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Cover: BLUE LADY, Krista Ferguson, 122 cm. x 94 cm., oil on canvas. The artist is a Métis woman who paints wonderous images in Brandon, Manitoba where she lives.

Couverture: BLUE LADY, Krista Ferguson, 122 cm. x 94 cm., huile sur toile. L'artiste est une Métisse qui peint des images merveilleuses à Brandon (Manitoba), où elle réside.

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Enquiries:
The Canadian Journal of Native Studies
Le Revue Canadienne Des Etudes Autochtones
Brandon University
Brandon, Manitoba
Canada, R7A 6A9
(204) 727-9640; Fax: (204) 726-0473

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INDIGENOUS "INSIDER" ACADEMICS: EDUCATIONAL RESEARCH OR ADVOCACY?

Faith Maina
Department of Curriculum and Instruction
Oswego State University
Oswego, New York
USA, 13126
maina@oswego.edu

Abstract / Résumé

This paper critiques social science research as a representation of the western academic thought that has invented an "Other" as the object of research. This leads to a critical appraisal of some existing research terminology and their in/appropriateness when the invented "Other" (referred to as an "Indigenous insider") becomes the academic researcher. With a portrait of experience, it illustrates some research strategies, a combination of which an insider can use to address those research questions. The strategies are most effective in allowing insider knowledge as legitimate and sufficient basis for research without overlaying and encumbering it with mainstream research methodology.

Ce travail critique la recherche en sciences sociales en tant que représentation de la pensée académique de l'ouest qui a inventé un «autre» comme l'objet de recherche. Ceci conduit à une évaluation critique d'une certaine terminologie existante en recherche et leur in/opportunité quand le «autre» inventé (auquel on fait référence comme un «indigène initié») devient le chercheur académique. Avec un portrait d'expérience, elle illustre quelques stratégies de recherche, une combinaison dont peut se servir l'initié pour parler de ces questions de recherche. Les stratégies sont les plus efficaces en tenant compte de la connaissance initiée comme légitime et base suffisante pour la recherche sans lui superposer et l'encombrer avec les méthodologies de recherche à tendance dominante.

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> ....Fundamental questions must be raised about what knowledge is produced, by whom, for whose interests, and toward what ends. Such arguments begin to demand the creation of a new paradigm and organization of science—one that is not only for the people, but is created with them and by them as well. (Gaventa, 1993, p.40)

Social Science Research and the Indigenous "Other"

I literally agonized trying to come up with a research methodology that could adequately describe my lived experience as a teacher and a member of my community, and those of the people who were going to be involved in the research. Much of this agony stemmed from the realization that some of the existing research methodologies and the subsequent terminology has until recently excluded personal experiences of historically disadvantage people as a basis of study and analysis (Vidich, 2000). Part of the reason this knowledge has been excluded is because of epistemological notions so that meaning as contained in texts and the study of texts, particularly their deconstruction, becomes the primary focus of education (Clandinin & Connelly, 1994). There is also the argument that experience cannot speak for itself, again putting the focus on the meaning contained in texts and the forms by which they are constructed. There has also been the contrasting argument that experience is too comprehensive, too holistic, and, therefore, an insufficiently analytic term to permit useful inquiry (Clandinin & Connelly, 1994). Consequently, the voice of academic researchers with "insider" knowledge, the kind of knowledge that is based on experience and not found in texts, is often silenced or excluded (Ahlberg, 1991; Ndunda, 1995).

Yet, Ron Scapp argues in reference to a classroom setting, "when one speaks from the perspective of one's immediate experiences, something's created in the classroom for students, sometimes for the first time. Focusing on experience allows students to claim a knowledge base from which they can speak" (cited in hooks, 1994, p.148). It is from this understanding that I began my search for a mode of inquiry that would accommodate my experiences as an insider[1] academic. I knew right at the onset that my research: 1) must not be *on* "others", 2) must include the *shared experiences* of all people involved in the research, 3) must be *dialogic*, and 4) must be *sharing of skills* so that the process continues long after I had left the field.

Research Must Not Be On "Others"

Social science research has recently been criticized by some aca-

demics as being the representation of academic thought that has invented the "other" as the object of research (Alcoff, 1991; Fine, 1994; hooks, 1990; Vidich, 2000). It therefore becomes problematic when individuals from the invented "other" become the producers and interpreters of knowledge. Indeed, Wright points out that "African thinkers who espouse ideas that appear strange to the West are viewed as primitive, childlike, or inconsequential" (cited in Tedla, 1995, p.13).

> This insistence that Western culture is superior to all other cultures has effectively barred out from consideration other ways of interpreting and understanding the world. (Tedla, 1995, p.13)

Tedla (1995) argument concurs with Fine (1994) who also argues that much of qualitative research has reproduced, if contradiction-filled, a colonising discourse of the "Other" by reinventing the hyphen of Self-Other that both separate and merges personal identities. Fine argues further that this re-invention of the "other" has made critical, feminist and or Third World scholars view social science as a tool of domination (1994).

Fine's argument resonates with that of Alcoff (1991) who says that speaking for "Other" has come under increasing criticism and, in some communities, it is being rejected as "arrogant, vain, unethical and politically illegitimate" (p.6). This ultimately makes hooks (1990) to wait for "them" to stop talking about the "Other" (p. 151).

> Often, this speech about the "Other" annihilates, erases: "no need to hear your voice when I can talk about you better than you can speak about yourself...only tell me about your pain. I want to know your story. And then I will tell it back to you in a new way. Tell it back to you in away that it has become mine, my own. Re-writing you, I write myself anew. I am still the author, authority. I am still the coloniser, the speak subject, and you are now the centre of my talk. (hooks, 1990, p.153)

One of the reasons why our experiences as insider academics have not been embraced in the academic research terminology originates from the very description of social science. In the social sciences, the relationship between the researcher and those researched has been "obscured in social science texts, protecting privilege, securing distance and laminating the contradictions (Fine, 1994, p.72). "There has been a tendency to view the self of the social science observer as a potential contaminant, something to be separated out, neutralized, minimized, standardized, and controlled" (Fine, 2000, p.108). Doing research from this perspective would not answer to that call of "inclusion of subjective experience of the researcher" (Fine, 2000) that would enable the academic insider to conduct research *with* and *not* on the community members.

Research as Shared Experiences of All People Involved in the Research

Clandinin and Connelly (1994) define social science as being concerned with humans and their relations with themselves and their environments, and, as such, the social sciences are founded on the study of experience. I knew right at the onset that experience would be the starting point and key term for my inquiry. The challenging task for me was to sort out the appropriate methods of data collection that would be congruent with the experiences of the members of my community and particularly the teachers who would be directly involved in the research. Some of the methods of data collection and analysis I have encountered in my academic life do not allow experience sharing as a basis of inquiry. Positivist inquiry, for instance, suggests that we must observe phenomena exhaustively and define them precisely in order to identify specific cause and effects. The researchers should stand apart from their subject and think of it as having an independent object-like existence with no intrinsic meaning. The knower and that which is or can be known are considered separate, so that the social scientist can adopt the role of observer of an independently existing reality. And since social investigation is a neutral activity, we should strive to eliminate all bias and preconceptions, not be emotionally involved with or have a particular attitude toward our subject, and move beyond common sense beliefs to discover causes and to make predictions (St. Denis, 1989). Doing this research from such a paradigm would lender the experiences of the insider useless.

Research Must Be Dialogic

Paulo Freire (1970) encourages researchers to initiate an interactive process, which he refers to as dialogue. This way of doing research, in my opinion, shows commitment to bringing the participants of the study into the process of knowledge generation. It also supports the epistemological position that places the importance on:

a) experiential knowing that emerges through participation with others;
b) beliefs that people can learn to be self-reflexive about their world and their actions within it. (Reason, 1994)

Research Must Be Sharing of Skills So That Process Continues

Knowledge produced by social science is a powerful and effective means to influence decisions regarding people's everyday lives. Whether this knowledge is used for the advantage or disadvantage of the group of the people being researched "depends on who controls the research process" (St. Denis, 1979, p.1). Reynolds & Reynolds (1970) argue that

research and the consequent knowledge generated "has worked to make the power structure relatively more powerful and knowledgeable, and thereby to make the subject population more impotent and ignorant" (Gaventa, 1993, p. 27). For third world academic researchers who often have little control of the research process in terms of research funding, loyalty to certain schools of thought and academic institutions and the consequent distribution of the knowledge, it would be a miracle to expect their experiences to play any significant role in the knowledge generated. I would therefore conclude like Gaventa that:

> Where knowledge is produced about the problems of the powerless, it is more often than not produced by the powerful in the interest of maintaining the status quo, rather than the powerless in the interest of change. (1993, p. 26)

Because I'm historically situated within this traditionally powerless group Gaventa refers to above, my research had to be educative, a "dialogical approach to research that attempted to develop voice as a form of political process" (Pinar, 1995). All I had to do was "provide these individuals with a lens through which they could see themselves, become aware of new ideas, or recognize concepts that they were intuitively acting upon but that lacked clear articulation" (Goodman, cited in Pinar, 1995, p. 259). Doing research this way would ensure greater collaboration with teachers. This interaction would become part of the curriculum, thus, providing some skills that could be used long after I had left the field.

Because of the commitment to the four criteria, it was important that I select carefully the qualities in various research methodologies that would lead to a social investigation involving full participation of the researcher and those targeted for research: an educational process and a means of taking action for change. The section below provides a detailed description of how I met this challenge.

Finding My Niche: A Paradigm Cocktail

Indigenous people around the world are re-affirming the validity of their own cultures and re-defining their political, economic and social priorities in the twentieth century (Barman, 1986). Central to this process is the re-socialization of the youth with their own culture, giving them a sense of pride in their own cultural heritage. It is a shift made necessary by centuries of colonial domination and it neo-colonial offshoot, which deliberately undermined the cultural values of Indigenous people through assimilative and later integrative educational policies (Kirkness, 1992). It against this background that educators of Indigenous people are facing the challenging task of recovering the cultural heritage while providing preparation for successful participation in a cultur-

ally diverse, modern technological society (Hamme, 1996). While Indigenous people are developing strategies to face this challenge, the Kenyan educational system priorities are almost opposite. In Kenyan schools, traditional cultures and languages have a lower priority for policy makers, parents and educators. For example, curriculum is developed by the Ministry of Education and distributed to all the schools for adoption regardless of the linguistic and cultural diversity of the Kenyan people. The teachers adopt the curriculum as prescribed and implement it to specifications. Consequently, the local wisdom, cultural values, skills and beliefs that have the potential of enriching the curriculum remain largely untapped. The learners fail to see the connection between school knowledge and their local realities, which ultimately give them a weak cultural identity. It is against this background that my study sought to explore ways in which local resources would be used to enrich the school curriculum. It also explored ways in which curriculum could become a place in which the cultural values, knowledge, skills and beliefs that provide foundations for identity could be understood, defined and interpreted.

From the beginning it was imperative given my insider position that my research had to be educative, a "dialogical approach to research that attempted to develop voice as a form of political process" (Pinar, 1995, p. 259). I had to provide these individuals with a lens through which they could see themselves, become aware of new ideas, or recognize concepts that they were intuitively acting upon but that lacked clear articulation (Pinar, 1995). Doing research this way would ensure greater collaboration with the participants. This interaction would become part of the curriculum change, thus, providing skills that could be used long after I had left the field. For me to do this effectively, I was informed by writings from various perspectives and which I refer as a paradigm "cocktail." The reason I use this term is to highlight the enhancement that resulted from my use of selected and combined perspectives that worked in my situation: feminist theory, critical theory and participatory action research played a significant roles. Each of these research perspectives in a way enabled me to use the research process as a place to intervene and advocate; collaborate; dialogue; share skills and knowledge; produce reflective practitioners; reciprocate; privilege all forms of knowledge and theorize collaboratively. These research strategies enabled me to do positive research in my community.

Elders[2] use abstract metaphors of space to describe the place from which they speak. Ngugi wa Thiong'o (1993) talks about "moving the centre" to create many centres that reflect the diversity of world peoples and cultures. This is a recognition and acknowledgment that there could never

be only one centre from which to view the world but that different people in the world had their cultures and environment as the centre (Ngugi, 1993). Ngugi's "moving the centre" provides me with the "language" in which to verbalize my feelings/ thoughts/ experiences that consequently enable me to locate my speech. Working within such an ideological framework I'm able to work comfortably within multiple locations.

My feelings at this point could well be verbalized within some feminist theory perspectives. Feminist research is concerned with the process as an occasion for intervention and advocacy (Patai, 139). Harding (1991) for instance argues that, by documenting women's representation of their own reality, "we were engaging in advocacy. We felt that our work was indeed, political and that it was for women" (cited in Patai, 1991, p. 143). Interpreted for my research context, it would mean removing the notion of political neutrality emphasized by traditional research enabling me to recognize my work as a political act. Feminist research has challenged the pose of neutrality and objectivity that has for so long governed positivists' social science. It has also challenged the hierarchical division that separates researcher and those who are researched. The model of a distanced, controlled, ostensibly neutral interviewer has been replaced with that of "sisterhood, an engaged and sympathetic interaction between two individuals united by the fact of gender oppression" (Patai, 1991, p. 143). This way of doing research may be what Klein refers to as *conscious subjectivity* and, Weskott adds, *inter-subjectivity:* the kind of research in which the "researcher compares her work with her own experiences as a woman and a scientist, and shares the resulting reflections with the researched, who in turn might change the research by adding her opinion" (cited in Hale, 1991, p. 125). For my research situation, it meant comparing my own experiences as a member of the community, a teacher, parent and curriculum theorist and sharing the resulting experiences with the teachers who in turn might change the research by adding their opinion.

Intervention and Advocacy

I wrote a letter to the principal of my local secondary school long before I got to there. In the letter, I explained clearly that I was a doctoral student at the University of British Columbia seeking participants in a study called *Cultural Relevance in Kenyan School Curriculum*. I further explained that the purpose of the study was to collaboratively explore the possibilities of tapping the local resources to enrich curriculum in Kenya, so that teachers can begin to use both materials and human resources, which are locally available and culturally relevant to meet curriculum goals. I would therefore appreciate the opportunity to carry out my study in her school and invite the teachers to participate in the

study.

During our first meeting, I explained to teachers broadly what the research was about, how the research idea had evolved and where it was going. I also explained what the research would mean to them in terms of time and personal commitment. This idea concurs with feminist research, which encourages honest and responsible methods, which do not just include protecting anonymity but also respecting the "informants." It includes letting people know exactly what the research is about and particularly to avoid the practice of tricking" people into exposing themselves; intentionally luring them into contradictions; using one "informant" to expose or contradict another; manipulating people to obtain the "truth" and the "facts" (Hale, 1991). This meant allowing the teachers to share only what they wanted to without exerting undue pressure. At the end of the meeting, I gave each teacher a consent form to take home and then return to me signed when they were ready to. All the teachers returned the consent forms the following week and the principal wrote to me a letter of approval allowing me to carry out the research in the school.

The invitation of teachers to be collaborative partners was my attempt to break down the established power roles between researcher and participants,

> Collaboration seems to have become aligned with the idea of equal participation, responsibility and representation-all subsumed within a comfortable, friendly community of persons engaged in a mutually interesting project or endeavour. (Sumara & Luce-Kapler, 1993. p.393)

Collaboration frequently enhances communication, builds relationships (Peterat & Smith, 1996) and ensures that everyone's point of view will be taken as a contribution to resources for understanding (Winter, 1989). Though collaboration can cause tension, frustrations, dis-comfort, and dissonance (Peterat & Smith, 1996) and often makes people toil together under conditions of distress or trouble, making them exert their body and mind in ways which are sometimes painful (Sumara & Luce-Kapler, 1993), it initiates an interactive process which Freire (1970) refers to as dialogue.

Opening the Dialogue

Each teacher volunteer was interviewed at the beginning of the study. These interviews were conversational and dialogical, involving non-directive, open-ended questions. The purpose of the interviews were two-fold: a) to explore the beliefs, conceptualizations, and practices of the teacher and b) to explore the reasons for initiating change in curriculum materials and the questions that arise in the process. The idea of "dialogue" came from Frerian concept of initiating an interactive process in

research.

> Dialogue is thus an existential necessity. And since dialogue is the encounter in which the united reflection and action of the dialoguers are addressed to the world which is to be transformed and humanised, this dialogue cannot be reduced to the act of one person's "depositing" of ideas in another, nor can it be a simple exchange of ideas to be "consumed" by the discussants. (Freire, 1970, p.59)

Freire views this interactive process as establishing the participants as the subjects of their own history and encouraging shared control and generation of knowledge (1970). The understanding that emerges through this research process is constructed jointly by researcher and participant and which I believe is appropriate for people whose voices have seldom been heard or documented (McCaleb, 1994, p.58). By inviting teachers to engage in dialogue with the researcher, they begin to feel that their experiences are important and valid. Teachers begin to realize that their words and experiences merit a valuable place in the making of curriculum. They also begin to realize that, by sharing their personal experiences, they can help their students and others to understand new and old ways of viewing the world.

Sharing Skills and Knowledge

A dialogue group was formed to discuss questions of mutual concern, to identify ways and means to address those concerns. The intent of these discussions was to bring the teachers together to talk with each other about the issues that had arisen in the interviews. Even though much of what the teachers said was important to the general understanding of the problems currently facing the education system, I carefully steered the discussion towards the problem of lack of cultural relevance in the existing curriculum and their perceptions. At this point, I realized I had to take the role of an "initiating facilitator" in the manner of participatory action research (Reason, 1994). Taking this direction was a risk because at this point teachers had not fully internalized cultural relevance as a problem. It was a "risk" I felt was worth taking. Lather (1986) argues that critical theory research responds to the social reality of people without power. It is research *for* rather than *about* people. It "aims to foster a reflexive and critical consciousness, enabling a critical understanding of social reality" to initiate emancipatory social action and to develop emancipatory knowledge necessary for radically improving and transforming social reality (St. Denis, 1989, p.25).

I found this way of consciousness-raising to be appropriate in the context of my research. Although it could be interpreted as hypocritical

to critique the very education that has availed me a chance of "upward mobility," I felt that the same education had provided me with the skills to challenge the structures of domination, which has continuously led to the daily struggles for meaningful existence for my people. I, therefore, felt that I had a personal responsibility and commitment to communicate carefully that understanding.

Beside my academic knowledge, I constantly found reinforcement from the popular knowledge found in the community and which I would use to draw the attention of the teachers. For instance, at one time before a group meeting, Henri Lopez the UNESCO deputy director, had been reported in the morning daily as having said that education systems that did not reflect the cultural needs of the people were bound to fail (1997). I brought this information to the meeting and we discussed the implication of such a statement and what it meant. At another time, I cut out a piece of Ngugi wa Thiong'o, again the Daily Nation in which he had been featured as warning Africa on alien languages.

> Africa will remain a continent of 'nations of bodiless heads and headless bodies' as long as a small minority continues to speak in European languages and the majority in their own different communal languages. (Munugu, 1997, p. 30)

Using such information I discussed/argued with the teachers that what we have is in fact an enrichment to our culture if we are able to select skills suitable in our environment (Couture, 1978) and having the wisdom of using such skills. This is another point where I felt I could be rushing the teachers. I was biased. It had taken me over three years of graduate school to get convinced that we need not turn back the clock to reclaim our culture, that our culture cannot be described in past tense. Yet, I wanted these teachers to buy this idea within a period of less than three months, without the extensive support of critical theories that characterize graduate courses. However, little by little, I could see us developing some kind of understanding. Yes, our culture is a living culture. We can no longer teach our children the skills we would like them to have at home because the socio-economic landscape has changed. But how could we take advantage of the present arrangement of the school to equip the students with usable skills? Skills that can be used in/out of the community, skills that can enable our children to make choices.

As the study progressed, it was clear that the teachers were beginning to find the lack of cultural relevance in the school curriculum as being significant. But what did this mean to us? I knew that at this point I had to share some skills and knowledge that would enable the teachers to have the vocabulary in which to verbalize their thoughts. I began by introducing Freire's work on the "banking" concept of education. I

asked the teachers to read a chapter from Freire's book, *Pedagogy of the Oppressed*, which raised the issue of teachers assuming that they are the only "knowers" and that the students are "empty" vessels" to be filled with "communiqués." We discussed the issues raised in the chapter, trying to integrate those issues to our own teaching practices. This discussion brought out honest descriptions of classroom practices that could best be described as "authoritarian." Teachers described vividly their use of rote as the only teaching method and using evaluative practices that demand "memorization and re-production of knowledge."

However, at this point the teachers began to feel "guilty" about their classroom practices, almost succumbing to a feeling of helplessness. The teachers felt that I was negatively judging their practices. In fact, they began to get defensive about the syllabus being too wide, being expected to cover so much content in such a short time, to justify what they had identified as defective classroom practices.

For the next meeting, I again introduced to the teachers a series of Ngugi wa Thiong'o's work in which he describes the inadequacy of our education system as originating from the uncritical acceptance of colonial education and adopting it for Kenyan children. The understanding of this background allowed the teachers to relax and even talk freely about the historical incidents they could remember from some education courses they took at the university or some lived experience they had. We then moved to judging our present and to question the future. What can we possibly do to change our classroom practices?

Reflective Practitioners

Reflective practice is a term aligned to action research, a process in which the practitioners show interest in asking themselves awkward and challenging questions about their practice and depending on colleagues talking to one another and trusting one another (Strauss, 1991). In this part of the project, the teachers as individuals initiated projects in their own classroom based on the knowledge and skills acquired in the first and second parts of the research project. Which projects they initiated depended on individual choice and subject area, but they used resources, which are culturally relevant and locally available. During this time, we had the option of meeting as a group to review and discuss classroom experiences. This provided an opportunity for us to explore some of the struggles, tensions and frustrations associated with research for change.

It was becoming clear to us that there was some historical background to the current classroom practices we are using. We were perpetuating colonial practices in our education, which are not just expensive, but continue to impoverish our society. Again some feeling of

helplessness began to envelop our discussions. What can we "little" people at the bottom of the ladder possibly do? We only teach what we are expected to. We have to complete the syllabus. If we don't teach what the examination council wants us to teach, our students will fail. And then we can't explain such failure to the community, administration, and even to ourselves. We assumed that those at the top know what is best for us.

I empathized with these feelings. Being a teacher and a student in this system, I was well aware that teachers' views are not solicited when curriculum changes are made. The curriculum is developed at the top and distributed to the schools for adoption with no consideration to the regional diversity of the country. For the sake of national unity, we cannot recognize diversity. What can we then do? At this point I had to take some leadership role so the teachers were not to be overwhelmed by that feeling of hopelessness and take a defeatist attitude of "nothing can be done."

Reciprocity

This term is associated with doing research with respect. It means acknowledging the valuable time that people have taken to accommodate the researcher. In some First Nations' communities, a gift of tobacco when working with elders is symbolically important (Crowchild, personal communication). When one of the teacher participants left teaching in the middle of the project, the principal asked me to be a temporary replacement on a volunteer basis to which I readily agreed. Fortunately, his teaching subject was literature in English and language, which happens to be my subject area. I was able to access a classroom and face the harsh realities of the classroom. I was no longer an out/insider observer directing an overworked group of people. I became a part of. I was immersed.

To some extent this arrangement worked well for all of us. To the principal, I was no longer an intruder taking away precious time from the overworked teachers. Besides, I was now to shoulder other school responsibilities such as attending sports, participating in parent/teacher meetings, taking students on field trips and so forth. To the teachers, I became just another colleague. I was now in close proximity to whatever the teachers were doing. We could now discuss the issues informally during tea breaks, lunch and as we walked home from school. To the students, I stopped being just a faceless body hovering around the school compound without a properly defined role. I was now the new teacher of English language and literature. A teacher, who took them for field trips, took them to sit under that tree to tell stories, a teacher who

was concerned with the day-to-day running of the school. I now belonged. I began to understand the culture of the school even more deeply. I got to share the staff room jokes; I understood relationships with administration, staff, parents and students. It was like a new life had begun. I could now view the world of teaching from many different angles. My being incorporated into the school worked well for all of us. Parents were happy because of my volunteer service.

Privileging All Forms of Knowledge

As I got re-integrated into the community activities such as clan meetings, marriage negotiations, weddings, church, fund raising, parent/teacher meetings and so forth, I found some teachers participating in the same activities and it goes without saying that we quickly developed a kind of rapport. Here were teachers with whom I shared some interests/problems/ aspirations: our children attending the same primary school in the same grade, being members of the same clan, having communal responsibilities by virtue of marriage and so forth. It is little wonder then I found myself developing stronger bonds with the non-participating teachers as my research progressed. It was quite interesting to note that we shared thoughts and exchanged ideas in a relaxing atmosphere with the non-participating teachers, in their homes when I visited or in my home when they came. Or when we just met during communal activities, which gave me a solid base for reflections. Though I did not develop a profile for the non-participating teachers, they played a very significant part in the way I understood the world of teachers, viewing things from their perspective as we actively participated in community activities, events and occasions that are close and important to us. There was no time that these individuals felt that they were part of the research project and neither did I at anytime feel that I was a researcher. Questions such as, how is your research project going on? often came up. It was only on those moments when I sat down to reflect that it could dawn on me the significance of what an individual had said during the day or I could remember a conversation that we held earlier or even something I picked being said to someone else. This information filled in the gaps or helped me raise some important questions for further discussion/ probing with the teacher participants. This also provided me an opportunity to understand the culture of the school better and by extension the role-played by each and every teacher in the daily running of the school. Here was a group of teachers who felt directly responsible for the progress of the research project. They somehow felt scrutinized and often pressured to perform certain tasks no matter how much I tried to create a relaxed environment. On the other hand, there was this group

of teachers who are technically outside the research project but who significantly participate albeit unknowingly.

Theorizing Collaboratively

As an insider researcher, I had the responsibility of analyzing data collaboratively with teachers. I could not just pack my bags and leave before we had theorized and generated knowledge together from the information we had gathered. Kushner and Norris (1980) argue that the task of understanding can only be successfully pursued when provisions are made for people to "move from merely articulating what they know (i.e., providing us with data) to theorizing about what they know (i.e., creating meaning)" (p.27). It was therefore necessary that the final part of the research process was an engagement with data analysis, where the teachers gave meaning to their experiences through discussion, creating discourses and personal reflections. This part of the research process is important because the perspectives of the teachers can only be effective if they are not forced into preconceived "academic methodologies of categorizing knowledge" (St. Denis, 1989, p.38). As Hall argues, despite the best intentions in the world, researchers cannot comprehend, much less intuitively grasp, the conditions and priorities of survival and growth in the villages — by virtue of the fact that "our class positions and our class interests, the knowledge we created about their lives was [is] bound to be in error" (1979, p.398). Teachers' interpreting the data from their perspective was an important part of the project. It meant that they gained access to "scientific" methods of generating data about their world "so that they can make the necessary changes in their world as they see it" (St. Denis, 1979, p.41).

Research as a Site of Struggle

Although academics that are insiders experience moral dilemmas as they conduct research with living persons, some of my experiences were almost paralysing. To use St. Denis' (1989) words, in reference to community-based participatory research, this kind of research is 'messier' than 'conventional' research because it does not follow a standard research formula. Instead, it is dependent on the interpersonal dynamics of all the research participants. Dependence on interpersonal dynamics makes it difficult to pre-determine transpiring events which may influence the outcome of the research. For example, two of my research partners were unable to implement their classroom projects even though they had actively participated in articulating what they know (i.e. providing data) and theorising what they know (i.e. creating meaning). They were unable to

participate fully in transforming the reality for social change (i.e. taking action). These unforeseen human dynamics reminded me about the inevitability of working with human beings that often have diverse needs and aspirations.

Such experiences enabled me to understand the 'risk' the researcher has to be willing to take in using such research strategies. This way of doing research should not be seen as an efficient and easier way. Assumptions and ideological perspectives accumulated over a long period of time are painful to give up. It can only occur when enough time is set aside for researcher and partners to know each other well, to allow opinions, some in conflict with each other, to be heard. This way, the researcher is able to give up something in exchange of something else more useful and practical under the circumstances. In short, the researcher has to be flexible.

The Double Role of an "Insider" Academic

In this paper, I have discussed the dilemma faced by academic researchers who also played the double role of being an Indigenous "insider." The dilemma rose from the fact that social science research has invented an "other" as the object of research, which becomes problematic when the "other" becomes a researcher. However, some research perspectives such as feminist, critical theory, action and participatory action research offer some practical solutions to the dilemma of choice. Each in its own way shows a commitment to power balance between the researcher and those researched; creating self-awareness through consciousness raising leading to social change. These research strategies when used effectively can enable the insiders to answer research questions that concern them.

Doing research with the people "goes a long way toward narrowing the knowledge gap, in that it relates the production of knowledge to the process of action and to the actual experiences of the powerless group" (Gaventa, 1993, p.33). Because of setting four criteria to guide my research: 1) it must not be research on "others;" 2) it must include the shared experience of all people involved in the research; 3) it must be dialogic; and 4) and there must be sharing of skills so that the process continues long after I had left, I have found to some extent that my research was an educational process and a means of taking action for change. This research made provisions for the teachers to move beyond articulating what they know (i.e. providing us with data) to theorizing about what they know (i.e. creating meaning) and to transform their reality for social change (i.e. taking action). This way of doing research created a space for advocacy and intervention, a process feminist researchers refer to as conscious

subjectivity, in which the model of a "distanced, controlled, ostensibly neutral interviewer" has been replaced with that of "sisterhood," an engaged and sympathetic interaction between two individuals united by the fact of gender oppression" (Patai, 1991. p.143). This way of doing research is morally defensible, particularly for groups that have previously been disadvantaged by knowledge generated through social science research.

Notes

1. This term is used here to refer to those academics historically situated within traditionally powerless groups of people.
2. This word "elder" does not indicate chronological age much as it shows the respect I have for their wisdom

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FERTILITY OF A COMMUNITY IN TRANSITION: THE CASE OF JAMES BAY INDIANS, CANADA

Anatole Romaniuc
Adjunct Professor
University of Alberta

1977 Highridge Avenue
Ottawa, Ontario
Canada, K1H 5H1
romaniuc@netrover.com

Abstract / Résumé

This is an in-depth study of procreative behaviours of the Indian community in the James Bay area, based on a socio-demographic survey carried out there in 1968, along the two axes—the level and the tempo of reproduction. A wide range of underlying social, cultural and biological factors are explored. Shifts in infant lactation, from breast to bottle-feeding, and from a nomadic to a sedentary life are prominent factors in the post-war increase in the natural fertility of Indian people. Attitudes towards procreation and practices of birth control in this isolated community suggest that at the time of the survey a reappraisal of traditional natalist values for a more selective fertility was in the offing.

Mettant à profit une abondante statistique démographique, tirée de l'enquête auprès des Indiens de la Baie James en 1968, cette étude entreprend une analyse approfondie de leurs comportements procréateurs sous la double dimension du niveau et du calendrier (tempo) de la reproduction. Les facteurs socioculturels, démographiques et biologiques sous-jacents sont explorés à tour de rôle. Le passage de l'allaitement naturel à l'allaitement au biberon, ainsi que la sédentarisation des populations indiennes se traduisent par une hausse de la fécondité naturelle dans les années d'après guerre. L'étude des attitudes à l'égard de la procréation et des pratiques anticonceptionnelles suggère qu'une réévaluation des préceptes traditionnels natalistes vers les normes d'une fécondité sélective se soit déja manifestée à l'époque de l'enquête.

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Introduction

This article explores a unique set of data collected by the socio-demographic survey, carried out in the summer of 1968 in the six Indian settlements of the Eastern and Western shores of James Bay,[1] namely Moosonee, Moose Factory, Fort Albany, Attawapiskat, Fort Rupert and Fort George, with a total population of about 3500 inhabitants of which 2,678 (1404 males and 1274 males) were actually canvassed. In terms of households, 474 were visited, but those that did avail themselves to the interview represent 74.5%; the remaining 25.5% were not interviewed for different reasons (refusal, too old, sick, absent). This is not a poor response rate considering the extent to which Indians on reserves are inundated with all kinds of inquiries.[2] The survey includes a wide range of demographic variables – age, marital status, family and household composition, mortality, migration. Particular emphasis was placed on fertility. Complete reproductive histories were obtained for 427 women. With this wealth of information, the article undertakes a comprehensive, in-depth study of the procreative behaviours of an Indian community at an exceptionally important stage of its demographic development.

Indeed, the survey caught the Indians of James Bay, and to a great extent Indians in Canada in general, at a particular juncture in their demographic history. While still preserving many of the traditional attributes of their demography, they were just entering, in the post-war years, the process of modernisation that triggered a cycle of rising natural fertility before setting, as of the mid-sixties, on a course of long term fertility decline. These shifts in procreative behaviour come to light when older and younger mothers' generations are compared. As such the survey sheds light, depending on the cohorts of women considered, on pre-modern, traditional fertility patterns, on post-war early modernisation, and the onset of the transition to modern childbearing norms.

A number of articles of this survey have been featured earlier (Piché, 1977; Romaniuk, 1974; Romaniuk, 1981), on various demographic aspects, particularly on procreative behaviours. The approach in issuing the information was piecemeal rather than comprehensive. A number of variables, more notably those on the attitudes towards procreation and practices of birth control were entirely left out. Yet, reliable historical data on the demography of Canada's Aboriginal peoples are so rare that I felt the information was too important not to be made available to potential researchers, even at this late date.

The Indians of the James Bay region are known as the Swampy Cree who belong to the Algonkian linguistic group. In the past, they relied on hunting, fishing, trapping and fur trading as their main sources of subsistence. In the post-war years they started to abandon their no-

madic way of life and adopted a sedentary one. Their traditional means of subsistence were replaced by government relief schemes, supplemented by income from the few wage-earning opportunities available in the region. At the time the survey was taken, they still lived in relative isolation from mainstream Canada. Their contacts were limited to a few missionaries, traders and administrators living in the region, but they were by that time opening up to the wider world. Indeed, shortly thereafter, they began the transition towards modern childbearing norms. As Aboriginal populations in general, they have yet to catch up to the Canadian population in this regard.

The article is made up of three sections: the first presents the estimates of natality (birth rates) and fertility levels; the second examines the reproductive patterns, with special attention to child-spacing; and the third and final section explores a range of underlying biological, social and cultural factors.

Section 1: Levels of Natality and Fertility

To approximate the overall childbearing performance of the James Bay Indian population, use is made of the crude birth rate and the total fertility rate or average number of children born to a woman past reproductive age. As for the former, three kinds of estimate are produced:

1. Direct estimate, by conventional method, based on the number of births reported to have occurred in the last 12 months preceding the survey. There were 121 such births recorded for a population of 2,556 individuals (present residents), who have been surveyed. This yields a birth rate of 47.34 per 1000 population.

2. Indirect estimate, in Table 1, derived from the proportions of children under age 15, by means of stable population models. Data on the age distribution for the six villages surveyed are taken from the population registers kept by the Department of Indian Affairs and Northern Development. Conceptually this is a de jure population; it includes all residents, present and absent.

3. Indirect estimate, in Table 1a, by means of stable population models, derived from the proportions of children under age 15 of the population covered by the 1968 James Bay survey.

Table 1
Estimates of Birth Rate Derived from the Proportion of Children in the Specified Age-Group, by Coale-Demeny Stable Population Model West, James Bay Indians, Using data from Resident Population Registers kept by DIAND (see note below), 1968

Age Group	Proportion in specified age group in per cent*	Birth rate** per 1000 population	Birth rate adjusted for late births reporting***	Birth rate adjusted for gains in survivorship****
(1)	(2)	(3)	(4)	(5)
0-4	19.64	46.7	50.4	49.9
0-9	35.59	46.8	48.8	48.5
0-14	47.90	45.8	47.0	46.8

Notes:

* Children proportions in col. (2) are averages for three year (1966, 1967 and 1968) period data on Indian residents, present and absent, registered by the Department of Indian Affairs and Northern Development (DIAND).

** Birth rate derived by the Coale/Demeny stable population model, from the age proportions in col. (2). To this end, an estimate of mortality level was required. According to the life tables for the Canadian Indian population, available for the 1967-68 period, the expectation of life at birth was 63 years. For the purpose of estimating the birth rate for the James Bay, the expectation of life for this relatively isolated community was assumed to be in the vicinity of 60 years. For rationales underlying use of the stable population models in estimating vital rates for Indian population of Canada, see Romaniuk and Piché (1972).

*** Births in Indian reserves are generally reported with some delays which in some case can be months, even years, and therefore registered child population under age 1 can be under-estimated as much as by 10 per cent. This percentage decreases with age (for the adjustments for late reporting see Piché and George (1973).

**** Since 1945 or so the survival rate of children has increase gradually, quite significantly. The infant mortality, for example, has dropped from about 170 infant deaths for 1000 births just after the war to abut 60 by 1970. The birth rates in col. (5) are adjusted (downward) to take into account the gains in proportion of children due to increased survivorship.

Table 1a
Estimates of Birth Rate Derived from the Proportion of Children in the Specified Age-Group, by Coale-Demeny Stable Population Model West, Using Data from the James Bay Indian Survey, 1968

Age Group	Proportion in specified age group in per cent*	Birth rate per 1000 population**	Birth rate adjusted for gains in the survivorship, per 1000 population***
(1)	(2)	(3)	(4)
0-4	20.42	49.2	48.7
0-9	37.55	50.5	50.2
0-14	51.72	51.6	51.4

Notes:

* Based on the 1968 James Bay Survey data for present resident population (visitors not included).

** See note in Table 1 for the estimation method.

*** See note **** Table 1

It is important to underscore that the three sets of estimates are independent of each other, either in regard to the source of data (survey v. administrative records), the reference population (de jure v. de facto) or in regard to the method of estimation (conventional v. non-conventional stable population). Yet the beauty of the exercise is that it yields birth rates remarkably close to each other, clustering in the narrow range of 46 to 50 births per 1000 population. It is difficult to be firm on any of the estimates. The direct estimate is based on a rather small number of births, subject to annual fluctuations. Estimates in Table 1a based on the survey data may be somewhat skewed toward households with children and therefore produce a birth rate which leans towards the high side. Perhaps the preferred estimates are those in Table 1, based on a three year average of the whole resident population (present and absent), included or not in the survey. As such these estimates are grounded on a more stable data base.

As to the total fertility rate, that is, the cumulative rate of the current age-specific fertility rates (births occurred during the 12 month preceding the survey, over the childbearing range up to mothers' 45 years of age), this posed a problem. There were not enough births (only 121 for 381

women in reproductive ages 15 to 45) to calculate reliable age-specific fertility rates. Therefore, to approximate the total fertility rate (the number of children born to women over their reproductive age span), it was necessary to resort once again to the indirect method of stable population, as per Table 2. In order to convert the birth rates (BR) in Table 1 (col.5) into gross reproduction rates (GRR), and then into average number of children per woman, two additional pieces of information were required: (1) the mean age of women at birth of their children (mean age of fertility) and (2) the masculinity ratio at birth. Neither of these parameters is exactly known for the Indians of James Bay, but plausible approximations are available (see Table 5 for average age of fertility). To be on the safe side, it has been assumed that the mean age of fertility is in the range of 28 to 30 years. As to the masculinity ratio, required to convert gross reproduction rate into the total fertility rate or mean number of births per woman, it is assumed to be 1.03, a ratio observed in many human populations.

Table 2
Gross Reproduction Rate and Average Number of Children, Derived from the Estimated Birth Rates by Age Group Shown in Table 1 (col. 5) for Specified Means Ages of Childbearing

Mean age at child-bearing	Gross reproduction rates (GRR) corresponding to birth rates in Table 1 (col. 3), derived from the specified age groups			Average number of births or total fertility rate (GRR X 2.03)		
	0-4	0-9	0-14	0-4	0-9	0-14
28.0	3.48	3.40	3.27	7.08	6.90	6.64
29.0	3.63	3.56	3.42	7.38	7.23	6.95
29.5	3.72	3.65	3.51	7.55	7.41	6.11
30.0	3.83	3.73	3.58	7.77	7.57	7.27

Source: The 1968 James Bay Demographic Survey

Table 3 offers yet another approach to estimate the average number of children born to women by age, for fertile women and all women, in taking into account their marital status. One begins by calculating the average number of births occurred to fertile ever-married women. Fertile women are assumed in this instance to be those who have given birth to at least one child. (It is deemed that data for fertile ever-married women,

as defined here, are likely to be more reliable than for never-married, single women or ever-married reported childless). In multiplying the average number of children per ever-married fertile woman in each age group, by the proportion of ever-married women in the corresponding age group, one obtains the average number of births of fertile women of all marital statuses (married and not married). Finally, adjustment is made for a 6% sterility rate to generate the average number of births for all

Table 3
Number of Births to Woman, in Specified Age Groups, by Marital and Fertility Status, James Bay Indians, 1968

Age	Number of fertile ever-married women	Number of live births to ever-married	Average number of births per mother (3:2)	Percentage of ever-married women*	Fertilty rate adjusted for:	
					Ever-married women (4x5)	Assumed 6% sterility
1	2	3	4	5	6	7
Under 20	5	10	2.00	11.57	0.23	
20-24	50	130	2.60	61.39	1.60	
25-29	46	220	4.78	81.82	3.91	
30-34	54	340	6.30	95.00	5.91	
35-39	40	293	7.33	95.00	6.96	
40-44	42	373	8.88	95.00	8.44	7.93
45-49	32	273	8.53		8.10	7.61
50-59	52	415	7.98		7.58	7.13
60-70	25	211	8.44		8.02	7.54
70 et plus	23	157	6.83		5.92	5.56
Age unknown	10	63	6.30	---	---	---
Total	379	2,485	---	---	---	---
45 and over	**132**	**1,056**	**8.14**	**95.00**	**7.60**	**7.14**

Source: The 1968 James Bay Demographic Survey
* The 95 percent of ever-married women for ages over 30 is a rounded figure.

women (fertile or not and ever-married or not). Note, that according to the survey only 2.1% of ever-married women who survived to 45 years of age have never given birth to a live child. However, it is likely that this is an underestimation given that the survey was so heavily oriented towards fertile women. For Canada as a whole, the childlessness among ever-married Indian women, past 45 years of age, is about 6% according to the 1961 and 1971 censuses.

Thus, according to these estimates, women who at the time of the survey (1968) were over 45 years old, have been fertile (had at least one child) and have been ever-married, produced on the average 8.0 children. When adjusted for childlessness (sterility) and marital status (all women ever-married or not), the average number of children turns out to be 7.14. Note, however that these averages are significantly higher for younger generations, respectively 8.9 and 7.9 (for 40-44 age group).

From the above estimation, it is safe to conclude that for the James Bay Indians the crude birth rate in the in the upper forties (47-50 per 1000) (Table 1). The exact period prior to 1968 to which these rates apply depends on the particular age group from which they are derived: past 7.5 years for the proportion of children under age 15, and past 2.5 for the proportion of children under 5 years of age. But broadly, these rates reflect the childbearing performance of generations of women who were in childbearing ages in the post-war years up to 1968.

For a historical perspective of the dynamics of fertility among the James Bay Indians, the reader is referred to Appendix Table 1, which exhibits birth rates over a broader time range, from 1972 back to 1920s. As we go back in time, to the 1930s and 1920s, the crude birth rate hovers around 40 per 1000, thus reflecting the traditional Indian childbearing regime. As elsewhere in Canada, the post-war years brought the James Bay Indians an increase in natural fertility (Romaniuk, 1981). Historically, the estimates of birth and fertility rates, derived from the 1968 Survey, are near their peak value. From there on, they set on the course of a rapid fertility decline (Romaniuc, 1987), as did Indians in general but with a time lag of a few years, probably on the account of their relative isolation.

Section 2: Reproductive Patterns

It is customary in the analysis of fertility to make a distinction between its two dimensions: the level or quantity/intensity; and the age pattern or tempo of childbearing. In the preceding section we dealt with the former, whereas in this section we shall turn our attention to latter dimension. The age at which women start and terminate having children, the age at which they have them, the speed (interval) at which

children are born, are important features of the procreative behaviour of a population.

The 1968 James Bay survey has collected complete reproductive histories for 427 mothers. They include such information as dates of successive confinements, whether confinement is a live birth, a still-birth or a miscarriage, whether the child is still alive or deceased and the child's date of death, mother's age at delivery, her marital status. With these data it was possible to calculate average intervals, cross-classified by mother's age at the time of the survey, birth order, duration of child survival, intervals containing pregnancy wastage (still born and/or miscarriage), all relevant to the study of the tempo of reproduction.

The following presents, first, the basic parameters of fertility age patterns and the reproductive span, then in greater detail the analysis of child-spacing.

Reproductive Span; Average Age at Maternity

The age, at first and the last confinements for live births, as well as mean length of reproductive life for mothers who have survived to at least age 45 and were still married at 45 although not necessarily to the same man, are shown in Table 4. They are compared with a few historical high fertility populations.

Table 4
Mean Age of Mothers at Birth of Their First and Last Child, and Mean Reproductive Span, for James Bay Indians and a Few Selected Earlier Populations Known for their High Fertility

Population	First Child	Last Child	Mean reproductive span (in years)
James Bay Indians (1)(*)	21.9	38.7	16.8
Hutterites (2)(**)	22.2	40.9	18.7
Cocos Keeling Islands (3)(***)	19.4	39.1	19.7
French Canadians (4)(****)	23.2	41.0	17.8
Punjab villages (5)(*****)	20.0	37.0	17.0

Sources: (1) The 1968 Demographic Survey; (2) Tietze, 1957; (3) Smith, 1960; (4) Henripin, 1954; (5) Potter Jr., et al, 1965. See references for complete identification of sources.

Notes:

(*) For James Bay Indians the age at first confinement (live births) and the age at last confinement are based on, respectively, 101 and 107 recorded cases of women who at the time of the survey were 45 years and over, and who were married to age 45, though not necessarily to the same man. For 88 ever-married women the dates both at first and last confinement have been recorded, and they yield an average reproductive span of 16.6, a very close figure to the one reported in the table.

(**) For Hutterites the estimates of the age at first and last confinements are based on records for 209 mothers who married prior to the age of 25, married only once, and were living with their husband to age 45.

(***) For Cocos Keeling Islands there was no information on the mean age at first birth. This had to be estimated by adding to the age at first marriage (18.1), the interval between marriage and the first child birth, assumed to be 16 months. As to the age at last birth, this is based on records for 84 mothers who were still married, though not necessarily to the same husband, at age 47.

(****) For French Canadians the age at first birth is estimated by this writer by adding to the age at first marriage (21.9), the interval between the latter and the first birth assumed to be 16 months. Jacques Henripin estimates the latter interval at 15.8 months. However, this amounts to 16.8 months when prenuptial conceptions are excluded. He considered this to be a somewhat inflated average since some of the prematurely deceased first-born infants may not have been recorded, and the interval may in fact include a first or even second child.

(*****) For the eleven Punjab villages the age at first birth is an approximation. It is not quite clear whether the last birth was meant to be only live or also still-birth. Furthermore, the authors of the Punjab study find the average age of 37 at last confinement to be young enough to raise suspicion that some birth control may have been practised among these populations late in the reproductive period.

There are three particular features about reproductive life of the James Bay Indian mothers that call for comments.

