." *The Edmonton Journal,* p. A1, Saturday, November 10, 1990.