First comment refers to the relatively late start in childbearing as compared, not only to the populations listed in Table 4, but also to many populations with high fertility in developing countries. Various hypotheses of this relatively late start of childbearing of Indian women may be advanced, though none are empirically verifiable. One such hypothesis is that some deliberate birth prevention was taking place at the time the

older generations, considered here, started procreation, and that their statements to the contrary during the interview may have to be accepted with reservation. Another hypothesis might be that sexual partnership in Indian society was not as indiscriminate as it might appear in light of the observed high prenuptial fertility. Finally, one may speculate about the delaying effects on childbearing of the poor health and living conditions that prevailed in earlier times. This could result in later start of menstruation, puberty, complications for very young girls to get pregnant or their incapacity to carry to term a live-born child.

Second, what stands out is the relatively early termination of childbearing. This seems to occur about two years earlier than among the Hutterites or the French Canadians of the XVIII century. Forty, instead of 38, as observed in the James Bay Indians, probably was the average age at last confinement for most Western populations in the past when little or no birth control within marriage was practised. Here again little can be offered in the way of explanation. One may hypothesise that some birth control was actually practised by James Bay women in their late reproductive life. Poor health conditions and the hardships of the nomadic mode of life may have caused reproductive impairments and premature sterility. The longevity of reproductive life may have been curtailed by lesser exposure to sexual intercourse, as they advanced in age.

Third, as a result of a later start and earlier termination of childbearing, Indian women are left with a reproductive span that is shorter by about two or even three years than that prevalent among populations known for their high fertility. As we shall see later, when analysing child spacing, earlier generations of Indian women took a comparatively longer time to resume conception.

It should be noted, however, that there is only a weak correlation (.26) between the ages at first and at last confinements. It follows that the age at which women start to bear children has little effect, if any, on the age at which they terminate it.

The average age of women at which their children were born, shown in Table 5, stands at 30.2 years for mothers over 45 years of age, an indication of relatively old fertility age pattern. French Canadian women of the XVIII Century experienced, like Indians, a relatively late entry into childbearing. But, unlike the former, they had many children. The combination of the two makes the average age at their children's birth even higher, 32.2. Most of the high fertility African and Asian populations start having children at very young age (see Congo as an example).

Table 5
Average Age of Women at Birth of their Children

Specification	Average age
James Bay (mothers over 45 years of age) Number of cases: 759 children	32.2
French Canadian (XVIII Century) (women with completed families)	30.2
Canada Indians*	27.6
R.D. Congo**	27.0

Notes:

* Based on the age specific fertility rates recorded for 1968 for all Indian population of Canada.

** Based on the age specific fertility rates for women 15 to 45 years in 1956 (Romaniuk, 1967)

Next we turn to a more detailed examination of child spacing by resorting to the data from the James Bay survey on the successive birth intervals.

Child-spacing

The interest in child-spacing to be analysed hereafter is two-fold: first, more general, to infer the level and age pattern of fertility; and second, more specific, to probe into intergenerational changes in procreative behaviours and thus get some sense of the time trends over the period that James Bay women were interviewed for their fertility.

In what follows, I shall examine the successive birth intervals cross-classified by: (1) age of mothers at time of the survey; (2) age of mothers at the commencement of interval, and (3) birth order (parity). For each of these cross-classifications, two series of birth intervals are presented: the observed and the adjusted. Given the rather small number of intervals and abnormal departure from the prevailing patterns in a few cases, it was deemed advisable to smooth the observed birth interval series. To this end, use was made of a first degree polynomial, that is, a linear regression method of fitting to the observed data. (Adjustment by a second degree polynomial was also tried but the fit was very close to that of

first degree). Unless otherwise indicated, the calculated intervals are between successive live births.

Let us focus first on Table 6 showing birth intervals at a mother's age at the time of the survey (1968). What is striking in this table is the trend of birth intervals to diminish from older to younger mothers' generations. From slightly over 32 months for mothers over 60 years old to slightly less than 20 months for mothers under age 25.

Table 6
Mean Birth Intervals Between Recorded Successive Live Births of Mothers Continuously Married during Interval by Age of Mother at Time of Survey, 1968

Mothers' age in 1968	Number of intervals	Average interval in months: Observed	Adjusted	Standard deviation
-20	5	17.80	17.20	3.71
20-24	74	18.69	18.80	6.56
25-29	168	19.33	20.41	7.96
30-34	261	22.19	22.02	9.56
35-39	217	23.94	23.63	10.25
40-49	457	26.07	26.04	12.94
50-59	226	29.34	29.26	16.19
60 +	11	32.39	31.77	19.49
Unknown	10	24.20		9.31
All ages	1529	24.91	—	13.07

Source: The 1968 James Bay Demographic Survey

There may be at least four reasons for the observed decrease in the length of the birth interval from older to younger generations. First, there has been a real change in intergenerational procreative behaviours. As we shall see later, younger generations have largely given up breast-feeding for bottle-feeding which may entail an earlier resumption of the ovulation and exposure to pregnancy. Second, it is well-known that fecundity decreases as women reach higher ages and higher parities. Third, the effect of so-called "truncated intervals," that is open intervals, may be greater for young mothers, as some of them may have had their next child well after the survey. The exclusion of the latter cases from the observation field may introduce a shortening bias in the intervals. The

fourth reason is the tendency of old mothers to neglect to report some of their children, particularly those who died at very young ages. Intervals exceeding 48 months represent 6.5% of all intervals and some of them may actually conceal unreported dead children. Short intervals, less than 12 months, account for 4.5% of intervals. Unusually short intervals may be due to erroneous recording of birth dates or still-birth being mistaken for live birth. The removal of the unusually long (over 48 months) and unusually short (less than 9 month intervals) will bring down the length of the average interval from 25 to about 23 months for all ages

Table 7
Mean Birth Intervals between Recorded Successive Live Births of Mothers Continuously Married during Interval by Age of Mother at Commencement of Interval, James Bay Indians, 1968

Age of mother at the *commencement* of interval	Number of intervals	Average interval in months: Observed	Adjusted	Standard deviation
Less than 16	7	21.29	--	10.86
16	11	18.00	21.31	4.75
17	30	20.27	21.65	9.37
18	46	22.61	21.98	10.37
19	66	22.29	22.32	12.11
20	98	23.91	22.66	17.54
21	79	21.23	22.99	8.89
22	100	23.09	23.33	16.60
23	88	23.73	23.66	14.54
24	87	24.59	24.00	11.93
Less than 20	160	21.66	22.16	10.78
20-24	452	23.35	23.69	14.53
25-29	367	25.75	25.22	14.71
30-34	255	28.74	26.75	15.84
35-39	144	26.51	28.29	11.32
40 and over	29	29.90	29.82	12.27
All ages	1407	25.22	—	14.31

Source: The 1968 James Bay Demographic Survey

combined, and from about 32 months to about 27 months for mothers over 60 years old, while that of women under 30 remains the same, about 19 months – a rather substantial gap of about eight months between older and younger generations.

Further insights into the dynamics of child-spacing may be gained from the intervals cross-classified with the mother's age at the commencement of the birth interval, shown in Table 7. As one can see, the length of interval increases gradually with the mother's age at the beginning of the interval: almost 22 months for those under 20 years of age; nearly 26 months for those 25 to 29 years old; and close to 30 months for women who started childbearing at more advanced ages. The interpretation thereof is complicated by the fact that thus ordered intervals confound the generational and birth order effects. The increasing length of birth interval with age at the commencement of the interval may reflect the fact that women who enter later into childbearing are precisely those who are less fecund or are less fit to carry pregnancy to term. It is also well established that increasing pregnancy wastage, longer postpartum amenorrhoea, lesser fecundity due to either physiological causes or lesser exposure to sexual intercourse are associated with the mother's age.

Table 8
Mean Birth Intervals between Recorded Successive Live Births of Mothers Continuously Married during Interval by Birth Order, James Bay Indians, 1968

Birth order	No of intervals	Average intervals in months: Observed	Adjusted	Standard deviation
1-2	256	22.71	23.96	11.46
2-3	232	24.44	24.23	15.11
3-4	224	23.64	24.57	12.13
4-5	195	25.61	24.88	13.89
5-6	167	25.86	25.18	12.91
6-7	135	26.22	25.49	12.53
7-8	103	27.64	25.79	16.37
8-9	82	27.13	26.10	11.79
9-10	64	24.47	26.40	9.28
10 and plus	71	25.62	26.71	9.97
All orders	1529	24.95		13.07

Source: The 1968 James Bay Demographic Survey

Finally, to cast some light on the relationship between birth order or parity and the length of intervals, we shall turn to Table 8. The reading of this table, as in the previous case, is complicated by the fact that it mixes up various generations, older and younger, which as we have already seen, exhibit different patterns of procreation. To neutralise, to some extent, the latter problem, the very least we can do is separate the older generations with already completed childbearing (which to a large extent represent more traditional childbearing behaviours), from the younger generations, under age 40 at the time of the survey, (which represent more modern childbearing patterns). This is what is done in Tables 9 and 10 respectively.

Table 9
Mean Birth Intervals between Recorded Successive Live Births of Mothers Continuously Married during Interval by Birth Order, for Mother Under 40 Years Old at the Time of the Survey, James Bay Indians, 1968

Birth order	No of intervals	Average intervals in months: Observed	Adjusted	Standard deviation
1-2	157	20.67	21.87	9.19
2-3	134	21.61	21.81	9.75
3-4	126	21.09	21.74	8.76
4-5	103	23.13	21.68	10.48
5-6	74	22.31	21.62	8.77
6-7	53	23.62	21.56	10.12
7-8	29	20.24	21.50	8.06
8-9	20	21.70	21.44	7.44
9-10	14	21.21	21.38	7.65
10 and plus	15	20.33	21.32	7.12
All orders	725	21.66		9.35

Source: The 1968 James Bay Demographic Survey

Table 10
Mean Birth Intervals Between Recorded Successive Live Births of Mothers Continuously Married during Interval by Birth Order, for Mothers Over 40 Year Old at the Time of the Survey, James Bay Indians, 1968

Birth order	No of intervals	Average intervals in months: Observed	Adjusted	Standard deviation
1-2	97	26.05	27.75	13.82
2-3	96	28.29	27.77	19.81
3-4	96	26.93	27.79	14.80
4-5	90	28.63	27.81	16.58
5-6	91	28.71	27.83	14.92
6-7	82	27.90	27.85	13.60
7-8	74	30.54	27.87	17.82
8-9	62	28.89	27.89	12.38
9-10 1	50	25.38	27.90	9.48
0 and plus	56	27.04	27.9	10.14
All orders	798	27.88		15.15

Source: The 1968 James Bay Demographic Survey

When one compares the two aggregates, older versus younger generations, respectively in Tables 9 and 10, two distinct features stand out. One is the invariability of the birth intervals, though at different levels, for each generational aggregate. In other words, for a given generational aggregate intervals appear to be more or less of the same length irrespective of the birth order. This at first view is somewhat surprising because one would expect the length of intervals to increase with age for reasons mentioned earlier. On the other hand, shorter intervals are required to achieve large family size, say 10 and more offspring. Those who achieve such a high level of pregnancy may be precisely the women enjoying excellent reproductive health. Those who suffer from reproductive impairments may not go beyond two or three children, and to do even that may take a much longer time.

The second feature that stands out, when comparing the two generational aggregates, is the significant difference in their respective length of intervals. The latter is about six months shorter for the younger, as compared to the older generations, a clear indication of intergenerational change in the dynamics of reproduction.

Table 11 lines-up intervals for James Bay (older and younger generations separately) and for two high fertility populations, Cocos Keeling Islands and the Hutterites. The significantly longer overall average interval for the older mothers' generations of James Bay is striking. Their tempo of reproduction is clearly slower; they take comparatively longer to produce progeny.

Table 11
Average Live Birth Intervals between Successive Live Births for James Bay Indians (1968) and a Few High Fertility Populations (in Months)

Population	Average interval in months
James Bay Indians:	
All generations combined (1)	25.2
Those who at the time of survey were over 40 years old	27.9
Those who at the time of survey were over 50 years old	30.3
Those who at the time of survey were over 60 years old	32.4
The Cocos Keeling Islands (2)	24.4
Hutterites (3)	25.4
Punjab Villages (4)	30.0

Sources: (1) The 1968 James Bay Demographic Survey; (2) Smith, 1960. (3) Tietze, 1957. (4) Potter, 1965. See references for complete identification of the sources.

Notes: *For James Bay Indians, weighted average of mean birth intervals for ages 50-59 and 60 and over.

The reported average live birth intervals, respectively for old and younger generations of the James Bay Indian mothers, are consistent with the range of the theoretical or hypothetical intervals calculated under the specified assumptions regarding the individual components of the live birth intervals, as per Table 12. The chief differentiating factor between the two generations appears to be the duration of breast-feeding, long for the older and much shorter for the younger generations. Reduction in the period of ovulatory exposure to pregnancy, and that of pregnancy wastage are contributing factors.

Table 12
Expected Average Intervals Separately for Older and Younger Generations, Under Specified Assumption, James By Indians, 1968

Assumptions	Old generations (prolonged lactation)	Young generation short or no lactation)
1.Gestation period	9	9
2.Unovulatory cycle (1)	2	2
2.Ovulatory exposure (2)	6-10	5-7
4.Added pregnancy wastage (3)	2.5	1
5.Lactational amenhorrea (4)	9-10	3-5
Total	28.5-33.5 months	20-24 months

Notes: (1) Resumption of menstruation after the delivery is assumed to be 2 months. (2) Longer ovulatory exposure for older generations is assumed on account of their nomadic mode of life. (3) See Potter's estimates of the contribution of the pregnancy wastage to the length of live birth interval in Table 26. It is further assumed that due to health improvement and sedentary life of younger generations the pregnancy wastage-related delay is reduced from 2.5 to 1 month. (4) The lactational amenorrhoea is a function of the duration of the breast-feeding (see text later).

One closing comment: the two dimensions—the level or in demographers' jargon intensity or quantity of fertility, and the tempo of childbearing—are not independent of each other. One would indeed expect an inverse correlation between the two. The shorter intervals, in the absence of systematic birth controls, will tend to produce larger offspring, and vice versa. In order to check for consistency between quantity and tempo, Table 12(a) has been constructed. Note also a high degree of constancy between expected number of births per woman as derived from birth intervals (col.2), and the estimates for the same in col. 4., taken from Table 3 col. 4.

Table 12(a)
Average Birth Intervals and Average Number of Births per Woman, Expected and Estimated

Generations	Average Interval	Expected average number of births	Estimated average number of births
(1)	(2)	(3)	(4)
Older generations:			
Over 40	27.9	8.24	8.21
Over 50	30.3	7.67	7.83
Over 60 old	32.4	7.23	7.67
Younger generation: under 45 years of age	25.2	9.02	8.00

Notes: Reproductive span is taken to be 16.8 years or 202 months as per Table 4. To calculate expected values for average number of births (col.3) the reproductive span of 202 months is divided by the number of birth intervals (col.2), and add one birth. Estimated values in col. 4, are taken from Table 3 col. 4.

Section 3: Factors in fertility

This section deals with a range of factors deemed to influence, directly or indirectly, the intensity and the tempo of reproduction. Specifically, such factors as marital status, illegitimacy, lactation practices, pregnancy wastage, some reproduction-related features of nomadic way of life, and finally attitudes toward childbearing and birth control, stand to receive due attention in this section. In doing so, the dichotomy of older and younger generations should be kept in mind.

Nuptial (marriage) Patterns

The age at which people enter conjugal unions appears, in the light of statistics collected for various populations, to be a significant factor in fertility, especially among those with little or no birth control practice.

Marriage, as an institution, undoubtedly offers the optimum conditions for bearing and upbringing children. Almost invariably, regular unions sanctioned by law or by custom, stand to produce larger offspring than do the more vulnerable and unstable consensual unions. Acute marital instability, often a symptom of social disorganisation, has a depressing effect on fertility because of women's lesser exposure to sexual intercourse or because women with conjugal problems are more prone to resort to contraception and abortion. If accompanied by wide-spread sexual promiscuity, conjugal mobility (divorce and remarriage) will act as a medium for dissemination of venereal diseases, known to cause impairments of reproductive organs and sterility (Romaniuk, 1968). These observations suffice to justify the need to acquaint ourselves with the marital patterns as background to a better understanding of the Indian procreative behaviour.

Table 13
Single Indian Females in Specified Age Groups, in Percent

Age	Canadian Indians	James Bay Indians
10-14	100.0	100.0
15-19	83.8	88.4
20-24	39.1	38.6
25-29		18.2
	}15.7	}10.8
30-34		3.1
35-39		2.3
	}7.4	}4.5
40-44		6.4
45-49		2.7
	}4.4	}4.5
50-54		6.9
55-59		0.0
	}3.7	}2.0
60-64		5.3
	}3.2	
65 and over		2.5

Sources: For Indians the 1961 Census, Canada Statistics Canada, Demography Division; for James Bay Indians the 1968 Demographic Survey.

The overall picture that emerges from Table 13 is that female marriage among Indians, if not universal, comes close to it. Those remaining single, among both Indians generally and the Indians of James Bay, hardly exceed five percent of the women by the time they reach menopause and are no longer fertile. Only in the 25-34 age group, the proportion of women remaining single in James Bay appears to be significantly lower as compared to all-Indian population, respectively 10.8% and 15.7%. In general, a lower percentage of singles among James Bay Indians might be due to a somewhat more liberal definition of "conjugal unions" adopted in the James Bay survey as compared with the census definition. Whereas in the 1961 census definition only those who are "legally married" are considered to be married, the James Bay survey may have included cases of de facto unions.

But surprisingly enough, the age pattern of Indian marriage is relatively late, compared to populations of many developing countries, with which Canadian Indians otherwise share many demographic features. Even in the age group of 20 to 24 nearly 40% still remain unmarried, both for Indian women in Canada as a whole and for the James Bay Indians.

Table 14
Estimates of Mean Age at First Marriage for James Bay Indians and a Few Selected High Fertility Populations

Population	Females	Males	Difference
Indians (James Bay, 1968)			
Direct method	22.7	25.6	2.9
Stable population	22.5	24.6	2.1
Hajnal method	21.6	24.7	3.1
Cocos Keeling Island[1]	18.1	-	-
Hutterites[2]	20.7	-	-
French Canadians (18th century)[3]	21.9	26.8	4.9
Congo (Stable Population method)[4]	16.7	21.5	4.8
Ukraine (1891)(5)	19.5	20.5	1.0

Sources: (1) Smith, 1960; (2) Tietze, 1957; (3) Henripin, 1954; (4) Romaniuk, 1967; (5) Romaniuc and Chuiko, 1999. See References for complete identification of the sources.

One important feature of the nuptiality of any population is age at marriage. Table 14 highlights the estimates of the mean age of marriage for Indian males and females, and compares them with a few populations known for their high fertility.

Age at marriage has been recorded for 86 James Bay women who at the time of the survey (1968) were 45 years and over. The average age at first marriage for these women is 22.7, exactly the same as for Canadian women in 1970. Similar figures have been derived by two indirect methods of estimating the mean age at marriage. One, devised by Hajnal (1953), derives mean age at marriage from the proportion of single by age under age 50. The other consists of equating the mean age at marriage with the age at which the proportion of single under age 50 corresponds to the proportion of single in a distribution by age in the Coale-Demeny stable population model family West (1966).

Illegitimacy (out-of wedlock births)

Prevalence of a high incidence of illegitimacy is another distinctive feature of both matrimonial and procreative behaviours of the Indians. As shown in Table 15, mothers who conceived at least one child prior to marriage represent 26% of all mothers. According to this Table the incidence of prenuptial conceptions tends to increase from older to younger generations. One line of interpretation thereof could be that as Indian society becomes more and more caught up in the modernisation process, there is an increasing relaxation of sexual discipline. Another interpretation might be that we are faced partly with a statistically spurious phenomenon, caused by memory lapse, which increases with age. The likelihood is also that as mothers regularise their matrimonial status after the child is conceived, they may deliberately conceal or post-facto 'legitimise' the prenuptial conceptions experienced in the more or less remote past.

If this latter interpretation is correct, then the incidence of prenuptial conception might be more in the vicinity of 40%, as for the younger generations of women, rather than the 26% average for all generations.

The high incidence of out-of wedlock births is by no means inherent to the Cree group alone. It is rather a general feature of Indian communities in Canada, as revealed in Table 16. About 38% of all children born in 1969 are reported illegitimate. The term 'illegitimacy' seems to include children normally born to unwed mothers, and probably, children born to women not 'legally' married. The increase in the illegitimacy ratio by age of mothers, from older to younger, actually reflects the fact that most of the illegitimate births are first births.

Table 15
Women Who Gave Birth to at Least One Child Prior to Marriage or During the First 8 Months Following Marriage, by Age Group, James Bay Indians, 1968.

Age of mothers at the time of survey (1968)	Number of mothers	Percentage of mothers with prenuptial conception
Under 15	-	-
15-19	110	4.5
20-24	92	42.4
25-59	62	38.7
30-34	65	33.8
35-39	43	23.3
40-44	47	25.5
45-49	35	34.3
50-54	27	25.9
55-59	32	31.3
60-64	19	26.3
65-69	7	14.3
70 and over	34	5.9
All ages	572	26.0

Source: The 1968 James Bay Demographic Survey

Table 16
Illegitimate Births as Percentage of all Births Reported in 1969 for Status (Registered) Indians of Canada

Age group	All births	Illegitimate births as percentage of all births
Under 20	1,697	64.2
20-24	2,892	43.6
20-29	1,888	27.6
30-34	1,163	22.6
35-39	700	16.7
40-44	292	17.8
45-45	32	3.1
50 and over	70	4.3
Total	8,734	37.9

Source: Department of Indian Affairs and Northern Development

Lactation Practices

The 1968 Survey included a series of questions purporting to determine the habits of the James Bay Indian mothers with regard to lactation. Each mother was asked whether she breastfed her children in general, and more specifically whether she breastfed her first and last born child, and if so, for how long. It was felt that there was something to be gained from confining the interview on lactation to only these two birth orders, since the extension of this question to all children could have caused unnecessary respondents fatigue and result ultimately in stereotype answers. The last-born child is the one least subject to biases due to memory lapses. The first birth, which is the most important event in motherhood, is also likely to be better remembered than events associated with subsequent births. Since there was particular interest in the changes in procreative behaviour over time, the span between first and last child was in many cases long enough to make the comparison in lactation practice at both ends of motherhood meaningful. The mothers who indicated that they did not breastfeed their first or last child or both were asked to specify, in each case, the reasons why they did so and what other means they resorted to for nursing their babies.

The responses to the questions on duration of breastfeeding, asked separately for the first and last child, were cross-classified with the child's birth period and with the mother's age at the time of the survey. In the context of this study, our interest lies not only in the absolute level of lactation incidence, but also in the shifts that have taken place over time and from one generation to the next in lactation duration. Relevant data are presented in Tables 17, 18 and 19. The figures therein do not include children still being lactated – the case for many "last born" children. Nor do they include those cases where lactation was terminated by the child's death. Excluded also were a few cases where the date of the child's death was incomplete and, hence, it was not clear whether the termination of lactation was prior to or coincident with the infant's death.

It would be overly optimistic to assume that all the information on lactation practices is accurate, and that all respondents correctly reported the number of months they breastfed their first and last born baby. It is generally known that data on lactation are prone to various errors, the most common of which are due to memory lapses, which increase with the mother's age. Biases associated with the attraction of certain numbers such as 6, 12, and 24 months are frequently found in lactation surveys. Certain mothers, notably the older ones, indicated that they did not remember how long they had lactated, while others stated that they did so until "the child was able to take food" or "until a new pregnancy occurred." As to the non-lactating mothers, the reasons they

gave for not breastfeeding appeared to be credible, such as "sickness," "lack of milk," "on doctor's advice," "other woman breastfed the child," or "used bottle." The kind of responses gathered suggests that a certain amount of effort of recollection was made by respondents, and that the questions on lactation were not taken lightly by most of the mothers interviewed.

The 1968 James Bay Survey is of particular interest as it reflects not only the most recent status of breastfeeding in this remote area of Indian settlements but also intergenerational changes. Those who breastfed for only short periods, and those who did not breastfeed at all, are rapidly increasing in number with age. The proportion of non-lactating first-child mothers increased from about 4%, for children born prior to 1940, to 25% for children born after 1960. The proportion of mothers who reported having breastfed over a period of 9 to 15 months diminished from 43 to 23%, according to the data in Tables 17. Similar conclusions can be drawn from the data in Table 18 referring to the last child's lactation experience. Among mothers who gave birth to their last child after 1960, a high proportion, about 40%, reported that they had not breastfed at all their last-born child.

Table 17
Percentage Distribution of Women According to Duration of Lactation, Classified by Period of Children's Birth, First Child, (Children Surviving to at least Two Years), James Bay Indians

Lactation duration	Children born since 1960	Children born 1950-1959	Children born 1940-1949	Children born prior to 1940
Non-lactating	24.7	15.7	11.3	4.0
Lactating				
3 months and less	31.2	25.3	12.9	9.2
4-8 months	20.8	13.5	11.3	6.6
9-15 months	23.4	32.6	45.2	43.4
16-24 months	---	6.0	14.5	14.5
Over 24 months	---	3.6	3.2	10.5
"Until next pregnancy"	---			
"Until they could eat food"		3.6	1.6	11.8
Total	100.0	100.0	100.0	100.0
Number of cases: 298	77	83	62	76

Source: The 1968 James Bay Demographic Survey

Note: Cases of mothers with one child have been classified in the "first child" category.

Table 18
Percentage Distribution of Women According to Duration of Lactation, Classified by Period of Children's Birth, Last Child, (Children Surviving to at least Two Years) James Bay Indians

Lactation duration	Children born since 1960	Children born 1950-1959	Children born 1940-1949	Children born prior to 1940
Non-lactating	41.4	35.7	8.3	11.1
Lactating				
3 months and less	24.0	21.4	8.3	7.4
4-8 months	15.4	7.1	---	---
9-15 months	16.0	14.3	37.5	44.4
16-24 months	2.4	14.3	16.7	18.5
Over 24 months	---	2.4	25.0	7.4
"Until next pregnancy" or "Until they could eat food"	1.8	4.8	25.0	11.1
Total	100.0	100.0	100.0	100.0
Number of cases: 262	169	42	24	27

Source: The 1968 James Bay Demography Survey.
Note: Cases of mothers with one child have been classified in the "first child" category.

Average duration of breastfeeding by age of mother, for the first and last-born child for mothers who breastfed, is shown in Table 19. This duration dropped for lactating mothers from about 16 months for those over 50 years of age to about five for those 15-24 years of age. The consistently shorter duration of lactation of the last-born child for all mothers (lactating and non-lactating) may reflect the more recent trend among mothers of all ages to adhere to modern infant diet.

What is true for the James Bay Indian mothers, also holds for Indian mothers across Canada. For proof, let us turn to Table 20 drawing from data of the 1962 National Health Survey among Indian mothers living on reserves. Through this survey, 5,552 infants, accounting for approximately 70% of all Indian children born in 1962, were closely followed from birth to their first birthday by nurses of the Federal Medical Services. Records were kept on the method of nursing and on the health of both the infants and mothers. Children who were either never breastfed, or were breastfed less than one month, represented 64% of those surveyed. Only 18% of the mothers breastfed their children for 6 months or more.

Table 19
Mean Duration of Lactation Period (in Months) by Age of Mother at the Time of the Survey, (Children Surviving to at least Two Years), James Bay Indians, 1968

Age of Mother at Survey	Lactating and Non-lactating: First Child	Last Child	Lactating Only: First Child	Last Child
14-24	3.7	2.6	5.3	4.6
25-29	6.3	3.2	7.6	5.7
30-34	6.7	3.6	8.1	6.1
35-39	9.5	4.9	10.5	7.3
40-44	10.8	5.2	12.1	9.1
45-49	12.1	6.9	12.7	10.3
50+	15.0	11.9	16.7	15.9
All ages	9.2	6.1	10.9	9.6
Number of cases	285	248	243	158

Source: The 1968 James Bay Demographic Survey

Table 20
Percentage Distribution of Children Born to Canadian Indian Women Living on Reserves by Duration of Lactation, 1962

Duration of Breastfeeding	Percentage Distribution of Births
Under 1 month	33
1 month but less than 2 months	5
2 months but less than 3 months	4
3 months but less than 4 months	3
4 months but less than 5 months	2
5 months but less than 6 months	4
6 months or more	18
Presumed not breast-feeding	31
Total Percentage	100
Total number of births observed	5,552

Source: Survey of Maternal and Child Health of Canadian Registered Indians, 1962, Medical Services, Department of National Health and Welfare, Ottawa.

It is clear from the above that a revolutionary change has taken place in baby-nursing practices among Indians. Prolonged breastfeeding was common among Indians in earlier days. "The total absence of milk, except what the mother herself could provide and the absence of cereal among all but the agricultural tribes, lengthened the period of lactation, because no infant under the age of three years could assimilate a diet solely of meat and fish; and prolonged lactation affected the fertility of the women, making the average family small, although the Indians were naturally as fecund as Europeans" (Diamond, 1932, p. 51). This quotation is probably a fair summary assessment of the lactation status and

Table 21
Intervals Between Successive Confinements for Mothers Continuously Married During Interval, According to Duration of Child Survival (Intervals Containing Miscarriages or Stillbirths Are Excluded), James Bay Indians, 1968

Specifications	After stillbirth	Infant surviving: Less than 1 month	1 to 6 months	7 to 12 months	13 to 23 months	At least 24 months
Average interval as reported	18.23	20.42	21.48	23.40	26.22	25.05
Average interval as adjusted	19.98	20.12	20.80	22.56	24.87	26.49
Standard deviation	8.82	10.98	12.09	13.26	7.34	13.76
Number of Intervals	24	27	49	37	12	1249

Source: The 1968 James Bay Demographic Survey

Note: If intervals smaller than 9 and larger than 48 months are excluded from the calculation, the pattern remains practically the same.

its likely reproductive repercussion in traditional Indian society. Since then the diet of Indian peoples has undergone such a radical transformation that nutritionists speak of the profound food acculturation of contemporary Indian society. The changes in infant feeding practices among North American Indians and Inuit include a drastic reduction in breastfeeding and an increasing use of bottle-feeding (Carlile et al., 1972; Schaefer, 1975; Smith, 1975).

It remains to be seen what the childbearing implications are of this shift in nursing habits. Two pieces of indirect evidence, particular to the James Bay Indians, are illuminating in this regard. According to the first evidence, in Table 21, the interval between successive live births increases with the duration of child's survival. For example, it takes only 18 months for a birth to occur after a stillbirth and 26 months if the child survived to at least 24 months. According to the second evidence, in Table 22, there is a significant positive correlation between the duration of the first child lactation and the interval between the first and second live births. It should be noted that intervals between the first and second birth exceeding 48 months were eliminated from the calculation of the correlation coefficients. It has indeed been assumed that such long intervals must be due to causes other than lactation.

Both pieces of evidence produced here tend to suggest that lactation is indeed a factor in the duration of the postpartum amenorrhea, the resumption of menstruation and fecundity cycle, and hence in the duration of live birth intervals.

Table 22
Correlation Coefficient between Period of First Child Breastfeeding and Length of Interval Between Birth of First and Second Child, James Bay Indians, 1968

Villages	Correlation coefficient	Number of cases
Fort Albany	0.68	28
Attawapiskat	0.30	17
Moosonee	0.46	33
Moose Factory	0.43	43
Rupert House	0.61	30
Fort George	0.62	45
All villages	0.66	184

Source: The 1968 James Bay Demographic Survey

This conclusion is consistent with various theoretical models and empirical findings done elsewhere (Tietze, 1961; Potter, 1963; Potter et al., 1965; Berman et al., 1972; Knodel and Van de Walle, 1967). Lesthaeghe and Page (1980) have developed a model by means of which the median length of postpartum amenorrhea can be predicted from the median duration of natural lactation. If we assume the relationship implied in this model holds true for the James Bay Indians, then a reduction from, say, 15 to 5 months in the average duration of breastfeeding experienced by Indian mothers, as per Tables 17-21, will cause the length of postpartum amenorrhea to diminish approximately from 9.0 to 3.0 months. Therefore, for the level of incidence of breastfeeding observed among James Bay Indians, a 10-month reduction in lactation entails a reduction by about 6 months in the length of postpartum amenorrhea. The proportionally lesser decrement in the latter reflects the curvilinear shape of the Lesthaeghe/Page model.

In conclusion, the analysis of lactation data offers strong indirect evidence to the effect that the massive, almost abrupt, shift from prolonged breastfeeding to bottle-feeding is a potent factor in the cycle of rising natural fertility among James Bay Indians, as in general among Canadian Indians, observed in the post-war years and up to about the mid-1960s.

In what follows we shall take a look at two other factors that may have contributed to the curtailment of birth intervals and therefore to the increase of natural fertility among Canadian Natives.

Reproductive Health/Pregnancy Wastage

According to the James Bay Survey, 726 of deliveries occurred in hospitals, and that among these 16, or 2.2%, were stillbirths. Reported stillbirths for all women, irrespective of the place of delivery, was 2%, which is most likely an understatement. One would expect the stillbirth ratio to be higher for women of older generations who used to deliver at home or in the bush. Only 5% of mothers interviewed stated that they had had a miscarriage.

Table 23 reveals the impact that the presence of pregnancy wastage can have on birth intervals. Thus intervals containing one reported miscarriage are roughly eight months longer than those containing no pregnancy wastage, whereas those containing one reported stillbirth are about 15 months longer, on average. This comes close to Potter's estimates (1963) according to which a three-month miscarriage or a stillbirth add to the length of an interval between successive live births, 9 and 16 months respectively. Hence, the number of months which a miscarriage or a stillbirth adds to the over-all average length of the

inter-live-birth-interval depends on the level of pregnancy wastage, as is illustrated in Table 26, calculated by a procedure worked out by Potter. So if, for example, in the absence of any pregnancy wastage the average interval between successive live births is 24 months, the prevalence of 10% of miscarriages and 2% of stillbirths will elongate the average interval by 1.4 months.

Table 23
Reported Live Birth Intervals Comprising Cases of Pregnancy Wastage, James Bay Indians, 1968

Type of pregnancy	Average between-live-birth interval (in months)	Number of reported cases (1)
Live birth interval including one miscarriage	31.56	42
Live birth interval including one still-birth	38.66	16
Live birth interval including more than one miscarriage or still birth	77.54	4
Live birth intervals (all ages) free of any miscarriage or still birth	24.00 (estimate)	1,472

Source: The 1968 James Bay Demographic Survey.

Note: (1) It can be suspected that intervals containing still-births and particularly miscarriages are under-reported. The average intervals may however stand as order of magnitude.

There is no direct data to document the reduction in the levels of pregnancy wastage experienced by the James Bay Indians over time. However, it can be surmised from indirect evidence that some reduction in pregnancy wastage must have taken place as a result of significant improvements in medical care in this otherwise remote and isolated area. Twenty years prior to the 1968 Survey only a few births occurred in hospitals; since then practically all deliveries occurred there, as shown in Table 24. Furthermore, there was a rapid decline in infant mortality in the last two decades prior to the survey, as illustrated in Table 25. Finally, it

is worthwhile noticing that the proportion of stillbirths has fallen in Canada as a whole from 1.5% in 1955 to 1.1% in 1968. Not necessarily representative of the James Bay Indians, these figures are nevertheless indicative of the reduction in the level of pregnancy wastage that can be achieved when modern medical facilities are available to the potential mothers.

In brief, the shortening of the birth interval due to reduction in pregnancy wastage is probably something in the order of 1.5 months, a small, but not negligible, gain in the reproductive tempo of the James Bay women, for the period covered by the survey.

Table 24
Place of Deliveries in Percentage by Period of Birth, James Bay Indians, 1968

Place of delivery	Prior to 1940	1940-49	1950-59	1960 and after
Home	54.98	52.74	25.19	5.32
Bush	43.41	39.95	19.34	3.47
Hospital	1.29	7.31	55.32	91.09
Undetermined	0.32	---	0.15	0.12
Total	100%	100%	100%	100%

Source: The 1968 James Bay Demographic Survey

Table 25
Infant Mortality During the First 3 Months by Period of Birth, James Bay Indians, 1968

Period of birth	Death ratio per 1000 live births
Children born prior to 1940	65.14
Children born 1940—49	73.68
Children born 1950-59	50.38
Children born after 1960	18.96

Source: The 1968 James Bay Demographic Survey

Table 26
Time Added to a Live Birth Interval for a Given Level of Pregnancy Wastage (Proportion to the Total Pregnancies)

Proportion of miscarriage	Proportion of stillbirth	Average time added to an average interval between successive live births (in months)
0.05	0.01	0.6484
0.10	0.02	1.3856
0.15	0.03	2.2317
0.20	0.04	3.2104

Source: Potter (1963, see references)

The Shift From a Nomadic to a Sedentary Mode of Life; Prolonged Conjugal Separation

Over several decades, and especially in the post-war years, Indians have gradually shifted from a semi-nomadic hunting and gathering society to a sedentary one. By the time, the survey was taken, an overwhelming majority of them lived on reserves, working in or close by, or, in the absence of wage earning, benefiting from welfare and various government subsidies.

The nomadic life, which Indians adopted in the past, remains an under-explored area in terms of how it may have affected the reproductive health and procreative behaviours. It can however be surmised that pregnancy accidents such as miscarriages or protracted secondary sterility, missed opportunities to get pregnant because of admittedly lower exposure to sexual intercourse and the heavy burden to which women, in particular, were subjected to during moves, and other hardships of nomadic life, have negatively affected fertility. Conversely, some of these liabilities may have been lifted up as they adopted a sedentary and more comfortable way of life. The hypothesis is corroborated by Eric Roth (1981) who, using genealogical data of the pre-1900 and post-1900 cohorts, among Kutchin Athapaskans in the furtherst North of Canada, observed an increase in fertility rate as they were brought to adapt a sedentary mode of life.

A somewhat related question that needs some consideration refers to the temporary separation of spouses in earlier Indian society, due either to the nomadic way of life and/or to customs requiring the periodic return of wives to their families. The following quotes taken from early research on the Northern Ojibwe by Dunning cast some light on

the residential patterns of couples or couples-in-making in traditional Indian communities

> "Each man hunts for himself, alone on his trails, the hunters scattering as widely as possible in order to make the most of the thin supply of game. The household of wife and children, who depend upon the man's hunting, lives in complete isolation during the winter season (November to March)." (1937: 5)
>
> "After marriage the daughter remains close to her mother at least until she moves to her husband's camp. Visiting back and forth is frequent, and the girl's mother remains attentive and concerned for the well-being of her grandchildren. The warmth and solidarity of mature women who are sisters, centred around their ageing mother, is a notable feature of Pekangekum society." (p.97)
>
> "During the summer and fall of 1954, the first suitor took up residence openly with the girl at her home, thus symbolising a sanctioned marriage. It was not until winter, after he had made several short visits from his winter trapping camp, that he was able to persuade her mother to let the woman accompany him to his own camp. Although it was several months before the girl was permitted to join her husband at his camp, the change in residence was more rapid than for most marriages. (....) C. Noose and the girl were married and although the marriage has been nearly broken up by the girl's going home to her parents, they are at the present time still married." (p.145)

As shown in Table 27 a significant proportion of wives were born in other villages, and it can be assumed, given the strong filial ties of Indian people, that they periodically took time to return to their kin. Improved means of transportation, aeroplanes and boat, to cover the several hundred miles that separate villages, particularly in the North, may have increased the frequency of family visits but, possibly, shortened their duration. It might be argued, on the other hand, that the early tendency for periodical absence of a spouse, whether driven by the search for a means of subsistence (hunting, trapping) or by customs, may have been replaced by modern patterns of migration, wage- or education-driven (Piché, 1977).

If, on balance, the incidence of prolonged conjugal separation has diminished because of some of the factors suggested above, then this quite probably has contributed to the shorter birth intervals noted for the younger generations of Indian women. Although this hypothesis re-

quires further empirical testing, it is consistent with reports in the literature concerning similar strong social customs found among preliterate and pre-industrial societies (Romaniuk, 1967). Potter and his colleagues (1965) have attributed the relatively low pregnancy performance of Punjab females to their custom of making long visits to their parental homes during the first few years of marriage.

Table 27
Percentage of Wives Born in Villages different from their Husbands', by Age Group, James Bay Indians, 1968

Age group	Percentage
14-19	33.3
20-29	36.3
30-39	43.9
40+	37.4

Source: The 1968 James Bay Demographic Survey

Attitudes Toward Procreation and Birth Control

Our understanding of the James Bay Indians' procreative behaviour, and by inference that of Indians in general, may further be enhanced by examining information on their attitudes toward procreation, family size preferences and practice of birth control.

Table 28 lines up responses to three questions, designed to assess women's attitudes towards procreation, administered to single and evermarried. One particular feature that emerges from this Table and which requires our immediate attention is the rather high rate of "non-response." It is not unusual to find a high non-response rate in this type of questions among traditional populations. In some cases it meant respondents' unwillingness to answer the question, though few outright "refusals" were recorded by interviewers. Recorded reasons for non-response include "absent," "had to go to work" and "unable to continue the interview," "illness," etc. To the extent one can infer from interviewers' notes, non-responses resulted primarily from respondents' inability to communicate or verbalise in a coherent way situations that may have been for them somewhat ambivalent. Instances where mothers had illegitimate births before marriage is an example thereof. While having children may have been their genuine desire, the arrival of yet another child before they eventually did marry, may have been looked upon with apprehension.

Table 28
Attitudes Towards Procreation, in Percentage, James Bay Indians, 1968.

Age	Pop.*	Q.1: Before your last pregnancy, did you want another child?				Q.3: Do you feel that one or more of your pregnancies came sooner than you wanted?				Q.4: How would you feel if you didn't have any children?			
		Yes	No	Ind.	NR	Yes	No	Ind.	NR	Good	Bad	Ind.	NR
14-24	70	59.6	23.1	1.9	15.4	30.8	44.2	0.0	25.0	5.8	71.2	5.8	17.3
25-34	110	55.0	23.1	1.1	20.9	35.2	48.4	3.3	13.2	6.6	75.8	8.8	8.8
35-44	83	34.7	44.4	4.2	16.7	37.5	51.4	0.0	11.1	6.9	77.8	5.6	9.7
45 +	136	27.9	59.5	3.6	9.9	25.2	61.3	1.8	12.6	6.3	67.6	14.4	12.6
Unknown	13	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
All ages	412	41.9	40.1	2.8	15.3	31.5	52.6	1.5	14.8	6.4	72.5	9.5	11.6

Source: The 1968 James Bay Demographic Survey

* Population: Number of women with at least one live birth, single and ever-married. Among these women there were 379 with at least one live birth and at least once married. There were 327 women who were actually interviewed on the attitudes towards procreation.

Notes: Ind. = Indifferent; NR = No response.

Turning our attention to the answers to question 1 in Table 28, designed to probe into the desirability of the last pregnancy, one finds that the "Yes" answers decrease and the "No" answers increase with the respondent's age. More than half of the respondents over 45 years old answered that they did not desire their last pregnancy to occur. As women get older and achieve a certain family size, they may regard children in excess of that size as surplus, if not necessarily a liability, serious enough to induce them to take preventive measures.

It is more difficult to surmise the reasons behind the posture of those younger mothers, who in quite significant proportions, stated that they did not want their last pregnancy. Perhaps for many them the family size was already a matter of concern – the first step in internalising modern norms of procreation.

To question 3, "Do you feel that one or more of your pregnancies came sooner than you wanted?", the "No" heavily outweighed the "Yes" answers. But the latter were sufficiently numerous to suggest that the timing of births may have been already of some concern to many women, particularly the younger ones.

Finally, to question 4, "How would you feel if you didn't have any children?", the overwhelming majority of respondents stated that they would feel "bad." One would of course expect this to be the answer of the members of a society known for its pro-natalistic cultural values. But for the same reason, one may find it surprising that 6.4% felt a need to state that they would feel "good" and that even more, 9.5%, stated that they would be "indifferent" if they had no children. Either the sincerity of these answers is questionable or they suggest that there was already a minority, a core of women who tend to adopt non-conformist attitudes toward the norms of procreation prevalent in traditional Indian society.

Responses to the three questions, intended to test the family size preference are confined to Table 29. The first two questions aimed at determining the maximum and minimum number of children, which, in the respondents' opinion, a couple should have. The maximum number given varied from 12 for the respondents over 45 to slightly below 10 for those under 25 years old, whereas the minimum number varied for the two age categories from an average of 3.4 to 2.8, respectively. The minimum and maximum numbers stated might be viewed as the average family size, which the respondents perceive as being the ideal in their community.

The question 8, "If you could have just the number of children you want, what would that number be?", was intended to determine the respondents' desired family size, that is, the number of children they con-

sidered as desirable for themselves. This number varied from 7.6 for respondents over 45 years old to 4.9 for those under 25 years of age. It may be worthwhile noticing that desired family size, given here, and ideal family size, referred to in the above paragraph, falls short only by a small margin for the older generations, whereas, in the case of respondents under age 25, the former deviates downward quite significantly from the latter. One would be tempted to interpret this as an indication that younger generations tend to adopt standards of procreation that are not only lower than those adhered to by older generations, but that are even lower than those which they still consider as being ideal for their society. As to question (9) "Of these how many would you like to be girls and how many boys", the score was almost equal, 3.14 and 3.47 respectively. There seems not to be any sex preference.

Table 29
Desired Family (Average) Size, James Bay Indians, 1968

Age	Number of respondents	Q.6: In your opinion, what is the maximum number of children a couple should have?	Q. 7: In your opinion, what is the minimum number of children a couple should have?	Q.8: If you could have just the number of children you want, what would that number be?
14-24	107	9.75	2.80	4.86
25-34	97	10.68	2.99	6.86
35-44	73	11.87	2.81	8.87
45 and over	114	12.00	3.43	7.57
All ages	391	11.05	3.03	6.67

Source: The 1968 James Bay Demographic Survey.

Findings elicited by the questions about attitudes towards, knowledge and practice of birth control are presented in Tables 30 and 31. Of all fertility questions, these caused the greatest concern to the survey takers. Matters related to birth control were considered by many Indians too intimate to be discussed with strangers. To minimise the risk of mas-

sive non-response, it was decided to restrict the administration of the birth control module to four villages, where on the basis of prior information obtained through the informants, it was sensed that the inhabitants might be more receptive.

As limited as the results obtained may be in terms of coverage, they nevertheless tell us some interesting stories about the status of birth control among James Bay Indian communities. First of all, those who approved of birth control constitute a rather large proportion of the respondents, 37.0%. If those who gave a qualified approval "depends" are included, their proportion would rise to 44.5%. This is a rather unexpected result for a community reputed for its traditionally pro-natalist stance. Interestingly enough, there does not seem to be any association between age and proportion of those approving of birth control. Both younger and older generations uttered similar attitudes in this regard. This apparent high degree of tolerance of birth control contrasts rather sharply with the extent of the avowed knowledge, and in particular with its actual practice, as per Table 31. Those who stated knowledge of some method of preventing births were significantly fewer in number than those who declared their approval. Those who stated that they tried to prevent or to delay pregnancy at some time in their life were few in number, barely 4.0% of all respondents.

How can one reconcile this, real or apparent, incongruity between the stated attitudes towards, and the actual practice of, birth control among James Bay Indian women? The author is inclined to accept the results as truthful in regard to both the attitudes and the practices of birth control. As a result of outside influence, Indian society, by the time the survey was conducted, matured enough to accept the idea of birth control and acquired some limited knowledge of its methods. At the same time, some rather fundamental changes may have actually been taking place therein in regard to procreative norms. The findings that a large proportion of women did not want their last pregnancy to occur are significant thereof. A fair proportion also expressed concern about the timing of births, and younger generations stated a desire for a family size smaller than that of older generations.

But the reappraisal of traditional values of procreation did not go far enough to entail a consequential birth control practice. Its level at the time of the survey may have been still as low as it seems to have been formerly in traditional Indian society. The picture revealed by this survey is consistent with findings on birth intervals in this article's earlier section, and also with observations by anthropologists. Thus Dunning (1959) who has studied Northern Ojibwe, a neighbouring group of the James Bay Cree, remarks: "...during the time of my field work I found the peo-

ple most willing and prepared to have large families. There was no idea on the part of any married persons to limit the size of their families."

Likewise, Honingmann in his study (1956:60) of Attawapiskat (James Bay), states that "Occasionally, coitus interruptus is utilised to forestall conception but this practice seems to be definitely limited."

Table 30
Attitudes towards Birth Control, in Percentage, James Bay Indians, 1968

Age group	Number of respondents	Q. 12: Today, some married couples try to limit the number of their children for health considerations or because of their desire to give their children greater care, or because they are not able to support large family, or for other reasons. Do you approve or disapprove their doing to this kind of things?				
		Approve	Disapprove	Depends	Don't know	No response
14-24	78	32.05	25.64	11.54	25.64	5.13
25-34	63	44.44	30.16	4.76	14.29	6.35
35-44	51	33.33	25.49	7.84	23.53	9.80
45 and plus	62	38.71	25.81	4.84	20.97	9.68
All ages	254	37.01	26.77	7.48	21.26	7.48

Source: The 1968 James Bay Demographic Survey.
Note: Data collected only in Rupert House, Moose Factory, Fort George and Moosonee.

Table 31
Knowledge and Use of Birth Control, in Percentage, James Bay Indians, 1968

Age group	Number of respondents	Q. 13: Do you know of any methods to keep from getting pregnant that are used by married couples?			Q. 14: Have you ever tried to prevent or delay pregnancy in any way?		
		Yes	No	No response	Yes	No	No response
14-24	78	21.79	62.82	15.38	1.28	75.64	23.08
25-34	63	36.51	55.56	7.94	11.11	79.37	9.52
35-44	51	23.53	58.82	17.65	1.96	74.51	23.53
45 and plus	62	19.35	62.99	17.74	1.61	79.03	19.35
All ages	254	25.20	60.24	14.57	3.94	77.17	18.90

Source: The 1968 James Bay Demographic Survey.
Note: Data collected only in Rupert House, Moose Factory, Fort George and Moosonee.

It should be reiterated that findings reported in this section refer to the periods prior to 1968. Since then, the transition from traditional high to low modern fertility patterns took hold among Canadian Indians, including those of James Bay, albeit with some time lag in the latter. Birth control must now be a wide spread practice in order to curtail so drastically childbearing performance.

Summary and Conclusions

Although each of the miscellaneous pieces of evidence brought forward in this study has shortcomings, when considered in combination they provide a consistent picture of the James Bay Indians procreative behaviours as they appear in light of the 1968 survey. More specifically, the survey captures the succession in time of three patterns of procreative behaviours, which, while overlapping to some extent, present sufficiently distinct features to warrant special consideration. Thus, we can speak of:

- the traditional patterns of childbearing, represented by the older generations of women who at the time of the survey were over 50 years old, and who entered, if not altogether completed, their childbearing prior to 1945;

- the cycle of a rising natural fertility associated with the process of modernisation which the Indian population started to undergo in the post-war years and which in terms of fertility is represented by the younger generations of women who entered childbearing in the post-war years and reached their peak in the years prior to 1968;

- the incipient transition to modern low fertility, represented by some of the youngest generations who, while still adhering to the traditional norms of childbearing, may have already begun to assimilate some of the modern practices of selective childbearing, including birth control.

Let's briefly describe each of these fertility regimes.

The traditional Indian fertility regime, in light of the evidence produced in this study, was characterised by a relatively low intensity and relatively slow tempo of reproduction. The crude birth rate was most likely in the range of 40 to 42 births per 1000 population, and a family size of about six or seven children per woman, hence well below the levels observed among high fertility populations with a birth rate in excess of 50 per 1000, and eight or nine children per woman. As to the tempo of reproduction, compared to some high fertility populations, Indian women used to start having children at a somewhat later age (21.9) and stopped having them at a somewhat earlier age (38.7), according to our estimates based on the data for older generations of mothers. Hence their reproductive span was somewhat shorter, by about two years, as compared to high fertility populations. At the same time, the intervals

between successive live births was rather long, close to 32 months, as compared to about 25 observed among such high fertility populations as the Hutterites or Cocos Island.

The factors underlying this relatively low intensity and slow tempo of childbearing are not all too clear. Two, however, stand out most prominently as being procreation-inhibiting in traditional Indian society. One, breastfeeding, which in the absence of animal milk and with a diet relying heavily on meat and fish was, by necessity, long and as such had the tendency of delaying the resumption of ovulation and fecundity. The other restrictive factor was the nomadic mode of life and hardships associated with it, likely to have caused pregnancy accidents and possibly lesser exposure to conjugal intercourse. All this may have caused a high level of pregnancy wastage, longer temporary and premature permanent sterility. The relatively late entry of Native women into stable unions may have also been a factor. Even though out-of-wedlock pregnancies were relatively frequent in traditional society, transient, unstable relations do not offer the best conditions for procreation. The combination of all these biological and cultural factors resulted in a childbearing performance that I would qualify as sub-optimal.

As Indian populations began to undergo the process of modernisation in the post-war years, traditional procreation-inhibiting factors were weakened or altogether removed. As Indians switched from a nomadic to a sedentary, more comfortable, mode of life, pregnancy accidents most likely subsided as did the level of pregnancy wastage with practically all women being able now to enjoy medical assistance during delivery, and pre- and post-natal medical follow-ups. But the most potent factor, no doubt, was the massive switch from protracted breastfeeding to bottle-feeding as milk became commercially available. The switch to bottle-feeding was apparently triggered also by medical considerations as a way to avoid transmission from mother to infant of possible infections, in particular tuberculosis. Child-spacing has been reduced to an average of about 23-25 months among the youngest generations. It should be noted that this change in lactation practices took place before large-scale birth control took hold. As well, family allowances, introduced in Canada in the 1950s, may have acted as a financial incentive to have children. The combination of these factors led the birth rate to jump to a level of about 48 or even to 50 births per 1000 population from 40-42 experienced by older (pre-war) generations.

The transition to low modern fertility was not yet in evidence among younger generations when the 1968 survey was taken. But data on the attitudes to procreation and knowledge of birth control method revealed that many young women were already mentally prepared to control the

timing of childbearing and limit family size. As of the mid-sixties, Indians, in particular in the southern stretch of their habitat in Canada, embarked on a course of rapid fertility decline. The James Bay Indians, as subsequent data have revealed, followed the move with a lag of a few years. The birth rate of Indians in Canada fell to 15 per 1000 population and total fertility to 2.4 births per woman in 2000.

Can the demographic experience of the James Bay Indians, as described in this study, be extrapolated to the whole of Indian populations in Canada? The question cannot be answered unambiguously. A country the size of Canada is the habitat of many Indian nations, spread over a wide territory, each with their distinctive features. But to the same extent that we can speak of Western European or African patterns of fertility, we can speak of Canadian Indian fertility patterns. It is fair, therefore, to imply that much of what was learnt from the James Bay survey can be applied with due caution to Canada's Indian population as a whole.

As this piece of research is being drafted, 35 years have elapsed since the 1968 Survey was conducted in the James Bay region. The time may be ripe to take stock of the changes in the region's socio-demographic landscape that have taken place since, not least under the impact of Hydro Power developments.

Appendix Table
Percentage of Children in Specified Age Groups and the Corresponding Estimates of Birth Rate for James Bay Indians

Year	Percentage of Children aged		Corresponding Birth Rate	
	0-4	0-14	0-4	0-14
1974	15.6	45.6	-	-
1973	15.7	45.9	-	-
1972	17.1	46.7	41.1	-
1971	16.9	46.7	41.5	-
1970	17.2	47.1	45.4	-
1969	17.7	47.1	45.9	-
1968	18.1	47.3	46.5	-
1967	18.3	46.9	47.1	47.3
1966	18.9	46.9	47.7	47.8
1965	18.7	45.1	48.2	48.9
1964	na	na	48.8	48.9
1963	na	na	48.6	49.7
1962	na	na	-	50.3
1961	na	na	-	50.0
1960	na	na	-	49.7

1959	18.3	44.0	-	48.4
1958	na	na	-	-
1957	na	na	-	-
1956	na	na	46.2	-
1955	na	na	-	-
1954	15.8	39.2	-	-
1953	na	na	-	-
1952	na	na	40.5	47.3
1951	na	na	-	-
1950	na	na	-	-
1949	16.9	38.3	-	-
1948	na	na	-	-
1947	na	na	44.5	42.9
1946	na	na	-	-
1945	na	na	-	-
1944	12.8	38.2	-	-
1943	na	na	-	-
1942	na	na	34.0	42.6
1941	na	na	-	-
1940	na	na	-	-
1939	16.8	41.3	-	-
1938	na	na	-	-
1937	na	na	44.9	42.9
1936	na	na	-	-
1935	na	na	-	-
1934	14.5	36.9	-	-
1933			-	-
1932			39.1	46.8
1931				-
1930				-
1929				-
1928				-
1927				41.9

na = not available

Notes: For the method used to convert child proportions into birth rate estimates refer to the Technical Appendix in Romaniuk (1981). Increase in Natural Fertility during the Early Stages of Modernisation: Canadian Indian Case Study, *Demography*, Vol. 18, No 2, pp.157-172. The time lag between reported child proportions, 0-4 and 0-14, and estimated thereof birth rates is respectively 2.5 and 7.5 years.

Because of changes in settlements, it was not possible to reconstruct child/population ratio series for years prior to 1934 for James Bay.

Notes

1. What is know as James Bay administrative area comprises eight major settlements, four on the Quebec side and four on the Ontario side. For logistical reasons only the six villages mentioned above were surveyed, the remaining which were not are Winisik on the West, and East Main and Paint Hills the East shore. The total population of the eight James Bay villages in 1968 was 6,124 according to the population registers of the Department of Indian Affairs and Northern Development.
2. The survey received the support of local Aboriginal authorities and the Fathers Oblate mission in Moosonee. It was undertaken by the author, at the time professor of Demography at the Department of Sociology, University of Ottawa, with a team of students from the same university. Funding for the survey was provided by the Population Council (currently SSHRC). For more details on the James Bay Indian demographic survey see V. Piché and A. Romaniuk, (1972)

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TWO RELATED INDIGENOUS WRITING SYSTEMS: CANADA'S SYLLABIC AND CHINA'S A-HMAO SCRIPTS

R. Alison Lewis
University of Lincoln
Lincoln LN6 7TS
United Kingdom

Louis-Jacques Dorais
Département d'anthropologie
Université Laval
Québec, Québec
Canada, G1K 7P4

Abstract / Résumé

Around 1840, a team of Ojibwa and Cree speakers working with Rev. James Evans, a British Wesleyan missionary, developed a syllabic writing system which disseminated rapidly among the Cree and other northern Canadian Aboriginal nations. Some 65 years later, in 1904, another Methodist, Rev. Samuel Pollard, who also worked in close collaboration with local people, supervised the elaboration of a script for transcribing the language of the A-hmao, an Aboriginal minority in south-western China. This article tells the story of these two writing systems, discusses the evidence of a connection between them, and describes their similar educational role in terms of social empowerment.

Vers 1840, une équipe formée de locuteurs de l'ojibway et du cri travaillant en collaboration avec le Révérend James Evans, un missionnaire wesleyen d'origine britannique, développa un système d'écriture syllabique qui se répandit rapidement chez les Cris et d'autres nations autochtones du Nord canadien. Quelque 65 ans plus tard, en 1904, un autre méthodiste, le Révérend Samuel Pollard, qui travaillait lui aussi en étroite collaboration avec les populations locales, supervisa l'élaboration d'une écriture pour transcrire la langue des A-hmao, une minorité autochtone du sud-ouest de la Chine. Cet article raconte l'histoire de ces deux systèmes d'écriture, discute d'une relation probable entre eux, et décrit leur rôle éducatif en termes d'outils de pouvoir social.

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Introduction

People interested in Canada's Aboriginal cultures and languages know that a large number of First Nations currently use syllabic writing systems. This is the case with a majority of Ojibwa and Cree nations, as it is with the Canadian eastern Arctic Inuit (except for Labrador), and with the speakers of at least one Dene language (Chipewyan). All these systems originate from the same source: the script devised in the late 1830s and early 1840s by a team of Native speakers of the Ojibwa and Cree languages, under the supervision of Rev. James Evans, a Wesleyan missionary at St. Clair River (Ontario) and Norway House (Manitoba).

What is often overlooked is that at the other end of the world, in south-western China (provinces of Guizhou, Guanxi and Yunnan), writing systems at least partly inspired by Canadian syllabics are also in use among the A-hmao and a few other Aboriginal populations of the area. They were devised at the beginning of the 20th century, thanks to the collaboration between Native speakers and Rev. Samuel Pollard, a Methodist missionary who most probably knew about Evans' work.

In the following pages, we will look at these two sets of writing systems in order to explore the connections between them—in terms of their history, mode of operation, and role in defining Aboriginal identities—and point at their similarities and differences. Canadian syllabics will be dealt with first.

James Evans and His Team

The story of Rev. James Evans, who is commonly credited with the invention of the syllabic script, is fairly well known (*cf.* Pilling 1891; Young 1899; McLean 1932[1849]; Hutchinson 1988; Lewis 2001). Born on January 18, 1801 in Hull (Kingston-upon-Hull), East Yorkshire, then a leading British port, Evans was the eldest son of a sea captain in the Baltic trade. After having been schooled (in Lincolnshire, according to Hutchinson 1988), he was apprenticed in 1816 to a grocer in Hull. It is presumably during this period that he acquired two skills that would play an essential part in his later life.

Whether at school or in the course of his apprenticeship, Evans learned to write in shorthand. The most common shorthand in use in the 1810s and 1820s had been devised by Samuel Taylor in 1786 (Butler 1951), and it was probably the one with which Evans became acquainted. Pitman's shorthand, sometimes mentioned as an inspiration for the syllabic script, became popular only after 1840, the year James Evans printed the first Cree book in syllabics.

The second skill seemingly acquired by Evans during his apprenticeship was an interest in foreign languages and a gift for learning them.

At that period in its history, Hull was a cosmopolitan seaport where seafarers speaking various foreign tongues were to be met: Dutch, Scandinavians, North Germans, Poles, and other residents from the countries surrounding the Baltic Sea. It may be presumed that some of them procured their ship's supplies at the grocery where Evans worked, and that the young apprentice had ample occasion to hear the sounds of many different languages. He may also have heard about Aboriginal people—and even met some of them wintering in Hull—from local whaling captains who interacted with the Inuit during their campaigns along the west coast of Greenland.

Another important event in the life of James Evans was when he converted and joined the Wesleyan Methodist church in 1818, after which he became active as a Sunday school teacher and local preacher. This teaching experience provided him with another ability he would put into good use later on: communicating knowledge.

Evans' family emigrated to Canada in 1820, at which time James and his younger brother Ephraim moved to London. There James was employed in a glass and crockery business, before joining his family in Lachute (northwest of Montreal), Lower Canada, in 1822. After a few months, he was offered a teaching job at L'Orignal, Upper Canada, on the south shore of the Ottawa River, where he met and married Mary Blithe Smith in 1822 or 1823.

In 1828, Evans was invited by the Canadian Methodists to teach at their Rice Lake Indian school, near Peterborough, Upper Canada. He stayed there for three years, learning quite rapidly the Ojibwa (also called Saulteaux) language and starting to work on translations. Between 1831 and 1833, Evans taught at various Indian missions at Credit River (Mississauga), Ancaster and St. Catharines. His first attempts at finding a script suitable to Ojibwa date from this period.

After having been ordained a Methodist minister in 1833, Evans was sent to Saint Clair mission near Sarnia, where he was invited to join a committee of the Methodist church charged with finding a solution to the problem of written Ojibwa. This committee included three Native speakers—Joseph Stinson, Peter Jones and Thomas Hurlburt—as well as three European missionaries: William Case (president of the Upper Canadian Methodist district), James Evans, and Evans' brother Ephraim, who had also become a minister (Hutchinson 1988). The committee worked as a team, the input of its Ojibwa members being essential to the achievement of its goal.

This goal was attained in 1836, when the committee proposed a script which, in contrast with the common alphabet, used symbols representing whole syllables rather than separate vowels and consonants.

This writing system, whose principle was partly similar to that of shorthand, appeared easier to learn than the alphabet. It was rejected, though, by the Toronto Bible Society, because it would have been too expensive to print books written in these new characters. It may also be added that since most Ojibwa schools were already bilingual, some educators thought that the simultaneous use of two writing systems, one for English and the other for the Aboriginal tongue, would be detrimental to students. In 1837, James Evans spent four months in New York City, publishing Ojibwa translations of hymns and biblical texts in an alphabetical orthography (Young 1899).

The rejection of the script proposed by the committee may have been instrumental in James Evans' decision to seek another field of mission. Evans had had occasion to participate in meetings with northern Ojibwa and, possibly, Cree Indians at Manitoulin Island and, in the words of his son-in-law, the Hudson's Bay Company (HBC) trader John McLean, "his sympathy had been awakened by the sight of their degradation and spiritual destitution" (McLean 1932: 363). Whatever the case may be, in 1838, he was asked by the Canadian Wesleyan Conference to undertake a circuit of the north shore of Lake Superior, together with Aboriginal missionary-linguists Thomas Hurlburt (who had been a member of the committee) and Peter Jacobs, in order to investigate possibilities for establishing new missions. In May 1839, Evans met with George Simpson, governor of the HBC, who, according to McLean, invited him to pursue missionary work in the Hudson's Bay territory, in exchange of which he would hold the same rank and receive the same allowance as HBC's wintering partners.

In April 1840, James Evans learned that he had been appointed superintendent of Methodist missions in the Hudson's Bay territory. He left Upper Canada for Norway House (north of Lake Winnipeg) a few weeks later, accompanied by three other missionaries, his wife, their daughter, and two Ojibwa collaborators: Peter Jacobs (Pahtahsega) and Henry Bird Steinhauer (Sowengisik).

Since Jacobs and Steinhauer played a major part in the development of Cree syllabics, it may be interesting to say a few words about them (*cf.* Pilling 1891: 477-478; French 1982; Sieciechowicz 1982). Jacobs was the oldest of the two. He had been born in 1807 at Rice Lake and baptized in 1825 by William Case. After having studied at two Methodist schools (in Belleville and Credit River, Upper Canada), where he presumably learned English, he became an interpreter and Wesleyan preacher. After having accompanied Evans and Hurlburt in their 1838 trip to Lake Superior, he remained at Rainy Lake (to the west of Lake Superior) till 1840, when he joined Evans' party. Jacobs was ordained

minister in 1842, after which he was stationed at various mission posts. For unknown reasons, he was expelled from the Wesleyan Methodist Conference in 1858, and died in Rama (on Lake Simcoe, north of Toronto) in 1890, after having been readmitted to the church in 1867 (French 1982).

Rama was the place where Henry Steinhauer was born in 1820. After his baptism in 1828 (he too was christened by William Case) and one or two years at the Grape Island (Lake Couchiching) mission school, he spent three more years at the Cazenovia Seminary, in New York State. This is where he adopted the surname Steinhauer, the name of the benefactor who had paid for his tuition. Henry Steinhauer then taught at various mission schools in Upper Canada. He joined James Evans' party in 1840, but left it at Rainy Lake, in order to interpret for Rev. William Mason, one of Evans' fellow missionaries. Two years later, however, Evans invited Steinhauer to Norway House, because he needed someone to replace Jacobs as translator (Sieciechowicz 1982). Steinhauer remained in northern Manitoba (at Norway House and Oxford House) till 1855, the year he was ordained Wesleyan minister. He then established a mission at Lake La Biche (Alberta), which was moved to nearby Whitefish Lake in 1858. Steinhauer died at Whitefish Lake in 1884.

Both Jacobs and Steinhauer were Native speakers of Ojibwa. This language belongs to the northwestern branch of the Algonkian family. This explains why they do not appear to have had any problem understanding the Norway House (and, in the case of Steinhauer, northern Alberta) Cree speakers, as Cree too is part of the same northwestern branch of the Algonkian languages. This is also why Evans had no problem either to transfer his linguistic skills from Ojibwa to Cree.

James Evans remained at Norway House (and Rossville, a neighbouring settlement) for six years. Working in team with Jacobs and, then, Steinhauer, he put, once again, his knowledge of shorthand into good use, adapting to Cree phonology—within two months, if Hutchinson (1988) is right—the syllabic script already devised for Ojibwa; teaching this script to adults and children; and printing books using it. The role of Jacobs and Steinhauer was essential at all steps in this process. Besides contributing to Evans' understanding of Cree phonology, they helped him devise religious and secular curricula for the local school, and translated the Scriptures and several hymns in Cree (Pilling 1891: 478).

Evans had other collaborators—two of them Aboriginal—who also had an important part to play in the production of written materials in the Cree syllabic script (see Pilling 1891: 1338-1341). John Sinclair was a half-breed Cree from the Hudson's Bay territory. According to Pilling, Sinclair translated the Old Testament up to Job, as well as the Gospels

and Acts, while Steinhauer did the same with the rest of the Old Testament, the Epistles and the Revelation. Another part-Cree, Sophia Mason, also contributed to these translations, together with her missionary husband William Mason. The Cree Bible was later published in England under the name of Rev. Mason, and it seems that in some circles, he was credited with the invention of syllabics, though he later denied having ever made such a claim (Pilling 1891: 1341). In any case, when Evans left Norway House in 1846, due to various problems and misunderstandings, his team had already published seven books of a religious nature, entirely in syllabic characters, and his collaborators continued to produce written material long after his departure.

It is said (Young 1899: 186) that because the HBC first refused to transport to Norway House the printing press Evans had been offered by the British Wesleyan Conference, the missionary had to carve the syllabic characters by himself, out of the leaden lining of tea chests, and to print his books on birch bark (with soot mixed with sturgeon oil as ink), using a fur press to do so. This may be partly hagiographic, but it is sure that James Evans' problems did not cease to increase during his stay at Norway House. In 1845, Governor George Simpson asked the Wesleyan authorities to recall the missionary who, in June 1846, received a letter inviting him to meet with his superiors in London. Evans left during summer, arriving in Britain in October. His health had already been deteriorating and he died in Lincolnshire on November 23, about a month after his arrival.

The Syllabic Script

According to Pilling, the chief problem for Evans and his collaborators was to create a writing system suitable to nomadic people who did not remain at the same place long enough to have time to go to school. This system had to be simple—in order to be learned rapidly—while, at the same time, reflecting accurately the phonemic structure of the language, *i.e.* those sounds that the language used as functional units of pronunciation.

One important advantage of syllabics, as compared to a script that would have been based on the common alphabet, was that the influence of predetermined writing conventions was at a minimum. Let us give one example, that of vowels. In written English, five letters are used for symbolizing vowel sounds: a, e, i, o, u (not to mention y). Had Evans and his team worked on an alphabetic writing system for Cree, they might have insisted that this language had five vowels, because there were five letters for vowels in the alphabet they knew. This is precisely what the Moravian missionaries did in Labrador, and the Anglicans in

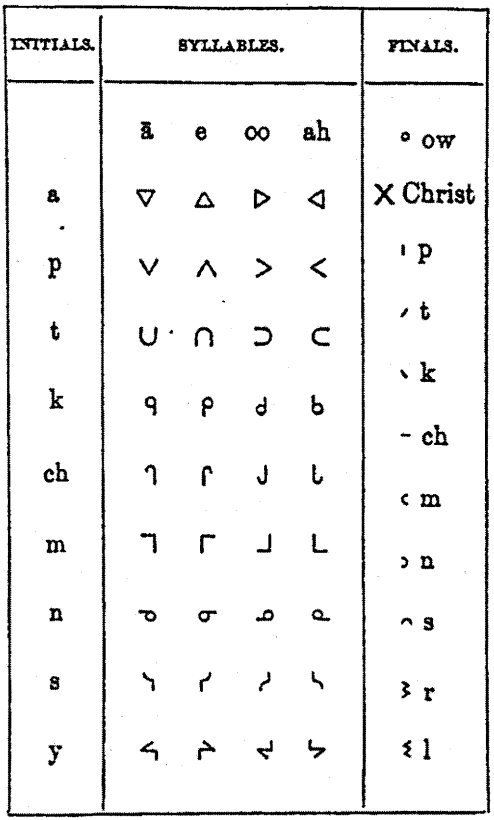
the western Canadian Arctic, when they devised writing systems for the Inuit (see Dorais 1990). Most Cree dialects, though, have only four vocalic phonemes (if vowel length is not taken into account): /e/ (as in "rest"), /i/ (ee), /u/ (oo) and /a/ (as in "task"). This was correctly understood by the inventors of syllabics.

This means that the linguistic intelligence of Evans, Jacobs, Steinhauer and others had an important part to play too. They were able to discriminate, among all varieties of sounds uttered by the speakers they heard, which vowels and consonants were really functional and which ones were mere varieties of these basic phonemes. They, thus, anticipated the research methodology common among modern linguists. It is said (Young 1899: 185) that Evans first studied the Cree language to "find the number and character of the sounds used by the best speakers in the tribe," discovering that the "principal sounds" were 36 in number and that they could be expressed in written form.

Evans' familiarity with shorthand—a script where consonants and vowels are often compacted together in easy-to-draw symbols—suggested him a practical solution for achieving such a written form for Cree, a solution he had already put into use when devising a writing system for Ojibwa. Instead of attributing a separate graphic symbol to each of the 36 "principal sounds" of the Cree language, he rather found it more practical to arrange these sounds in "rhythmic order," according to Young's expression. What actually happened is that Evans and his collaborators realized that with a language like Cree, whose phonological structure is chiefly syllabic (*i.e.* words are most often composed of consonant-vowel sequences), it is much simpler, as it is in shorthand, to devise series of partly similar written symbols, each series representing a set of syllables starting with the same consonant, than to graphically separate each phoneme (Murdoch 1981).

A simple, regular shape was thus associated with each consonant of the Cree language. A supplementary shape was attributed to syllables without initial consonant (*i.e.* made out of a mere vowel). Each of these shapes could occur in four different geometrical positions, according to the vowel (e, i, u, a) included in the syllable. In the original version of the system, where eight consonants (p, t, k, ch, m, n, s, y) had been elicited, this generated a total of 36 syllabic characters, one for each of the 36 "principal sounds" (*i.e.* basic syllables) of Cree, but in fact, speakers had to memorize only nine different graphic shapes, together with the four positions each of these could take (Figure 1). This made reading and writing very easy to learn, even with the addition of diacritic signs, 11 smaller symbols used for expressing final consonants, diphthongs, or vocalic length (for a detailed description of syllabics, see Nichols 1996).

Figure 1
The Cree Syllabic Alphabet



INITIALS.	SYLLABLES.				FINALS.
	ā	e	oo	ah	° ow
a	ᐁ	ᐃ	ᐅ	ᐊ	X Christ
p	ᐯ	ᐱ	ᐳ	ᐸ	ˈ p
t	ᑌ	ᑎ	ᑐ	ᑕ	ˊ t
k	ᖁ	ᖿ	ᖅ	ᖃ	ˋ k
ch	ᖵ	ᖾ	ᒍ	ᒐ	- ch
m	ᒣ	ᒥ	ᒪ	ᒫ	˂ m
n	ᓀ	ᓂ	ᓄ	ᓇ	˃ n
s	ᔆ	ᔑ	ᔕ	ᔖ	ˆ s
y	ᔦ	ᔨ	ᔪ	ᔭ	ˇ r
					ˉ l

The dot over any syllable lengthens the vowel sound.

*Thus, ᒪᓂᐅ = Manito, the Indian name for the Great Spirit, or God; ᒪᒪ = Mama; ᐸᐸ = Papa.

Source: Young 1899: 187

The shape of some syllabic characters recalls that of shorthand symbols, but Evans and his collaborators did not systematically transcribe the Ojibwa and Cree languages into any already existing (Taylor's for instance) shorthand system. In several cases, syllabic signs are more neatly and squarely drawn than the often curvilinear shorthand symbols. The general idea of transcribing the spoken language into syllables rather than into letters representing individual vowels and consonants was undeniably inspired by shorthand, as may have been the very shape of some symbols, but syllabics should not be considered a mere adap-

tation of shorthand to Aboriginal tongues. James Evans and his collaborators rather invented a totally new way of giving a written form to hitherto oral languages.

Some twenty years before this invention, though, in 1819 or 1820, a syllabic script had been devised by Sequoya, a Cherokee Indian, to put his Native language into writing. This system, which was still in use in the Cherokee communities of Oklahoma and North Carolina in the 1990s (Walker 1996), differs from Cree syllabics in that each of its symbols is idiosyncratic, *i.e.* completely different from all others, rather than resulting from the combination of a limited number of shapes and geometrical positions (Scancarelli 1996). According to Nichols (1996: 599), Evans was "struck by reports in the mission press[1] of the success of the Cherokee syllabary," a fact which may have contributed to his choice of a syllabic (rather than alphabetical) form of writing.[2] It is worth noticing that the Cherokee script may have influenced at least one other Indigenous syllabic writing system, that of the Vai people of Liberia and Sierra Leone, devised in 1832-33 (Tuchscherer and Hair 2002).

Evans' system was readily adopted by the Cree, by Christians at first, who, according to Young (1899: 186), acquired it in a few days, "because there was no spelling to learn," that is because the system was so close to the actual pronunciation of the language that students did not have to memorize arbitrary writing conventions. Non-Christians were curious about it too, and some learned to read. Young (*ibid.*) asserts that since religious texts were the only available reading material, learning syllabics hastened conversions. Whatever the case may be, the Cree soon started using the system towards their own ends, writing letters to relatives and friends, and noting down events such as births and deaths in their family bibles. Some even wrote up their daily diary. Rather than remaining a mere missionary tool for evangelizing Aboriginals, syllabics thus really became the people's own way of communicating among themselves.

From Norway House, the syllabic script was rapidly disseminated among surrounding Algonkian-speaking populations. Missionaries working in various regions adapted it to the phonological specificity of the dialects spoken in their area, and within twenty years of its invention, it was used, amongst other groups, by the Western Cree, Plains Cree, James Bay Cree, Oji-Cree, Naskapi, and Northern Ojibwa. Besides Wesleyan Methodists, other denominations adopted syllabics, most notably the Anglicans and Roman Catholics. Around 1855, the British and Foreign Bible Society started printing syllabic bibles in various Cree and Ojibwa dialects (Pilling 1891). At the same period, the script was adapted to two non-Algonkian languages: Chipewyan (a Dene form of

speech) and eastern Canadian Inuktitut (on the history of syllabics among Inuit, see Harper 1983).

Besides these adaptations, there were imitations (Walker 1996). In the early 1880s, Algonkian speakers from the Great Lakes area, in both Canada and the United States, devised a syllabic script whose look was completely different from that of Cree syllabics (which some of them probably knew), as it was based on the Roman alphabet. Speakers of the Fox, Sauk, Kickapoo, Potawatomi, Winnebago and Odawa languages adopted this Great Lakes Algonkian Syllabary, and during the 1990s, it was still known to some people belonging to the first four of these nations. Another syllabic script was devised around 1885 for the Carrier Dene language of northern British Columbia by father Gabriel Morice, a Roman Catholic missionary (Morice 1890). It followed the same principles (shape and position) as Cree syllabics, but the look of its symbols was partly different. It seems to have been abandoned during the 1930s.

This was not the case with the system invented by Evans and his collaborators. Nowadays, more than 160 years after its invention, the syllabic script is still alive among a majority of its original users, where it is known by 30,000 individuals at least. Its usage may have declined a bit among some Cree, Ojibwa and Chipewyan groups, due to the onslaught of formal education which, from the 20th century on, was entirely conducted in English, but for other groups—the Inuit and Naskapi for instance—it still constitutes the principal mean of written communication in the Aboriginal language. Even in those areas where they had started to decline, syllabics are now making a return of sorts. The reawakening of Aboriginal identities during the 1970s led to the development of formal education in Native languages, which entailed a revival of the use of syllabics for teaching children to read and write. The web site of a Canadian publisher in Aboriginal languages (www.nortext.com/schoolbooks/language) lists no less than 12 different versions of the syllabic script—including four versions of Cree syllabics, three of Inuktitut, and one each of Ojibwa, Oji-Cree, Innu, Naskapi, and Chipewyan—in which they currently publish school books. Syllabic fonts for the computer are in common use, and a font (Unicode Standard 3.0) including all existing syllabic symbols was devised a few years ago.

Some consider syllabics as far from perfect. Walker (1996) has criticized the shape of its symbols which, in his opinion, would be answerable to two different geometrical logics. The fact that bilingual readers are generally slower in syllabics than when using the alphabet has often been attributed to the allegedly cumbersome shape of syllabic characters. The difference, however, seems due to a lack of practice in reading

syllabics on the part of those who are literate in English; monolingual readers in the syllabic script can be as fast as any user of the alphabet (Dorais 1990). According to Murdoch (1981), the pedagogical qualities of syllabics far exceed its weaknesses. Be that as it may, the only three Canadian Aboriginal languages with excellent chances of surviving up to the end of the 21st century—Ojibwa, Cree and Inuktitut—are most often written in the syllabic script (Foster 1982).

Devised at the initiative—and with the technical support—of a British missionary, James Evans, the syllabic script could not have been invented without the input of a very competent team of Ojibwa and Cree speakers. As soon as it became available as a writing system, it was, so to speak, appropriated by its users, who made it totally their own. Nowadays, most Cree, Ojibwa, Inuit, Chipewyan and other users of syllabics genuinely consider it as *the* Aboriginal way of writing, by contrast with the White Man's script, the alphabet. The syllabic script thus really forms a part of contemporary Canadian Aboriginal identity.

As we shall now see, a similar process of devising a writing system in collaboration with its Aboriginal speakers—this system later becoming part of their cultural identity—occurred in a very different area of the world, south-western China, at the beginning of the 20th century. As far as we know, this process was at least partly inspired by the Canadian experience of James Evans and his collaborators.

Samuel Pollard and His Team

The name most closely associated with the invention of the A-hmao script[3] is Rev. Samuel Pollard, a Bible Christian missionary who arrived in Yunnan in 1887. His first significant encounter with the A-hmao people was in 1904, in Zhaotong, north-east Yunnan.

Pollard was born on 20 April 1864 into a Bible Christian[4] family living in Camelford in Cornwall, England. His father was a well-known preacher and his mother a teacher of French-Canadian extraction. Theirs was an itinerant ministry in Cornwall, Surrey and the Isle of Wight, seen as much part of Bible Christian evangelization as missionary activities in Australia, Canada and New Zealand. In 1876 Samuel Pollard went to the Bible Christian boarding school at Shebbear, North Devon, where the quality of instruction and his abilities led him to excel in the 1881 examinations, launching him into a career in the Civil Service. His family's particular evangelical Christian faith and his own personality and abilities gave a foundation to his missionary zeal and his skills in languages.

Between 1881 and 1887 he worked in the Post Office Savings Bank in London where it is probable that he used the Pitman shorthand system, the most common of the time. Equally significant at this time, he

was influenced by one of the 'giants' of the Bible Christian movement, Rev. F.W. Bourne, who combined energetic evangelism with "vigorous intellect and massive moral force," all characteristics which were later attributed to Pollard himself (Grist 1920: 7).

In 1884 the Bible Christians had mooted a mission to China, agreed in 1885 with the founder of the China Inland Mission (CIM), Rev. J.H. Taylor. Although there were Methodists working in South-west China with the CIM, it was agreed that Bible Christian missionaries would be stationed in Yunnan, in an associate capacity. In January 1888 Pollard and his life-long friend Frank Dymond arrived in Zhaotong, a small walled city in mountainous northern Yunnan and located on the main route between Sichuan Province and Kunming. His distinctive qualities had been enhanced at the CIM Chinese language school in Anqing, Anhui Province, where he excelled. Here he studied with a Scottish CIM missionary, Rev. James Adam, who later worked among the A-hmao in Guizhou Province. Pollard had an aptitude for languages. His diaries recorded New Testament studies in Greek and, in 1890, interest in Arabic while he was in contact with Moslem populations in Kunming. His first recorded contact with 'aborigines', the non- Han Chinese, also dates from this time (Pollard Diaries: 6 June 1890).

As pioneers in the hostile and traditional city of Zhaotong, both Pollard and Dymond were confronted by symbols and practices of China's traditional religions, by abject poverty and by the effects of opium use. They attempted to establish the Mission in the city but initially they spent their days in "one continuous grind at language study and evangelism" (Grist 1920: 37). But later, Pollard's competence in Yunnan Mandarin, his knowledge of Chinese religions, and insights into local politics enabled him to engage forcibly with people of all walks of life. Zhaotong had its educated and administrative elite with whom Pollard had good rapport, in particular with the Li family, which played a significant role in the establishment of the church and the development of the script for the A-hmao. It is not irrelevant to notice that Pollard was of small stature and a lively humorist, and he was fearless in adversity, especially when defending the weak. These factors contributed to the ease with which he engaged with people, be they Han or ethnic minority, official or labourer, and may have later been associated with the success of the script for the A-hmao.

Pollard's earliest encounters with the highland minorities in Yunnan and Guizhou provinces occurred on his travels well before 1904. His journeys along the trading artery between Yibin, on the Yangtze, and Kunming in the south, and north-east into the mountain strongholds of the Yi ('Nosu') took him through settlements in which people of different

ethnicities lived and into which he ventured, an explorer as well as a Christian missionary (Pollard 1908). As early as 1892 he was anticipating that he would, sooner or later, engage in work among the 'aborigines' despite his intense commitment to the Chinese (Grist 1920: 156). Evangelization among the Han Chinese had produced few converts and Pollard was an adventurer. He anticipated that this would extend his mission beyond the confines of the fortified cities and their residents.

During 1903, Pollard took three long journeys into north Yunnan with Li Sitifan (Li Guojun), who was a graduate and a son of a well-educated Han family of Zhaotong. He and Pollard had mutual respect, especially in the development of the script and translation. Li Sitifan became a Church leader and worked among A-hmao communities. He disappeared, feared dead, on a journey in 1918.

During these travels, Pollard encountered the mountain minorities, the Yi, A-hmao and Chuan Miao in their scattered mountainous communities (Lewis 2000). He recorded experiences which reflected their independence, resilience, poverty, and the absence of foot-binding of the women (Pollard 1908). The A-hmao are a sub-group of the Western Miao with a unique language and distinctive culture and traditions. It appears that they had no written language but a rich oral tradition of songs and stories, which included accounts of the loss of their writing (Parsons and Parsons 2000). Some claim that remnants of this writing remain in the patterns in their textiles (Enwall 1994: 47; Diamond 1996; Dong Ren Da 2002). Few of the other minority peoples in Yunnan had writing either, yet they were conscious of the power of writing, especially where they were under the control of the powerful Han administration and Yi landlords. The Yi priestly clan of Dalianshan had an ancient writing, in which each character represented a syllable, but this was accessible to relatively few people (Daniels and Bright 1996: 239).

It was not until July 1904 that Pollard was confronted by a group of the A-hmao. They came to him. Four A-hmao elders arrived in Zhaotong in July 1904. They had heard that Pollard was highly respected by the Chinese and Yi and ventured into the city, which was normally contemptuous of them. They arrived with five day's supply of food, intent on learning to read, but it does not appear that they sought religion. Was it only for this that they risked the contempt of the city? A few years earlier, a lone A-hmao had ventured into Zhaotong to make contact with Pollard, but left, unable to take the risk. (Grist 1920: 179) This later group had been directed to Pollard in Zhaotong with a letter from Rev. James Adam of the CIM in Anshun, Guizhou Province (Clarke 1911). In the weeks that followed, new groups of A-hmao arrived regularly, staying in the Mission buildings and wanting to learn to read. Within the first month, a

hundred eager Miao had visited the mission station. Pollard was receptive and ready for the challenge.

Pollard and Li Sitifan attempted to teach Chinese to the A-hmao using simple characters, but this was not effective among people for whom any writing was alien. There was little progress in reading Chinese characters. Pollard and Li Sitifan therefore resolved to learn their language so that they could teach the A-hmao to read and, thence, to understand Christian teaching. Initial progress was made with the help of people such as Zhang Chao Xian (Chang Mo-shee), an A-hmao leader who understood some Chinese (Enwall 1994: 103). Within a few weeks, Pollard and Li Sitifan had mastered enough A-hmao language to give short talks and write simple stories for the A-hmao, but still in Chinese characters. For the A-hmao, the problem of reading persisted. A script had to meet two criteria: the recording of the spoken language and the ease with which pre-literate people could learn it. The barriers to reading and writing for the A-hmao were eventually overcome, initially by Pollard's recognition that the language was syllabic, *i.e.* that word-elements usually ended in a vowel, and that it was tonal. Then Li Sitifan and he determined to devise a new writing system for the language, as neither Chinese nor a romanized alphabet would suffice. Pollard insisted that attempts to create writing "must be as simple as possible" (Grist 1920: 285) and be "absolutely phonetic and easily understood" (Pollard 1906: 174). On these grounds, he rejected the romanized writing system which had been devised by CIM missionaries in Anshun, Guizhou Province, despite the preference of the British and Foreign Bible Society.

The A-hmao Script

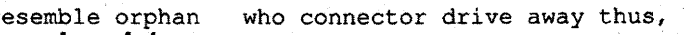
There is evidence that Pollard had experimented with devising scripts during his travels among the Yi, whose ancient script is syllabic, but no indication that this trial directly influenced the outcome of the A-hmao script, other than the possibility that he was familiar with syllabic writing and had attempted to simplify and make it accessible for the low caste Yi (Enwall 1994: 103). This demonstrates Pollard's prior willingness to make writing accessible to even the poorest and to opt for this solution for the problem of the A-hmao as early as October 1904.

On 12 October 1904 Pollard recorded in his diary the first attempt to devise a script which would be more effective than Chinese writing, a mere three months after encountering the language, and reported that "Mr. Steven Lee [Li Sitifan] and I are attempting to reduce the Miao language to a simple system of writing" (Pollard Diaries: 12 October 1904; Enwall 1994: 105). Their inclination to invent a special script for the A-hmao language and Pollard's memory of a successful syllabic

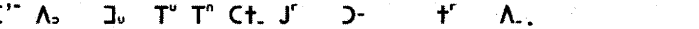
Figure 2
Sample text in A-hmao script with English gloss and translation. The concluding lines of a song describing the expulsion of the A-hmao from their ancient homeland.

A-hmao elder plural descendants able come resemble,
The descendants of the Miao elders were like,

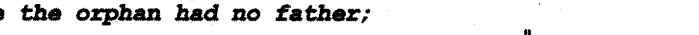
resemble orphan who connector drive away thus,
Like an orphan driven away,



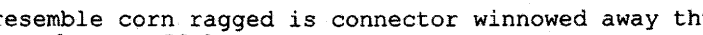
reason was orphan not have father oh.
Because the orphan had no father;



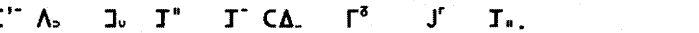
resemble corn ragged is connector winnowed away thus,
Like ragged corn all beaten out,



reason was corn ragged tilled not right.
Because the corn had been tilled amiss;

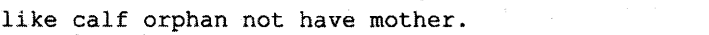


like calf orphan not have mother.
Like an orphaned calf without a mother.

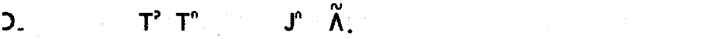


not be troubled over much.
Yet do not despair.

there is day thus calf orphan will live bull,
The day will come when the orphaned calf, grown into a bull,

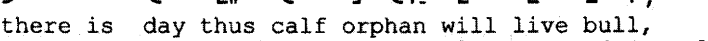


low three times situated room house thus.
Will low three times in its own room in the house.



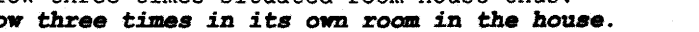
there is day thus corn ragged will live good seed,
The day will come when the ragged corn will produce good seed

situated connector loft connector not know.
To be stored in the grain-loft all unbeknown.



there is day thus orphan will live good guest,
The day will come when the orphan will be an honoured guest,

cause the wealthy the strong the wise plural,
While the wealthy and the strong and the clever,



ashamed come behind connector not know oh.
All unbeknown, will follow behind, ashamed.

orthography persuaded them to experiment with a new script. In correspondence with the British and Foreign Bible Society (BFBS), dated 10 April 1906, Pollard writes: "Years ago I read of the syllabic method adopted in North America, and of the success of Gospels printed by the BFBS in this style" (BFBS 1906: 1). The script to which Pollard referred was the Evans' syllabary (Enwall 1999). The parallels between this syllabary and the A-hmao script are evident but not close, as the A-hmao language has a more varied range of initials and finals. Both scripts answered similar needs: ease of learning and straightforward shapes for writing and printing. The Cree script had also been successful.

The principle of the A-hmao script is simple. Each syllabic symbol is made up of an 'initial' (*i.e.* consonant) and a 'final' (*i.e.* vowel). The position of the final identifies the tone. The shape of the 'initial' and the position (and shape) of the tone final give the pronunciation of the word. Pollard used his knowledge of Pitman's shorthand to locate the vowel or 'final' mark at different positions around the 'initial'. Thus a script was invented which incorporated all the necessary elements of the language, with a writing which was both easy to learn and straightforward to print (Pollard 1919; Grist 1920: 287). There are too many variations and complexities, compounded by the issue of tones, to include a table of the A-hmao script that would fit into the format of this article; we rather present a short example of an A-hmao text in parallel translation, showing its wider use rather than as a tool of the missionary (Figure 2). The A-hmao will welcome the choice. It is familiar and describes a significant event in their story.

There are 23 initial symbols and 33 finals, some in combination. Initially five tones were included, which coincided with the number of tones used in Chinese language teaching for missionaries at the time (Kendall 1947: 123). Later this was reduced to four tones. Some A-hmao were using seven tones during the 1940s, as explained to Rev. R.K. Parsons by Wang Ming-ji (Parsons and Parsons 2000). The A-hmao script is a "masterpiece of simplicity and the arrangement of the tones was genius," according to Rev. P.K. Parsons (personal communication, 2000). This, in 2000, from one of the few remaining scholars of the Pollard script, is credit enough for an introduction to writing and reading which transformed the lives of many in one of China's distinctive minority peoples, and distinguished them from their powerful neighbours. The main structure of the A-hmao writing had been completed by 1905.

Translation and Printing

Once the script had been created, then translation, literature and printing followed. The demand for literacy from the A-hmao and the

preachers' commitment to teach Christianity prompted the printing of the first booklets in 1905. Pollard's first translations in 1904 were undertaken with Li Sitifan, "my principal helper in the translation" (Pollard Diaries: 12 October 1904) and Yang Yage, to translate hymns and New Testament stories.

The procedure of translating from the New Testament was for Pollard and Li Sitifan to study the Greek and Chinese texts, then to paraphrase these and, with Yang Yage, put them into A-hmao colloquial in order to achieve both accuracy and clarity. The text was then written in the A-hmao script. This process combined the skills of A-hmao, Chinese and British people; the idioms of custom, people and place were important for understanding and remembering, as was accuracy to the original meaning of the text. In Pollard's Annual Report for 1905, he writes that most of the translation was done by 'Steven Li', and the authors of the first two Primers were 'Bo Geli',[5] Li Sitifan and Zhang Yue Han (Pollard 1906: 108). The first two Primers were printed in 1905 from woodcut blocks in Chengdu, Sichuan, at the West China Union University printing press, with the co-operation of Mr. J. Endicott, a Canadian printer. The second Primer contained hymns, the Ten Commandments, the Lord's Prayer and outlines of the life of Christ. They became both a tool of literacy and a source of Christian teaching for the enquirers. The demand for these books was considerable, they sold by the thousands. Pollard reported progress on translating Mark's Gospel with Yang Yage and Li Sitifan: "[...] and before long we hope to have this in the hands of the Miao. [...] The lion's share of this work has been done by Mr. Stephen Lee. Bro. Lee has been a true helper this year, and has won the confidence of these tribesmen to a great extent" (Pollard 1906: 31).

Others have claimed responsibility for the creation of the script and identify the strong influence of A-hmao traditional textile patterns, which in their view record pictograms of ancient Miao writing. In China, scholars articulate claims that the 'Pollard' or A-hmao script was from an indigenous source. Dong Ren Da (2002) summarizes opinions that "Pollard played an important role in the creation of the script, but that Miao and Han people contributed significantly to its creation. It absorbed the key elements of traditional culture among Nationalities in the South-West, especially the Miao" (translation). In addition, he reports that another person, John Zhang, "enquired about the structure and pronunciation of English and Mandarin and added this to his knowledge of traditional Miao symbols, thus producing the 'Old Miao' script."

Enwall (1994) considers in detail the myths and indigenous writing systems which may have influenced the A-hmao script and reiterates the view that the A-hmao contributed to the invention of the script as

well as to translation, and accepted the script as uniquely theirs from the earliest printing and study. However, the invention of the A-hmao script in 1904 was not without previous thought and influence. How else might the first printing have been completed by December 1904 when Pollard had only encountered the A-hmao six months earlier? However important these contributions are, recognition of the language's syllabic structure and the dated record that Pollard acknowledged of the achievements of Rev. James Evans in Canada, combine to give credit to the first collaborative work of Pollard, Li Sitifan and their A-hmao colleagues, Zhang Yue Han and Yang Yage. The last-named contributed more, and over a longer period, to the translation work than to the devising of the script (Enwall 1994).

At his premature death in 1915, not only was Pollard's reputation significant, but also the main structure of the script, the initials, the finals and the tone notation had remained, essentially unchanged. Modifications to the A-hmao script were made during the next twenty years as knowledge of the language increased and in response to demands for its use for other dialects (Chuan Miao) and languages (Gopu, Lisu and Laka) in Yunnan (Enwall 1994). Translation was undertaken after 1905 by Rev. A.G. Nicholls, from the CIM in Kunming, who studied the language and script with Pollard in order to work among the A-hmao in Wuding county, Yunnan (Enwall 1994; Kendall 1954). By 1907 Rev. Harry Parsons and Mrs. Annie Parsons had arrived, designated to develop work among the A-hmao. They lived at the new Shi Men Kan village, excelled in the language and travelled extensively. During Pollard's absence in 1907, H. Parsons translated the Book of Jonah and after Pollard's death in 1915, he translated the Gospel of Mark into the Chuan Miao dialect. By 1915 Rev. W.H. Hudspeth and the A-hmao translator, Yang Yage, were able to complete and take the proofs of the completed New Testament in A-hmao script to Shanghai to be printed. In 1949, Rev. P.K. Parsons and Rev. R.K. Parsons (sons of Rev. and Mrs Harry Parsons) departed from the region in advance of Communist forces. Although neither of them were translators, they had worked with A-hmao teachers and scholars, such as Wang Ming-ji, a teacher at Shi Men Kan school, and Yang Yung-xin, collecting A-hmao songs and stories. The very existence of the script meant that these songs and stories could be written by A-hmao themselves. They would otherwise have been lost during the political upheavals of the 1950s and to a disappearing oral history (Rev. P.K. Parsons, personal communication, 2000).

The A-hmao script became the vehicle for literacy and was associated with Christianity. The exceptional growth in church membership among the A-hmao immediately after 1904 cannot be dissociated from

the invention of the script and printing (Diamond 1996). However, the surge of activity among the A-hmao in the mission caused threats of insurrection among the Yi landlords and the Chinese in Zhaotong.[6] Pollard became an interlocutor with the authorities. His political actions on behalf of the A-hmao and his travel among them may have contributed to the success of the writing which emerged at this time so that by 1944, high levels of literacy were reported from this area (Lin 1944; Unger 1997) suggesting unusual achievement in an otherwise marginal and impoverished region of China.

Current scholarship and a revival of interest in China are revitalizing study of both the script and the language, and of their evolution during the twentieth century. A translation of the Old Testament is in preparation. Two retired missionaries, the already mentioned Rev. P.K. and Rev. R.K. Parsons, both scholars of the A-hmao language, have now created a web site which records traditional A-hmao songs and stories, a glossary and an active script for new writing. The glossary includes many 'Old Miao' words and phrases that were used only in the Songs and Stories. Had they not been recorded, they would have been lost as these traditions were obliterated in the 1950s. This is an exceptional record of a script, a threatened tradition and a declining language.[7]

Similarities and Differences

In a comparison of world writing systems, none other appears to resemble the Cree and A-hmao scripts (*e.g.*, BFBS 1965; Daniels and Bright 1996: 580-582, 599-611). Despite the apparent visual similarity between these scripts, there is no suggestion here, of course, that the languages themselves are connected. The focus is on the links between the writing systems. The first printing for both the Cree and the A-hmao scripts can be dated. Correspondence and diaries record the experimentation and collaboration in each place. However, given the apparent similarities, the extent of the influence on Pollard by Evans' script for the Cree is an issue. At one level, the likelihood of influence is slight. Evans had died in Britain in 1846, and although he and Pollard were both Methodists, the Bible Christians were fiercely independent. Any communications between Canada and South-west China were slow and the missionary societies were constrained by low incomes. At another level, any evidence for links between the scripts and their 'inventors' must be set against their distance in time and space, and against claims in China for indigenous origins for the A-hmao script.

Recent research in Yunnan shows persistent beliefs that the initials and finals of the script include motifs which were traditionally recorded on A-hmao textiles, as decoration and representation of history and sto-

ries. Although few could be identified, and some simple shapes are widespread, the belief itself is an important part of A-hmao tradition, as it was in the initial acceptance of the script by the A-hmao. Relevant as these beliefs are, the individual representations do not in themselves provide the means for expressing a language, whether as translation or in creative writing. Given Pollard's demand for both Biblical accuracy and for local understanding in the New Testament translations, to the extent of rejecting translations by another missionary, more than a collection of traditional symbols was required.

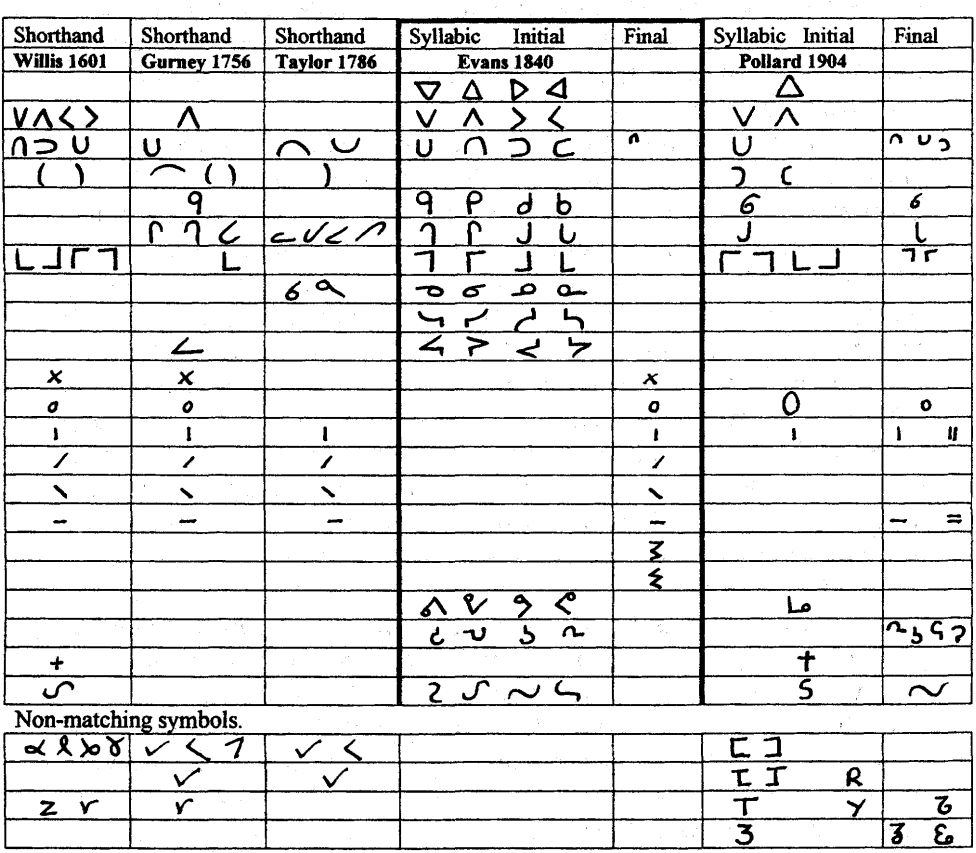
As the invention of the syllabic Cree script preceded the A-hmao script by sixty-four years, to what extent was Samuel Pollard aware of the existence of the Cree script, of its syllabic structure and of Rev. James Evans? Pollard's family would have had knowledge of Methodist missionary activities in North America and the Bible Christians had a short-lived missionary enterprise there prior to 1886 when they embarked on their activities in South-west China (Shaw 1965). The diet of a devout Bible Christian household might have included information about missions in Canada, including the 'invention' of the writing for the Cree people. The transatlantic traffic of Cornish and Devon settlers and miners, including many Bible Christians, would possibly have brought information to an active Christian household. That missionaries might invent scripts would then have been understood as a possibility.

Once in China, Samuel Pollard had contacts with the West China Union University in Chengdu, Sichuan Province. When printing was required for the first A-hmao script in 1904, Pollard was able to request assistance from the Canadian Mission press at the University, from Mr. J. Endicott. Pollard and Endicott may already have discussed the printing of non-romanized scripts, given Pollard's previous interest in Yi writing systems. As a printer and missionary, it is likely that Endicott was familiar with the script used for the Algonkian and Inuit languages in Canada. Also at the West China Union University was a highly regarded scholarly library, to support the research undertaken by anthropologists, linguists and historians. A copy of Pilling's *Bibliography of the Algonquian Languages* (Pilling 1891) may well have been available soon after 1900. In this there are many references to the syllabic script developed at Norway House, its adaptation for different languages, and the various contributors to the enterprise. This is speculative, but not unrealistic.

A third influence came from the China Inland Mission, which attracted missionaries from North America as well as Britain and elsewhere in Europe. Pollard would have met some of these people during his language training in Anqing, in Kunming, Yunnan, and there were links, albeit erratic, with Christian Missionary activities elsewhere in China, even

Figure 3

Symbols used in British shorthand systems, the Evans syllabic script (1840) and the A-hmao script of Yunnan, China (1904)



Source: R. Alison Lewis. Hull, October 2001.

in 1900. For a person interested in translation and Christian conversion, there were opportunities for Pollard to hear of and enquire about Canadian missions and Cree syllabics.

Both Evans and Pollard sought solutions to similar problems for writing and printing the Cree and A-hmao languages. We have argued that each drew on sources beyond their immediate surroundings, Pollard using Cree syllabics and Evans referring to Taylor's shorthand. Figure 3 juxtaposes Evans', Pollard's and Taylor's writing symbols. There is no relationship between the sounds which the symbols represent, but a clear linkage in the shape of some symbols.

Evans used three of Taylor's symbols, all of which are rotated in the syllabic system, and five additional symbols. Pollard used eight of Evans' symbols, only five of which are rotated in the A-hmao script, in the initials and finals of the syllables. In both scripts, other symbols are used which are not rotated and not found in the other system. We suggest that Pollard took both the idea of rotation of the symbols and some symbols from Evans' script.

A correlation between Evans' and Taylor's writing also indicates similarities in symbol and rotation, as Figure 3 shows. This is sufficient to suggest Evans' direct use of Taylor's symbols for the development of Cree syllabics, especially as no alternative sources have been found.

Earlier and similar influences are noted in the shorthand of Gurney (1756), where there are eleven symbols used in common, two of which are used rotationally. And even earlier, in Willis' shorthand of 1601, three symbols are used rotationally, with an additional four also used in the other scripts. Two symbols, albeit basic ones, are used in all five writing systems. This analysis offers sufficient evidence to argue for a continuity of writing symbols from Willis' 1601 shorthand through to Pollard's script of 1904. Willis, Gurney and Taylor each included symbols unique to his own script, invented to resolve the problems of their purpose and their period. Evans drew on Taylor's shapes and Pollard drew on Evans' symbols and on ideas from Pitman, to resolve their own problems of purpose, writing and printing in their exceptional circumstances.

Evans and Pollard were driven by the need to communicate, in writing, Christian teaching. The Willis, Gurney and Taylor shorthand systems are a minority among a multitude of obsolete shorthand systems. But they were the only ones to use such distinctive symbols and all three, in their time, were the most successful until Pitman's of 1839—too late to influence Evans (Butler 1951). Pollard was influenced by Pitman's shorthand to the extent that marks located around the central line change the vowel. This system offered a resolution to the problem of indicating tones in the A-hmao script. There seems to be nothing equivalent in the traditional pictorial signs in Miao tradition.

The role of Western missionaries is central to this historical account, but not to the exclusion of indigenous people. In each case, Native speakers who were involved in the invention and development of the writing systems can be identified. Ownership of the script was and is important to First People in both South-west China and Canada. In both regions, reports suggest that when the scripts were first used, they were undoubtedly adopted as belonging to the people with whom and for whom they were created. Their effectiveness and this acceptance were confirmed by the achievements in levels of literacy within a short time (Young

1899; McLean 1932; Kendall 1954), by statements that the scripts had been developed for specific people by Native speakers, and by the fact that neither Evans nor Pollard appear to have claimed the scripts as their own.

In both Yunnan and Canada, the adaptation of each system of orthography to other languages followed soon after the introduction of the first. In Canada, syllabics were adapted to other Algonkian languages and were modified for use among the eastern Arctic Inuit and the Chipewyan. In Yunnan, the script was modified for use among the Gopu, the Yi, the Lisu and the Laka, all living in the south-west of the province.

The social and political repercussions of the existence and widespread use of these scripts for pre-literate people were considerable. The acquisition of writing and reading became a means of empowerment for people who were at the bottom of the social and economic hierarchy in their respective countries. Not only did new skills give access to Bible study and Christian teaching, a central aspiration for both Western and Native missionaries, they also enabled the readers to experience an unfamiliar independence. They were no longer completely dependent on powerful external groups such as the Hudson's Bay Company, Yi landlords and Han magistrates.

However, there were many tribulations in attempts to reverse long-held attitudes, some of which persist. Stories from both areas describe the dissemination of texts and reading skills among the communities, from the poorest serfs in the Chinese mountains to northern Canadian nomadic hunters, and this in all age groups. Kendall (1947) reports that in the 1940s, a small community of Gopu (Yunnan) was found which had continued to read the Bible, their only book, twenty-five years after their last contact with any itinerant missionary. This level of resilience suggests that literacy was an effective part of missionary activities, but the extent to which it persisted is difficult to establish. Yang Zhongde (1990), in a biography of the eminent A-hmao leader, Zhu Huang Zhang, not only describes this leader's education and achievements, but also the uphill struggle through his life to maintain the momentum of education among the A-hmao people. Chinese authorities introduced a romanized script for the A-hmao language after 1950, but the old script remains in use in Christian communities and among a few older individuals who derived from A-hmao villages (Enwall 1994). In 2000, discussions with local government leaders in the Shimenkan area suggested that in only three 'Christian' villages was the Old Miao script known, and then among Christians only.

Conclusion

Despite the integrity of many world writing systems, there is evidence of inter-influences in the development of scripts, if not in their origins (Daniels and Bright 1996; Tuchscherer and Hair 2002). The juxtaposition of the Cree script of 1840 and the A-hmao script of 1904 suggests influence one to another. Using visual comparison alone, the clues given in the survey of shorthand symbols suggest that Evans was influenced by those of Taylor and indirectly from Gurney and Willis. The qualities of effective shorthand are not dissimilar to those required for Cree and A-hmao literacy—simplicity for both writing and printing, especially in the contexts in which each was created. It can be reasonably assumed that both Evans and Pollard were familiar with and used the shorthand of their times. They had similar commitments to literacy for pre-literate people among whom they worked, and they both appear to have had particular competence in linguistic understanding and a desire to communicate their Christian beliefs through education and literacy.

There may be relevance in the common denominational background of Methodism, for both Evans and Pollard, but they came from different traditions within it. However, each was committed to work with marginal communities and to education, consistent with policy and practices in Methodism, and their own upbringing. The combination of these varied factors does not presume a recipe for the invention of scripts for pre-literate people, but it does give an insight into possible motivations.

Finally, in both cases, the original educational goals of Evans and Pollard which, we should presume, were primarily religious, had unforeseen effects. Probably because the elaboration of the Cree and A-hmao scripts had resulted from team work—involving both Indigenous and non-Indigenous individuals—the people for whom these scripts were intended appropriated them readily, putting them to usages that went far beyond the mere study of Scriptures, and using them as powerful educational tools. As a consequence, in both northern Canada and southwest China, syllabic writing systems now form an integral part of the cultural identity of several Aboriginal nations. This is probably the greatest tribute that can be paid to those—foreign missionaries and local people—who toiled intelligently to introduce an original form of literacy to two very different corners of the world.

Notes

1. Which may have included "an anonymous report on the invention of the Cherokee syllabary" published in October 1828 in the *Missionary Herald*, "the widely circulating journal of the American Board of Commissioners for Foreign Missions" (Tuchscherer and Hair 2002: 431).
2. Nichols (*ibid.*) adds that Evans was also familiar with the Devanagari script of Northern India, an 'alphasyllabary' where vowels appear as diacritics to the consonant symbols (Bright 1996).
3. A-hmao is their own name for themselves. Hua Miao, the Mandarin name for this groups of Western Miao (Miao are also known as Hmong), means 'flower sprout'. The self name will be used here.
4. The Bible Christian Church amalgamated with the United Methodist Free Churches and the Methodist New Connexion to become the United Methodist Church in 1907. For details of the history of Bible Christians, see Shaw (1965).
5. Rev. Samuel Pollard's Chinese name.
6. A fierce conflict in Guizhou 1856-1876 was called the 'Miao Rebellion' and Yunnanese feared its revival (Jenks 1994).
7. This record is now available on-line at www.ecs.soton.ac.uk/~str/miao. Rev. P.K. Parsons and Rev. R.K. Parsons have developed the materials since the 1950s and the site has been devised with the assistance of Dr. S. Rake.

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THE LOST PROMISE OF MABO: AN UPDATE ON THE LEGAL STRUGGLE FOR LAND RIGHTS IN AUSTRALIA WITH PARTICULAR REFERENCE TO THE WARD AND YORTA YORTA DECISIONS

Janice Gray[1]
Faculty of Law
University of New South Wales
Sydney, New South Wales 2052
Australia
Email: j.gray@unsw.edu.au

Abstract / Résumé

In 1992, the *Mabo* decision was handed down by the High Court of Australia. The judgement was heralded as marking a great leap forward in the historico-legal struggle of Indigenous rights in or in relation to land. This paper argues that the case symbolised hope, aspiration and a heightened willingness, on the part of the judiciary, to respond to racial and legal injustice. Yet, the paper also concludes that the promise contained in *Mabo* has not been fulfilled and that more recent decisions of the High Court, such as *Ward* and *Yorta Yorta,* have helped undermine that hope and promise, so much so that the pursuit of Native title might not be the most beneficial course available to those seeking greater land justice.

En 1992, la High Court de l'Australie a rendu le jugement *Mabo*, qui a été salué comme un grand bond en avant dans la lutte historique et juridique pour les droits territoriaux des Autochtones. La présente communication met de l'avant que le cas *Mabo* a symbolisé l'espoir et les aspirations des Aborigènes, ainsi qu'une bienveillance accrue de la part du système judiciaire de réagir aus injustices raciales et juridiques. Pourtant, l'auteure conclut que la promesse contenue dans le jugement *Mabo* n'a pas été réalisée et que les décisions plus récentes de la High Court, telles que les jugements *Ward* et *Yorta Yorta*, ont sapé quelque peu cet espoir et cette promiesse, à telle enseigne que la poursuite des droits de propriété autochtones pourrait ne pas être le meilleur moyen à la disposition des personnes et des groupes qui recherchent la justice en matière de revendications territoriales.

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Introduction

This paper seeks to examine the historico-legal struggle of Indigenous Australians for recognised rights in, or in relation to, land, once contact with the British colonisers had occurred. In so doing, it analyses the method of acquisition of land by the British Crown, in 1788, and the effect of that acquisition process on the ability of Indigenous people both to steward and control the land as well as to use and enjoy its spiritual and physical offerings.

The paper briefly traces the legal impact of colonization and the consequent struggle for land rights through the legislative forum, but it focuses more fully on how the common law (largely through the *Mabo (No2)*[2] decision in 1992) encouraged hope and gave rise to a promise of a better deal in regard to land rights. The paper explores how subsequent legal developments have made that promise seem a little empty leaving a dissonance between aspiration and reality. It is argued that the symbolism of *Mabo (No2)*[3] today represents something of a taunt; beguiling and empty words that have left Indigenous people and their supporters sceptical of the common law as a tool for achieving equality and change. It is also suggested that the 'hope' engendered by *Mabo (No 2)*[4] needs to be re-envisioned as ultimately more of a tantalizing dream; an elusive aspiration or a false hope. Finally, the paper briefly considers what may have contributed to the dissonance between promise and practice.

The Story of Annexation

It is often recorded that, in 1770, James Cook, a captain in the British Navy, claimed the land later known as Australia, for the British Crown. For decades of Australian school children, Cook was seen as a hero and founding father of the Great South Land but as further details of the acquisition and its consequences came to light, other narratives emerged which began to question the process by which Indigenous Australians were denied access to the land that had belonged to their forebears for several millennia.

Given the rush by major powers to colonise during the eighteenth and nineteenth centuries, the invasion of Indigenous lands by militarily superior powers during this time was not an unusual phenomenon. Generally, it involved varying degrees of force and subjugation. To that extent the Indigenous experience in encountering Cook and his men was nothing exceptional but what did make the confluence stand apart are the instructions with which Cook was issued and on which he was supposed to conduct his interaction with the locals. The Admiralty's instruc-

tions to Cook issued in 1768 contained the following limitations:

> 'You are also *with the consent of the Natives* to take possession of convenient situations in the country in the name of the King of Great Britain, or if you find the country uninhabited take possession for His Majesty by setting up proper marks and inscriptions as first discoverers and possessors.'[5]

These instructions left open whether a simple courtesy was being afforded to the Indigenous population or alternatively whether the instructions contained an inherent recognition of Indigenous rights in land; interference with which Indigenous people were being asked to consent to.[6]

Ultimately, the Admiralty's instructions were not followed and Cook simply claimed *Terra Australis* on behalf of the British Crown, by-passing any consent requirement. Cook's attitude, in not respecting any pre-existing rights or interests in land of the prior inhabitants was not one that proved to be exceptional. Nettheim, citing Reynolds, suggests that the reason for such disregard of the imperial government's instructions is made apparent in Sir Joseph Bank's testimony to the House of Commons' Committee on Transportation in 1785.[7] That testimony incorrectly claimed that Indigenous people lived mainly on the coastal fringes of New South Wales and thus represented only a very small, perhaps even, negligible population. Accordingly, it was rationalized that as their presence was almost non-existent, Indigenous people could not have any rights worthy of protection.[8] Apparently such a view was common, leading Flannery to note in *The Explorers* that Sir Thomas Mitchell, of Australian inland fame, was indeed quite unusual in 'recognizing and wishing to perpetuate a sense of prior Aboriginal ownership of Australia.'[9]

The marginalisation of the Indigenous population, evident in Cook's by-passing of the consent requirement, fed very easily into the legal doctrine of *terra nullius;* a term meaning land belonging to no-one. (Note that an alternate meaning to this term can be found in the words of Yunupingu, a present day elder of the Gumatj clan, at Yirrkala, on the Gove Peninsula. He said:

> We [Indigenous people] learned that [English common] law told them [the English colonisers] a story called terra nullius, which meant that if you go to a land where the people don't look like you or live like you, then you can pretend they don't exist and take their land.'[10]

The denial of the very existence of an Indigenous population provided the socio-political basis for the adoption of the legal doctrine of *terra nullius*.[11] It followed that application of this doctrine meant that if Australia belonged to no-one and was, therefore, 'uninhabited' or 'desert

and uncultivated,' then it was impossible for the 'settlers' to enter into a treaty with previous land owners. Previous owners did not exist.[12] Further, if the land belonged to no-one it would have been most illogical to acknowledge pre-existing laws belonging to prior inhabitants who, in the eyes of the law, did not exist.

However, law like history, has the potential to engage in an element of myth and the fact that British officials, initially and after occupation, began to encounter the presence of dark-skinned people (whose difference and mere existence both frightened and intrigued them) set reality and the myth contained in the doctrine of *terra nullius* on a collision course.[13]

As evidence of resistance to and/or collaboration with British colonisers became more prevalent, it consequently became increasingly difficult to maintain the delusion that Australia had no prior occupants.[14] Inter-cultural clashes together with examples of inter-cultural collaboration provided undeniable proof of Indigenous existence. That there now rages a dispute, as to the extent of Indigenous fatalities in post-contact conflict, does not alter the fact that Indigenous people had a presence in Australia, at the point of contact and thereafter.[15] *Any* acknowledgement of conflict or collaboration points to the prior occupation of Indigenous people; an occupation that threatened the legal underpinning of the *terra nullius* doctrine.

One way of dealing legally with the apocrypha that Australia had no prior occupants, when evidence of their existence was abundant, was to rely on the 'extended' doctrine of *terra nullius.*[16] Such a doctrine acknowledged the physical existence of Indigenous people but deemed them to be so barbarous as to be incapable of possessing any settled law. However, this doctrine sat awkwardly with other court decisions that recognised Indigenous institutions and customs. For example, Chief Justice Forbes, found in the case of *R v Ballard or Barrett,* that intra-Aboriginal crimes should be settled according to Aboriginal people's own customs and Justice Dowling, in the same case, stated that he knew 'of no reason human, or divine, which ought to justify us interfering with their *institutions* (emphasis added) even if such an interference were practicable.'[17] Accordingly, the complaint of Indigenous barbarity was somewhat difficult to maintain in the early nineteenth century. If Indigenous people had customs and institutions, how lawless could they have been?

Given the difficulties evident in applying the *terra nullius* doctrine, one is led to ask why that doctrine was embraced in the first place and why continued adherence to it was so strong? The answer to these questions seems to lie in the three documented modes of acquisition in

relation to new territories. According to the legal scholar, Blackstone, new territory could be acquired by: (a) settlement; (b) conquest; or (c) cession.[18] Acquisition by settlement is prefaced on the presumption that the land is uninhabited and, therefore, can be 'settled,' whereas conquest and cession necessarily involve recognition of a prior occupier, who is displaced. Legally, it follows that if Australia were settled, as much of the law of England that was applicable to the colonists' own 'situation and the condition of the infant colony' was received into Australia.[19] Hence, the colony was governed by the laws of England, in conjunction with the law that was made in Australia. There was no responsibility to rely on, alter or repeal any pre-existing law of any prior inhabitants because there were neither prior inhabitants nor prior laws with which to contend. By contrast, if Australia were acquired by way of conquest or cession, different legal principles were applicable. For example, cession (by treaty) or conquest would have seen the laws of either those surrendering or those who had been conquered, remaining in force, until such time as those laws were replaced by the laws of the invader.

Annexation by 'settlement,' together with the British Crown's acquisition of sovereignty, operated to deny Indigenous people any continuing sovereignty. Hence, when the English legal doctrine of tenure was imported, as a consequence of the acquisition process, all land in Australia was held 'of' the Crown.[20] The Sovereign was the ultimate owner or Paramount Lord and no allodial holdings were recognised.[21] This paradigm provided no space for the recognition of Indigenous law, even if it were found to exist. In being law that was not dependent on ultimate Crown ownership, Indigenous law had no place in the doctrine of tenure.

The collision course between myth and reality, referred to above, was not resolved legally, until 1992, when the *terra nullius* doctrine was finally overturned and the truth of Indigenous people's presence, at contact (and later), on the land of their ancestors, together with the recognition of their law, customs and traditions, was acknowledged.[22] With the overturning of the *terra nullius* doctrine and the gentle re-casting of the all -pervasiveness of the doctrine of tenure, there emerged the possibility of recognition of Native title; a title which is underpinned by the continued existence of Indigenous customs and traditions that survived the acquisition of British sovereignty.

The Legal Struggle for Land Rights

The legal struggle for the recognition of rights in or in relation to land in Australia was binary; it involved both the common law and legislation. It was also a struggle that took some time to find momentum. Many factors may have contributed to the delay, not the least of which were

the diseases that ravaged Indigenous Australia, taking a serious toll on its Native inhabitants. For example, small pox alone allegedly wiped out between 30-60 percent of the estimated population of at least 750,000, in 1788.[23] With steadily decreasing numbers, one assumes it would have been difficult to focus on the assertion of rights. Further, whilst Indigenous people fought for Australia in two world wars the Commonwealth's right to make laws for them was only confirmed in 1967 when an amendment to s 51 (xxvi) of the Constitution (the race power) was supported in a referendum by 91% of voters.[24] The same referendum resulted in the deletion of s 127 of the Constitution which had read: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, Aboriginal Natives shall not be counted.'

Despite these debilitating factors, the legal push for land rights, by Australia's Indigenous population, did eventually come but it was not until the 1960s and 1970s. It is arguable that the push is best understood as part of a broader, developing and sometimes militant, worldwide struggle by minorities, for political, legal and social recognition. In Australia, in 1966, the Gurindji pastoral workers led the Indigenous struggle, when, they staged the Wave Hill 'walk-off.' The immediate trigger, causing the Gurindji to withdraw their labour and physically walk off the Wave Hill cattle station (situated in a remote part of the Northern Territory) was dissatisfaction with inadequate pay and conditions, provided by the Vestey group, which leased the station. Having left their workplaces, the Gurindji then camped on traditional land at Daguragu and effectively staged a 'sit-in' until the Wave Hill lease was handed to their representative, the elder, Vincent Lingiari, in 1975, by the then Labor Prime Minister, Gough Whitlam.[25]

While the Gurindji's struggle was unfolding, the common law was used in another attempt to establish Indigenous rights in land.[26] A legal case was mounted, in which it was argued that the Yolgnu people from Arnhem Land, had rights in land. The case, *Milirrpum v Nabalco*, often referred to as the Gove case, was decided in 1971.[27] The intention of Milirrpum's counsel was to establish Indigenous rights in land and then use those rights to stave off bauxite mining (by the mining company, Nabalco). Yet, from the Yolgnu's perspective, the case was unsuccessful. Whilst Justice Blackburn did find that the Yolgnu had a system of laws, those laws did not accord with common law notions of property and hence, the Yolgnu were held not to have property in land. Partly in response to the failure of that case to achieve recognition of Indigenous rights in land, through the common law, the push began to focus on the development of land rights through the passing of legislation.

In pursuit of legislative reform, Indigenous people went to Canberra,

setting up a 'tent embassy', from which they petitioned the Federal Parliament. Eventually, the Labor Party, which was in opposition at the time, promised to introduce land rights legislation if it were elected. When it did gain office, it set up the Woodward Royal Commission as a precursor to the drafting and passing of the *Aboriginal Land Rights (Northern Territory) Bill*. However, before Labor could enact any legislation, it lost office. It then was up to the Liberal Party, led by Malcolm Fraser, to pass the *Aboriginal Land Rights (Northern Territory) Act*, which it did, albeit with amendments that considerably cut back the Woodward Royal Commission's recommendations. For example, although Woodward's recommendation that vacant Crown land potentially be available to claimants was included in the legislation, other recommendations were left out. The recommendation that claimants also be given recourse to other land and resources in lieu of that lost, was one of those deleted.[28]

The Struggle for Land Rights Legislation

Different states and territories took up the mantle of legislative reform for the establishment of land rights, at different times. Land rights legislation now exists in all states with the exception of Western Australia, the most geographically vast state of all. Other states, such as Tasmania, were very tardy in developing specific legislation to assist their Indigenous populations gain access to land but eventually did so. No state or territory makes land already alienated, in fee simple, by the Crown, available as the subject of a claim. In lay terms, this means that if an individual already 'owns' land, it is not claimable by Indigenous people under the relevant legislation.

Unfortunately, much of the land rights legislation is designed to make access to land, by Indigenous people, dependent on sequential steps involving various approvals and support, for example by parliament or the Minister. It is arguable that such requirements may be used negatively causing delay, obfuscation and in some cases denial of access to land.

Perhaps with the exception of the *Aboriginal Land Rights (Northern Territory) Act* 1976, the extent that legislation has permitted or encouraged the acquisition, by Indigenous people, of rights in land, has not been very extensive.[29] For example, in Tasmania, land held by the Aboriginal Land Council amounts to 0.06% of land in the state.[30]

The land rights legislation covering the states and territories of Australia is often characterized as tri-pronged. These prongs are :

- [the] return of land which is culturally significant;
- compensation for dispossession and loss [and];
- [recognition of] land as an economic base and to facilitate viable

Aboriginal communities which can regenerate and be self sufficient.[31]

While these characteristics are worthy in themselves, it is unfortunate that their operationalisation through legislation has not led to greater land justice.

A summary of the land rights legislation in each state and territory is contained in Appendix A.

The Struggle for Rights in Land Through the Common Law

From *Milirrpum* to *Mabo*: Laying *Terra Nullius* to Rest

As noted above Indigenous plaintiffs used the common law as another avenue for the recognition and assertion of legal rights in or in relation to land. The common law is judge-made law, worked out through legal cases and based on precedent rather than the passing of Acts by parliaments.

As already observed, *Milirrpum v Nabalco* was one of the important, early cases that argued for land rights, through the common law. Although the plaintiffs were unsuccessful the decision was not appealed.[32] However, those seeking to test the existence of land rights through the common law persevered and were encouraged by two later cases. They were *Administration of Papua v Daera Guba* and *Coe v Commonwealth*.[33] In the first, Justice Barwick intimated that Native title could exist, while in the second, the whole court agreed that the issue of Native title was arguable if properly raised.[34]

The proposition that Indigenous people had rights in or in relation to land which survived the British acquisition of sovereignty, was argued in the landmark case, *Mabo (No 2)*.[35] That case gestated in the legal system for ten years. Its progress was marred by many obstacles, including the need to clarify whether legislation purporting to declare retroactively that, upon annexation, the islands off Queensland (including the plaintiffs' home island of Mer) were vested in the Crown, free from all other interests or claims, was valid.[36]

Ultimately, the High Court handed down its decision, in 1992, finding that the Meriam people were entitled to possess, occupy, use and enjoy the Murray Islands, of which Mer was one.[37] Unfortunately, the first plaintiff, Eddie Koiki Mabo, did not live long enough to hear the decision.[38]

In coming to its conclusion the High Court found that the question of British sovereignty was not justiciable in a municipal (Australian) court but the consequences of the acquisition of that sovereignty were differ-

ent from those previously understood.[39] For example, the Court found that absolute beneficial ownership of all land in Australia, by the British Crown, was not a concomitant of sovereignty. Instead, when the Crown acquired sovereignty it acquired radical or ultimate title. Radical title could co-exist alongside Native title and only in circumstances where Native title had been extinguished did the Crown's radical title blossom into full beneficial ownership.

Further, the High Court concluded that the common law of Australia recognised a form of title, known as Native title, which had its basis in the laws and customs of Indigenous people. Put another way, the origin and nature of Native title lay in the 'traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory' and '[t]he nature and incidents of Native title must be ascertained as a matter of fact by reference to those laws and customs.'[40] Change of and adaptation to those laws and customs was permissible so that they would not be frozen in time, but evidence of an ongoing connection to the land still needed to be established.[41]

Redressing a 'Legacy of Unutterable Shame'

Yet, in order to find that Native title could even potentially exist, the Court had firstly to over-turn the fallacy of *terra nullius;* a doctrine discussed earlier. Presumably, Justices Deane and Gaudron were, at least in part, prepared to do so, because a denial of the applicability of the *terra nullius* doctrine helped overcome what they described as 'a legacy of unutterable shame.'[42] But overturning legal precedent, particularly when it is the precedent of the highest court in the land is not a task undertaken lightly.

Justice Brennan's judgement in *Mabo (No2)* raised several concerns regarding the re-directing and re-casting of established doctrines and principles. Nevertheless, despite his concerns he supported fundamental changes to principles and doctrines in cases where not to do so results in a rule which 'seriously offends the values of justice and human rights...[they being] aspirations of the contemporary legal system.'[43] He also observed the High Court's freedom to bring about change, by bypassing precedent, when he stated that:

> Although our law is the prisoner of its history, it is not now bound by the decisions of courts in the hierarchy of an Empire then concerned with the development of its colonies.... [T]his court is free to depart from English precedent which was earlier followed as stating the common law of this country.'[44]

The key limitation that Justice Brennan placed on the Court's re-

positioning and re-directing of the law was one which prevents the adoption of rules 'that accord with contemporary notions of justice and human rights,' if that adoption would 'fracture the skeleton of principle which gives the body of our law its shape and internal consistency.'[45] But where change is necessary for reasons of justice, truth and morality it seems that, according to Justice Brennan, the only limitation on changing the law lay in the need to preserve its 'shape' and 'internal consistency.'[46] In practical terms, we must ask: 'if the rule were to be overturned...[would] the disturbance to be apprehended...be disproportionate to the benefit flowing from the overturning?'[47]

Clearly, Justice Brennan was in favour of the law being modified to reflect the values of a contemporary era so as 'to bring it into conformity with contemporary notions of justice' but he was against 'the skeleton of principle' being 'destroyed.'[48]

What seems to emerge from Justice Brennan's words is a moral underpinning to his position. His judgement appears to embrace a social policy element as well as a legally doctrinal re-direction. The same could be said of Justices Deane and Gaudron's joint judgement, which carefully detailed the pain of Indigenous dispossession and noted that 'the oppression and, in some areas of the continent, the obliteration or near obliteration of the Aborigines were the inevitable consequences of their being dispossessed of their traditional lands.' Those latter two judges ultimately concluded that '[t[he acts by which that dispossession in legal theory was carried into practical effect constituted the darkest aspect of the history of our nation.'[49] What was powerful about all of these judgements was the recognition that past legal practices had operated as weapons of harm and causes of Indigenous pain and suffering. In doing so, these judgements took an important early step towards reconciliation. They represented what Taft, in reflecting on Tavuchis and the discourse of apology, calls 'the public hearing of the inner conversation;' a conversation where it is necessary to identify and actually set out what constitutes the wrongdoing.[50]

Creating a Spirit of Hope

The *Mabo (No 2)* decision generally encouraged an expectation of change. Its subtext was one of 'righting the wrongs.' It was anchored in the importance of truth, at least in so far as that concept exists, given that it is one necessarily moderated by memory and perspective. Further, it was a refreshing and inspiring judgement because, at last, respect was accorded to the existence and importance of Indigenous customs and traditions when Native title was defined by reference to them. Finally, the judgement encouraged aspiration, possibility and vision while

employing flexibility and creativity to come to its conclusions. Certainly, the judgement also had its limitations. For example, it did not provide an avenue for compensation where Native title was extinguished and while it overturned the doctrine of *terra nullius*, it did not embark on a complete re-vamping of the doctrine of tenure. Presumably, Justice Brennan thought that to undertake the latter would have fractured the 'skeleton of principle,' despite the fact that the doctrine of tenure is suggested by others to have been accorded an importance beyond that which it deserves.[51] However, overall *Mabo (No 2)* created a spirit of hope.[52] Many supporters of Indigenous rights found it uplifting and it seemed to represent a new phase of enlightenment and promise, concerning land justice issues. Indeed, according to Indigenous activist and lawyer, Noel Pearson, there was every reason to think that non Indigenous Australia should embrace *Mabo (No2)* wholeheartedly.[53] It was, after all: (a) a product of non Indigenous heritage, that is, of the English common law heritage and; (b) it recognised a title that 'could never result in anyone [in White Australia] losing any legal rights they held in land or in respect of land already.'[54] It was also a decision that Pearson has described as 'correct' and one which 'truly represented an opportunity to settle the question of land justice for indigenous people in the Australian nation.'[55] True it was, that *Mabo (No2)* represented a compromise that was weighted in favour of non Indigenous Australians but given that the legal gains, for Indigenous people, in regard to land, over the preceding 204 years had been quite minimal, the decision still inspired hope and optimism.[56] It represented a promise that things would improve for Indigenous Australians.

Legislative Reaction to *Mabo (No2)*

It is important to note that after the handing down of *Mabo (No2)*, the Australian legislature passed the *Native Title Act* 1993.[57] In retrospect it can be seen that this Act has contributed to the erosion of the promise in *Mabo (No2)*.[58] The Act was a direct response to the *Mabo (No 2)* decision and both its passage through parliament and its application thereafter, caused ructions throughout the community. (The Act was amended in 1998 and again those amendments stirred strong reactions in the community.)[59] Some supporters of the *Mabo (No2)* decision were sceptical about the need for an Act at all, but many others thought that the legislation upheld, crystallized and protected the rights flowing from the common law finding.

The Act defined Native title in s 223 and it set up a procedure to deal with claims.[60] It also validated land titles that came into existence after the passing of the *Racial Discrimination Act* 1975 (Cth). There was an

argument that the post 1975 'ordinary' titles might not have been valid because, if those titles had the effect of extinguishing Native title and no compensation for loss of Native title had been paid, the act of issuing the 'ordinary' title, could be deemed discriminatory and therefore, in breach of the 1975 Act. The discrimination would have arisen from the fact that extinguishment of 'ordinary' titles by the Federal government is subject to the constitutional right to compensation for loss of property whereas no such compensation was available for the loss of Native title.

The Act's strengths have been described as: (1) the 'recognition and protection of common law rights' and; (2) '[the] protection against wholesale extinguishment [of Native title] by hostile governments' while its weaknesses have been described as: (1) 'the unfair allocation of certainty;' (2) 'the granting of party status to third party interests whose rights and interests were already secured under the common law- or by the NTA;' (3) its focus on 'procedures rather than substantive rights;' (4) 'the suspension of the Racial Discrimination Act and the breach of the International Convention' on the Elimination of All Forms of Racial Discrimination.[61] This list of weaknesses highlights the beginning of the failure to live up to the promise of *Mabo (No 2).*[62] Unfortunately, the scope of this paper does not permit a detailed analysis of these strengths and weaknesses[63] but it is useful to note that the allocation of certainty is definitely weighted in favour of non Indigenous titles and that such an allocation represents a critical factor in inhibiting the effective 'workability' of the Native title regime embodied in the Act.[64] The Act makes very few aspects of Native title certain, save, of course, its extinguishment. By contrast, whether Native title exists at all and by what standards its existence is to be tested, are issues that are far from certain. Clearly, the lack of certainty has important implications for Indigenous litigants. If the test by which the existence of their rights is to be adjudged is still a 'work in progress,' how do they know what case to prepare and put before the court? What tack should they take to deal with the shifting sands? Perhaps this lack of predictability might go some way to explaining why Justice Kirby has described Native title as 'an impenetrable jungle.'[65]

Has the 'Promise' of *Mabo (No2)* Been Eroded?

In this section I examine whether the 'promise' contained in the *Mabo (No2)* decision has been eroded and, in that regard, I focus particularly on two recent cases dealing with Native title claims. They are the *Ward* decision,[66] which is sometimes referred to as the Mirriuwung Gajerrong decision, and the *Yorta Yorta* decision.[67]

In the 2003 Sir Ninian Stephen Annual Lecture, Noel Pearson, re-

ferred to these two cases and claimed that before they were handed down, Native title, in Australia stood for the propositions that:

(a) non Indigenous title granted to 'settlers,' by the British Crown, after annexation was indefeasible. That is Native title, in Australia, confirmed 'the privileges and titles of the settlers and their descendants' and 'the common law of this country, [does] not allow us to derogate from those accumulated privileges;'[68]

(b) 'all of those lands that remained after 204 years, unalienated, was the legal right of the traditional owners;'[69] and

(c) in areas of land covered by pastoral leases and national parks, where Native title may co-exist with Crown title, if there is any inconsistency between these two titles, the Crown title will always prevail.[70]

In summary he said that:

> 'the whitefellas get to keep everything they have accumulated, the blackfellas should now belatedly be entitled to whatever is left over and there are some categories of land where there is co-existence and in the co-existence the Crown title always prevails over the Native title.'[71]

Whereas, after the *Yorta Yorta* decision, Pearson thought a more apt statement of the law was:

> '...[T]he three principles of Native title are that the whitefellas do not only get to keep all that they have accumulated, but the blacks only get a fraction of what is left over and only get to share a coexisting and most subservient title where they are able to surmount the most unreasonable and unyielding barriers of proof-and indeed only where they prove that they meet White Australia's cultural and legal prejudices about what constitutes 'real Aborigines.'[72]

The *Ward* and *Yorta Yorta* Decisions

The *Ward* decision, like the *Yorta Yorta* decision, dealt with Native title as defined under the *Native Title Act* 1993.[73] The claim in *Ward's* case was made by the Mirriuwung Gajerrong people, in 1994, and was for 8,000 square kilometers of land, some of which was in the East Kimberley region of Western Australia, while other parts were in the Northern Territory. The area of land under claim was vast and included the Ord River Irrigation Area, Lake Argyle and Lake Kununnurra, Glen Hill Pastoral lease, part of the Argyle diamond mine, Keep River and Mirima National Parks, some Aboriginal-owned land, areas of vacant crown land that had formerly been part of a pastoral lease, 3 islands in Cambridge Gulf and part of the inter-tidal zone of the Gulf.

The decision involved four appeals from the Full Federal Court and the key issues under consideration were: (a) whether there could be partial extinguishment of Native title rights and interests; and (b) 'what principles should be adopted in determining whether Native title rights and interests have been extinguished in whole or in part.'[74] The High Court remitted several issues to lower courts for hearing but it did make some important findings in regard to the definition of Native title and the meaning of 'tradition' and 'traditional', for example.[75]

It was argued by the claimants in the *Ward* case that the definition of Native title needed to be worked out, by reference to pre-existing case law.[76] The Court rejected this supposition and found that the *Native Title Act* 1993 not only contained a definition of Native title on which it was compelled to rely but that the definition in the legislation was different from the one available in case law, such as *Mabo (No2).*[77] The Court stated that '[t]he statute lies at the core of this litigation.'[78] In brief, subsection (c) of s 223 imposed a further requirement over and above the common law definition of Native title. While subsections (a) and (b) effectively re-iterated the common law by defining Native title with reference to '*traditional laws* acknowledged and *traditional customs* observed' [emphasis added] and requiring that 'those laws and customs have a *connection* to the land or waters' [emphasis added] subsection (c) went further. It required that Native title rights and interests be 'recognised by the common law of Australia.'

The inclusion of this additional requirement poses some difficulties when defining Native title because as the High Court stated, the Indigenous relationship to land is an essentially spiritual one but according to the Act, that spiritual relationship to land must be understood in terms of rights and interests. Rights and interests are what the common law recognises and Native title must be seen in those terms, too, in order to comply with s 223 (1) (c) of the Act. The conundrum for the majority was captured in the words of Chief Justice Gleeson and Justices Gaudron, Gummow and Hayne when they said:

> 'The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests which are considered apart from the duties and obligations which go with them. The difficulties are not reduced by the inevitable tendency to think of rights and interests in relation to the land only in terms familiar to the common lawyer.'[79]

Nevertheless, despite being aware of the difficulties which reliance on s 223 of the *Native Title Act* 1993 caused, the majority found that it was compelled to rely on that section when deciding this case. Given

this, it is worth exploring a little further some of the difficulties that such reliance may cause.

Fitting the Proprietary Mould or Opening Up the Recognition Space?

Perhaps one of the difficulties of reliance on s 223 (1) (c) of the Act is that if Native title rights have to be recognised by the common law, as the majority thought they did, it may potentially foreclose more imaginative understandings of Native title by a process of 'fitting' the unknown into the mould of the known. In that process of moulding, shaping and re-casting Indigenous customs and traditions so that ultimately they look like something non-Indigenous outsiders understand or know, it may be that their integrity is harmed, making them lose something of their original essence. An alternative may be to respect difference and acknowledge that although traditional customs and laws might bear no synonymy with the common law, they should be upheld anyhow. Further, to retain the common law requirement contained in s 223 (1) (c) may effectively cause that section to act as a filter to keep out any customs or traditions that are regarded as too removed from the common law. As I have observed elsewhere, this would be unfortunate and may result in opportunities for interpreting aspects of Native title that are different from the cultural and legal understandings that non-Indigenous people bring to the matter, being denied.[80] If the High Court is to be taken seriously when it refers to Native title as a *sui generis* right, the uniqueness of that right should not be compromised by legislative interpretation that forces the right to conform to common law understandings, in order to provide recognition.[81]

Several years ago, in reflecting on how Native title should be characterized, Pearson formulated the term, 'recognition space.' To him, Native title provided a place where Indigenous customs and traditions could be recognised.[82] Those customs although often foreign to the common law, found in Native title a place, where like faces in a mirror, they were reflected, so that others could see and understand them.

By employing this conception, Native title can be seen as providing a medium for interpretation or reflection of Indigenous customs and traditions. At times these customs and traditions will be akin to known rights in the common law such as proprietary, personal and usufructuary rights but at other times there will be no synonymy with the common law at all. Where Indigenous rights have no equivalence with rights known to the common law, compliance with s 223 (1) (c) may cause these unique and special Indigenous rights to go unrecognised due to their lack of likeness to known rights. If the common law cannot recognise them,

they cannot be Native title rights. Such an approach imposes severe limitations on the establishment of Native title rights.

Perhaps because of a fear that Native title may go unrecognised there has been a tendency by some legal academics to try to fit Native title into a proprietary model; ie to see it as a form of property.[83] If it looks like property, then it will be recognised by the common law and will satisfy the requirement of s 223(1) (c). Yet, to take this approach is less than satisfactory. As Webber states:

> '[I]ndigenous title is frequently discussed as though it were simply another kind of interest affecting land, slipped into the structure of Australian property law. The implications are thoroughly captured by determining the content of indigenous law according to the rules of indigenous customary law, examining to what extent the title has been extinguished by prior acts of the non–Indigenous sovereign, and then enforcing the remaining interests. That view of indigenous title, is, however, altogether too limited, not just because it misunderstands what the recognition of indigenous title necessarily involves. Indeed, it mischaracterizes the very nature of indigenous title as legal doctrine.'[84]

Another problem with this approach is that it may also lead to a process of 'rights reductionism' and could result in the 'delegitimation of Indigenous rights.'[85]

It is suggested that a better way of approaching the problem of the restrictions inherent in s 223 (1) (c) is to reform the statute, rather than trying to fit 'square pegs' into 'round holes,' which is the effect of 'forcing' Indigenous customs and traditions to find a synonymy with common law rights in cases where none exists.

Purposive Interpretation: Looking to the Intention of Parliament

There is good reason to repeal s 223 (1) (c) in that, arguably, the legislature never intended to go beyond the common law definition of Native title when it was devising the *Native Title Act* 1993. It can, therefore, be argued that subsection 'c' is an aberration. Indeed the *Explanatory Memorandum* to the *Native Title Bill* 1993, stated that:

> The Commonwealth's major purpose in enacting this legislation is to recognise and protect Native title.... Native title is defined as the rights and interests that are possessed under the traditional laws and customs of Aboriginal peoples and Torres Strait Islanders in land and waters and that are recognised by the common law. The Commonwealth has sought to adopt the common law definition.'[86]

Even as late as 1997 when the *Native Title Amendment Bill* was being introduced, the *Explanatory Memorandum* to it stated that: 'The NTA adopted the common law definition of 'Native title'."[87] These statements together with statements by Senator Gareth Evans,[88] the Attorney General in 1993, and Senator Minchin[89] suggest that subsections (a) and (b) of s 223 (1) would have been sufficient to import the common law definition of Native title into the Act but that was not done. More was included and when the High Court decided the *Ward* and *Yorta Yorta* cases on the basis of the Act in force (including s 223 (1) (c)) its decisions contributed to the eroding of the promise in *Mabo (No 2).*[90] The long struggles for land rights recognition in the form of Native title were lost. In the case of the Yorta Yorta people nine years of pursuing land rights along 1,860 square kilometers along the Murray River had come to nothing. The hurdle was raised too high, and the threshold that the claimants were expected to satisfy was unrealistic.

According to Pearson, the High Court, itself, was to blame for choosing to interpret s 223 (1) (c) as it did in the *Yorta Yorta* case.[91] He complained that in the Court's

> 'flawed and discriminatory conceptualization of Native title and in their (sic) egregious misinterpretation of fundamental principles of the *Native Title Act*, they (sic) are destroying the opportunity for Native title to finally settle the outstanding question of indigenous land justice in Australia.'[92]

Whilst it is true that the outcomes of the *Ward* and *Yorta Yorta* decisions were very disappointing, there is an argument that the High Court, in being shackled by the restrictions that s 223 (1) (c) imposed, had little choice other than to define Native title in the manner in which it did. Such a view is underpinned by more of a literalist approach to statutory interpretation. Yet, reliance on a literalist approach has its limitations and has been avoided in the interpretation of many statutes relating to land law.[93] A viable alternative may be to apply a purposive approach because it is capable of yielding outcomes of integrity which are also workable. If such an approach were to be employed in the present circumstances, recourse to the parliamentary debates preceding the passing of the *Native Title Act* 1993 would be useful. Those debates suggest that the purpose of the subsections in s 223 was to re-iterate the common law definition contained in *Mabo (No2).*[94] If that approach had been taken by the High Court in recent cases on Native title, the common law jurisprudence developed both here and in Canada could have been used to inform the decisions in *Ward* and *Yorta Yorta* and perhaps different outcomes would have ensued.[95]

It is notable that Justice McHugh, of the High Court, also gave strong

support to Pearson's belief that s 223 had been wrongly interpreted by the majority. He stated:

> 'I remain unconvinced that the construction that this Court has placed on s 223 accords with what the Parliament intended...this court has now given the concept of 'recognition' a narrower scope than I think the Parliament intended....'

But he acknowledged that given the position taken by the High Court, in earlier cases such as *Yarmirr* (known as the Croker Island case) and the *Ward* case, the position of Gleeson CJ, Gummow and Hayne JJ in *Yorta Yorta,* had to be taken as correct.[96]

In Pearson's view the position taken by Justice McHugh is the same as that taken by Paul Keating (former Prime Minister), Senator Gareth Evans, John Howard (present Prime Minister) and Senator Nick Minchin.[97] How the High Court could take a different view leaves Pearson bewildered but the Court did do just that and in so doing it is argued that it contributes to the gap between the promise of *Mabo (No 2)* and the reality that Native title is incredibly difficult to establish.[98]

Act of State and the Doctrines of Recognition and Continuity

Another area where there is a disparity between the aspiration encouraged by the *Mabo (No2)* decision and the position of later cases concerns the effect on Indigenous occupants of the act of State, constituting the acquisition of British sovereignty.[99] Under the act of State doctrine it was possible for the British Crown to expunge any Indigenous rights at the point of acquisition of Crown sovereignty and so acquire not just radical title to the land but absolute beneficial title. Had absolute beneficial title been acquired, the related expropriation of Indigenous rights would not have been justiciable in a municipal court. However, if the British Crown did not expropriate all Indigenous rights on the acquisition of sovereignty, the Crown could only expropriate Indigenous rights later by virtue of authorizing legislation. Having become British citizens, Indigenous people would have been entitled to the protection of the common law of England; the law that governed the colony.[100]

Yet, until *Mabo (No2)* was handed down it was uncertain in cases where Indigenous rights survived the acquisition of British sovereignty, whether those rights needed to be affirmed by the Crown in a positive act of *recognition*, or whether it could be presumed that the surviving Indigenous rights simply *continued* to exist without the need for affirmation. McNeil referred to the first approach as the doctrine of recognition and the second as the doctrine of continuity.[101] Had the doctrine of recognition been applied in Australia, Native title could not have been found to exist in *Mabo (No2)* because no positive acts recognised the

continuance of Indigenous rights. Indigenous rights were just presumed to continue to exist. Hence, the position in Australia became one of application of the doctrine of continuity. Yet, this begs the question: exactly what continued to exist after the Crown acquired sovereignty? Pearson argues that there are two possible answers to a question such as this. They are:

(1) 'the rights and interests established by the group's traditional laws and customs which continue after annexation;' or

(2) 'the right to occupy and possess the land under the group's traditional laws and customs that continues after annexation.'[102]

He clearly favours the latter formulation referring to it as 'more subtle and correct'[103] and more at one with the approach taken in the Canadian case of *Delgamuukw.*[104] Weaving the concept of 'occupation' into the formulation has 'profound implications for the way in which one conceptualizes Native title and ultimately how one deals with proof.' According to Pearson '[t]his is why the High Court's error in relation to this issue was so prejudicial to the way in which they[sic] understood and approached the *Yorta Yorta* appeal.'[105] Unfortunately, Pearson does not pursue this argument further but two things are worth commenting on from what he does say. The first is that Pearson believes 'occupation ...excites recognition and protection of the common law.'[106] It is perhaps a small point but I would suggest that it is possession that the common law protects, rather than occupation. One is a conclusion of law and the other a conclusion of fact. Evidence of occupation does not necessarily lead to the conclusion in law, of possession. However, where it does, there is a nexus with Pearson's argument. If Indigenous people have a right to occupy land in accordance with their customs and traditions, and that right leads to the conclusion in law of possession, then that conclusion assists in satisfaction of s 223 (1) (c) of the *Native Title Act* 1993 because a right to possession is recognised by the common law.

However, the majority in *Yorta Yorta* saw the issue differently.[107] It found that where rights survived sovereignty they were the rights and interests established by the group's traditional laws and customs. In applying this principle the Court ultimately failed to find that Native title existed in the claim areas.[108] The hope that Native title could be established faded quickly. Even where there was evidence of great tenacity by the 300 parties to the action and even with a court[109] willing to take oral evidence on 'country,' in a temporary shelter at Rumbalara Community near Mooroopna, in rural Victoria and later at 65 other locations in Victoria and New South Wales, the outcome for the claimants was still unsatisfactory.

Interpreting Tradition: Whose and What Evidence?

Another issue dealt with in the *Yorta Yorta* case, which has diminished the hope inspired and the promise promoted by *Mabo (No 2),* is the question of how the Court chose to understand and interpret the concept of 'tradition' or 'traditional.'[110] The *Yorta Yorta* case raised fundamental questions about what level and type of 'tradition' is needed to support and nourish Native title, as well as how evidence to prove that is to be obtained.[111] In consideration of these issues it is helpful to reflect on the positions at first instance and on appeal in this case. At first instance, the Yorta Yorta led oral evidence, in which they asserted that they maintained a continuing system of customs and traditions which were grounded in a traditional relationship to the land; a relationship that was in evidence through continuous physical occupation of the land of their ancestors.[112] Justice Olney, however, chose to reject their evidence preferring the evidence on tradition and custom that was gleaned from an historical account of Indigenous laws and customs provided by the written records of Edward Curr, a squatter, in the district, in the nineteenth century. That the written record of an 'outsider' was favoured over the oral narratives passed from generation to generation by the Yorta Yorta, raises issues of both historiography and legal evidentiary standards. Is one account intrinsically more valid than the other? How much weight is to be given to the perspective of an 'insider' who may not fully appreciate the nuances of tradition and custom, as against the possibility that oral evidence may be more readily corrupted by the failure of memory?

When Justice Olney chose to favour Curr's account of the Yorta Yorta's customs and traditions, he locked that group of people into a continuing observation of only those customs and traditions. As a result he found that although it may have been laudable for the Yorta Yorta to protect sites of cultural significance and to be engaged in issues of land and water management, these were not manifestations of an earlier cultural tradition. Curr had not mentioned them. His Honour stated that:

> 'The preservation of Aboriginal heritage and conservation of the natural environment are worthy objectives...but in the context of a Native title claim the absence of a continuous link back to the laws and customs of the original inhabitants deprives those activities of the character of traditional....'[113]

Interpreting Tradition: Frozen or Fluid

In the same way Justice Olney found that although witnesses orally attested that a practice of the Yorta Yorta was to take only as much food

from the land and water as was needed, Curr had not observed this practice among the group in the 1800s, so any continuation of it, in contemporary circumstances was not seen as an example of the continuation of an earlier custom or tradition.[114] Justice Olney's approach seemed to require that the contemporary exercise of a tradition or custom be closely related to the custom as observed by Curr, if the practice in question were to be regarded as a continuation of a cultural tradition. If that were true, it left open the criticism that Justice Olney's approach froze in time traditions and customs. A long line of cases had previously found that customs and traditions could change and be modified to accommodate contemporary life. Indeed *Mabo (No2)* had commented that customs and traditions 'change and evolve as the society changes and evolves'[115] and in *Yanner v Eaton* fishing from a motorized boat was seen as a modern manifestation of a tradition or custom.[116] On appeal to the Full Federal Court in *Yorta Yorta*, the majority confirmed that some degree of change was permitted stating that the

> 'primary issue is whether the law or custom has in substance been handed down from generation to generation...[and that] it cannot now be accepted that the fact that an indigenous society has adopted certain aspects of the now dominant culture means that the society has necessarily abandoned its traditional connection with land or waters.'[117]

Chief Justice Black, in dissent, in the Full Federal Court, was also against a frozen rights approach. He did not think that the *Yorta Yorta* judgement at first instance employed a frozen rights approach but he thought the approach taken was too restrictive nevertheless.[118]

On appeal to the High Court the majority suggested that the ordinary meaning of the word 'tradition' was inapplicable. Normally that word meant the 'transmission of law or custom', 'from generation to generation' and 'usually by word of mouth'[119] but under s 223 of the Act the meaning was altered to incorporate two other elements. Those other elements are that: (1) the Indigenous traditions and customs date back to a time before British sovereignty was asserted and; (2) the rights or interests in land or water which are possessed under traditional laws acknowledged and traditional customs observed, require that the normative system under which those rights and interests are possessed, has been in continuous existence and has demonstrated a continuous vitality since the acquisition of British sovereignty.[120]

In summary, the traditions and customs need to relate back to the pre-acquisition of sovereignty period because the source of Native title lies in the normative rules existing in that period. Further, the chain of custom and tradition dating back to the normative system must be con-

tinuous. Although, the Court did not insist on the tracing of individual activities to the pre-acquisition period it did require evidence of a continuing body of law. That construction of 'tradition' is fairly onerous. Indeed Chief Justice Gleeson and Justices Gummow and Hayne said as much, when they stated, some might say somewhat unsympathetically, that:

> 'It may be accepted that demonstrating the content of that traditional law and custom may very well present difficult problems of proof. But the difficulty of the forensic task which may confront the claimants does not alter the requirements of the statutory provision.'[121]

The majority also acknowledged that difficult questions of fact and degree may emerge when assessing change to and adaptation of customs and traditions. It felt unable

> 'to offer any bright line test for deciding what inferences may be drawn or when they may be drawn, any more than [it could offer] such a test for deciding what changes or adaptations are significant.'[122]

However, the High Court did concede that some change to or adaptation of, traditional law and custom would not necessarily be fatal to a Native title claim.[123] Yet, it observed that in some cases change and adaptation would take on high levels of significance in deciding the issue but always the key question should be 'whether the law or custom can still be seen to be traditional law and traditional custom.'[124]

The majority's approach in regard to the question of interruption of use and enjoyment was even less liberal. On that issue the Court found that:

> 'acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty. Were that not so, the laws and customs acknowledged and observed *now* could not properly be described as the traditional laws and customs of the people's concerned.'[125]

Although the majority led by Gleeson CJ, Gummow and Hayne JJ noted that European settlement changed a lot of practices and had profound effects on Indigenous societies, substantial interruption still could not be tolerated if Native title were to be established.

> '[B]ecause what must be identified is possession of rights and interests under traditional laws and customs, it is necessary to demonstrate that the normative system out of which the claimed rights and interests arise is the normative system of the society which came under a new sovereign order

> when the British Crown asserted sovereignty, not a normative system rooted in some other, different society.'[126]

Unlike the majority, Justices Gaudron and Kirby agreed that Indigenous communities could disperse and regroup later without losing continuity. Those judges believed that a community could demonstrate the requisite continuity if people identified as part of the community and recognised others as part of that community.[127] However, the majority found that there had been dispersal of the original Yorta Yorta people and that the people who had brought the Native title claim in this case were not part of the group who had originally held Native title.[128] Both the majority and the minority of the Court deferred to Justice Olney's findings at first instance but they drew different conclusions from those findings. The minority did not understand Justice Olney to have found that the Yorta Yorta people had ceased to exist as an identifiable group[129] whereas the majority did. The pedigree test for ongoing group membership appears to be quite strict and involves lineage checks of an extensive nature. By contrast, under old system title of Native title a good root of title can be established by 30 years worth of documentation.[130] Yet Indigenous people may be expected to establish that they have an inheritance line going back over two hundred years. This places a heavy onus on Indigenous claimants and one is led to ask if such inquiries are within the spirit and intendment of *Mabo (No2)*?[131]

Diminishing the Spirit of Hope

Application of these principles left the Yorta Yorta people without Native title. Native title proved to be as elusive as ever[132] leaving one wondering whether such a technical test for the satisfaction of Native title was ever envisioned by the Court in *Mabo(No2).*[133] Perhaps the answer is that it was never part of that Court's brief to devise a system for the mechanics of proof of Native title and so the Court would have had no view but one cannot help but feel that the present state of Native title is a long way from the encouragement, aspiration, understanding and regret that is seen, particularly in the words of Justices Brennan, Deane and Gaudron, in *Mabo (No2).*[134]

That the disappointment associated with the failure of the Yorta Yorta people to prove Native title was not universal can be seen in the words of the press release issued by the Commonwealth Attorney-General's Department, immediately after the *Yorta Yorta* decision was handed down.[135] Its tone and message was in contrast to the spirit of *Mabo (No2).*[136] The press release began in a triumphalist tone 'welcom[ing] the decision.'[137] It then asserted that the *Yorta Yorta* decision 'does not represent a departure from what had been understood at the time of the

Mabo decision about what is required for Native title to be established."[138] Yet, as the *Mabo* decision pre-dates the statute under which this case was decided and the statute as noted above, has been interpreted to reach beyond the common law definition spelled out in *Mabo (No 2)*, this statement seems somewhat curious.[139]

The tone of the following words is also worthy of comment. The press release stated that:

> 'It is worth noting that the Preamble to the 1993 Act recognises that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert Native title rights and interest'[140]

Whilst it is all too true that dispossession of their traditional lands has meant that many Indigenous people are unable to satisfy the test of 'connection' necessary to establish Native title, there appears to be a lurking tone of dismissiveness in these words. The subtext seems to be that Indigenous people should not have had such hopes for Native title and that their disappointment in the lack of satisfaction of aspiration and expectation, should have been tempered by an awareness that the test for Native title was very difficult to satisfy. If this were the case, this position would be in sharp contrast to the jurisprudence of compassion that can be observed in *Mabo (No 2)*.[141]

Finally, the press release notes that:

> 'It is important to remember that the Commonwealth Government provides a mechanism, through the Aboriginal and Torres Strait Islander Land Fund, that enables those indigenous Australians who cannot establish Native title, to obtain access to land.... In addition, Commonwealth and State land rights schemes are also available to assist indigenous peoples gain access to land of particular significance.'[142]

These words seem to deal with the loss and disappointment of Indigenous people in a peremptory fashion. They appear to give cursory attention to the fact that Indigenous peoples' struggle for the assertion of either rights in or in relation to land have once again proved elusive. That Indigenous people are advised to direct their attention to the Land Fund and various land purchase schemes seems not only to be a tad dismissive but also representative of a lack of willingness to confront the obstacles placed in the path of effectively operationalising Native title in Australia.

'Winning Native Title' – Is There Such a Thing?

Although the claimants in the *Yorta Yorta* case and many others failed

to establish Native title, a limited number of cases have been successful in establishing Native title.[143] In the few cases where this has been so Native title has not proved to be the great benefit that Indigenous people and their supporters had hoped. Again, there is a dissonance between aspiration and reality. That dissonance is well depicted in Michelle Riley's account of how Native title must be managed once it is established.[144] Instead of proving to be an advantage, Riley argues that for her people, the Nharnuwangga, Wajarri and Ngarla, it has been a costly burden. Since Justice Madgwick, made an order on 29 August, 2000 that her people held Native title in their claim area they have entered into several secondary agreements[145] and have had to set up a Prescribed Body Corporate (PBC) to hold Native title. This requirement is mandatory but the PBC has no income, assets or staff. The Corporation has no office, fax or computer but it has onerous administrative and reporting responsibilities. It has obligations as a fiduciary and a trustee but it does not have any funding for legal advice about what these obligations mean or for training members of its Governing Committee.[146] Riley concludes:

> When we lodged our claim, we did not do it because we thought that we would get money or benefits. We did it because we thought that it would provide a future for our children. We did it because we thought it would mean that they would receive more respect for our sacred land and our laws than we ever did.
>
> For us, getting Native title was never about money. But now that we have Native title, we find that we are losing it because we do not have the money to protect it.'[147]

In the euphoria and excitement that followed *Mabo (No2)* it is unlikely that many contemplated such an unsatisfactory outcome.[148]

Conclusion

It has become increasingly clear that the optimism which accompanied *Mabo (No2)* has dissipated.[149] The eleven years since that judgement was handed down have proved to be a period of ongoing struggle for rights either in or in relation to land. It has been a time marked by disappointment and frustration for claimants and their supporters.

There are many reasons that account for the change of mood and the diminution of optimism. They include the fact that the High Court is now differently constituted from the one which handed down *Mabo (No 2)*. Indeed all of the bench which was responsible for that decision has now retired with the exception of Justice McHugh[150] and the new Court has a reputation for greater conservatism.[151] Further, there has been a populist backlash against 'judicial activism' and 'judicial creativity,' which

has, at times, been fuelled by overt hostility from some members of the government.[152] These factors may be contributing to the Court's timidity in finding the existence of Native title.

Given that the 'promise' of *Mabo (No2)* has proved difficult to live up to, one is led to ask what can be done to improve the situation. In that regard three issues come to mind. They are:

(1) reform of s 223 of the *Native Title Act* 1993 particularly by repealing subsection c;[153]
(2) re-grouping and reconsidering strategies and;
(3) turning to mediation instead of litigation.

The first point has been discussed above and repeal of s 223(1) (c) is recommended so that the definition of Native title can revert to the common law definition intended by parliament.

In regard to the second strategy, Pearson stated (some might say rather bravely) in his *Mabo* Lecture of June 2003 that, '[N]ative title is not a dead issue.'[154] Perhaps that is so but the promise of *Mabo (No2)* has certainly been eroded severely and several post- *Mabo* decisions have militated against that promise being fulfilled. Whilst Pearson may be correct when he says that Native title will continue to impact on the development of the natural resource industries,[155] it is also true that other strategies need to be developed to facilitate a fairer distribution of land in Australia.[156] Neither land rights legislation nor Native title have resulted in land justice, so perhaps it is time to think about a new form of title; one that is not rigidly tied to a strict proof of lineage[157] or alternatively to dependency on the doctrine of tenure.[158] Maybe it is time to conceive of a new form of statutory title. But for this to occur there would need to be the requisite political will and it would seem that this is absent at the present. Today's climate does not seem favourable to expanding the ways in which Indigenous people may gain access to land. True it is, that the politics of 'One Nation' are no longer overtly at the forefront but one explanation for why this is so is that those politics have now been 'mainstreamed' in Australian politics, evidence of which can be seen in Australia's attitude towards the detention of refugees seeking asylum.[159] Public sentiment would not presently appear to be in harmony with the further development of methods for land justice.

Without a will for radical reform attention has turned to mediation and negotiated agreements, such as Indigenous Land Use Agreements (ILUAs). Indeed, after the *Yorta Yorta* decision was handed down, the President of the Native Title Tribunal, Graeme Neate, suggested that mediation might be the best course of action for Indigenous claimants, as litigation had proved 'an onerous way to go.'[160] He alluded to improved skills and methods in negotiation today as compared with when

it was attempted by the *Yorta Yorta* people several years ago. Yet, mediation is not likely to be very effective unless the parties have equal bargaining power. Without that there is little incentive for compromising and re-positioning. If Indigenous people know that their recourse to Native title is unlikely to be successful and that the rights they may be able to enforce through land rights legislation are limited, one wonders how much they have with which to bargain.

Appendix A

The following material surveys the legislation in each jurisdiction.

Northern Territory

The Commonwealth legislation, which covers the Northern Territory and is known as the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) is the most favourable in the country, to the acquisition of rights in land, by Indigenous people. This Act is sometimes known as the *Aboriginal Land Rights Act* or the *ALRA* and under it 40% of land, in the Northern Territory, has been successfully claimed by Indigenous people.[161]

Land rights in the Northern Territory are also subject to another Act, namely the *Pastoral Land Act* 1992 (NT). This latter Act permits a successful claimant to acquire rights in land that is the subject of a pastoral lease.[162] Acquisition involves an excision process.[163] There are several points of intersection between these Acts and Native title; Native title being a common law doctrine now regulated in part, by legislation. For example, *Pareroultja v Tickner* held that a grant of an estate, in fee simple, to a Land Trust under the *ALRA* does not extinguish Native title.[164]

When enacted, the *ALRA* both directly vested existing reserves in Aboriginal ownership and provided mechanisms for land claims to be lodged by Aboriginal groups.[165] The latter process requires that Aboriginal claimants convince an Aboriginal Land Commissioner that they are the owners of the land in question, under Aboriginal law. If convinced of their claim, the Aboriginal Land Commissioner then makes a recommendation to the relevant Commonwealth Minister, suggesting that the land should pass to the Aboriginal people, by the grant of a title under Australian law. Hence the title that successful Aboriginal claimants receive is one that exists within the common law.

In 1987, important changes to the Act were passed. They introduced a ten year sunset clause into the *ALRA*, the effect of which is that the 5 June, 1997 marked the date on which any new claims can be brought

under the Act. By this date, 249 claims had been lodged and by 2002, 51 claims had been finalized, 26 withdrawn and 12 claimed areas had been added to the Schedule 1 of the Act.[166] Hence, although there are still claims to be decided there is now a limitation on the number of claims available under this Act.

South Australia

In South Australia, there is no legislation permitting a claims procedure. The legislation in that state rests on a different premise, namely that of transfer and land trust. The *Aboriginal Lands Trust Act* 1966 (SA) sets up a transfer system, by which reserve land is transferred to a statewide land trust, which acts for the benefit of the traditional Aboriginal owners of the land.[167] One of the drawbacks of this Act is that it does not permit any additional land to be reserved to the Trust.

Victoria

The position in Victoria is similar to that of South Australia, in that the relevant legislation does not contain a formal claims mechanism. In Victoria, six Acts comprise the land rights legislation. They are (1) the *Aboriginal Lands Act* 1970 (Vic); (2) the Aboriginal Lands Act 1991 (Vic); (3) the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); (4) *Aboriginal Lands (Aborigines' Advancement League) (Watt Street, Northcote) Act* 1982 (Vic); (5) the *Aboriginal Land (Northcote Land) Act* 1989 (Vic); and (6) the *Aboriginal Land (Manatunga Land) Act* 1992 Vic. The amount of land affected by these Acts is quite small. For example, the land affected at Lake Condah amounts to half of a square kilometer, while at Framlington Forest it amounts to 11 square kilometres and in Watt St, Northcote, a suburb of Melbourne, where an Aboriginal Community Centre exists, it amounts to the site of the community centre itself. One is left to conclude that the operation of the combined legislation has not greatly assisted the push for land rights through legislation in that state.[168]

New South Wales

In New South Wales, Local Aboriginal Land Councils or the New South Wales Aboriginal Land Council hold land that was previously vested in a land trust under earlier legislation.[169] Today, the *Aboriginal Land Rights Act* 1983 (NSW) governs land rights in New South Wales. It permits claims to be made over permissible areas of Crown land. One of the Act's key features is that it does not require claimants demonstrate a traditional affiliation with the land. This approach is laudable, in that it arguably

provides implicit acceptance of the view that Indigenous people once had a relationship to the land under claim. By not requiring evidence of an affiliation with the land the Act also permits partial accommodation of the effects of government policies such as the forcible removable of children; a policy which was the subject of the 'Stolen Generation' report. The policy of forcible removal of children potentially denied the opportunity for Indigenous people to remain affiliated with the land.[170] Yet, the lack of the traditional affiliation requirement does present some difficulties. For example, it has set up a tension between traditional owners and other Indigenous people resident in the same area. The question of whether non-traditional owners should be able to claim the same land as traditional owners becomes pertinent and the issue of whose claim is more meritorious is put on the political agenda.[171] Where a land claim is successful, land is granted as a freehold estate except in one region, known as the Western Lands Division. There, successful claimants can be granted leases (in non-urban areas) in perpetuity. Grants made under the *Aboriginal Land Rights Act* 1983 (NSW) are subject to any Native title rights.

Queensland

In Queensland, a range of approaches has been used to cover land rights. Aboriginal reserves were the earliest method by which land tenure was established but in the 1980s this system was partly replaced by DOGITs.[172] DOGIT is an acronym for the term 'deed of grant in trust.' DOGITs were made to Aboriginal and Torres Strait Islander communities. Legislation was passed which attempted to give Indigenous people more say in how former reserve and DOGIT land was administered. A claim process was also established but as '[j]ust over two per cent of the state is available for claim' this cannot be regarded as a very extensive or far-reaching claim scheme.[173]

Tasmania

In Tasmania, specific land rights legislation did not exist until the *Aboriginal Lands Act* 1995 (Tas) was passed. It has been suggested that perhaps the delay in passing legislation was because there was a belief, quite erroneous, as it turns out, that Tasmanian Aborigines died out with Truganini, in 1876.[174] Be that as it may, the Tasmanian legislation sets up the Aboriginal Land Council, which is a body corporate and is constituted by a representative Aboriginal group of eight people, who are elected to represent five regions.[175] Like several other states, the legislation does not provide a claims mechanism. Instead, it operates on the

basis of the Council using and managing Aboriginal land and its natural resources, which it holds in perpetuity, for the benefit of Aboriginal people. The land that is vested in the Council comprises twelve areas but in practical terms they only amount to 0.06% of land in the state.[176] However, land may be purchased by the Council and added to its holding.[177] Nowhere under the Act is there any overt reference to the type of title under which the Aboriginal land is held. Clearly, the type of title dictates what rights and remedies flow. One positive feature of the Act is that it does not permit Aboriginal land to be compulsorily acquired. Perhaps this should be seen as the saving grace of legislation that was a long time in coming and once operational affects so little of Tasmanian land.

Western Australia

In Western Australia, a geographically vast state, with a high Indigenous population, there is no land rights legislation. This is despite the fact that an inquiry conducted on behalf of the Western Australian Minister with Special Responsibility for Aboriginal Affairs recommended the drafting of such legislation back in 1984.[178]

The operation of the *Land Administration Act* 1977 (WA) does permit land to be transferred to an Aboriginal person in fee simple or by virtue of a lease of Crown land for either a fixed term or in perpetuity[179] but these provisions do not operate by way of right. It is also possible for the Minister to reserve land for a specific purpose such as for the benefit of Aboriginal people and further lands may be added to the reservation but only on the recommendation of the Minister, once he or she has referred the matter to the Aboriginal Affairs Planning Authority, which, in turn, writes a report to accompany the Minister's recommendation. One of the difficulties with the latter provisions, as far as Indigenous people are concerned, is that their operation is not only dependent on ministerial intervention/support but that there are too many opportunities for a positive recommendation of the Minister to be rejected.[180]

Finally, under the *Aboriginal Affairs Planning Authority Act* 1972 (WA) an Aboriginal person may enter unenclosed or unimproved land held under a pastoral lease if the entry is for the seeking of sustenance in his/her accustomed manner.[181] Should the land be enclosed or improved this section is inapplicable.

Australian Capital Territory

The *Aboriginal Land Grant (Jervis Bay Territory) Act* 1986 (Cth) governs land rights in the Australian Capital Territory (ACT). The provisions of the Act transferred land at Jervis Bay (which was part of the ACT) to

the Wreck Bay Aboriginal Community.[182] The benefit of this transfer for Indigenous people is reduced by the fact that the Wreck Bay Aboriginal Council had to grant a 99 year lease back to the Commonwealth so that the land is made available to all members of the community and not just Indigenous people.[183]

Further, the Minister may make a declaration under which land is transferred to Aboriginal people if that land adjoins Aboriginal land and is of significance to Aboriginal people. However, the weakness in this procedure is that the parliament can object and prevent the declaration from becoming effective. It can be observed that the Act does not contain any claims mechanism.

Notes

1. Janice Gray lectures law, in the Faculty of Law, at the University of New South Wales. Her book J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney was published in 2003. She also writes in the fields of Property and Equity and has published nationally and internationally on Native Title.
2. *Mabo v Queensland (no2)* (1992) 175 CLR 1; 107 ALR 1.
3. *Mabo v Queensland (no2)* (1992) 175 CLR 1; 107 ALR 1.
4. *Mabo v Queensland (no2)* (1992) 175 CLR 1; 107 ALR 1.
5. J. M. Bennet and A. C. Castles, *A Source Book of Australian Legal History*, Law Book Company, Sydney, 1979, pp 253-4.
6. See J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney, 2003, pp 116-121.
7. G. Nettheim, 'Native Title: Facts, Fallacies and the Future,' University Symposium Papers, University of New South Wales, Sydney, 1998 p 15. Nettheim cites H. Reynolds, *The Law of the Land*, Penguin, Ringwood, 1992.
8. Brennan J. rejects this fiction in *Mabo v Queensland (no2)* (1992) 175 CLR 1 at 32; 107 ALR 1 at 28.
9. T. Flannery, *The Explorers*, Text Publishing, Melbourne, 1998, p 13.
10. G. Yunupingu, 'We know these things to be true,' The Third Vincent Lingiari Memorial Lecture, 20 August, 1998, p 2. Reproduced on the Reconciliation and Social Justice Library site hosted by www.austlii.edu.au. Note also that what Indigenous people saw as the absurdity of the annexation process and its concomitants, were parodied when Burnam Burnam, and a small group of Indigenous people landed on a beach near Dover, England, planted the Aboriginal flag, proclaimed Aboriginal sovereignty over the British Isles

and presented trinkets to a bewildered onlooker. Indeed G. Nettheim in 'Indigenous Rights, Human Rights and Australia: The legal situation of indigenous people in Australia—with Canadian comparisons—and the evolution of international law relating to indigenous peoples,' *Australian Studies Centre, Working Paper in Australian Studies*, held at UNSW library, LQ KM208.43 N8 1 p 1 points out that the bemused bystander was an Australian tourist! Meanwhile the rest of Britain remained unaware of the activity.

11. If the land were regarded as *terra nullius* when British sovereignty was acquired that meant, according to Blackstone's Commentaries, that the law relating to settled colonies applied. Blackstone, *Commentaries on the Law of England*, Book 1, Chapter 4, Seventeenth Edition, 1930, pp 106-108.
12. See words of Lord Kingsdown in *Advocate-General of Bengal v Ranee Surnomoye Dossee* (48) (1863) 2 Moo N S 22, at 59' (15 ER 811, at 824.)
13. Accounts of Indigenous and 'settler' clashes and conflicts can be found in Blagden Chambers' first hand account of the massacre at Pigeon Creek (Black and White: *The Story of a Massacre and Its Aftermath, Methuen Australia*, Melbourne, 1988) and Michael Organ's collection of documents about the Aboriginal history of the New South Wales South Coast (Black and White: *The Story of a Massacre and Its Aftermath, Methuen Australia*, Melbourne, 1988) mentioned in B. Elder, *Blood on the Wattle*, New Holland Publishers, Sydney, 1998. Note also that Deborah Rose gives an allegorical account of encounters between Indigenous and non Indigenous people in "*The Saga of Captain Cook; Morality in Aboriginal and European Law*," *Australian Aboriginal Studies*, 2 1984 pp 31-34. See also Gipps to Glenelg, 19 December, 1838 in *Historical Records of Australia*, series 1, vol 19 and H. Goodall, *Invasion to Embassy*, Allen and Unwin, Sydney, 1996, p 27 for a discussion of resistance by the Dharuk and Gandangara landowners to the penetration of White farmers.
14. Reynolds in *Disposession – Black Australians and White Invaders, Allen and Unwin*, NSW, 1989 details numerous instances of armed Aboriginal retaliation with respect to the taking of their lands. At 26, he quotes Curr "The Australian Race, Volume 1, Melbourne 1886, pp 100-6 who stated that "the meeting of White and Black races considered generally, results in war." Reynolds also notes that lists were often compiled of Aboriginal attacks against White settlers by governmental and police authorities, irrefutable evidence of official knowledge of Aboriginal resistance.
15. The protagonists in the dispute about the extent of Indigenous deci-

mation are Prof Henry Reynolds author of: *The Other Side of the Frontier: Aboriginal Resistance to the European Invasion of Australia*, Penguin, Victoria, 1982 and Mr. Keith Windschuttle, author of *The Fabrication of Indigenous History. Vol. 1, Van Dieman's Land 1803-1834*, Macleay Press, Paddington, NSW, 2002. This dispute has spawned much literature including the publication by R. Manne & H. Reynolds (eds), *Whitewash*, Black Inc, Melbourne, August 2003.

16. *Re Southern Rhodesia* [1919] AC 211 at 233.
17. *R v Ballard or Barrett* reported in B. Kercher, Decisions of the Superior Courts of New South Wales, 1788-1899 at: www.law.mq.edu.au/scnsw/index.htm See also B. Kercher, 'The Recognition of Aboriginal Status and Laws in the Supreme Court of New South Wales under Forbes CJ, 1824-1836' in A Buck, J. McLaren and N.E. Wright (eds), *Land and Freedom: Law, Property Rights and the British Diaspora*, Ashgate, Aldershot, 2001, pp 83-102; B. Kercher, 'R v Ballard, R v Murrell and R v Bonjon', (1998) 3 (3) *Australian Indigenous Law Reporter*, 410.
18. William Blackstone, *Commentary on the Laws of England*, 14th ed, T. Caddell and W. Davies, London , 1803, p 107. See also A.C. Castles, *An Australian Legal History*, Law Book Company, Sydney, 1982, pp 9-13.
19. William Blackstone, *Commentary on the Laws of England*, 14th ed, T. Caddell and W. Davies, London, 1803, p 107.
20. Evidence of the importation and consequences of the doctrine of can be seen in *Attorney-General v Brown* (1847) 1 Legge 312.
21. Allodial holdings are absolute holdings. See *Mabo v Queensland (no2)* (1992) 175 CLR 1; 107 ALR 1 at 79
22. *Mabo v Queensland (no2)* (1992) 175 CLR 1 at Austlii para 50; 107 ALR 1 at 33.
23. P. Grimshaw , M. Lake, A. McGrath, and M. Quartly, *Creating a Nation,* McPhee Gribble, Ringwood, 1994 pp131-138.
24. Section 51 (xxvi) of the Constitution had given the Commonwealth Parliament the right to legislate with respect to 'The people of any race, *other than the Aboriginal race in any State*, for whom it is deemed necessary to make special laws.' (italics added) The amendment deleted the words in italics.
25. Paul Kelly's song 'From little things, big things grow' is about the Wave Hill walk-off and the role of Vincent Lingiari.
26. Used in this sense, the term common law means judge-made law.
27. *Milirrpum v Nabalco*, (1971)17 FLR 141.
28. See T. Libesman & C. Cunneeen, *Indigenous People and the Law in Australia*, Sydney, Butterworths, p 137.

29. See Appendix A which refers to 40% of the Northern Territory having been successfully claimed by Indigenous people.
30. See Appendix A.
31. T. Libesman & C. Cunneeen, *Indigenous People and the Law in Australia*, 1995, Sydney, Butterworths, p 143.
32. *Milirrpum v Nabalco* (1971) 17 FLR 141.
33. *Administration of Papua v Daera Guba* (1973) 13 CLR 353 at 397; *Coe v Commonwealth* (1979) 53 ALJR 403.
34. *Coe v Commonwealth* (1979) 53 ALJR 403 per Gibbs J. at 408; Jacobs J. at 411 and Murphy J. at 412. See J. Gray & B. Edgeworth, *Property Law in NSW*, Butterworths, Sydney, 2003 p 123.
35. *Mabo v Queensland (No 2)* (1992) 175 CLR 1; 107 ALR 1 at 79.
36. The Act whose validity had to be tested was the *Queensland Coast Islands Declaratory Act* 1985 (Qld). It was found to contravene the *Racial Discrimination Act* 1975 (Cth) s10.
37. The Court left open the position of land that was the subject of a lease and other land used by the Queensland government for administrative purposes.
38. Five Meriam plaintiffs initiated proceedings but two dropped out, leaving Eddie Mabo, David Passi and James Rice to continue.
39. *Mabo v Queensland* (No 2) (1992) 175 CLR 1 at 32; 107 ALR 1 at 20.
40. *Mabo v Queensland* (No 2) (1992) 175 CLR 1 at 58; 107 ALR1 at 42.
41. *Mabo v Queensland* (No 2) (1992) 175 CLR 1 at 110; 107 ALR 1 at 83. For a discussion of the issue of connection to land see J. Gray & B. Edgeworth, Property Law in New South Wales, Butterworths, Sydney, 2003, pp 130-134; R. Bartlett, *Native Title in Australia*, Butterworths, Sydney, 2000 .
42. *Mabo v Queensland* (No 2) (1992) 175 CLR 1 at 59; 107 ALR 1at 79.
43. *Mabo v Queensland* (No 2) (1992) 175 CLR 1 at 30 ; 107 ALR 1 at 19.
44. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 29-30; ALR at 18.
45. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 29 ; ALR at 19.
46. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 29; ALR at 18.
47. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 30; ALR at 19
48. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 30; ALR at 19.
49. *Mabo v Queensland [No2]* (1992) 175 CLR 1 at 109; 107 ALR 1 at 82.
50. L. Taft, 'Apology Subverted: the commodification of the apology' (2000) 109 (5) *Yale Law Journal* 1135 at 1136; see also N. Tavuchis, *Mea Culpa*: A Sociology of Apology and Reconciliation, Stanford University Press, 1991.
51. See T. Cyprian Williams, 'The Fundamental Principles of the Present Law of Ownership of Land' (1931) 75 *Solicitor's Journal* 843; P. Butt, Land Law, Law Book Co, Sydney, 1996, p 60 claims that 'Australia

was never organized along feudal lines.'

52. That hope was abundantly clear in the newspaper reports that followed the handing down of the *Mabo (No 2)* decision but it was equally clear from those same reports, that in some quarters, eg mining and pastoral quarters, there was much fear and nervousness. See J. Gray, The *Mabo* Case: Radical Decision? (1997) 17 (1) *Canadian Native Studies Journal* 33.
53. *Mabo v Queensland [No2]* (1992) 175 CLR 1.; 107 ALR 1.
54. N. Pearson, 'Where we've come from and where we are at with the opportunity that is Koiki Mabo's legacy to Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003, p 3. Note that Native title cannot be found to exist where there has been a grant of land, creating a right to exclusive possession.
55. N. Pearson, 'Where we've come from and where we are at with the opportunity that is Koiki Mabo's legacy to Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003, p 3.
56. *Mabo v Queensland [No2]* (1992) 175 CLR 1; 107 ALR 1.
57. *Mabo v Queensland [No2]* (1992) 175 CLR 1; 107 ALR 1.
58. *Mabo v Queensland [No2]* (1992) 175 CLR 1; 107 ALR 1.
59. See G. Nettheim, The Search for Certainty and the Native Title Amendment Act 1998 (Cth) (1999) 22 (2) *UNSWLJ* 564; G. Nettheim, 'Native Title: Facts, Fallacies and the Future' University Symposium Papers, University of New South Wales, Sydney, 1998.
60. See R. Bartlett, *Native Title Law in Australia*, Sydney, Butterworths, 2000 for an account of the claims procedure and the past and future acts regimes etc.
61. N. Pearson, 'Where we've come from and where we are at with the opportunity that is Koiki Mabo's legacy to Australia', Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003, pp 4-6.
62. *Mabo v Queensland [No2]* (1992) 175 CLR 1; 107 ALR 1.
63. For a discussion of these and other issues associated with the Native title process see, H. McRae, G. Nettheim, L. Beacroft, & L. McNamara, *Indigenous Legal Issues*, LBC, Sydney, forthcoming 2003, chapter 7.
64. Dissatisfaction with how the issue of certainty has been dealt with is a common in the literature. See N. Pearson, 'Where we've come from and where we are at with the opportunity that is Koiki Mabo's legacy to Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003.
65. *Wilson v Anderson* (2002) 190 ALR 313 at 345 per Kirby J.

66. *Western Australia v Ward* (2000) 170 ALR 159.
67. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58. A discussion of this case necessarily involves consideration of some provisions of the *Native Title Act* 1993.
68. N. Pearson, 'The High Court's Abandonment of the ' "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta,*' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 5.
69. N. Pearson, 'The High Court's Abandonment of the ' "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta*', Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 5.
70. N. Pearson, 'The High Court's Abandonment of the ' "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta,*' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 5. Here Pearson was referring to the position after the *Wik Peoples v Queensland* (1996) 187 CLR 1.
71. N. Pearson, 'The High Court's Abandonment of the ' "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta,*' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 4.
72. N. Pearson, 'The High Court's Abandonment of the ' "Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta,*' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 5.
73. *Western Australia v Ward* (2000) 170 ALR 159; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
74. *Western Australia v Ward* [2002] HCA 28 (8 August, 2002) para 1.
75. The High Court split 5:2 in this case.
76. *Western Australia v Ward* [2002] HCA 28 (8 August, 2002) para 1
77. *Mabo v Queensland* (No 2) (1992) 175 CLR 1; 107 ALR 1.
78. *Western Australia v Ward* [2002] HCA 28 (8 August, 2002) para 2.
79. *Western Australia v Ward* [2002] HCA 28 (8 August, 2002) para 14.
80. J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney, 2003, p 166.
81. For references to the *sui generis* nature of Native title see *Mabo v Queensland (No 2)* 1992 175 CLR 1 at 88-89; 107 ALR 1 at 66-67 per

Deane and Gaudron J.J.; and CLR 132-133; ALR 101-102 per Dawson J.

82. N. Pearson, 'Concept of Native Title at Common Law', Northern and Central Land Councils, *Land Rights Past, Present and Future, Proceedings of the Conference on 20 Years of Land Rights*, Canberra, 1991, p 118.
83. See R. Bartlett, *Native Title in Australia*, Butterworths, Sydney, 2001.
84. J. Webber, 'Beyond Regret: Mabo's Implications For Australian Constitutionalism' in D. Ivison, P. Patton & W. Sanders, *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, Cambridge, 2000, p 61.
85. M. Harris, Native Title in Australia – the Frustration of Aspirations' paper presented to the Law and Society Conference, Central European University, Budapest, Hungary, 4-7 July, 2001.
86. *Explanatory Memorandum* to the *Native Title Bill* 1993, Part A at p 1.
87. *Explanatory Memorandum* to the *Native Title Bill* 1997, para 3.7.
88. Australia, Senate, *Parliamentary Debates* (Hansard) 16 December, 1993 at 5097.
89. Australia, Senate, *Parliamentary Debates* (Hansard) 2 December, 1997 at 10171. Referred to by McHugh J. in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 paras 129-130.
90. *Western Australia v Ward* (2000) 170 ALR 159; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
91. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
92. N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta,' *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003.
93. *Conveyancing Act* 1919 NSW, s 23 C is an example of a section where statutory interpretation has been employed in a creative and sometimes unexpected manner. Although s 23 C (1) (c) is contained in a section on 'dealings with land' it has been found to apply to personalty as well.
94. *Mabo v Queensland* (No 2) (1992) 175 CLR 1; 107 ALR 1.
95. *Western Australia v Ward* (2000) 170 ALR 159; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
96. *Commonwealth v Yarmirr* (2001) 75 ALJR 1582; *Western Australia v Ward* (2000) 170 ALR 159; *Members of the Yorta Yorta Aboriginal*

Community v Victoria [2002] HCA 58.

97. N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 12.
98. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
99. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
100. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 14.
101. K. McNeil, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989.
102. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 15.
103. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 15.
104. *Delgamuukw v British Columbia* (1997) 153 DLR 192.
105. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 18. See also K. McNeil, *Common Law Aboriginal Title*, Clarendon Press, Oxford, 1989.
106. This discussion is taken from N. Pearson, 'The High Court's Abandonment of 'The Time-Honoured Methodology of the Common Law' in its Interpretation of Native Title in Mirriuwung Gajerrong and Yorta Yorta', *Sir Ninian Stephen Annual Lecture*, 2003, Law School, University of Newcastle, 17 March, 2003, p 15.
107. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
108. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
109. The Federal Court travelled to these locations. It sat for 114 days

and heard evidence from 201 witnesses. The decision at first instance is: Yorta *Yorta Peoples v Victoria* [1998] FCA 1606. The case then went on appeal to the Full Federal Court in Members of the *Yorta Yorta Peoples v Victoria* [2001] FCA 25; (2001) 110 FCR 244; (2001) 180 ALR 655 and finally on appeal to the High Court in *Yorta Yorta Peoples v Victoria* [2002] HCA 58.

110. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
111. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58
112. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at paras 17-20 where Gleeson C.J., Gummow and Hayne J.J. summarise the appeal of the claimants.
113. *Yorta Yorta Peoples v Victoria* [1998] FCA 1606 at para 128.
114. *Yorta Yorta Peoples v Victoria* [1998] FCA 1606 at para 123.
115. *Mabo v Queensland* (No2) (1992)1 CLR1; 107 ALR 1.
116. *Yanner v Eaton* [1999] HCA 53 (7 October 1999) per Gummow J. at para 68.
117. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2001] FCA 45 at para 127.
118. *Yorta Yorta Peoples v Victoria* [2001] FCA 25.
119. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 46.
120. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 47.
121. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 80.
122. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 82.
123. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 83.
124. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 83.
125. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 87 per Gleeson CJ, Gummow and Hayne JJ.
126. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 90.
127. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 117.
128. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 at para 117.
129. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002]

HCA 58 at para 119.

130. Conveyancing practice once set this at 60 years but today statute sets the period at 30 years. See *Conveyancing Act* 1919 NSW s 53 (1).
131. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
132. This is also the thesis of L. Strelein in 'Members of the *Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) Comment,' Land, Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p 6. Available at www.aitsis.gov.
133. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
134. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1. The word regret calls to mind J. Webber's excellent article, 'The Jurisprudence of Regret: The search for standards of justice in Mabo,' (1995) 17 (5) *Sydney University Law Review* 5.
135. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
136 *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
137. Press release issued by the Federal Attorney-General's Department, 12 December, 2003. Available at www.ag.gov.au/attorneygeneralhome.
138. Press release issued by the Federal Attorney-General's Department, 12 December, 2003. Available at www.ag.gov.au/attorneygeneralhome.
139. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1
140. Press release issued by the Federal Attorney-General's Department, 12 December, 2003. Available at www.ag.gov.au/attorneygeneralhome.
141. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
142. Press release issued by the Federal Attorney-General's Department, 12 December, 2003. Available at www.ag.gov.au/attorneygeneralhome.
143. See the Native Title Tribunal's website for statistics on the progress and outcomes of claims. www.nntt.gov.au
144. M. Riley, '"Winning" Native Title: The Experience of the Nharnuwangga Wajarri and Ngarla People,' Land Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, November, 2002 (ed J. Weir) pp 3-5. www.aitsis.gov.au
145. These are: an Indigenous Land Use Agreement; a heritage agreement and; pastoral access protocols.
146. M. Riley, '"Winning" Native Title: The Experience of the

Nharnuwangga Wajarri and Ngarla People,' Land Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, November, 2002 (ed J. Weir) pp 3-5. www.aitsis.gov.au

147. M. Riley, '"Winning" Native Title: The Experience of the Nharnuwangga Wajarri and Ngarla People,' Land Rights, Laws: Issues of Native Title, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, November, 2002 (ed J. Weir) p 5. www.aitsis.gov.au
148. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
149. *Mabo v Queensland (No2)* (1992) 175 CLR 1; 107 ALR 1.
150. Note that one of the retirees was Justice Dawson and that he was in dissent in *Mabo (No2).*
151. This can be seen in a number of areas not just Native title. See for example its lack of inclination to elaborate implied rights in the Constitution.
152. These terms have gained currency in the popular press and they tend to be used pejoratively. NB The former leader of the National Party, Tim Fisher, was one government member, who was, at times, quite critical about the role of the judiciary. Recent criticism about a generous award of damages for a swimmer at Bondi Beach, who was injured when not swimming between the flags, is an example of the scrutiny that the courts face. Similar scrutiny can be seen in relation to the courts' sentencing decisions in rape cases.
153. This recommendation is also made in J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, Sydney, 2003 and is also called for later by N. Pearson in The High Court's Abandonment of the '"Time-Honoured Methodology of the Common Law" in its Interpretation of Native Title in *Mirriuwung Gajerrong* and *Yorta Yorta,*' Sir Ninian Stephen Annual Lecture 2003, Law School, University of Newcastle, 17 March, 2003, p 22.
154. N. Pearson, 'Where We've Come From And Where We're At With The Opportunity That Is Koiki Mabo's Legacy To Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003 p 2.
155. N. Pearson, 'Where We've Come From And Where We're At With The Opportunity That Is Koiki Mabo's Legacy To Australia,' Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June, 2003 p 2.
156. Pearson is mindful of this in N. Pearson, 'Where We've Come From And Where We're At With The Opportunity That Is Koiki Mabo's Legacy To Australia,' Mabo Lecture, Native Title Representative Bod-

ies Conference, Alice Springs, 3 June, 2003 but there he limits the new strategies to the avoidance of a 'delegated industry involving lawyers and anthropologists.'

157. As is Native title.
158. As is a fee simple estate held directly or in trust through land rights legislation.
159. One Nation is a political party formerly led by Pauline Hanson and now led by David Oldfield. It has restrictive views on immigration and Indigenous rights.
160. *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; See press release of the National Native Title Tribunal, 12 December, 2003 at www.nntt.gov.au/media.
161. This figure is taken from G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 294 who rely on C. Anthanasiou, 'Land rights or Native title' (1998) 4 (12) *Indigenous Law Bulletin*, p 14-15.
162. A pastoral lease is a statutory lease that requires the lessee to undertake certain pastoral/ agricultural activities as a condition of the lease.
163. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002 p 240 & 248. See also Part 8 *Pastoral Land Act* 1992 (NT).
164. *Pareroultja v Tickner* (1993) 117 ALR 206. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002 p 294 note that the Reeves Report recommends the *Native Title Act* 1993 be amended to provide that a past or future grant of land under the *ALRA* causes the extinguishment of Native title rights in the subject land. See J. Reeves, *Building on Land Rights For the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976*, ATSIC 1998. Clearly, interaction between the *ALRA* and Native title continues.
165. The word, 'Aboriginal' is used in the legislation, not 'Indigenous'.
166. This information is taken directly from G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal

Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 242.

167. *Aboriginal Lands Trust Act* 1966 (SA) s 5.
168. For an excellent account of the operation of these Acts and the areas of land affected see G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002 p 262-266.
169. The legislation, now repealed, which vested land in land trusts was the *Aborigines Act* 1969 (NSW).
170. The formal reference for the report is: *Bringing Them Home. Report of the National Inquiry Into the Separation of Aboriginal and Torres Strait Islander Children From Their Families*, April, 1997 presented to the Attorney General, The Hon Darryl Williams AM QC MP by Ronald Wilson, the President of the Human Rights and Equal Opportunity Commission.
171. See J. Gray & B. Edgeworth, *Property Law in New South Wales*, Butterworths, 2003, p 122.
172. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 271. For a more detailed analysis of the various modes of land rights regulation in Queensland see pp 271-281.
173. T. Libesman & C. Cuneen, *Indigenous People and the Law*, Butterwoths, Sydney, 1995 p 149.
174. This view is put in G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 281.
175. *Aboriginal Lands Act* 1995 (Tas) s 18 (1) (a).
176. G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 282.
177. *Aboriginal Lands Act* 1995 (Tas) s 18 (1) (b).
178. The inquiry was conducted by Paul Seaman QC between May 1983 and September, 1984.
179. *Land Administration Act* 1997 (WA) s 41.

180. If either house of the Western Australian state parliament rejects the recommendations of the Minister they cannot be put before the Governor. See G. Nettheim, G. Meyers & D. Craig, *Indigenous Peoples and Governance Structures: A Comparative Analysis of Land and Resource Management Rights*, 2002 Aboriginal Studies Press, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 2002, p 286.
181. *Aboriginal Affairs Planning Authority Act* 1972 (WA) ss 25 & 26.
182. *Aboriginal Land Grant (Jervis Bay Territory) Act* 1986 (Cth) s 8.
183. *Aboriginal Land Grant (Jervis Bay Territory) Act* 1986 (Cth) s 10.

HIV / AIDS AMONG CANADA'S FIRST NATIONS PEOPLE: A LOOK AT DISPROPORTIONATE RISK FACTORS AS COMPARED TO THE REST OF CANADA

Donna M. Hill
1703 41st Avenue
Vernon, British Columbia
Canada, V1T 7M8

Abstract / Résumé

This paper discusses the prevalence of HIV/AIDS among Canadian Aboriginal peoples. More specifically, it looks at the significant factors that contribute to the higher rate of infection among the Aboriginal population as compared to non-Natives. A number of contributing factors signify reasons for the disproportionate rate of HIV infections among Aboriginal peoples. A major cultural issue leading to these higher rates remains the historical effects of colonization and the residential school system in Canada.

La communication traite de la prévalence du SIDA et du VIH chez les Autochtones du Canada. L'auteure se penche particulièrement sur les principaux facteurs qui font en sorte que le taux d'infection est plus élevé dans la population autochtone que dans la population non autochtone. Un certain nombre de facteurs contributifs produit des raisons qui expliquent le taux disproportionné d'infection au VIH de la population autochtone. Un des principaux facteurs contributifs de nature culturelle demeure les effets historiques de la colonisation et du système des pensionnats au Canada.

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Among Aboriginal peoples throughout Canada, the AIDS epidemic continues to rise at a disproportionate rate compared to the rest of the country. Health Canada figures show that Aboriginals accounted for 14.1 percent of AIDS cases reported in the first half of 2002, up from 5.3 percent in 2001, and 10 percent in 1999 (AIDS Education Global Information System (AEGIS)). Being of Aboriginal or any other cultural descent itself does not qualify as being a predictor of higher risk for HIV/AIDS. However, there are a number of underlying social factors that contribute to Aboriginal peoples being at increased risk of infection. Some studies show as many as "20% of 17,000 AIDS cases in this country may be Aboriginal" (Canadian Aboriginal AIDS Network (CAAN)). An article in *Windspeaker* Journal reports that approximately "40% of total AIDS cases being reported to Health Canada's Laboratory Centre for Disease Control do not include ethnic origin of the individual. Therefore, the number of Aboriginal people who have AIDS is likely to be underestimated."

One of the predominant contributing factors for higher HIV infection rates in First Nations peoples is the effects of colonization and the residential school system in Canada. Poverty and abuse is another. Cultural barriers such as government and educational attitudes, location and travel of Aboriginal peoples, and language all add to the overall studies confirming Aboriginal peoples are marginalized with regards to their higher infection rates. Issues specific to youth and women are seen as further reasons for increased risk, as are the high risk activities and underlying negative attitudes of two-spirited or gay men, and intravenous drug users.

AIDS (Acquired Immune Deficiency Syndrome) is the result of not one but a number of health complications arising from the natural progression of HIV (Human Immunodeficiency Virus). Upon contraction of the disease, the HIV Virus attaches itself to white blood cells known as the immune system. Once attached to a single cell, the Virus replicates itself into 500 copies, thus spreading at an insurmountable rate. The body's immune system, designed to fight against opportunistic diseases such as colds, cancers, and pneumonias, is systematically broken down.

HIV is an acquired disease, meaning a person has to actively 'do' something to contract the Virus. HIV/AIDS requires certain modes of transmission. To become infected, there must be an exchange between two people of one or more body fluids, such as blood, semen, vaginal fluid, spinal fluid or breast milk for any transmission of the Virus to occur. In Aboriginal communities, these activities of risk are increased as a result of a number of significant social factors.

Women and Youth

Statistics show the disproportionate infection rates for women. "Women make up 40% of all new infections in the Aboriginal community as compared to only 17% of total non-Aboriginal cases" (Red Road HIV/AIDS Network). First Nations women live through multiple forms of inequality that lead them to be at greater risk for contracting HIV/AIDS, as this person supports:

> My mother and father drank. They were products of residential schools. I was the youngest...I was placed in a foster home. It's tough being an Aboriginal woman. I was part of an abusive relationship. What I saw in him was what I got from my family. I was sexually abused. (Native 79)

Drinking and using drugs can become a way of escape. They are coping mechanisms which help to mask or dull the pain Aboriginal women carry deep inside them. Poverty is a common factor among women. Women are often single parents and dealing with the brunt of supporting more than simply themselves. Their personal health and welfare therefore become less of a priority.

Women's subordination is also a key factor to understanding their increased levels of risk for HIV. They are more vulnerable to coerced sex, including rape, other sexual abuse, and being forced into the sex trade. Circumstances such as these prevent a woman from being able to negotiate safer sex practices. However, doing so may only lead to consequences of further abuse or abandonment, as this woman explains:

> It was a violent sort of encounter; having someone on top of you, pulling off the condom and then finding out a month later that you are HIV positive from this person...then being abandoned. (Native 79)

The *Alberta Report* Journal has published that among Aboriginal men, heterosexual contact is identified in 4.2% of AIDS cases, not an exceptionally high ratio. However, among Aboriginal women with AIDS, sexual contact accounts for 35.7%, a rate 50% higher than other women.

At a BC clinic which cares for the majority of HIV infected pregnant women in the province, "41% (41/61) of the women under care in 1996 were Aboriginal" (CAAN). Another report quotes, "Between 1989 and 1997 Oak Tree Clinic [in Vancouver] had seen 126 children of whom 28% (35) were HIV positive. Overall, 36% (45) of the children were Aboriginal" (Red Road 16). Vertical transmission (HIV passed on from mother to child during or shortly after birth) accounts for "5.2% cases of infection among Aboriginal females, while 1.5 cases are of Aboriginal males" (CAAN). Another transmission route for babies is through breast milk. In a culture where poverty and oppression are prevalent, Aboriginal mothers often

cannot meet the needs of nutritional supplements and so have no choice but to nurse their babies. While breastfeeding is commonly accepted as the best source of nutrition for babies, the risks herein lies with mothers who are HIV positive and find themselves with no other support or resources than to nurse their babies, thus transferring the virus from mother to child. Many children, who do not suffer the direct effects of HIV infection themselves, are affected by their parents or family members being HIV positive. Insofar as many generations before them suffered the abuses of residential schooling, some children today suffer abuse which may later lead to the emotional difficulties related to greater risks of contracting HIV and AIDS.

Children and youth are basically the first victims of abuse in society, and as such, are unable to protect and defend themselves. Sexual, physical, emotional and spiritual abuse can occur, and as a result, increase the risks of HIV infections in adulthood. As published in a journal article from *Alberta Report*, according to the B.C. First Nations Society, Aboriginals with AIDS are younger than non-Aboriginals (29.8% versus 18.6% were diagnosed at less than 30 years of age) and are more likely to be women (15.9% among Aboriginals, versus 7% for others). Often the limited amounts of AIDS education in the school system does not take into account any of the cultural factors that Aboriginal youth are experiencing. In this way, they are not learning in the cultural ways best suited to them about future parenting skills, or ways in which they can protect their own children from the higher risks of HIV infection. An article in *Windspeaker* Journal claims as high as 77% of reported cases of Aboriginal people with AIDS are between the ages of 20 and 39 years.

Intravenous Drug Use

Social problems such as poverty, abusive relationships for women, and histories of abuse for men, all contribute to intravenous drug use among Aboriginal peoples. Intravenous drug users (IDUs) are the fastest growing at-risk group in Canada. In one Vancouver study (1997), "57% of 151 Aboriginal HIV positive people reported injection drug use as their main exposure category" (CAAN). The proportion of adult Aboriginal AIDS cases with any IDU as a risk factor has dramatically increased over time, "from 6.3% (<1989) to 25.4% (1989-93) and 51.2% (1994-98). Recent studies (1996-98) have found that Aboriginal people make up 25% of the IDUs studied in Vancouver" (Aids Education Global Information System (AEGIS)). Other drugs such as Cocaine and alcohol also cause a much higher risk because they impair judgement toward healthier choices at the time of use.

The sharing of needles and other drug paraphernalia increases the

risks of infection. Although some users may be aware of this, they are sometimes either unwilling or unable to clean their works before sharing. The compulsion to use can be stronger than the need to protect themselves. Some men and women who are drug users will turn to the sex trade for means of supporting their habit, thus leading them to further high risk activities.

Two-Spirited Men

Two-spirited (gay, bi-sexual and transgender) Aboriginal males show a high rate of HIV infection. Men who have sex with men (MSM) constitute "52.4% of infections among Aboriginal males" (CAAN). While sex between two-spirited men is healthy and normal to engage in, anal sex without a condom is an extremely high-risk behaviour. Internalized negative attitudes often plague these men. Aboriginal gay men face interlocking oppression as they struggle with their identities. Feelings of guilt and shame for experimentation with their sexual orientation, and subsequent acceptance of being gay, for many, can lead to isolation from others in their community. They may turn to substance abuse to hide their emotional pain, thus creating impaired reasoning for protecting themselves from high-risk activities. In a North American study reported by AEGIS, up to 70% of Aboriginal/Native AIDS cases are men who have sex with men.

Racism and homophobic messages received from family, community, and church leaders that homosexuality is wrong often lead these men to feelings of worthlessness, fear, loneliness, alienation, depression, and even suicide. Oppressive values placed upon them not only increase the likelihood of partaking in activities of higher risk, but also prevent many HIV positive men from receiving the proper health care they require.

Cultural Barriers

Many cultural barriers exist for Aboriginal peoples that have an impact on their greater risks for becoming HIV infected. Economic and social issues such as isolation, unemployment, and higher incidents of violence plague remote communities of both the Métis and Inuit peoples. Segregation from technologies such as fax machines and computers prevent a more modern way of communicating and learning the necessities of harm prevention. "Over ninety percent (90%) of the Inuit population lives in remote and northern parts of Canada, that is the NWT, northern Quebec and Labrador. These areas are isolated and hence difficult to access via the mainstream media" (Joint National Committee 8). While isolation is also a factor, it is understood that the Métis and Inuit

can be transient people, travelling to and from urbanized areas and bringing back to the reserve, the Virus.

AIDS education and awareness, otherwise known as *harm prevention / risk reduction*, is limited among these smaller communities. Often from the top down, governments are not accepting that HIV/AIDS is more than a homosexual disease, or that it is in fact a deadly one for Native and non-Native peoples alike. Funding is very lacking, for the necessary outreach programs to be presented both in the school system and outer community of adults.

Language can be an extremely large cultural barrier among First Nations peoples. River Glenn, Client Support for the AIDS Resource Centre, Okanagan and Region, explains:

> Language is very important; so many of our First Nations people do not have the words to express what they are going through. Nor can they get through the shame and guilt of it all. Some cannot describe their situations, the disease, right up until and including the very end. (Glenn, Personal Interview 2003)

Since the colonial beliefs of residential schooling came to pass, Aboriginal peoples were stripped of their rights to carry on tradition, to speak in their own language. Another point in case is the very fact that so few HIV positive Aboriginal people are socially allowed to, or choose to, remain within their smaller communities. Alex Archie, Prevention Program Consultant, Health Canada, explains:

> There were no long-term survivors when I was newly diagnosed. We need more Aboriginal people who have survived with this Virus to tell their stories. We need them to advise newly diagnosed people about the challenges of learning to live with this Virus. (Native 28)

In today's education system, language differences make if difficult for non-Natives to provide adequate sex education in ways Aboriginal peoples deserve to understand.

Residential Schooling

Very distinct differences remain between traditional ways of learning for Aboriginal people and the European methods imposed upon them during the days of religiously run residential schools. "It would be a mistake to view missions primarily in theological terms. What incorporation of Native groups into mission villages fundamentally meant was the extensive (if not total) reorganization of social life by the adherents" (Knight 90). Mission villages and residential schools entailed organized programs intent on assimilation and acculturation of the Indians into European

values and beliefs. Residential schooling was a kind of frontier industrialization. It became the policy of the Canadian government to take, even 'kidnap' as many felt, Aboriginal children away from their families on the reserves, and place them in these missionary residential schools.

> Most people now refer to this truck as the cattle truck, but at that time it was called the school truck. For many children it was their initial introduction to a way of life in which their family identity was obscured.... (Haig-Brown 43)

"Second only to insisting that the Native people abandon their own religious beliefs and take up Christianity was the push for them to abandon their migratory lifestyle" (Haig-Brown 29). European setters perceived the quickest and best way to 'civilizing' the Aboriginal population was through assimilation.

Although there remained differences in how each school operated, in many cases children were forbidden to speak their Native language, their culture deemed primitive, their spirituality labelled heathen. Western ethnocentric views are said to be some of the main contributing reasons for the many painful challenges Aboriginal peoples face today. Most former students recall their memories of this time with anguish. The heart of Aboriginal culture is family, and children were denied this basic premise:

> Indian children are required to assume, and are capable of assuming, responsibility for themselves and others at a much younger age than White children.... By contrast, once at school, they were conditioned to perform under strictly controlled conditions. When they were eventually released back into their Native environment, they were no longer capable of identifying with their families and elders. The residential school forcibly divided them from a culture to such an extent that a serious communication gap exists today between generations. (Ennamorato 68)

Children were prevented from learning basic parenting skills, cultural traditions, and the Native way of life. Brian Mairs, Client Support for the AIDS Resource Centre, Okanagan and Region, validates:

> The residential school system virtually wiped out seven generations of parenting skills. Sure, the schools were of a patriarchal nature, but this is not the same as basic parenting skills. And when this void is present, the need is to fill it...with drugs, alcohol, obesity, abuse, whatever works to fill this void of not knowing how to effectively parent our children. (Mairs, Personal Interview 2003)

Enculturation, whereby knowledge of culture is considered to be a

learned process, was prevented from being passed down through several generations of Aboriginal peoples in Canada. Instead, children were abused in various ways including strapping, public humiliation, and in some cases, having a tack driven through their tongues for being caught speaking their Native language. Many also suffered sexual abuse at the hands of their figures of authority, and often learned to hide their pain with alcohol.

Insofar as some children began drinking at school and brought this escape mechanism home with them on holidays, other parents began drinking on the reserves to help mask their pain of losing their children. Consequently, these activities and reinforced negative attitudes in promoted higher risk for behaviours that could contract the Virus. Even today, with schools closed, many Aboriginal peoples harbour negative repercussions from this era, as one Elder describes:

> I got it from injection drug use. And the problem that I'm having today is that most of society doesn't want to accept HIV and AIDS as a reality. And yet they expect me to accept it.... We are not dealing with just the epidemic of HIV and AIDS, we're dealing with feelings and things in the past, residential schools and physical, mental and sexual abuse because I've been through all of them.... (Red Road 10)

These attitudes can lead to feelings of low self-esteem resulting in depression, abusive relationships, economic difficulties, substance abuse, and ultimately suicide. All of these in turn become contributing factors among First Nations peoples for the prevalence of HIV/AIDS being significantly higher than the rest of Canada.

Conclusion

A journal article in *Canadian Press Newswire* states that Canada's Aboriginal people represent 2.8% of the country's population but account for more than 9% of all new cases of HIV. Despite increased levels of awareness about HIV/AIDS and its risk factors, infection rates among Canada's Aboriginal population continue to grow at an alarming rate. *Voices of Two-Spirited Men* reports the annual proportion of reported AIDS cases attributed to Aboriginal persons has increased from 1% before 1990 to 15% in 1999 (Health Canada 2000).

One of the foremost significant factors to impact the rise in risk factors for HIV/AIDS among Aboriginal peoples is Canada's history of residential schooling. Many Aboriginals were stripped of their traditional knowledge of learning, and in turn, their abilities to teach their own children through effective parenting skills. Such effects from this era continue to linger today. Other social circumstances and attitudes also pre-

vail. As this Elder summarizes:

> We have survived attempts against our Aboriginal souls of every description. These attempts have taken an enormous toll and we have learned...painfully and with difficulty. But we should realize that AIDS is one of the greatest challenges we are going to face as First Nation peoples in our lifetime" Andrew Yellowback. (Red Road 7-8)

The practice of unprotected sex both in heterosexual and homosexual relationships also leaves people at very high risk for contracting the HIV Virus. Within many Aboriginal relationships this behaviour is undertaken through lack of education for healthier choices or situations of being in an oppressive relationship, as is the case for some Aboriginal women. Two-spirited men may experience shame, both internally and from messages sent from their community around them. Subsequently, the effects of being isolated from their own communities play a large role in their self-worth and abilities to make healthy choices for themselves regarding lower-risk activities.

Despair and depression about poverty, another factor particular to many Aboriginals, often results in low self-esteem, which can lead to intravenous drug use, as well as participation in the sex trade as a way of supporting an addiction. Most often it is the children first hit with the effects of a dysfunctional lifestyle, and from these modeled behaviours they grow up and learn to care for themselves in similar unhealthy ways. Intervention as early as pre and postnatal education, care and nutrition can be most beneficial for First Nations children and women, particularly those mothers having given birth, who are HIV positive.

Many cultural implications exist for Aboriginal peoples that prevent them from education about the threat of HIV/AIDS. Without this awareness, opportunities for more informed decision-making about activity risk levels cannot be met. Oppression and poverty, housing insufficiencies, isolation, travel to and from more urban centres, racism, and fear and disgrace all contribute to the rising trend of marginalization for Canada's First Nation's peoples, thus making them at greater risk for contracting the HIV disease than the rest of the population.

According to Health Canada's report entitled, *Determinants of Risk for HIV* (2002), strong, positive social supports can decrease the risk of becoming infected with HIV/AIDS. These networks include family and friends as well as government programs and community education. Meegwetch explains in *Voices of Two-Spirited Men*:

> Privacy plays a big part in people's lives, especially when healing the mind and body. [We need] more intimate counselling and workshops in Aboriginal towns to let people know

> this is important to us all, not only homosexuals. With training and talking circles we can all "talk" and take time to listen to our bodies and minds to help in the fight to heal and keep healthy mentally, physically, and spiritually. (Waalen 65)

Cooperation between government and community-based programs is considered one of the keys to helping Aboriginal peoples become more aware of harm prevention, risk reduction behaviours. When being implemented among public schools and reservations to reach young children and their parents, such programs need to be culturally relevant and use the appropriate languages necessary. In this way, Native individuals can then be empowered to make healthier decisions for themselves, and in doing so, can effectively prevent the higher rates of infection among Aboriginal peoples as compared to the non-Native population of Canada.

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PINPINAYHAYTOSOWIN [THE WAY WE DO THINGS]: A DEFINITION OF TRADITIONAL ECOLOGICAL KNOWLEDGE (TEK) IN THE CONTEXT OF MINING DEVELOPMENT ON LANDS OF THE ATTAWAPISKAT FIRST NATION AND ITS EFFECTS ON THE DESIGN OF RESEARCH FOR A TEK STUDY

Norbert Witt
Aboriginal Education,
University of Regina
Regina, Saskatchewan
Canada, S4S 0A2

Jackie Hookimaw-Witt
Ontario Institute for Studies in Education of the University of Toronto (OISE/UT)
2013 Grant Drive
Regina, Saskatchewan,
Canada, S4S 4V8

Abstract / Résumé

Due to the Canadian Environmental Assessment Act's (CEAA) regulation that an Environmental Impact Assessment (EIA) on development on lands of Aboriginal people should include a TEK study, the company exploring ancestral land of the Attawapiskat First Nation offered to finance such study. This paper offers a definition of the term within the Attawapiskat context, establishes why TEK studies are needed, and discusses how a study has to proceed in order to be of advantage for the First Nation.

En raison du règlement de la *Loi canadienne sur l'évaluation environnementale* (LCEE) qui exige que les évaluations environnementales visant les projets d'aménagement des terrains attribués aux peuples autochtones comprennent une étude du savoir écologique traditionnel, une entreprise qui explore les terres ancestrales de la Première Nation Attawapiskat a offert de financer une telle étude. La présente communication présente une explication du savoir écologique traditionnel dans le contexte de la Première Nation, démontre la nécessité d'étudier le savoir écologique traditionnel et propose des modalités de recherche et d'étude qui avantagent les Premières Nations.

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Introduction

With the discovery of diamond bearing kimberlites in Northern Ontario, Northern Saskatchewan and in the North-West Territories, isolated communities like Attawapiskat, a Swampy Cree (Omushkegowuk) community on the Ontario James Bay coast, were faced with a sudden interest in and planned *development* of their ancestral lands by mainstream Canadian or foreign companies. As any activities on ancestral lands will affect the lives of the people inhabiting the lands and certainly also the ecosystem, there have to be some processes in place to be followed in order to control this impact, or even to ensure positive *development*. As the development being referred to in this article commences on ancestral lands of a First Nation, one would expect that the First Nation be included in the definition of the processes to be followed. In Canada, these processes seem to be set by the *Canadian Environmental Assessment Act* (CEAA), which defines environmental effects to be regulated (Section 2(1)) as

> any change that the project may cause in the environment, including any effects of such change on physical and cultural heritage, on the current use of lands and resources for traditional purposes by Aboriginal persons.... (CEAA 1996:2)

Thus, with the reference to Aboriginal persons, the Canadian Environmental Assessment Act suggests to include *Traditional Ecological Knowledge* (TEK) "as part of its regular planning process" (McGregor 2000:449). This can be interpreted that TEK data be utilized as a basis for *Environmental Impact Assessment* (EIA). Following Pereira's (2000) interpretation of her quotes on LeBlanc and Shillington (1995), an EIA "is a recognized process for integrating environmental factors into development" (Pereira 2000:2). Or, as Sallenave (1994) states, it is "one way of safeguarding the environment from adverse effects of development [and] can be used to predict, evaluate, and monitor the environmental impact of all activities" (1). Depending on the understanding and definition of *Traditional Ecological Knowledge* (TEK), this could be a powerful tool for the Attawapiskat First Nation, as they could define their position in land management. And thus they could ensure their input in the assessment of what the *development* commencing on their ancestral lands means to the community in terms of impact on their life as a whole, which includes culture and traditional economy.

There are problems, however, with the acceptance of TEK data as the appropriate tool for participation in an EIA. The concern that "there is resistance and apprehension among Aboriginal and non-Aboriginal people about acquiring and using TEK in EIAs" (Pereira 2000:1) refers to a problem that is echoed in many papers discussing TEK: the problem

of how to define *traditional ecological knowledge*. The lack of undisputed acceptance of Aboriginal knowledge in the academic world, and, on the other hand, the certainly justified suspicion by the Aboriginal community towards the academic community, which could appropriate Aboriginal knowledge, might lead to the "lack of confidence in TEK's validity as being a viable source of information for EIAs" (Pereira 2000:1).

In the case of the Attawapiskat First Nation, we are, however, faced with the reality that *development* on ancestral land is in full process already. And even though the initiative in the *development* has indeed been taken by the company, which explores the land and plans a diamond mine, the only tool for meaningful participation and input in the planning phase is a TEK study. The company agreed to use TEK data as the basis for impact assessment. The question then is what collecting these data would involve and who actually sets the rules or guidelines for such study. How much actual input the Attawapiskat First Nation has in any environmental assessment on the development on their ancestral lands, and in how far environmental practices of the First Nation are respected, will depend on the act of First Nation members taking ownership and control of the TEK study. That means that the validity of TEK for the First Nation will be dependent on control the First Nation members can exercise in order to ensure actual Aboriginal data and analysis of the study.

This also means that the concept of *Traditional Ecological Knowledge* has to be defined by the community the data are collected in. Based on literature and conversations with elders of the community, we tried a definition, which is presented below. The next paragraph will then discuss the need of TEK studies for the community in terms of self-determination, conservation and sustainability, defining the position of the First Nation, damage assessment, and cultural integrity of the First Nation whose lands are affected by *development,* followed by a look into the Attawapiskat context and a discussion of how the TEK study has to be developed in order to meet the needs of the First Nation. Much of this discussion is based on the proposal the authors have worked out for raising funds for the TEK study project in Attawapiskat (Hookimaw-Witt & Witt 2003).

Defining TEK

To set the stage for the following presentation of the need of a *Traditional Ecological Knowledge* (TEK) study and how processes for researching TEK are to be developed in Attawapiskat, we will define what we understand by the term, trying to capture the community's view of what *Traditional Ecological Knowledge* means for the people who live it. Based

on both the accumulation of knowledge and the use of it, we will try a definition that seems to be logical, considering what the term *traditional* would mean in the context of knowledge by people of First Nations.

To avoid confusion we also have to establish that different sources use different terms to describe what we define as TEK. For example, Grenier (1998) chose the term *Indigenous Knowledge* (IK) but refers to this concept also as *traditional local knowledge* (1) or *traditional ecological knowledge* (2). Similarly, Couture (1991a) and Boissieres (1986) refer to it as *Indigenous knowledge*. All these terms, including *traditional knowledge* or *Aboriginal knowledge* are referring to TEK in the way we have defined it below because of the connection of Indigenous cultures to the land or ecology.

Martha Johnson (1992) defines TEK as "a body of knowledge built up by a group of people through generations of living in close contact with nature", adding that it is "both cumulative and dynamic, building upon the experience of earlier generations and adapting to the new technological and socioeconomic changes of the present" (4).

The Cree-Métis psychologist Joseph Couture (1991a) goes beyond the condition of *knowing,* defining *Indigenous Knowledge* with Boissieres' (1986) words as "the ancient purity and integrity of the ceremonies, the ancient knowledge of humanity" (55). The indication to the ceremonies already points into the direction that the term goes beyond the mainstream understanding of *knowledge,* as it includes *praxis*. We have to caution that the term *ancient* does not indicate that the concept of Indigenous knowledge is stuck in the past. In our understanding, as it is also interpreted by McGregor (2000:443) and Johnson (1992:4), knowledge and the way it is used is additive, meaning that it always adapts to new challenges. Nevertheless, Indigenous knowledge has its basis in the spiritual cultural understanding of the relations among all living beings, which has been observed since time immemorial, the ancient knowledge of humanity as Couture describes it.

The interaction of knowledge and praxis is also reflected in the statement that TEK is "the culturally and spiritually based way in which Indigenous people relate to their ecosystems" (Winona LaDuke 1994:128). Similarly, Grenier (1998) defines Indigenous knowledge as referring to "the traditional, local knowledge..., covering all aspects of life, including management of the natural environment." McGregor (2000) concludes in reference to LaDuke that "TEK is thus more than another accumulation of knowledge; it is a way of relating to creation and all its beings and forces. It is more than knowledge of a relationship; it is the relationship itself" (444).

The inclusion of praxis and knowledge thus being the relationship

to the land, which can be defined as *way of life,* can also be extracted from our elders' discussion on traditional knowledge. Elder Marie Louise Hookimaw elaborates on the appropriate gathering and processing country food as being important for health and survival (Hookimaw-Witt 1998:207). Similarly, elder Raphael Fireman explains to some length how the appropriate application of traditional knowledge still secures survival of the community (Hookimaw-Witt 1998:208-214). And elder John Mattinas chooses the example of gathering medicine plants to interpret the goal of the Omushkegowuk's application of TEK being *sustainability*. He points out that not only do we teach the younger generation about *what* we know about using these plants for healing but also about *how* to use them in a way that they are still there for following generations. When he says that "we also teach deep respect for these treasures" (Hookimaw-Witt 1998:216) he expresses the spiritual dimension of TEK being *relationship* and refers to the goal of sustainability, which, according to a definition by IUCN (1997) is secured "when human conditions **and** the condition of the ecosystem are satisfactory or improving (31).

The goal of sustainability would also demand responsibility of the individual land user to the land, and this responsibility can be defined within the concept of self-determination. This is reflected in our elders' response to the questions of who has the power of decision on what is to happen on the land. Elder Shano Fireman responded that "the one who lives on the land is the one responsible for it, and that is me" (Hookimaw-Witt 1998:186), and Elder Mary Wabano pointed out that "Kitche Mando (The Great Mystery) gave us the land to use, not to control. But we have to look after it" (Hookimaw-Witt 1998:186/187). And she includes self determination when she says that "Kitche Mando created the land and [s/he] did not say for us to be controlled [by the government]" (Hookimaw-Witt 1998:190). Both elders emphasize the individual's responsibility or role of "empowered guardian" of the land (Western Canadian Protocol 2000:15). The role of empowered guardian refers to the decision making power of the individual land user and thus expresses the traditional decision making process and political structure of Aboriginal societies in regards to land management.

The indication to individual land use also points to the other phenomenon McGregor (2000) refers to: that of multiple knowledges due to individuals having different interpretations (446). Different family groups within the Attawapiskat region have been responsible for different parts of the land. The knowledge on these specified parts of the land was within the family groups who occupied it (map in Hookimaw-Witt 1998:iv).

Expanding on McGregor's (2000) definition of TEK as "the relationship," we therefore chose the Omushkegowuk (Swampy Cree) term of

pinpinayhaytosowin in our title to describe what TEK means to us. The term can be translated as *the way we do things*, as self-determination, which is included in *Way of Life.* The way of life can only be interpreted holistically, which means that all aspects of life (here of the Omushkegowuk) have to be considered.

With paying respect to the elders who guide us in this study project, we therefore came up with the following **definition**:

> *Traditional Ecological Knowledge* is the totality of life of the people, which consists of knowledge (or *laws of nature)* as it was observed and accumulated **and** as it is still applied in order to keep the balance in the relationship to the environment. The application of traditional knowledge is directed towards sustainability of life as a whole and it is defined within the concept of self-determination. TEK is the way of life of the people.

To avoid possible misinterpretations we also want to acknowledge McGregor's (2000) discussion on the origin of the term TEK, which refers to mainstream academic definitions and use (or misuse?) of TEK (McGregor 2000:443-448). There is a danger of misinterpretation when the concept *traditional* is merely used to create an illusion of First Nation input and protection of First Nation interest. This would divert from actual existing land rights First Nations have by the treaty or by pending land claim settlements. Thus McGregor's (2000) caution that TEK is a term created by non-Native academia is justified, and we therefore have to caution to see any definition of TEK as a frame, not as an absolute, and that interpretations will differ depending on the community that is researched and whose TEK data are used for EAs. What that means is that, although the *outsider*, being a possible researcher or the development partner, will utilize the TEK data to satisfy conditions for an EIA, control over application and definition of concept has to remain with the researched people, not the researcher. The implications of defining TEK as *way of life* on the process of researching a TEK among the Attawapiskat First Nation, which was also the basis of the research proposal (Hookimaw-Witt & Witt 2003), resulted in the suggested structure of the study, which we will describe below as *rules of engagement.* But first we want to establish why the TEK study is needed.

The Need for a TEK Study

In terms of assessment of damage to the environment and economic loss due to development, for a First Nation affected by exploration on ancestral/treaty lands the appropriate definition will mean that the closer TEK is defined on the basis of the community's understanding of envi-

ronmental impacts of development, the more accurate actual losses can be calculated. The assessment of probable damage by *development* on ancestral land would be the basis for calculating compensation for loss by people who used the land before this *development* started, and most probably continue to use the land after the *death* of the diamond mine. If TEK is actually defined as way of life and knowledge of the affected community, the goal of managing *development* will be that the damage is kept within a range that the land can be used again. In the meetings, of the TEK working group, which one of the authors, Jackie, is part of, the two elders always refer to how land is still used, expressing their emotional connection to it. (Meetings of working group and phone conferences throughout September and November 2002).

And here is the point where TEK is important for the position of an Aboriginal partner in land *development*, as the goal development is discussed in might refer to different concepts, that of economic gains versus sustainability.

As pointed out in our definition, TEK includes responsibility to and thus managing of the land. In his paper on TEK, Dudgeon (2000) identifies two different types of approaches to "management of common property resources", which he defines as the one being consistent with "TEK of the Aboriginal peoples of Canada and a minority tradition within the scientific community, and the other [being] consistent with dominant Western techno-economic practices and with traditional understanding of science" (Dudgeon 2000:1). The former would lead "to sustainable management of the commons", while "the techno-economic view has tended towards a short term, profit oriented approach, which often erodes the resource base over a relatively short period of time" (Dudgeon 2000:1).

These are the two opposite positions, which roughly define the conflict arising when the interests of the *two worlds* meet on the field of *development* on Aboriginal lands. In regards to possible attempts to interpret those opposite positions as being compatible, we want to make aware that

> the Elders say the elements of the mainstream and traditional cultures are not transferable. The wage economy and social assistance stand in contradiction to the traditional use of the land and the role of the individual as an empowered guardian. (Western Canadian Protocol 2000:15)

In other words, one has to pick one of the positions, and ours will be that of sustainable management of the commons, as this is consistent with the Omushkegowuk worldview. The conflict between the two positions shows in the Attawapiskat project in the concern the vice president of the company in Canada raised with Environment Canada when

he asked: "what when Traditional Knowledge contradicts accepted scientific findings?" (Fowler 2000). The anticipated contradictions, of course, refer to the company's approach towards short term profits, their profits that is, while the community or band, which we define according to *Corbiere vs Canada* (1993) as the entire band membership including those living off-reserve, not only their leaders, would naturally desire an approach for sustainability of land and resources. Fowler's (2000) statement also allows the conclusion that the initiation of a TEK study was based on the hidden agenda to use TEK data not for protection of the Aboriginal position but "largely for their [the company's] future profits" (Grenier 1998:10). Being members of the community, we base our following statements why a TEK study is needed on the position Dudgeon (2000) describes as sustainable management of the commons.

The first statement, referring to self-determination of First Nations, is that TEK would be the basis for culturally appropriate decision making processes concerning land management. Considering that the development we are referring to proceeds on land that has been used by the people living on it for thousands of years, the people should then be the ones to determine how development has to proceed on their lands, as they have done according to the responsibilities they were given by Kitche Mando. The logical choice of accessing information about how land and people are affected by *development* would be through the knowledge of the people as they are the ones affected and the ones who know the land. The responsibility for the land, and knowledge of how to live with the land, how to sustain it, is with the people or more specifically with our elders. And that is where the data for a TEK study have to be researched. To ensure self-determination, the people affected by *development* have to be the ones assessing the impacts. Then TEK, used as position of the First Nation in questions of land use, ensures self-determination.

The second statement is that conservation and sustainability is a concern globally and that TEK data would be needed as a starting point to change the habit of destroying our own habitat for the sake of short-term economic gain. In this context, Couture (1991b) refers to the global "need to survive to which Native North Americans have something significant to contribute" (203). Referring to sustainability, Higgins (1998) similarly makes aware that "the Brandtland Report of the WCED (1987) called for official recognition and protection of Indigenous peoples and their knowledge because of their ability to contribute to local, regional, and global sustainability" (Higgins 1998:323). Contrary to the company's concerns that TEK might contradict scientific findings, it would rather complement science because, as Grenier (1998) points out, "western

techno-scientific approaches are an insufficient response to today's complex web of social, economic and environmental challenges," and "traditional systems usually examine problems in their entity" (8). In this context we need to collect data on TEK in order to find ways to stop the destruction of our own habitat, which would threaten our lives altogether.

Our **third statement** would be that TEK data have to be collected and recorded in order to preserve culture and knowledge of the First Nation and to state its validity within the western academic context. The limitations of EIAs have to be seen in the fact that on the one hand "the impacts of developments affect Aboriginal communities" (Sallenave 1994:3), and on the other hand the EIAs are based within the different cultural context of mainstream society. Sallenave (1994) continues that there is "a lack of adequate ecological baseline data and the lack of an adequate framework or method to link ecological and social components of the environment" (3), which is also echoed by Grenier (1998) who sees the value of researching TEK as providing environmental baseline data (10). Referring to the baseline data as TEK we want to point to the necessity of EIAs to be assessed within the understanding of the people who are affected by the development. With the indication to ecological and social components of the environment, Sallenave (1994) refers to a holistic assessment of ecological damage done by *development,* which would go beyond assessing losses to the traditional economy of the community affected by *development* commencing on its lands and would include effects on social life (including health), economic life, political structure and spirituality of the community. The goal of utilizing TEK data in EIAs would then be to protect the Aboriginal community's way of life. McGregor (2000) establishes that "most environmental practitioners agree that it is important to gather and document TEK before the knowledge disappears, as the number of the knowledge possessors (Elders and resource users) is dwindling" (446). Grenier (1998), McGregor (2000) and Sallenave (1994) make aware of the lack of recorded ecological knowledge, which would ask for such studies to be done. If Aboriginal land is affected by development, Aboriginal Knowledge on the impacts of such developments will have to be the basis for assessing such impacts. Sallenave (1994) therefore directly refers to TEK as tool for such assessments when concluding that "Aboriginal Ecological Knowledge should be integrated formally into the process [of an EIA], and Aboriginal peoples should be given greater decision making powers concerning EIA research and policy" (5).

Our **fourth statement** is that without TEK as the basis for assessing the damage *development* causes on the land, there can never be reasonable compensation, as the actual impact *development* has on the

life of the community is ignored. What we are referring to are "net gain and loss calculations" (Gibson 2002) which are the basis for compensation assessments. First we have to know what is lost in order to assess how to compensate for it. The danger is that any payment the company is making towards the community is seen as benefit to community development, additional funds if you will, when in reality the community is losing its economic basis. Such compensation practices are happening in Attawapiskat already by putting the amount of $200,000 towards the community arena as compensation for losses in gathering food, while the people actually affected by these losses, the hunters, are ignored (Attawapiskat 2002). Although the funding of "new community recreational facilities" can be counted as "compensating for risks to traditional hunting and trapping (substitution in kind)" (Gibson 2002), the payments will have to be accounted towards a figure representing the calculation of loss. That also means that the actual *monetary value* of the traditional economy has to be calculated first, based on how TEK is still practiced, before any compensation, which makes up for loss of those values, can be assessed. And this has not been done yet. The basis for our statement is that a large portion of the population no matter if they are counted as *traditional* or *modern* are still engaged in the annual goose hunts, many women are still producing crafts, and almost everybody in Attawapiskat uses wood as fuel for heating their homes. The basis for all these activities and the commodities resulting from them is the land and the traditional use of it. A mere study of hunting activities in the very small area of the actual diamond exploration, as it was done by Wilkinson and Associates (2000), cannot grasp the impact this exploration has on the wider environment, also considering the pollutants from blasting getting into the river etc. Also, among the very small number of hunters (31 out of 4 families) interviewed in Wilkinson's (2000) survey, only one family received compensation. A TEK study is thus needed as the basis for loss calculations in order to be able to assess if payments by the company will actually compensate for possible losses due to development.

Our **fifth statement** is that without TEK data as the local basis of assessment of community life and economy there is the danger of cultural disruptions or even loss of culture due to the uneven power relations between the First Nation and the company. Oxfam America (2002) summarizes this phenomenon as follows:

> The new company not only is immensely more powerful but also employs resources and criteria that disrupt and often challenge traditional power structures and ways of making decisions. Local authorities often become humble **suppli-**

> cants of services and favours from the company, and thus the cultures and traditions they symbolize become diminished in their own eyes and those of their community members. This represents a cultural aggression—albeit unintended—by the company and often means that once the mine's life term is over, the community may be culturally and politically unstable. (Oxfam America 2002)

There are indications of these processes, based solely on the expectations of *benefits* the company offers, happening in Attawapiskat. The ignoring of hunters, the actual land users, in compensation, as discussed in the previous statement, is one example. Another example is the signing of an agreement for a winter project by the Attawapiskat First Nation leadership without the in these cases necessary sufficient consultation with the band-membership. The Council with their lawyer presented the agreement to merely 30 band-members. Traditionally, decisions concerning land use are made by the whole community. Although the Council is divided on this issue, the councilor responsible for economic development is "not interested in a TEK study because the lawyer said we don't need it" (Hookimaw-Witt 2003a). In all cases, ignoring the actual land users, the "empowered guardians" (Western Canadian Protocol 2000:15), the lack of real community consultation, and in the disinterest in a TEK study by the representative of the leadership, common decision making processes in the First Nation are ignored. Traditionally, elders are our advisors, and decisions concerning the land are made by all members, not just by leaders who are *advised* by the partner in development, the company that makes the profits. The processes of a breakdown of traditional political structure and power relations, described by Oxfam America (2002), has started already just with the presence of a company which can influence decisions by the power of the money they can put into the community. A TEK study is needed for defining the position of the community, which the leaders can base their decisions on.

Rules of Engagement – How the Study Should Proceed

Beside the fact that a TEK study was initiated because such study is needed for an Environmental Impact Assessment (EIA), the community is a good place to do such study in, due to the community's isolated location and the still wide spread use of TEK. Thus a study in this community promises to produce *authentic* data. It is also worth mentioning that this TEK study will be the first one in the Omushkegowuk region.

Attawapiskat was entered into official treaty with Canada and the Province of Ontario relatively late, in 1930 (Treaty #9 adhesion), and the

majority of the First Nation members moved to the community as late as the mid-1960's (Witt 1998:247). Thus, traditional structures, thinking and interpretation of life could be salvaged into the present despite the alien political structure that was introduced and forced on the Band by the Indian Act, and despite the *alien* (mainstream) education system the children now receive their formal education in. A few of the elders still lead a traditional life on the land, moving into the community only over Christmas season (Witt 1998:249), and some families, although having their home base in the community, are still using the land extensively as their economic and social basis. The vast majority of community members are involved in the yearly goose hunts in fall and spring (Witt 1998:6). Therefore there is still an awareness of traditional way of life among most of the Attawapiskat First Nation members. This means that traditional knowledge can be researched on a wide basis, but it also has to be researched according to the definitions of the people of the First Nation rather than definitions by the academic community.

Based on the awareness that the people had to find their own definitions in case of research proceeding in their community, we started to organize the *local voice* since the beginning of exploration on Attawapiskat treaty land in 1996. In order to secure protection of local knowledge and local interpretation and analysis of how TEK is actually applied, this eventually led to the following suggestions how this TEK study has to be set up in Attawapiskat.

Control Over the Study - The Local Working Group

As we mentioned already, it was the company, which, also offering to pay for it, suggested a TEK study in order to satisfy the conditions for the necessary Environmental Impact Study. To ensure the appropriate input of the community, a local TEK working group was then formed by Chief and Council. This group consists of four local people being two elders, elder Annabella Iahtail and elder Raphael Fireman, Jackie Hookimaw-Witt as a research coordinator and researcher, and Jason Hookimaw, who represents the community as environmental monitor. Frictions with the company arose in the question of control over design and procedures of the study. The local working group understood their purpose as ensuring community control, and the attempt of the representative of the firm hired by the company for designing and executing the study to push through their own design eventually failed due to the resistance of the local working group. The rationale of this resistance was, of course, that as it is local knowledge that is to be researched, our local elders are to be the ones who have to design it and advise in the interpretation of meaning of the data collected. The demand by the com-

pany that "this entire area needs to be revisited and *rationalized*" (our emphasis) (Fowler 2000) is out of place, as the *rationalization needed* certainly refers to *western* knowledge and understanding and would thus diffuse the meanings of the data to be researched.

To ensure authenticity of the data, to secure the basis for self-determination in terms of decision making on land management on the First Nation land base, and to ensure a truly traditional, Omushkegowuk result, the community has to be involved in every aspect of the research. The direction for the research, which includes designing of questions and identifying focal points, has to come from elders of the community, who are identified as the elders in the working group. To make sure that local traditional definitions are followed all the time, the elders (male and female) have to be a permanent part of the research process and will also give advice in the analysis of the data. The elders are instrumental in designing research and research questions and identifying the focal points of the research.

Language

Attawapiskat is an Omushkegowuk community with almost 100% of the Aboriginal population speaking Cree (n-dialect) as their first language (Witt 1998). Many of the elders either speak only Cree and other Aboriginal languages or have only a very fragmented understanding of the English language. Naturally, the language of the research therefore has to be Cree, as many respondents would not or only partly understand the researcher if English was used. Yet, this should not be the only reason for using the Cree language in this project. Although we will look for and analyze commonalties between science and TEK, the mere recording of traditional knowledge will be the first step, and this recording will show the difference. Commonalties will have to be interpreted from the *traditional* (Cree) understanding to the *scientific* understanding not the other way around, as this project should show the Attawapiskat Cree perception. For getting accurate results, Aboriginal language has to be used because, as Edward Chamberlin (2000) discusses the accepted fact that language defines what is to be human, consequently, "while language in the abstract may be what defines us as human, languages in practice—different languages in different practices—determines these differences" (133). What that means in explanation of the Omushkegowuk's connectedness to the land is that "no English words are good enough to give a sense of the links between an Aboriginal group and its homeland" as Chamberlin (2000:136) quotes William Stanner (1969). This means, of course, that all names of geographic places and spiritual sites have to be recorded and mapped in the Ab-

original language. For the English version of the completed final report, a glossary then has to be added with a translation of the meaning of these terms.

All interviews and their recordings are in Cree and then have to be subscribed to both Cree (syllabics) and English for analysis and written records. The translation into English will go beyond literally translating concepts as many of the Aboriginal terms will have to be interpreted for their meanings. For legibility by non-speakers of Cree, the original terms used in the English version will be written in Roman orthography.

Ethical Considerations

For the purpose of securing funding for any research project, the project has to satisfy the necessary ethical review. Ethical reviews are usually supervised by the appropriate committees within universities, which have set guidelines of research practices, consent forms, archives etc. At the same time we want to point out, however, that such committees lack the authority to make such decisions in regards to people deriving from cultures different from those the committees have their bases in. Researching in an Omushkegowuk community with one of the researchers originating from that community, we, of course, have to follow the local, Cree protocol for interaction among people, which is not yet recorded in any written form, and largely unknown and/or ignored by such university committees. A critical issue are consent forms and how to secure consent from elders and other informers within the community. Consent, as we interpret it, is a process that is not sufficiently adhered to by the signature on a consent form. Rather, as described in AIATSIS' (2000) *Principles of Ethical Research*, "research projects should be staged to allow continuing opportunities for consideration of the research by the community" (AIATSIS 2000:2). These continuing opportunities are created by the process we suggested for the research in Attawapiskat, which is the continuing involvement of an elders group in design and execution of research, and elders' participation in the analysis of the data collected. Another issue connected to ensuring consent is the interpretation of how intellectual and cultural property rights are to be protected, respected and preserved. Protection of intellectual and cultural property rights does not necessarily mean that Aboriginal knowledge is not shared, as often interpreted by scholars. In the context of researching in Aboriginal communities it rather means that those who shared the knowledge have to be identified and properly quoted. As AIATSIS (2000) puts it, "it is a fundamental principle of research to acknowledge the sources of information and those who have contributed to the research" (3). We refer to former research experience in the community (Hookimaw-

Witt 1998 and Witt 1998), where the informers and elders asked to be identified whenever we quoted the research data, rather than just being generally acknowledged somewhere in the appendix. This stands in contrast to the usual requirement by ethical review committees at universities, to code quotes on data collected in order to protect the informant. Any guidelines set by university committees or ethics committees of other funders will have to be interpreted by researchers in Native communities in a way that they satisfy ethical considerations Native to community and culture researched. The practice of identifying the individuals and involving them in the whole research project, including the analysis, is consistent with the Geneva *Seminar on the Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People* (Daes 2000), where it was pointed out that "Indigenous peoples were the 'source' of culture, not just the carriers" (397). That is why we suggested an elders' group and its leading role in design of the research and analysis of data. For the research process and identification of research subjects this means that the researched will advise the researcher about what they consider important data to be included as *traditional ecological knowledge.* The term *heritage* is defined according to *The 2000 Revisions of the United Nations Draft Principles and Guidelines* (Wiessner & Battiste, 2000) which "allows for the inclusion of things and ideas as disparate and subject to otherwise differential legal regimes as, *inter alia*, songs, dances, works of art, ceremonies, scientific knowledge, knowledge about the use of flora and fauna, human remains, and sacred sites" (384). This explains the structure of the research we are suggesting, considering all aspects of life, not only economy. By this, our definition of *Traditional Ecological Knowledge* is linked to the definition of Aboriginal people being *the source* (Daes 2000:397) of their culture and naturally also of the knowledge researched. Thus, when the knowledge to be researched should represent the actual *tradition*, it has to be researched and analyzed from the point of view of this *source.* Control over research and analysis has to stay within the people researched in order to produce recordings of actually *traditional* knowledge, and to respect feelings and protocol on how knowledge, particularly spiritual knowledge, should be recorded.

We acknowledge that studies on how to proceed with research in Aboriginal communities have been done already (e.g. Dene Cultural Institute 1991), and much of the literature refers to those studies. Yet, we also want to establish that ethical details on how research has to proceed still have to be worked out with the community, and that protocols already worked out are to be interpreted as providing general directions to be followed, as

> a set of standards so that [Indigenous] people might be informed of research, its benefits and costs, be treated fairly and ethically in their participation in any research, and have an opportunity to benefit and gain from any research conducted among them. (Mi'kmaq College Institute, 1999)

Our following suggestion of how TEK research has to be set up and proceed in Attawapiskat therefore refers to the needs of the community to keep their self-determination, which is based on protection of traditional knowledge and way of life. We are referring to the Mi'cmaq Ethics Watch, establishing that "each community shall have knowledge and control over their own community knowledge and shall negotiate locally respecting levels of authority" (Mi'kmaq College Institute, 1999).

Despite the necessity to include TEK in an EIA, the study, like any research in a Native community, should also lead to positive community development. In this case we try to establish guidelines for the TEK study of the Attawapiskat First Nation in the context of negotiating a position for development on ancestral lands. Hence we chose the title of *Pinpinhaytosowin – the way we do things.*

Probably due to the misinterpretation of Aboriginal knowledge as being *primitive* (Posey 2000:1), control over design and execution of the study was claimed by the *developers* rather than by the ones whose land and resources are being *developed.* The underlying assumption is, as discussed by Posey (2000), that Indigenous cultures and resources have to subjugate "to the presumed more advanced and developed national cultures" (2), which are here represented by Canada (the government) and South Africa (the company).

To ensure positive community development, control has to be taken by the community. The positive community development would be that, with the use of TEK data, the Attawapiskat First Nation can define their position in the development proceeding on their land, resulting in the community's involvement in managing their own resources on their ancestral lands. On the basis of the analyzed data, the often used term of *environmental stewardship* can then be defined from an Aboriginal (here Omushkegowuk) point of view. This would be the basis of further economic and social development of the community and ensure meaningful participation in any future *development* concerning the First Nation's ancestral lands. Also, such data base has the effect that TEK will eventually be recognized as valuable contribution to knowledge on the effects changes in the natural environment will have on human life.

Some scientists have already acknowledged TEK in projects that concern Aboriginal lands. For example, Arctic ecologist Pruitt has been using Inuit, Athapaskan, Lappish and Tungus terms to make his descrip-

tions of the phenomena he researched more precise (Berkes 1993:2). And the earlier mentioned World Commission on Environment and Development (WCED 1987) stated that

> tribal and Indigenous peoples' lifestyles can offer modern societies many lessons in the management of resources in complex forest, mountain and dry land ecosystem. (WCED 1987:12)

For Attawapiskat this means that through the database to be developed, the First Nation cannot only define their own position in land management but can also contribute to environmental knowledge, here on wetland management. As it should be researched, recorded, analyzed and catalogued following both local protocol and regular academic procedures, traditional knowledge will then get the recognition and respect it deserves.

Research Methods To Be Used

The methods to be used a study concerning First Nations are based within the concept of *participatory action research* as defined by Park, Brydon-Miller, Hall & Jackson (1993). This means, as Hall summarizes it, that participatory research is "fundamentally about the right to speak" (xvii), or as Park puts it "a self-conscious way of empowering people to take effective action toward improving their lives" (1) with the researcher "participating in the struggle of the people" (9).

The *struggle of the people* would here be interpreted as getting the actual traditional knowledge recorded rather than interpreting what *mainstream* assumes traditional knowledge is.

It is unfortunate that there is a question at all of who controls research of *traditional knowledge*. The interpretation by Fowler (2000) shows, however, that in terms of researching *the other*, a colonial attitude has not disappeared yet. This attitude is described by the Mohawk scholar Marlene Brant Castellano (1986) as Native people being "conditioned to believe that they were backward and to accept the judgment of administrators, teachers, doctors, police etc." (52), which here means the judgment of the non-Native establishment the diamond company belongs to. What we want to find out, however, are "the ways the people [themselves] make sense out of their lives" (Bogdan & Biklen 1992:32).

Interview schedules have to be worked out in close cooperation with the local working group. An important factor in terms of interpreting cultural meanings is also that both researchers have done research in the community already (Hookimaw-Witt 1998 and Witt 1994 and 1998), and have knowledge of the local culture, and that one of them (Jackie) is a member of the community by birth, has grown up there and speaks the

language. Thus, concepts that are deemed important by both researchers and participants can be discussed and clarified while the interview schedules are designed.

The main research tool is the *interview schedule* with open-ended questions rather than a more structured questionnaire. This is defined as "semi-structured interviews" (Bryman & Burgess 1994:90), which give the respondents "an opportunity to develop their answers outside a structured format" (Burgess 1984:102) or, as we would define it, within their own cultural understanding. This makes the interview appear more like a conversation, a culturally appropriate research tool that was tested in the community already (Hookimaw-Witt 1998 and Witt 1994 and 1998).

Data collection tools will mainly be tapes, audio and video (or DVD), complemented by notes, and technology like Geographic Positioning system (GPS) for the land use study. If in some cases the elder interviewed insists on the traditional method (as in Hookimaw-Witt 1998) the data collector will have to memorize the conversation, as is usual in oral traditions, and has to transcribe it immediately after the conversation.

Data collectors have to speak the local language and have an understanding of both traditional life and academic methods. Notes and tapes are to be transcribed and catalogued in both languages, Cree and English. All notes and tapes have to be archived. The tapes can be used for future projects like curriculum and course developments, possibly being processed into teaching tools.

Analysis

In order to respect the way things are done in this Native community, the methods of analyzing the data must be positioned within the structures of *qualitative research* with a form of descriptive analysis as described by Bogdan & Biklen (1992:31-32). The analysis includes the search for the reasons why people answer the questions in the way they do. It will also produce data that show more depth (Bryman & Burgess 1994:91) than purely quantitative data and it allows for cultural interpretations. This is necessary for the understanding of the results by people who are based in a different cultural environment, which is particularly important for the English version of the report. Due to the nature of the interview schedules, the data (transcripts and field notes) will be grouped and indexed in descriptive categories (Bryman & Burgess 1994:91) in order to make the analysis workable. These categories can then be used for the final report. In order to represent the meanings of the recorded data correctly, the elders group will give advice on the interpretation of the data.

Geographical Areas To Be Researched

In order to represent the Traditional Knowledge of the community, eventually all the areas identified as *Attawapiskat Traditional Land Use* on the map by Keir Consultants Inc. (1994) have to be researched, not only the small part where the mine is established. The whole ecosystem is affected by the mining activities and all lands represent the traditional family lands of the Attawapiskat First Nation and thus represent the basis of the entire Traditional Ecological Knowledge of the First Nation. Different families have traditionally used different parts of the land.

Research Subjects

The study of traditional ecological knowledge has to be understood holistically. When Aboriginal environmental stewardship is based on a harmonic relationship with the environment, and any future development has to be based on that relationship (Gwich'in 2000:1), this relationship has to be understood first from all aspects of life.

Due to the special connection of land and people, and the impact this connection has on the life of the Omushkegowuk, data to be collected have to include all realms of life (social, economical, political, and spiritual). The relationship to the land is central to Omushkegowuk culture, and in order to understand any form of traditional knowledge this relationship has to be understood. Gregory Cajete (1999) explains that Aboriginal peoples transmit this relationship in every aspect of their lives. What he means by that can be understood by his interpretation of the Natives' sense of *place*, which is not only a geographical, physical place but also a spiritual place, and a place of being and understanding (Cajete 1999:4). The land is thus more than an economic basis. It defines life as a whole and is the basis for social, economic, political and spiritual development of the First Nation. Any *development* of the land therefore impacts the community as a whole and the impact of the development can only be measured by a holistic view into the matter. Also, meaningful participation of the First Nation in any development project will always refer to sustaining *the whole* rather than concentrating on a mere possible, short lived economic gain.

At this place we will include an issue which is discussed in most recent papers on research, that of **gender**, or "making research gender sensitive" (Grenier 1998:37). Researching the entity of Traditional Ecological Knowledge of course includes women as research objects and gender roles as research subjects. Our rationale is based on the Omushkegowuk traditional world view that explains the role of men and women as being complementary. This perspective goes beyond "recog-

nizing gender roles to represent different needs of men and women" (Grenier 1998:40), which will particularly be understood once we look into the economic realm of life. Leaving out women's perspectives and roles in Aboriginal life would not only lead to incomplete data concerning the needs of women but also to confusing data concerning needs and their satisfaction within the whole community. This is so because a complete process in any realm of life can only be reflected when both parts of the process, the female and the male, are considered.

(a) The emotional/social realm

The land and the observation of life on it have always defined social structure, relations, and behaviour of the people who live on it. Part of the data on Traditional Ecological Knowledge to be researched therefore has to explain the social aspect of land use, which goes beyond a mere *Social Impact Study* that the company meanwhile initiated without the input of the elders in the working group. This includes questions on health (medicines, the development of diabetes and similar *new* illnesses, mapping of medical plants Native to the geographical area), recreation (and mental health), social structure, the purpose of division of labour and gender roles on the land, education, (with camps and land use as educational means to socialize children), child rearing, awareness and understanding of social organization (in reference to what is observed in the environment). Any losses due to *development* of ancestral land will have to also consider losses, and expenses who make up for those losses, in the social realm.

(b) The physical/economic realm

Although the economic sector is usually taken as the mere basis for compensation of possible loss due to *development,* it also is usually not represented from an Aboriginal point of view. In order to understand Aboriginal sustainable economy, all aspects of it, the purpose of economic activity with division of labour, and the role both genders play have to be understood. That means that a definition of *economy* cannot be based on mainstream understanding of it with definitions of *private* and *public* sectors, which usually leave out the women's contribution, as is discussed by Ouellette (2002:15-27). Also, understanding the Aboriginal worldview one has to consider that food is not the only commodity harvested from the land. The study for the purpose of calculating compensation (Wilkinson 2000) included neither women nor all actual land users, nor did it survey any other commodities than food. Furthermore, the only food identified in that survey was meat and fish.

As women's and men's work in this sector complement each other and are equally important, gender roles and their meaning for economy and sustainability will have to be researched and analyzed, as well as all possible commodities that can be harvested from the land. The exclusion of the women's part in economic activities does not only give a wrong picture but would be nonsensical because of the complementary nature of women's and men's work. For example, when losses in food assets are calculated, one has to consider that geese, fish and mammals do not represent the only part of the diet. Plants, roots and fruit (berries) are also harvested, as well as small mammals (like rabbits), and birds that are snared (like grouse). This contribution to the diet is traditionally women's work. Furthermore, animals can only be identified as food after they were processed into food, which, of course, adds value to the product by the work that went into it. Women are the ones processing the kill into food and other necessities of life. The gathering and use of medicine plants, usually also within the women's responsibility, can state an enormous economic factor considering the price for the pharmaceutical products that now replace them. Parts of the animals are still processed into tools (e.g. bones for scrapers), clothing (hides into dresses, mittens, moccasins) and other crafts, blankets (rabbit skin, goose downs) and other commodities. Particularly the crafts, done by women, represent enormous economic value that was not considered by Wilkinson (2000). Another economic factor that was left out by the last study was that wood is harvested for fuel (firewood), making tools (e.g. handles for axes, snowshoes), and crafts (e.g. tamaracks). A TEK study therefore looks into gender roles and the resulting division of labour as well as all aspects of economic land use in order to grasp the entity of economic activity and value.

(c) The mental/political realm

As it was deducted from observation of nature, the traditional political organization of the First Nation is part of traditional ecological knowledge and has to be researched in a TEK study. We mentioned the individual's role as empowered guardian of the land already. As Attawapiskat women and men work together on the land within the family, it is particularly important to understand the women's role in political decision making in traditional society, which, of course, is still detectable in so-called *modern* society but is neither understood nor is it considered in most political activities concerning *modern* First Nations. Although it is true that "economic activities..., such as hunting, fell primarily into the male sphere of decision making" (Archibald & Crnkovich 1999:10), hunting is by far not the only nor is it the predominant of the

"economic activities related to the lands and resources" (ibid). The resulting conclusion that therefore men are the ones to have knowledge of and responsibility over land and resources and are the sole decision makers in this area may have led to an incomplete understanding resulting in the wrong definition of traditional knowledge being unscientific. The actual *science* in traditional land management cannot be grasped on the basis of one activity alone, like hunting, no matter what society is looked into. The term *egalitarian society*, as discussed by Stasilius & Jappan (1995:102) has to be understood as the previously mentioned complementary character of male and female responsibilities. You have to understand both in order to get a picture of the whole. The definition of concepts like *land ownership, sustainability, land use and management, wetland management*, to be researched in a TEK study project, have to be deducted from both male and female responsibilities and knowledge. Only after collecting the data on that basis can we concern ourselves if "Traditional Knowledge contradicts accepted scientific findings and practices" (Fowler 2000), if it contradicts it at all when *science* is defined on the basis of environmental science rather than economy. Nevertheless, the data have to be collected first, and, in order to be complete, the survey has to include both male and female knowledge.

(d) The spiritual/cultural realm

It is widely understood that sacred places on the land are to be handled with particular care. In the Christian understanding, for example, burial grounds are to be exempted from economic *development* or, when it is unavoidable, are to be moved observing special care of ceremonies. Nevertheless, hunters of the Attawapiskat First Nation spotted claim posts on graves in an old Christian cemetery at the Attawapiskat River. This act of disrespect alone would warrant a mapping of sacred places, which was partially done by Keir Consultant Inc. (1994) already, identifying burial grounds on the ancestral lands of the Attawapiskat First Nation. Taking this map as a basis, the TEK project has to complement or complete the mapping of sacred places, which will include certain land formations and bodies of water with certain spiritual meanings to the people who live on the land. The spirituality of people has to be respected, and might just be similar to environmental science interpretations to land use and management.

Although almost everybody in Attawapiskat can be counted as being Christian (Roman Catholic or Pentecost), traditional spiritual practices, believes and definitions in connection to land use are still very wide spread and are used to explain practices of land management, particularly in connection with activities on the land. Spirituality is the basis of

awareness for land management. How land is managed in order to sustain the following seven generations, how much game can be harvested, how trees and other plants are managed, how water is managed in order to sustain the environment is traditionally explained through spirituality. In order to assess traditional knowledge as being scientific or not, traditional spirituality and the spiritual understanding of life and environment have to be understood. A lot of explanations on *sustainability* as explained by environmental science have their traditional origins in the spiritual understanding of the cosmos. The explanations might be different, yet, the resulting assessment if the environment will keep its sustainability or not will be the same no matter if assessments originate in traditional spirituality or modern environmental science. The recording and analyzing of traditional spiritual knowledge is then the basis for assessing commonalties between *western* (scientific) and traditional knowledge and interpretations. Therefore, spirituality connected to the land has to be researched and recorded if one tries to understand and interpret Aboriginal science. The *mapping* of spirituality in traditional ecological knowledge of the Attawapiskat First Nation goes beyond geographical sites and formations and has to include explanations of practices in land management that ensure *sustainability*. However, ceremonies cannot be not discussed, and those parts of spirituality and knowledge considered *protected* by local people can only be recorded in the way researchers are advised by the elders or not be recorded at all.

Data Ownership, Use and Access

As "research in Indigenous studies should benefit Indigenous peoples at the local level and more generally" (AIATSIS 2000:3), control of the data should stay with the local participants. TEK is proprietary data. The data are owned by the First Nation. All participants in the study (researchers, respondents, research assistants) should be able to access the data from the archives of the Band. The data can be used as basis for further development in detailed research of the political system, for curriculum development and as explanation for the economic basis and ecological capacity building.

Conclusions

With the reference to capacity building we want to conclude this paper, indicating the core of our opinion why we consider TEK studies so important. TEK is more than collecting data, which can be shelved afterwards. It is not some abstract entity to be analyzed to death. Tradi-

tional Ecological Knowledge is even more than what the concept *knowledge* would stand for. It is a living organism or, in the words of the Aboriginal author of this article, "it is our life." And thus, TEK has its own right to exist, which does neither depend on justification by academic discourse nor on whether it is deemed a necessary process for environmental impact assessment by a federal act. TEK is also the basis for self-determination of the First Nation because it expresses their worldview. In Attawapiskat it is the only possibility to have input in the management of the lands where *development* has already started. Thus TEK becomes particularly important when the two different worldviews of mainstream and the First Nation collide over the different interest of management and protection of Aboriginal lands. TEK then becomes the basis the First Nation operates from, the definitions on which the First Nation explains its position. Referring to our statements, TEKs can become important for the survival of the planet or can at least be seen as the First Nations' contribution to land management practices. As the land is the basis for the life of the First Nation and its unique culture, loss of the land due to development will necessarily result in the loss of culture. Culture can only be protected when the people who practice their culture have input in how to manage its basis, the land. And for this, a TEK study is needed. In order to really protect *Indigenous Knowledge* within mainstream context, TEK data have to be collected, recorded and analyzed.

For the purpose of getting accurate data and analysis, certain rules for ensuring that *Traditional Ecological Knowledge* actually represents *the traditional* and is not used as justification for western development, collection, recording and analysis of data have to follow *pinpinayhaytosowin,* the rules of engagement the First Nation (which are all its members) sets for the research. Then TEK, as the basis of how the First Nation defines itself, becomes a powerful tool for self-determination and the basis for capacity building in dealing with *the other*.

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INDIVIDUAL PROPERTY RIGHTS ON CANADIAN INDIAN RESERVES: THE HISTORICAL EMERGENCE AND JURISPRUDENCE OF CERTIFICATES OF POSSESSION

Christopher Alcantara
Department of Political Science
University of Toronto
Sidney Smith Hall
100 St. George Street
Toronto, Ontario
Canada, M5S 3G3

Abstract / Résumé

One common misconception is that Indian reserves in Canada do not have individual private property. This is simply not the case, as several different individual private property regimes exist on First Nation territories. The most common type is the Certificate of Possession system, which allows individual Indians to obtain ownership of a tract of reserve land for the purpose of building a house, constructing a business, or exploiting its resources. This paper traces the history of individual private property rights on reserves in Canada and surveys the relevant legislation and caselaw in order to shed some light on the nature of Certificates of Possession.

Une idée fausse assez répandue veut que les résidents d'une réserve indienne ne jouissent pas de droits de propriété individuels au Canada. Ce n'est tout simplement pas le cas, étant donné que les territoires des Premières Nations possèdent divers régimes de propriété privée. Le régime le plus courant est celui des certificats de possession qui permet aux particuliers d'obtenir la propriété d'un lopin de terre sur la réserve afin de bâtir une résidence ou d'exploiter une entreprise ou des ressources. La présente communication présente l'histoire des droits de propriété privée individuels dans les réserves canadiennes, ainsi que les mesures législatives et la jurisprudence pertinentes, afin de jeter de la lumière sur la nature des certificats de possession.

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Recently there have been several books published on how private property rights have been used to improve the standard of living in impoverished regions throughout the world. In *Property and Freedom,* Richard Pipes observed that

> As the twentieth century draws to a close, the benefits of private ownership for both liberty and prosperity are acknowledged as they had not been in nearly two hundred years. Except for a few isolated oases of self-perpetuating poverty, such as North Korea and Cuba, where Communists manage to hang on to power, and except for the minds of a still sizable but dwindling number of academics, the ideal of common ownership is everywhere in retreat. Since the 1980s, "privatization" has been sweeping the world at an ever-accelerating pace. Thus Aristotle has triumphed over Plato. (Pipes 1999, 63)

Peruvian Hernando de Soto concurs, arguing in his book, *The Mystery of Capital,* that Latin American countries are poor not because they lack capital or resources, but because they lack a formal system of private property law. Functional and stable systems of private property allow people to use their assets such as houses and businesses to generate capital for investment and expansion (De Soto 2000, 6). Political Scientist Terry Anderson has looked at how private property institutions have helped to alleviate some of the social and economic problems of Indian communities in the United States. In his book *Sovereign Nations or Reservations,* he compares Indian fee simple ownership to communal ownership regimes and finds that private ownership of land has been far more effective in terms of agricultural productivity and profitability (Anderson 1995, 121, 133-134). Communal institutions restrain Aboriginal Peoples from developing self-sustainable economies (Anderson 1995, xi-xii, xvi, 19-20). Canadian Political Scientist Tom Flanagan believes that the free market system is the best way for raising the standard of living on reserves, and "inducing self-interested individuals to serve the needs of others" (Flanagan 2000, 9). Moreover, the improvement of existing Indian property rights would help solve many of the social and economic problems that exist on reserves throughout Canada (Flanagan 2000, 131).

Interestingly, Indigenous scholars have on the most part been silent about private property rights. Rather, they have focused their efforts on Aboriginal title, treaty rights, the right to self-government, the right to self-determination, Aboriginal sovereignty, and cultural survival rather than on private property rights. Thus, non-Indigenous scholars have dominated private property scholarship. Even then, the number of schol-

ars dealing with this issue is comparatively quite low (see Flanagan 2000, Flanagan and Alcantara 2004, Anderson 1995, Anderson 1992, Notzke 1985, Hickerson 1967).

In Canada, there are four types of property rights regimes in operation on reserves – customary rights, the independent land codes developed under the recently passed First Nations Land Management Act, leases, and Certificates of Possession (CPs) (see Flanagan and Alcantara 2002). The most prevalent regime is the certificate of possession system, which replaced its predecessor, the location ticket system, in 1951. According to the Department of Indian Affairs, approximately 10,059 Location Tickets (the predecessor of the CP) and 145,000 CPs have been issued to individuals on 301 reserves since 1888 (Guest and Gros-Louis 2001, Payne 2002). A CP is the evidence of an individual band member's lawful possession of an individual tract of reserve land. In order for an individual Indian to acquire a CP, the band council must allot the land to the applicant and the Minister of Indian Affairs must approve the allotment. Only band members can hold a CP. Although the CP holder gains similar property rights to an off-reserve resident, there are several important differences. The ability to transfer possession, the legality of wills, the right to an equitable division of property after divorce, the power to lease, and the ability to use property as equity are different from off-reserve practices. As well, Indian private property rights are subject to the exclusive power of Parliament, and to the discretionary will of the Minister of Indian Affairs.

This research is important for several reasons. Individual title to land is important to the economic well being of a person. Security of title gives an individual the ability to build a home or use land for a business. At present, there is very little literature on the Indian individual property rights. Academics, public policy makers, and the wider public are unaware of the different private property regimes that do exist on reserves. The common assumption is that all Indian land is communal land. This is not the case. Indian reserves have a sophisticated land tenure system that has both positive and negative consequences for both the band and their individual members. Understanding how these regimes work is important in helping to come to a solution to the many problems afflicting Indian communities. Interestingly enough, there has been very little communication regarding private property regimes amongst bands themselves. Only in the last 5 years have associations such as the Ontario Aboriginal Lands Association, the British Columbia Aboriginal Land Managers Association, and the National Aboriginal Land Managers Association, been formed to facilitate an exchanging of ideas among land managers regionally and nationally. Amazingly, several bands in Manitoba

have not even heard of CPs (Martin and Martin 2002, Wilgress 2002). Thus this research will help provide the important information for policy makers and practitioners to use to improve the system. Moreover, in light of Minister of Indian Affairs Robert Nault's recent attempt to amend the government provisions of the Indian Act, such research is important in helping bureaucrats evaluate and possibly reform the relevant sections of the Indian Act pertaining to private property. As stated before, the CP system is the prevalent property right system in operation on reserves in Canada. Bands across Canada are in the process of, or have already subdivided their territories to individual band members using CPs. For instance, the government at Cowichan Tribes, B.C. is in the process of subdividing much of its customary held land by CP to its members (Sullivan 2002). In contrast, both Westbank First Nation near Kelowna, B.C., and Six Nations in Ontario, have already allotted almost all of their territories to individual members using CPs (Vanderburg 2002, Martin and Martin 2002). This research will help inform the public, academics and bureaucrats in Canada about land tenure on reserves, will aid policy makers in their decisions to improve or delete the current CP system, and may help spur further research on this important topic.

Since there is very little literature on this subject, one way to understand how CPs work is to look at the legislation and the case law. Therefore, this paper describes the history of Indian private property and CPs in Canada, examines what the Indian Act says about CPs, and finally, looks at how the courts have decided cases involving CPs. Through this method of analysis, one can get a sense of how CPs operate on Canadian Indian reserves. However, further work on how CPs and other property right regimes operate on reserves is needed.[1] The author hopes that this piece will help spur other scholars to study the usefulness of private property regimes in helping improve the standard of living for Indigenous Peoples throughout the world.

A History of British and Canadian Indian Policy in North America

Pre-Confederation: Protectionism

Formal Indian administration in North America originated in the late 17th century when the Thirteen Colonies appointed Indian commissioners to regulate the fur trade and suppress liquor traffic among Indian peoples (Tutley 1986, 1). Both British and French Indian policies were based on two interdependent precepts: fostering good relations with Indigenous nations, and protecting Indian peoples and their land from European encroachment. For the British, the Iroquois and the other Indian nations were key allies against the French. The British feared that if

they did not maintain a friendly relationship with Indian peoples, that they would ally with their enemy, the French. As such, the British colonial office conducted relations with Indian nations on a nation-to-nation basis, regularly giving them gifts, entering into formal alliances with them, and preventing European settlers from encroaching upon their land (Tobias 1983, 40). French Indian policy in Lower Canada was based on three objectives: christianizing Indian peoples using missionaries, the pursuit of military alliances, and the fostering of trade (Henderson 1980, 2). In 1759, the British captured Montreal, thus ending French control in Lower Canada. The fall of Montreal was the end of the direct influence of France in North America and marked the ascendancy of British dominance in European relations with Indian nations in the new world.

British policy, even after the defeat of the French, revolved around maintaining good relations and military alliances with the Indian nations, as well as protecting them and their land from European encroachment. In the 1760 Articles of Capitulation signed by both the British and French after the fall of Montreal, article XL stated "[t]he Savages or Indian allies of his most Christian Majesty, shall be maintained in the Lands they inhabit; if they choose to remain there" (Henderson 1980, 2-3). The Royal Proclamation of 1763 was a major relations building policy aimed specifically at ensuring that the Indian nations remained loyal allies to the Crown. It had two main points relevant to Indian nations. First, all the land not held or settled by the European colonies, as well as the land within the territory of the Hudson's Bay Company, were reserved for Indian peoples as their hunting grounds. Second, such lands could not be purchased, settled on, nor trespassed on without special permission from the Crown. A colonial citizen could only acquire Indian land if the Crown purchased it from an Indian first (Owens 2000, 5, Tutley 1986, 2, Henderson 1980, 6). One major problem with the Royal Proclamation was that possession actually meant "occupation" rather than "ownership." Furthermore, the designation of lands as Indian "hunting grounds" was a tenuous legal designation. The concept of fee simple ownership (complete ownership of the land forever) in British common law was tied to European concepts of land usage such as farming (Carter 1990, 18-29). In the eyes of Europeans, Indian peoples did not hold their lands under fee simple ownership, since hunting was not a legitimate use of the land. Thus, the Royal Proclamation was merely an excuse for the British government and colonials to acquire Indian land under the auspice of fair market transactions sanctioned under the legal authority of the Crown. Nonetheless, the Royal Proclamation was an attempt by the British Crown to fulfill its interrelated dual policy of maintaining good relations with Indian nations, and protecting them and their land from

European encroachment. The war of 1812, however, would be a major turning point, both in fact and in practice, in the relationship between British and Indian nations.

After the British victory over the new American state in the war of 1812, the British Crown began to question the need for its military alliances with the Indian nations (see Benn 1998). The British had defeated both the French in Lower Canada and the Americans to the south, and it seemed that the threat of military invasion was now non-existent. Thus, the British government allowed military alliances to elapse, and discontinued their policy of annual gift giving to Indian nations. After 1812, British Indian policy gradually moved from protectionism and nation-to-nation relations to a policy of protectionism and civilization (Tobias 1983, 40, Tutley 1986, 2-3).

A Shift in Policy: Protectionism, Civilization and the Emergence of the Idea of Indian Private Property

John Locke's *Second Treatise of Government* was the philosophical origin of western notions of private property and the benefits that derived from such rights. John Locke's conception of private property was very influential both in Europe and in the New World among colonials and government officials. For Locke, "every man has a property in his person" and thus everyone has a property in their labour (Locke 1989, para 27). Therefore, everyone had a right to property in what they mix their labour with (Locke 1989, para 27). Locke eventually used these three premises to justify a capitalist market economy of unequal possession of the earth (Locke 1989, para 50). Scholars such as Alice Kehoe believe that Locke's ideas laid the foundation for notions of western superiority and private property rights for Indians in Canada (Kehoe 2001).

Building upon the ideas of Locke, the general belief among colonials living in the Canadas was that individual ownership of land was the key to civilizing Indigenous peoples. Private property would help Indigenous peoples focus "their hopes, interests and ambitions. Lacking a fixed abode, they could have no notion of a proper family life" (Carter 1990, 17). One of the first sources of this civilization policy was from the work of the new world missionaries (Dickason 1997, 199). Missionaries believed that the Indians needed God and a western education to help them grow as a people. They taught the Indians agriculture, religion, the ability to read/write/speak French and English (Tobias 1983, 40, Carter 1990, 17). One missionary believed that private property would help quell the violent tendencies of Indian peoples (Carter 1990, 17). This was a belief shared by a lot of the colonials. According to Sarah Carter,

> Most Canadians believed that private ownership of prop-

> erty and possession would put an end to Indian warfare, which was viewed as an irrational, bloodthirsty sport, perpetuated endlessly because the Indians had little property to lose. (Carter 1990, 17)

Government officials saw agriculture and private property as necessary elements for Indian peoples to climb the steps out of savagery towards civilization. It is out of this context, rooted in Locke and an ignorance of Indian conceptions of private property, that the notion of individual ownership of land began to enter into colonial government policy towards Indian peoples in North America.

Indian peoples in North America did not have exactly the same understanding of property ownership that Europeans had. According to Julian Stewart,

> All natural resources, with the sole exception of privately owned eagle nests, were free to any one. This was not communal ownership; it was not ownership at all, because no groups whatever [sic] claimed natural resources. Water, seed, and hunting areas, mineral and salt deposits, etc., were freely utilized by anyone. (Anderson 1995, 32)

Notwithstanding Stewart's argument, Indian peoples did exercise joint rights and jurisdiction over their land. Jurisdiction included the right to exclude people from entering one's land and the right to recognize family or clan hereditary rights to land (Bell and Asch 1998, 68-69). These rights were respected and recognized by other Indigenous nations. Moreover, according to Michael Asch and Norman Zlotkin, Indian peoples believed one could not sell or give away land. Rather, land was shared with others (Asch and Zlotkin 1998, 216-217). Nonetheless, Indian peoples in North America did have notions of private property. According to James Huffman, Indian peoples understood and employed the concept of tenancy in common (Anderson 1995, 31). The Mahican Indians in the Northeast recognized the hereditary rights of families to tracts of land along rivers. The Havasupai and the Hopi recognized private ownership of farmland based on land usage. The Montagnais-Naskapi of Quebec recognized family and clan areas (Owens 2000, 15-16). Indian peoples also recognized private property in the form of possessions. When an individual created tools such as arrows, bows, and baskets, the labourer usually gained possession over the items (Anderson 1995, 40). Europeans did not understand that Indian peoples held their land in common and that such land could not be sold; the land was merely shared with Europeans. There could be no transfer of ownership of the land. Second, Europeans did not realize that Indians did in fact have private property. Indian notions of property ownership were not inferior to Euro-

pean ones, just different. Thus, guided by these two misconceptions regarding Indian understandings of property ownership, colonials developed harmful and misguided attitudes about the inferiority of Indian peoples and superiority of European property rights.

After 1812, Indian nations became an obstacle to British colonial expansion in the new world. Now that they were no longer useful as British allies, government officials had to wrestle with what to do with the newly adopted Indian British subjects who happened to own most of the land in Canada. The British colonial office believed that civilizing the Indians in the ways of European life, culture, and religion would solve the Indian problem. During the 1830s, the modern reserve system was born. Part of the civilization process was to move Indian groups off of their resource rich lands, and onto isolated reserves far away from British colonies where missionaries and government officials could teach them the European way of life (Tobias 1983, 41). British Indian policy, based on notions of greed for Indian land and a misguided notion of good will, moved from protectionism to a mixed policy of protectionism and civilization. The emergence of this new policy brought the notion of Indian private property rights into the government decision making.

One of the most important pre-Confederation government reports on Indians and property rights was the Bagot Commission (1842-1844) (Dickason 1997, 222). The Bagot Commission reaffirmed the Royal Proclamation's protection of Indian possession of land, called for the centralization of Indian administration, and recommended their education and conversation to Christianity. More importantly, the Commission "recommended that Indians be encouraged to adopt individual ownership of plots of land under a special Indian land registry system" (Canada 1996, 268). The commissioners believed that the government should encourage Indians to buy and sell land amongst themselves. The hope was that this type of market interaction using private property would promote the spirit of free enterprise and help them learn about the European land tenure system. The Commission also recommended Indian adoption of individual title to discourage White squatters (Canada 1996, 268, Henderson 1980, 12). Indians were described as "an untaught, unwary race among a population ready and able to take every advantage of them" (Dickason 1997, 222). In essence, the Bagot Commission set out some of the basic principles of the present Certificate of Possession system. It recommended that the government grant private property ownership of land to individual Indians, introduce a land registry system, and restrict the ability of Indians to transfer their land only to other Indians (Canada 1996, 268). Although the Bagot Commission's recommendations regarding individual property rights were not adopted until

several decades later, bands on reserves did have the power to parcel out land to individuals. Allotment of such land, however, had no legal recognition in the eyes of the Crown.

As mentioned earlier, the British in the 1830s had experimented with a reserve system for the express purpose of "civilizing" Indian peoples. As the British government and colonial subjects through the Crown purchased land from Indians, they were moved onto isolated reserves far away from White settlements. They were given a right of occupation to the land with legal title still in the hands of the Crown. These reserves however "failed to civilize" their inhabitants effectively and quickly enough. They did not adapt well to farming nor were the colonial government officials satisfied with the speed at which Indian peoples were picking up the English language. Moreover, most of the Indian peoples did not convert to Christianity nor did they abandon their traditions in favour of European ones. Thus, in 1850, the British government decided to move reserves closer to White settlements, based on past experiences in which Indian groups which had lived close to colonial villages had achieved civilization in a reasonable amount of time (Tobias 1983, 41-42). One result of this move however, was the increase in White settler encroachment and squatters on Indian reserves. In response to this problem, both Upper and Lower Canadas both passed Indian land legislation in 1850. There were four main provisions in the legislation. First, the legislation made it an offense for non-Indians to enter into transactions with Indians for Indian land. Second, trespassing on Indian land was illegal. Third, Indian land was exempt from both taxation and legal seizure for debts. Lastly, the notion of race became a determining factor in the classification of an individual as an "Indian" (Canada 1996, 269). The 1850 Acts were important in two ways. First, colonials were not obeying the Royal Proclamation; thus the colonial governments felt it was necessary to reaffirm the status of Indian peoples as subjects of the state with the right of protection from the Crown. Second, the exemption from taxation and legal seizure for debts, which were meant to protect Indian peoples from potential abuse by White colonials, became a consistent policy in subsequent Indian legislation.

Another Shift in Policy: Protectionism, Civilization, and Assimilation

In 1857, the Gradual Civilization Act made the colonial government's practice of moving reserves closer to White settlements official government policy and created a process for enfranchisement (losing Indian status) tied to the acquisition of private property. In the past, Indian settlements close to colonial settlements adapted the European lifestyle faster and easier than isolated Indian settlements (Milloy 1983, 58). In terms of

enfranchisement, any Indian who was judged to be of good moral character, free of debt, and could read and write English would be granted enfranchisement (Place 1981, 3). Enfranchised Indians, having passed a three year probationary period, would receive a life estate allotment of up to 50 acres of tribal land in which after the individual's death, the land would pass to his/her heirs in fee simple ownership. Enfranchised Indians would lose any title to the tribe's communal property and the enfranchised individual's land would now be subject to taxation and legal seizure. An enfranchised Indian however, could sell his land to anyone, including non-Indians (Hall et al. 1988, 451, Tobias 1983, 42). In other words, Crown-recognized individual property rights was supposed to be an important vehicle in the enfranchisement of individual Indians. It was first an incentive for individual Indians to enfranchise, and second an important step towards integrating Indians into the growing colonial community.

The Indian response in the 1860s however, was a rejection of the enfranchisement process. Indian leaders were successful in convincing their peoples not to enfranchise. What irked them the most was the fact that enfranchised Indians were given *tribal* land. Indigenous peoples were not opposed to civilization *per se*, which they defined as a revitalization of their traditional culture within an agricultural context, but they were opposed to losing their land and any measures that attacked their notions of communal property and culture (Hall et al. 1988, 452). From 1857 to the 1876 Indian Act, only one Indian, Elias Hill, applied for and was granted enfranchisement. Due to Indian opposition to Hill's enfranchisement however, he was not granted any land; rather, he was given a cash settlement six times less than the actual value of the land (Canada 1996, 46-48, Hall et al. 1988, 452).

The primary objective of the British government for most of this pre-Confederation period was to maintain good relations with Indian nations while at the same time protecting them from White settler encroachment and abuse. After the war of 1812, British policy shifted to a mixture of protectionism and civilization. Individual property rights, which had been advocated by missionaries and other colonials as a possible solution to the Indian problem, started to gain official government attention with the publication of the Bagot Commission's recommendations in 1844. The Gradual Civilization Act of 1857 marked the beginning of a new policy of assimilation. Overall, four important developments in Indian property occurred during British dominance in Canada. First, Indian lands were recognized as being held in common by Indigenous peoples. Second, Individual Indians could gain individual allotments for themselves or Indigenous chiefs could grant them individual allotments. Such

allotments, however, were not legally recognized by the Crown. Third, Indian lands were exempt from taxation and legal seizure for debts, and Indians were not allowed to sell their land to non-Indians. Lastly, the reserve system was a social policy; the intent was for Indians to eventually develop individual common law estates in reserve land and eventually assimilate into mainstream society (Henderson 1980, 15-16). The ground work for instituting private property rights for Indian peoples in Canada was laid out by the British government prior to Confederation. After Confederation, the new Canadian state instituted a system of private property for Indians founded on these past policies.

Canadian Indian Policy: The Origins of Certificates of Possession

In 1867, the British Parliament passed the British North America Act (BNA Act), uniting Lower Canada, Upper Canada and the Maritime provinces into the Dominion of Canada. The BNA act was Canada's Constitution, setting out the division of powers between the federal government and the provinces, as well as setting up the institutions of governance for Canada. With respect to Indian peoples, section 91 (24) granted the legislative Parliament of Canada authority over "Indians, and Lands reserved for Indians" (Imai 1997, 189). The federal government through section 91 (24) had exclusive and extensive control over Aboriginal rights and, up until the *Delgamuukw* Supreme Court ruling in 1997, also had the unilateral power to extinguish those rights (Imai 1997, 189).

In 1869, Parliament made its first foray into Indian policy with the passage of the Gradual Enfranchisement Act (GEA). Under the GEA, the amount of land that an enfranchised Indian received was undefined rather than the maximum 50 acres under the British government. Also, lawful possession of individual tracts of land was only recognized if the Governor-in-Council granted a location ticket. Land held under a location ticket gave the individual Indian lawful possession of the land, an exemption from taxes/legal seizure, limited the transferability to non-Indians, and allowed for the ticket to pass to a heir(s) upon death (Hall et al. 1988, 481). The Honourable Mr. Langevin called upon Parliament to pass the GEA because Indians could now be entrusted with "White man's privileges" (Canadian Parliament 1869, 83). The GEA would further the goal of educating Indians in good conduct and in the White man's ways with the eventual goal of the enfranchisement of all Indigenous peoples with fee simple property rights (Canadian Parliament 1869, 83). The Act was important because the location ticket scheme was the predecessor of the Certificate of Possession system found in the 1951 Indian Act.

The most important piece of Indian legislation in Canada is the 1876

Indian Act. The Indian Act was a consolidation of previous colonial Indian legislation into one Act, with power over Indians centred in the Superintendent General of Indian Affairs. During the House of Commons debates over the Indian Act, Members of Parliament believed that the purpose of the Indian Act was to raise the Indians "to the place of manhood" (Canadian Parliament 1876, 751) and to "lift the red man...out of his condition of tutelage and dependency" (Canadian Parliament 1876, 1038). According to another Member of Parliament, the government should move the Indians onto resource depleted reserves, give them a sense of ownership of the reserve land, but keep them under the plenary power of Parliament. "As soon as they [Indians] knew exactly what they possessed, they would look for enfranchisement" (Canadian Parliament 1876, 1038). In 1873, Minister of Interior Laird stated that "the great aim of the Government should be to give each Indian his individual property as soon as possible" (Canadian Parliament 1873, A1879). Laird also saw private property as a means of ending Indian dependence on hand outs, which he believed was rooted in their communal life style.

> The Indian who makes a laudable effort to provide for the support of his family, seeing that his stores often have to go to feed his starving brethren, then loses heart himself, and drops down to the level of the precarious hand-to-mouth system of the Band generally. (Christensen 2000, 349)

Thus, with these purposes in mind, Laird introduced the location ticket system for Indians living on reserves.

The location ticket system can be found in sections 5-10 of the 1876 Indian Act. It was a loose system of property rights for Indigenous peoples on reserves. Section 5 allowed the Superintendent General to subdivide reserve land into individual lots. Section 6 stated that an individual Indian could only gain lawful possession of land if both the band and the Superintendent General consented. Section 7 stated that after an allotment is approved, the applicant should be issued a location ticket granting title of the land to the individual. Section 8 protected lands held under a location ticket from legal seizure, and restricted the ability to transfer title to land to another Indian of the same band, subject to band approval. Section 9 allowed for land to be transferred to a widow and children. If no heirs nearer then a cousin were eligible, than the land became Crown land to be managed for the benefit of the band. Section 10 provided for any non-treaty Indian in the west and north who made improvements on their lands prior to the lands becoming reserve lands, to enjoy location ticket rights and privileges (Department of Indian Affairs and Northern Development 1981, 16). Moreover, Indians could gain fee simple interest in the land by enfranchising. Under section 86, an

Indian could apply for enfranchisement by demonstrating to the Superintendent General that he had "attained a character for integrity, morality, and sobriety" (Department of Indian Affairs and Northern Development 1981, 27). After a 3 year probationary period in which applicant demonstrated that he would use the land as a European would, the applicant would be enfranchised and gain fee simple interest in the allotted land. In essence, the 1876 Indian Act created two systems of land holding. Under the first, non-enfranchised Indians could hold lawful possession (life estate) of reserve land allotted to him by the band council with a location ticket issued by the Superintendent General. Under the second system, enfranchised Indians under sections 86 and 88, could gain a fee simple interest to reserve land; upon death, the land went to his children in fee simple (Department of Indian Affairs and Northern Development 1981, Place 1981, 6).

Between 1876 and 1951, very little changed in terms of individual property rights in Canadian legislation. In 1890, the Canadian government introduced Certificates of Occupation (COs) for the western Indian tribes. COs were introduced as a system of private property for the less advanced western Indian tribes in Manitoba, Keewatin, and western territories. Under a CO, lawful possession of up to 160 acres could be granted to each family head. The CO however, could be cancelled any time by the Superintendent General of Indian Affairs (Hall et al. 1988, 483). In 1919, the Deputy Superintendent General gained the power to grant location tickets to returning Indian war veterans without band consent (Canada 1996, 283). In 1927, Parliament passed legislation which stated that if an individual Indian made permanent improvements on reserve land, then he must receive compensation if he is lawfully removed from the reserve.

The 1951 Indian Act: The Current Certificate of Possession System

In 1951, the Department of Indian Affairs introduced the CPs to replace location tickets. According to the Superintendent General of Indian Affairs W.E. Harris, the location ticket system was unsatisfactory. Amendments to the Indian Act were needed as the Indian population were growing rapidly, getting wealthier, had "pulled [their] weight in two world wars," and were now an indispensable part of the community (Canadian Parliament 1951, 1353, 1355). Minister of Interior Bruce agreed, stating that "[t]he Indian is our brother" and Canada's relationship with them had to be modified (Canadian Parliament 1951, 1355). One of Minister Bruce's main goals in the 1951 Indian Act was to introduce a more

comprehensive and expanded system of private property that would eventually allow for the permanent integration of Indians into Canadian society. During debate, the Minister stated that

> The underlying purpose of Indian administration has been to prepare the Indian for full citizenship with the same rights and responsibilities as those enjoyed and accepted by other members of the community.... The ultimate goal of our Indian policy is the integration of the Indian into the general life and economy of the country. (Canadian Parliament 1951, 1356)

The Certificates of Possession System in the 1951 Indian Act was a major step towards fulfilling that goal.

In Canadian law, there are two main types of private property ownership. *Estate in fee simple* is the highest interest in land an individual can hold. Fee simple ownership means that the individual "has the land forever and has full freedom to sell it to someone else" (Henderson 1978, 9). The individual can grant the land to anyone in a will and has absolute and exclusive use of the land forever. The second type of ownership is a *life estate* in the land. Under a life estate, the individual owns the land only as long as he lives. Due to the temporary nature of ownership, the individual cannot sell or transfer the land. Also, the individual cannot designate the land to someone else in the event of his death and he cannot exploit the natural resources of the land (Henderson 1978, 9). The individual however, does enjoy all of the other benefits of individual ownership, including the right to construct a house or other buildings on the land.

The CP system gives individual Indians living on reserves property rights that fall somewhere between fee simple and life estate interests. Underlying legal title to reserve land still resides in the Crown, as reserves are set aside by the Crown for the use and benefit of First Nations (Department of Indian Affairs and Northern Development 1995, Directive 02-01, 1). However, individual Indians are able to gain lawful possession to an individual allotment of land through a CP. To obtain a CP, the council must first pass a band council resolution (BCR) allotting the land to the applicant. The BCR must list the name of the band member(s) acquiring the land, a proper description of the land, and the signatures of a quorum of band council members. Next, the application is sent to the Minister of Indian Affairs for approval (Cadieux 1989, 1-2). If the paperwork is in order, the Minister issues a Certificate of Possession (CP) to the band, which forwards it to the individual member. Lastly, the CP is registered in the Indian Lands Registry in Ottawa.

So what does lawful possession under a CP actually mean in terms

of *de facto* property rights for Indigenous people on reserves? In terms of practical application, there has been very little research done on the topic. The 1951 Indian Act lists some of the important rights that an Indian receives under a CP. It does not, however, specify whether an Indian who has been issued a CP has a fee simple interest or a life estate interest in the land. Rather, a CP recognizes that the individual Indian (who must also be a band member of the First Nation which he has been allotted land from) has *lawful possession* of the allotted land [section 20 (2)]. Moreover, a CP is "evidence of his [the successful applicant's] right to possession of the land described therein" and gives the holder lawful possession of the allotted land (Imai 1997, 31). It also gives the holder several important rights such as the right to build a home on the land, and the use of the land for resource extraction. CP holders can also divide up the land among their children, each of whom then receives CPs to smaller, individual tracts of land. A CP also allows the owner to transfer his interest in the land to several people in two ways. The first arrangement, *tenants in common*, occurs when each tenant has an equal interest in the property. More importantly, when one holder dies, the deceased's share falls to his or her descendents. The second arrangement, *joint tenancy* (ie husband and wife), occurs when all of the owners still have equal rights to the property. However, in the case of one person's death, his or her's interest falls to the other joint tenants listed on the CP (Cadieux 1989, 3; Payne 2002). Although both of these arrangements are not listed in the Indian Act, they were developed out of common law to deal with joint ownership issues (Brascoupe 2002; Payne 2002). These arrangements are accomplished through s. 24 of the Indian Act, which allows a CP holder to transfer his land to another band member. Such a transfer however, is contingent upon the approval of the Minister of Indian Affairs. Similarly, the CP holder can also transfer his land to another band member through a will, but it only becomes legal if the Minister approves it (s. 45). A CP holder can also lease his land out to either a fellow Indian or to a non-Indian through s. 58(3). Again, the consent of the Minister is necessary. The Minister also has the power to cancel a CP if the CP was incorrectly issued due to fraud or error (ss. 26-27), or if the CP holder requests it (s. 27). In the event that a CP holder is no longer entitled to live on the reserve and therefore loses the CP, the holder must receive some sort of compensation from the Minister (ss. 24, 25). Another important attribute is that land held under a CP is safe from legal seizure (s. 29) and aside from band-council-imposed taxes, is exempt from taxation (s. 87) (Place 1981, 11). This is important because immunity from seizure restricts the ability of the CP holder to mortgage his property or use it as equity to expand a business

(Smyth 2002). Banks and other financial institutions are reluctant to lend money due to the inability to collect on defaults.

Canadian Courts and Certificates of Possession

Although the legislation regarding CPs seems to be straightforward, the litigation involving CPs demonstrates the contrary. Problems have arisen when the Indian Act does not contain specific provisions for certain situations, such as the division of matrimonial homes in divorce provisions, or has provisions which are ambiguous, such as in the phrase "lawful possession" and the application of leases. Another problem confronted by the courts is the role of the Minister and the band council. More often then not, the courts have ruled in favour of Ministerial discretion at the expense of band council jurisdiction.

Overall, the courts have had a large role in defining the exact nature of the various CP rights. In the rest of this chapter, I will focus on CP cases to illustrate the intricacies of Indian property rights as compared to fee simple interest and life estate interest in land. Cases involving the meaning of "lawful possession," the ability to transfer a CP, the right to make a lease and a will, and the division of matrimonial property, among others, will demonstrate some of the unique characteristics of the rights that a holder enjoys under a CP. I will not however, discuss Aboriginal title cases such as *Sparrow* (1990 1 SCR), *Van Der Peet* (1996 2 SCR), or *Delgamuukw* (1997 3 SCR) as they deal more with Aboriginal title in general rather than focusing on the nature of CPs.

CPs and "Lawful Possession"

In many ways, CPs give band members a significant amount of power over an individual tract of reserve land. Section 20(1) of the Indian Acts states that "No Indian is lawfully in possession of land in a reserve unless, with the approval of the Minister, possession of the land has been allotted to him by the council of the band." As well, s. 20(2) mandates that "The Minister may issue to an Indian who is lawfully in possession of land in a reserve a certificate, to be called a Certificate of Possession, as evidence of his right to possession of the land described therein." The crucial phrase in both ss. 20(1) and 20 (2) is the meaning of "lawful possession" and it has been left to the courts to interpret this phrase. Justice Marceau in the case of *Pronovost v. Minister of Indian and Northern Affairs* (1986) 1 CNLR 51 described it as follows:

> The Act speaks of a right of "possession" which be proven by a Certificate of Possession, taking the place of a real estate title: it speaks of a right which does not derive from that

> of an owner but which may nonetheless be transferred as such, both by *inter vivos* and *mortis causa,* although such a transfer can only be fully effective after it has been approved by the Minister; and this hybrid right, which is both patrimonial and personal, is applied formally to the land by the Act without specifying what becomes of buildings or improvements on the land. It has been called *a sui generis* right: that is undoubtedly true, but what I wish to emphasize here is that this *sui generis* right defies any rational classification under our traditional property law. (1 CNLR 56)

The courts had further opportunity to elaborate on the exact nature of this phrase in the case of *Westbank Indian Band v. Normand* (1994) 3 C.N.L.R. 197. In this case, the band council brought a negligence suit against the defendant on behalf of a band member who held a certificate of possession for land damaged by flood water. The band argued that the defendant had released the flood waters onto the farmlands and thus should pay some sort of compensation for the damaged lands. The Federal Court of Appeals ruled that the band had no right to sue the defendant for negligence. Rather, it was up to the band member holding the certificate of possession to pursue a suit against the defendant. According to the Court, a certificate of possession transfers all "incidents of ownership" from the band to the individual holder. As such, Gary Swite should have been the one to sue the defendants for damages (3 CNLR 199).

In *Simpson v. Ryan* (1996) 106 FTR 158, Simpson had a certificate of possession for reserve land on the Duck Lake reserve. He decided to transfer the land to himself and his daughter as joint tenants. He did not however, obtain band council consent and did not register the transfer with the Ministry, as required by section 24 of the Indian Act. Later, Simpson wanted to build a mobile home park on the land but his daughter objected. The Federal trial court ruled that under section 24, band council consent for transfer of possession was unnecessary since a CP invests in its owner all incidents of ownership. Since the transfer did not meet the requirements of section 24, the transfer of the certificate of possession to himself and his daughter as joint tenants was invalid. Thus, Simpson retained sole ownership of the certificate of possession (106 FTR 160).

In *Dale v. Paul* (2000 AJ No. 751 Alta Master), Cecile Dale had a valid CP for a piece of land under dispute on the Enoch Indian Reserve in Alberta. She had allowed her brother, Harry Sharphead, to live on the property. For a brief period of time, Sharphead's wife, Elisie Paul, the respondent, also lived with him on the property. After Harry Sharphead's

death, Dale gave permission to Ruby Sharphead to live on the property, but the respondent Elisie Paul moved onto it first, claiming that Harry had given her permission to live on the property in the event of his death. She argued that oral bequests had to be honoured according to Native custom. The court ruled, however, that Paul did not have a right to reside on the property because Cecile Dale had a valid CP to the land. A CP was "the highest form of title an Indian can have to land that is part of an Indian reserve," as it gave the holder "fee simple certificate of title" (Imai 1999, 56). Thus, the court ordered Paul to vacate the property in accordance with the wishes of the CP holder, Cecile Dale.

In *Watts v. Doolan* (2000 FCJ No. 470 Fed. T.D.), the Kincolith Indian Band Council had, without obtaining permission, built a radio antenna, two satellite dishes, and a wooden frame building on land held under a CP by Marlin Watts. Watts brought an action against the band for trespass and subsequently won. The court ruled that since Watts held a CP to the land, the band had no right to erect communications equipment on his property without his permission, and it awarded Watts $10,300 in lost rent, damages, and interest (para 1, 14).

Three cases dealt with the question of whether an individual Indian could hold lawful possession of an allotted piece of land without a certificate of possession. In *George v. George* (1997) 2 C.N.L.R. 62, both parties were members of the Burrard Indian Band. In 1971, they acquired a parcel of land from Mr. George's father, which they then built a house on. In order to pay for the house, he received money from DIAND as well as a loan from the Canadian Mortgage and Housing Corporation (CMHC). In order to receive the loan, Mr. George had to sign a document in which he acknowledged that he was transferring his "lawfully entitled...possession of the land" to the Band until the CHMC loan was paid off. This document was signed by the chief and was formally recognized by the band through a Band Council Resolution (BCR). Later that same year, the Minister of Indian Affairs approved the loan (2 CNLR 65). In 1990, Mr. George and his wife separated. At issue in this case, therefore, was whether or not Mr. George had lawful possession of the land even though he did not have a CP. The BC Trial Court ruled that numerous references to Mr. George's lawful possession of the land, combined with the existence of a 1988 BCR asking the Minister of Indian Affairs to issue a CP to him, demonstrated that he indeed had lawful possession of the land pursuant to s. 20(1) of the Indian Act. Moreover, the approval of the Minister of Indian Affairs of the allotment could be inferred from the fact that the loan monies were issued by the CMHC (2 CNLR 68-69). The British Columbia Court of Appeals agreed with the Trial Court's ruling that one could *infer* lawful possession based on the actions of the band council

and the Minister of Indian Affairs. A CP was merely evidence of lawful possession and lawful possession could be established without a CP (2 CNLR 74).

Three years later, the British Columbia Supreme Court in *Nicola Band v. Trans-Can. Displays et al.,* (2000 B.C.S.C. 1209) tackled the question of whether a customary land holding was enforceable without a certificate of possession. A traditional or customary land holding is a right to land based on the historical occupation and the individual's traditional use (i.e. agriculture or residential uses) of the land (www.courts.gov.bc.ca, p. 23). According to Justice Smith,

> Ownership of lands based on traditional or customary use of the land does not exist independent of interests created by the [Indian] **Act**. Recognition of an individual's traditional occupation of reserve lands does not create a legal interest or entitlement to those lands unless and until the requirements of the **Act** are met. (emphasis in original) (p.23)

Thus, lawful possession requires an allotment by the band council and the approval of the Minister to be legally recognized. The court affirmed that a CP is merely evidence of lawful possession.

The courts have also ruled that lawful possession can be obtained through section 22 without a certificate of possession. Section 22 reads

> Where an Indian who is in possession of lands at the time they are included in a reserve made permanent improvements thereon before that time, he shall be deemed to be in lawful possession of such lands at the time they are so included. (Imai 1998, 50)

In the case of *Stoney Band v. Poucette* (1999) 3 C.N.L.R. 321, Poucette and his family received land in 1981 from the Stoney Band in exchange for surrendering other land to the band. Over the next years, Poucette and his family made permanent improvements to the land and raised horses and cattle on the lands. In 1996, he received notice from the Stoney Band that his land was to be used for agricultural purposes for the benefit of the whole band. He was given two weeks to vacate the land (3 CNLR 322). The plaintiff argued, among other things, that the defendant did not have a CP to the land and therefore the land was band land. The defendant argued that he and his family had occupied the land since 1981 and had made improvements to land up until the inclusion of the land into the Stoney Band in 1995 (3 CNLR 327). The Alberta Court of Appeals ruled in favour of the defendant, stating that a CP was not necessary for lawful possession since it is merely the evidence of possession. Moreover, since Poucette made improvements to the land prior to it becoming band land, he had lawful possession of the

land according to s. 22 of the Indian Act (3 CNLR 327-328).

Based on the cases cited, the rights enjoyed by CP holders seem to be quite sweeping. CPs themselves are not required for lawful possession; rather they are merely evidence of lawful possession. A CP seems to invest the owner with all incidents of ownership thus mimicking the fee simple rights that non-Indians enjoy off reserve. However, this is not entirely the case. The Federal Court of Appeal in *Boyer v. Canada* (1986 4 CNLR 53) outlined some of the very important differences between CPs and ownership in fee simple:

> The member [of the band] is not entitled to dispose of his right to possession or lease his land to a non member (s. 28), nor can he mortgage it, the land being immune from seizure under legal process (s. 29), and he may be forced to dispose of his right, if he ceases to be entitled to reside on the reserve. (s. 25) (*Boyer v Canada* 1986 4 CNLR 60)

The usefulness of CPs is limited by the fact that they can only be transferred within the band, thus making it difficult for members to use their property as equity to build housing, restructure debt load, or expand a business (Imai 1998, 46; Smyth 2002). Moreover, since the Certificate of Possession (CP) system comes from the Indian Act, and since Parliament has exclusive authority over Indians and lands reserved for Indians, problems can occur when there are procedural gaps in the CP system. The Constitution does not allow provincial statutes to apply to Indians and their reserve lands when such statutes clash with provisions in the Indian Act or other federal statutes. Thus, when a problem that is not covered by the Indian Act arises, such as the division of a matrimonial home during a divorce proceeding, Indians are unable to rely on other federal or provincial statutes for redress. Another factor limiting the usefulness of CPs is the discretionary power of the Minister. Transactions can take a long time to complete, due to the need for governmental approval. In one case at Six Nations, it took eleven years to complete a transaction involving a CP (Martin and Martin 2002). Moreover, some of the transactions can be detrimental to the band council since certain transactions, such as leases, only require the consent of the CP holder and the Minister. In other words, the band council is excluded from the process. In light of a lack of federal leadership to fix these problems in the legislation, it has been left to the courts to resolve these issues.

Divorce and the Division of Property

One such gap has been the absence of a provision dealing with the division of property in the event of a divorce. Off-reserve, spouses have

a legal right to a portion of matrimonial property—property which is used for a family purpose—in the event of a separation or divorce (*Derrickson v. Derrickson* 1986 2 CNLR 53). However, the Indian Act lacks such a provision thus forcing the courts to come up with their own makeshift rule. At issue in the case of *Greyeyes v. Greyeyes* (1983) 1 C.N.L.R. 5 was whether a spouse had a legal interest in matrimonial property within the meaning of the provincial Matrimonial Property Act. This Act gave spouses a legal interest in property once they married, which in this case a couple did in 1951. At the time, the respondent had a CP to 480 acres of farm land. During the length of their marriage, both parties contributed equally to the raising and caring of the family. In 1976, the respondent left the applicant and has lived separately since. After the separation, the respondent purchased a home for $35,000. The applicant then went to the courts seeking compensation in the form of a portion of the matrimonial property and a portion of the equity in the new home (1 CNLR 5). The court ruled that although the home and the farm land did constitute matrimonial property, the court could not divide up the land among the parties since "lands reserved for Indians are exclusively within the jurisdiction of the Parliament of Canada, and it is beyond [the court's] jurisdiction to order a division or sale of such land" (1 CNLR 6). Nonetheless, the wife did have an interest in the land and therefore was entitled to some form of compensation even though the husband had sole possession of the CP over the farm land (1 CNLR 7).

In the case of *Laforme v. Laforme* (1983) 2 CNLR 88, the parties were married in 1976 and held a CP to a parcel of land as joint tenants. Several years later, they divorced and the plaintiff went to court demanding that the court partition or sell the lands and that the defendant pay half of the value of the land to the plaintiff. The court, relying on *Sandy v. Sandy* (1980) 2 CNLR 101, ruled that the Indian Act superseded the Family Reform Act of 1978, and therefore no court-ordered division of property was available to the parties (2 CNLR 89). The Family Reform Act was a provincial statute and did not apply to Indian lands since such lands fell squarely within federal jurisdiction (2 CNLR 90).

Three years later, the Supreme Court was asked to rule on whether provincial statutes had force on reserves in light of the lack of a provision dealing with divorcing couples in the Indian Act. In *Paul v. Paul* (1986) 2 CNLR 74, both the husband and wife filed for divorce. The wife obtained an order for interim possession of the matrimonial home under section 77 of the British Columbia Family Relations Act, which allowed the courts to give one spouse "exclusive occupancy of the family residence" for a limited amount of time (2 CNLR 75). The husband however, had sole ownership over a certificate of possession for the land and

house, and sought an order to quash the wife's interim possession of the home. The Supreme Court of Canada ruled that Section 77 of the British Columbia Family Relations Act ran afoul of the certificate of possession provisions in the Indian Act (2 CNLR 78-79). Therefore, since the husband had lawful possession of the land as evidenced by his possession of the CP, and because the Indian Act lacked any specific provisions dealing with matrimonial homes, the husband was given possession of the matrimonial home and the women could not seek relief under section 77. Provincial laws which contradicted the Indian Act were ruled to have no force since the Constitution under Section 91 (24) grants Parliament exclusive power over Indians and Indian lands.

The *Paul v. Paul* case did not however, address the provision in the British Columbia Family Relations Act which called for compensation to be paid to a divorcing spouse for his or her legal interest in the family's assets. In the case of *Derrickson v. Derrickson* (1986) 2 CNLR 45, a husband and wife filed for divorce. The Court was asked to decide whether the divorcing wife, a member of the Westbank First Nation, had a right to half of her family's assets as mandated in the British Columbia Family Relations Act (2 CNLR 47). The husband however, had a certificate of possession over the majority of the family's assets. The Court ruled that the woman did not have a right to her husband's assets since the husband possessed a CP over the land. Provincial legislation had no force in regards to possession of reserve lands since Parliament had exclusive jurisdiction over Indians and their lands (2 CNLR 52). Such legislation could "significantly impact on the ability of the Band and the federal Crown to ensure that reserve lands are used for the benefit of the Band" (2 CNLR 55). Moreover, if the court did exercise its power under the Family Relations Act to divide up matrimonial property, it would come into conflict with the right of the Minister of Indian Affairs to manage land transfers involving Indian land (2 CNLR 60). The Court did rule however, that a provincial statute could entitle a woman to compensation since the Indian Act does not prevent CP holders from paying compensation in lieu of the division of property in the event of a divorce (2 CNLR 63). Thus, provincial laws were applicable as long as they did not contradict the objectives and spirit of the Indian Act.

These decisions were upheld in the *George v. George* (1996) 2 CNLR 62 case which I described above. Relying on *Derrickson v. Derrickson*, the court ruled that although the court cannot divide up Indian land, it can order that compensation be given to the spouse if it can be determined that the property in question was matrimonial property under s. 45 of the Family Relations Act. Since there was still no legislation governing this issue of compensation, the court was free to order Mr. George

to pay compensation to his wife (2 CNLR 62, 72).

In 1997, the Court had to decide a case *(Paul v. Kingsclear Indian Band* 1997 137 FTR 275) involving the division of property held under a certificate of possession in joint tenancy (when the death of one person grants the other person solitary possession of the CP) by a Native husband and non-Native wife. After getting married and acquiring a CP, the couple built a family home on their allotted reserve land. Several years after their marriage, they separated and divorced. The non-Native woman and her new partner continued to reside in the matrimonial home after the divorce. Under section 23 of the Indian Act, the Native man sought compensation for his contributions in building the house and an injunction preventing his former spouse from continuing to live in the house. The Federal Court of Appeal ruled that there were no grounds for preventing the woman from residing in the house since she was listed as a joint tenant under their CP (137 FTR 279). Furthermore, the man was not obliged to receive compensation unless the Minister of Indian Affairs wished to grant compensation (137 FTR 281). Under section 23 of the Indian Act,

> An Indian who is lawfully removed from lands in a reserve upon which he has made permanent improvements may, *if the Minister so directs,* be paid compensation in respect thereof in an amount *to be determined by the Minister.* (emphasis added) (Imai 1998, 26)

In this case the Minister did not provide any compensation and thus the husband was not entitled to any. This ruling reinforced the discretionary power of the Minister over individual Indian private property rights.

The last important case involving matrimonial homes was *Darbyshire-Joseph v. Darbyshire-Joseph* (1998 BCJ No. 2765). A Native couple living on the Squamish reserve jointly held a certificate of possession over an individual allotment of land and their matrimonial home. The couple divorced with the man winning custody over the children; the woman continued to reside in the home. The man wanted to move back into the home but the woman demanded compensation for her interest in the home under the jointly held CP. The British Columbia Supreme Court observed that the Indian Act did not have a provision with regard to the partition of property held under a CP. Thus, the partition of property was not possible. Furthermore, lacking a federal or provincial statute mandating compensation, the court could not rule on whether the woman was entitled to compensation. As such, the court ruled that the man and woman had to work out the matter between themselves (Imai 2001, 57).

These cases on the division of property held under CPs demonstrate two important peculiarities of the CP system. First, the Indian Act

is paramount in cases involving CPs. If the Indian Act does not have a specific provision dealing with a certain problem, then the courts must defer to the spirit of the Indian Act and the will of Parliament. Second, these cases on the division of matrimonial property reaffirm the discretionary power of the Minister. Off-reserve private property rights in Canada are not subject to the will of any Minister in the Canadian government and yet Indian individual property rights are. Thus on the subject of division of property resulting from divorce, the CP system gives Indians less rights and privileges than what a regular Canadian would enjoy with either a fee simple interest or life estate interest in property.

The Right to Lease

The right to lease reserve land is another area in which Indians do not enjoy the same property rights that other Canadian citizens do. When an Indian wants to lease land to another Indian, he can do so without involving the band council or the Minister of Indian Affairs. However, when an Indian wants to lease their land to a non-Indian, then the Minister of Indian Affairs and, to a somewhat lesser extent, the band council, has influence.

Individual Indians can lease their land to non-Indians by two methods: a land surrender as outlined under s. 38(2), or the leasing arrangement spelled out in s. 58(3) of the Indian Act. Under s. 38(2), the CP holder gives up his or her land to the band. The band then surrenders the land to the Crown for a pre-determined amount of time for commercial or residential purposes. From that time until the end of the lease, the land is no longer reserve land. However, at the end of the lease, the land reverts back to being reserve land. Temporary surrender requires band consent and the band has the option of attaching conditions to the surrender (Imai 1998, 62, 78). The most common type of lease which CP holders employ is the one outlined in s. 58(1) and (3) of the Indian Act. S. 58(1) reads "where the land is in lawful possession of any individual, [the Minister may] grant a lease of such land for agricultural or grazing purposes or for any purpose that is for the benefit of the person in possession." Under this provision, both the consent of the band council and the Minister of Indian Affairs is required. More importantly, s. 58(3) states that "the Minister may lease for the benefit of any Indian, on application of that Indian for that purpose, the land of which the Indian is lawfully in possession without the land being designated" (Imai 1998, 78). In this provision, the Indian registers the lease directly with Indian Affairs, without seeking band council consent. The courts have upheld these provisions resulting in an Indian private property system dissimilar to Canadian common law with respect to leases. In other words, the

leasing abilities of individual Indians with CPs is somewhat constrained compared to off-reserve residents.

Some of the intricacies involved in leasing to non-Indians are captured in the case of *R. v. Devereux* (1965) S.C.R. 567. In 1950, Harry Devereaux, a non-Indian, was granted a 10-year lease to a parcel of land at the request of Rachel Ann Davis, CP holder and member of the Six Nations Band. This lease was granted with the approval of the Minister of Indian Affairs under s. 58(3) of the Indian Act. Eight years into the lease, Mrs. Davis died. After the 10-year lease expired, the Minister of Indian Affairs extended it for two successive years using s. 28(2) of the Indian Act. Under s. 28(2), the Minister can grant to "any person for a period not exceeding one year, or with the consent of the council of the band for any longer period, to occupy or use a reserve to reside or otherwise exercise rights on a reserve" (Imai 1998, 47-48). After the two one-year permits expired, the band council passed a BCR asking the Attorney of General to evict the defendant based on the fact that he was unlawfully in possession of the lands. The Supreme Court of Canada decided in favour of the Attorney General, holding that since the expiry of the lease of the leases, the defendant could not point to any provision in the Indian Act which gave him lawful possession of the land (SCR 570). Therefore, according to this case, an individual non-Indian could acquire a lease from a CP holder in two main ways: through s. 58(3) or s. 28 (2) of the Indian Act, both of which required the consent of the Minister of Indian Affairs.

There does exist informal leasing arrangements which do not involve either Indian Affairs or the band. "Buckshee" leases are not registered with Indian Affairs, and more importantly are not enforceable in the courts or by the band council (Willgress 2002, *Tsartlip Indian Band v. Canada* 1999 181 DLR 4th 730, para 10, 28). Leases that are registered with Indian Affairs however, are protected by the law, and parties can seek remedy in the courts. The case of *Mintuck v. Valley River Band No. 63A* (1977) 1 CNLR 12 (Man. Ct of Ap.) dealt with the legal options of CP holder leasing their land under s. 58(3). Mintuck, band member, entered into a lease with Indian Affairs for ten years for agricultural development. The band council passed a resolution supporting the lease, and mandated that after five years, a share of the crop would be paid to the band. Soon after, the plaintiff was harassed by several unidentified band members. After a band council election, the new band council passed a resolution terminating the lease. According to Justice Guy, the band had a duty to ensure that nothing was done to hinder the fulfillment of the contract. The BCR "deprived the plaintiff of his right provided by the lease and thus breached their duty" (1 CNLR 13). Justice Matas ob-

served that the BCR was "unlawful interference with the plaintiff's economic interests" (1 CNLR 14). Therefore, the appeal was dismissed and the trial judge's original decision to award $10,000 in damages to the plaintiff was upheld (1 CNLR 13).

The case of *Boyer v. Canada* (1986) 4 C.N.L.R. 53 reaffirmed the Minister's power over leases and clarified the Minister's fiduciary duty when a CP was involved. John Corbiere, a member of the Batchewana Indian Band, obtained a certificate of possession to a parcel of reserve land in 1973. In 1980, he asked the band council for a BCR giving him permission to lease the land to a corporation which he and his wife were the sole shareholders, for the purpose of land development. The band council initially approved the lease even though further work, such as feasibility studies and financing arrangements, still had to be done. In 1982, Corbiere's corporation was given a lease by the Minister of Indian Affairs under s. 58(3). In 1983, the lease was drafted and sent to the band council, which objected to the lease and disputed the power of the Minister to approve it without their consent. The Minister granted the lease anyway and the band council challenged the lease in the courts, arguing that the Minister could not issue a lease without band council approval (4 CNLR 56). The Federal Court of Appeal ruled that the Minister could in fact grant a lease under section 58 (3) of the Indian Act without band consent. "[T]he 'allotment' of a piece of land in a reserve shifts the right to the use and benefit thereof from being the collective right of the Band to being the individual and personalized right of the locate" (4 CNLR 60). Band council consent was not necessary since the lease was between the individual CP holder, who has lawful possession of the land, and the Minister of Indian Affairs. S. 58(3) is quite clear – there is no mention of need for band consent for lease operating under this provision (4 CNLR 61). All that is required is the Minister's approval.

Eleven years later, the Federal Court of Appeal modified the *Boyer* ruling in the case of *Tsartlip Indian Band v. Canada* (1999) 181 DLR 4th 730. In this case, Blaine Wilson, Tracy Wilson, Geneviere Elliot, Lavina Olsen, and George Wilson (the locatees) were members of the Tsartlip Indian Band and held two certificates of possession for an individual allotment of reserve land on the Tsartlip Indian Band reserve. The locatees were also shareholders of the Clydesdale Estate Holdings Ltd. In 1995, they wanted to build a home park for non-Indians through their company on their land but the band refused to give permission, citing environmental and shortage of land concerns. Later that year, Wilson and his associates ignored the band and built 25 manufactured homes for non-Indian residents on the land without a permit or a lease (181 DLR 4th 734-735). The band council responded by passing a by-law which re-

quired band council approval for any commercial projects on reserve land. Wilson and his associates countered by applying for and receiving a lease directly from the Minister under section 58 (3) of the Indian Act. The lease was made retroactive so that the new by-law would not affect the lease (181 DLR 4th 137, 740). The Federal Court of Appeal ruled that the Minister had a duty towards both the CP holder and the band, as well as to uphold the principles of the Indian Act. In *Boyer,* the band council objected to the lease based on a matter of principle – that being that the Minister did not have the authority to grant a lease on his or her own. In this case however, the band council objected to the lease based on environmental and land shortage concerns. According to Justice Decary, the park "threatened their way of life" and the Minister had a responsibility to take into account band concerns because the Indian Act is "very much band-oriented where use of lands in the reserve is at issue.... The intent of Parliament, clearly, is to require the consent of the band council whenever a...non-Indian is to exercise any right on a reserve for a period longer than a year" (181 DLR 4th 748). In this case, the Minister failed to do so. Thus, the Court struck down *Boyer* and required the Minister to take into account the interests of the Band as a whole in future uses of section 58(3).

Although this is a substantial check on Ministerial power, the Minister's power is still extensive. The inability of Indians to lease to non-Indians without a formal transfer of possession, and the power of the Minister to issue leases and permits without band council consent severely restricts the ability of bands and individual members to use their property to further their own interests. Leases which may benefit individuals but hurt the band as a whole cannot be completely stopped by the band council.

One practice among CP holders is to develop their land through a corporation owned by them. In the case of *Assessor of Area No. 25 – Northwest-Prince Rupert v. N & V Johnson Services Ltd. and Williams (Gitwangak Band)*(1988) 4 CNLR 83, Norman Johnson and his wife Vina, tried to develop their land held under CP through a corporation in which they were the majority shareholders. To do so, they leased the land to their corporation using s. 58(3) of the Indian Act. They alleged that the leased land was held in trust by the corporation and therefore was exempt from taxation under s. 13(h) of the Taxation Act (which stated that land held in trust for the use of Indians would be exempt from taxation) and s. 87 (which reads that Indian property is exempt) of the Indian Act. However, no evidence was produced to show that the land was being held in trust (4 CNLR 87). In terms of whether "land occupied by a corporation whose shareholders are Indians exempt from assessment and

taxation," the court found that "[a] corporation is an artificial person. By its nature, it can have neither race nor religion nor sex" and therefore could not be considered a person for the purposes of a tax exemption (4 CNLR 87-88). As such, corporations should be taxed unless the Parliament passes a law legislating otherwise (4 CNLR 90).

Recently, the court had to tackle the question of what happens to rent money when the CP holder dies. In *Songhees First Nation v. Canada* (2002) www.courts.gov.bc.ca, the late Irene Cooper, band member, had a CP to a parcel of Songhees First Nation land which she leased through two leases through the Minister of Indian Affairs under s. 58(3). The leases were to expire in 2015 and 2045. In 1996, Ms. Cooper died. In her last will and testament, she left all of her rights and interests in the allotted land to her children. Her children however, were not members of the Songhees First Nation and therefore were not allowed to gain lawful possession of the land according to s. 50 of the Indian Act (para 9-10). S. 50 did allow for descendants who are not members of the band to receive compensation from the sale of the allotted lands (para 14). However, there was no provision that dealt with who should receive the rent money in the event of the death of a CP holder. Basing its decision on several related provisions in the Indian Act, the Supreme Court of British Columbia ruled that rent was "inextricably derived from a property interest in land" and that "Ms. Cooper's rights to possession and occupation terminated upon her death" (para 21). Since Ms. Cooper's interest in the land terminated at death, and since the children were not entitled to live on the reserve, they were not entitled to any rent.

In summary, the courts have ruled that a CP is not necessary for an individual to have lawful possession. Rather, the essential requirements for lawful possession are band consent and the consent of the Minister of Indian Affairs and Northern Development. Furthermore, an individual Indian could acquire through section 22 lawful possession if he or she made improvements on lands that he or she owned before the land became reserve land. The Court's rulings with respect to leases and the division of matrimonial homes reaffirm the power of the Indian Act and the Minister. The ability of Indians to lease to other Indians is somewhat restricted by the discretionary power of the Minister. As well, the interests of the band as a whole can be bypassed through this provision. The absence of a provision regarding the division of property means that whether a spouse receives compensation in a divorce is at the discretion of the Minister. Quite clearly, Indian spouses do not enjoy the same protections that non-Indians have. This body of litigation shows that Indian private property rights are unique. The power of both the band council and the Minister over individual allotments means that individual

property rights for Indians on reserves is less substantial than the rights enjoyed by non-Indian Canadian citizens living off reserves.

Conclusion

The Certificate of Possession private property system originated from a colonial desire to protect, civilize, and assimilate the Indians. At the root of these three objectives was a desire for Indian land. Private property was seen as a means of emancipating the Aboriginals from their state of savagery and a means of acquiring their land through purchase, either through the Crown or through the newly emancipated Indigenous owners of private land. As Alan Cairns observed, "the goal was assimilation...territorial separation was a preparation for assimilation" (Cairns 2000, 48). By 1951, however, the Canadian government wanted to balance the ability of Indians to enjoy the benefits of private property and the protection of the territorial integrity of reserve lands from non-Indian acquisition. Thus, the CP system itself was inherently contradictory. The system purports to give them a system of private property which allows them to enjoy private property rights for the purposes of raising their standard of living, and yet such rights are limited and weakened by the discretion of the Minister and the band council.

Today's First Nations have quite clearly demonstrated that they can manage their own affairs.[2] Further study on the CP system is necessary to give policy makers and academics the necessary knowledge to make improvements to the system. As mentioned earlier, Terry Anderson has argued that private property has helped some Indigenous peoples in the United States solve some of their social and economic problems. A similar Canadian study looking into the cultural, social, and economic effects of CPs and private property ownership on Indians and their reserves would provide valuable information for Canadian government policy makers in their current drive to reform the Indian Act. Whether one supports the idea of private property rights for Indians or not, clearly the present system needs to be changed. Based on the above caselaw, I make the following recommendations:

1) Parliament should amend the Indian Act to include a provision outlining a procedure for dealing with the division of matrimonial property in the event of a divorce, or allow provincial divorce statutes to apply.

2) Band councils should have a greater say in the granting of leases under s. 58(3). Band councils are responsible for the general welfare of the band, and have extensive knowledge on the environmental

conditions and municipal services available for projects. In a time of chronic housing and land shortages on many reserves in Canada, the band needs to be involved in land management decisions much in the same way that municipalities employ zoning by-laws for the benefit of its citizens. Land is in such high demand among members and non-members, and among on-reserve and off-reserve members, for a variety of uses. The band council needs to have a greater say in leasing arrangements.

3) Indian Affairs involvement in CP transactions should be phased out. Based on interviews with several First Nation Land Managers, much of their work is hindered by the slowness of Indian Affairs. Eliminating the role of Indian Affairs would speed up transactions and eliminate the problems that come from officials in Ottawa making decisions for places they have never visited nor do not have intimate knowledge of.

Notes

1. This paper is a compressed version of Masters thesis entitled, "Certificates of Possession: A Solution to the Aboriginal Housing Crisis in Canada," and is part of a larger body of work on Individual Property Rights on Canadian Indian Reserves. The author would like to thank Don Smith, Rick Ponting, Rainer Knopff and Tom Flanagan for their help with this project.
2. Two very interesting case studies are the Westbank First Nation near Kelowna, B.C., and the Six Nations Territory in Ontario. Westbank operates under s. 60 of the Indian Act, which gives them pre-approval from Indian Affairs for almost all of the transactions involving CPs. Six Nations is currently employing an innovative use of CPs to meet their housing shortage.

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BOOK REVIEWS

Binnema, Theodore. *Common and Contested Ground: A Human and Environmental History of the Northwestern Plains.* Norman: University of Oklahoma Press. 2001. 263 pps. ISBN 0-8-61-3361, Paper US$29.95.

Common and Contested Ground: A Human and Environmental History of the Northwestern Plains derives from Theodore Binnema's doctoral dissertation in history from the University of Alberta. Binnema approaches his study by using primary documents, innovative secondary sources, and autobiographical interpretation (p. xi). The resulting book is interdisciplinary in nature, making extensive use of the geographical, historical, archaeological, ethnological, and ethnohistorical literature, as well as studies from grassland ecology, to trace the interactions of Aboriginal groups and Euroamericans in the study area.

In the Preface as well as the Introduction, Binnema is critical of the extant culturalist paradigm used in earlier studies, offering instead a volume which "is an exploration of alternatives to the culturalist preoccupations that marked much of twentieth century scholarship" (xiii). Binnema views intraethnicity and interethnicity as essential to life on the northwestern plains and promotes this perspective by examining trade, diplomacy and warfare in that region between A.D. 200 and 1806. However, Binnema's description of the culturalist paradigm is not fully developed nor does he explain his own approach beyond saying there is value in studies "that recognize the importance of relationships within and among ethnic groups" (p. 11) and which are against the notion of fixed boundaries between groups (p. 13). Also treated in an abbreviated fashion is the controversial anthropological construct, "tribe," which Binnema discards in favor of the "band" as best fitting the sociopolitical organization of the northwestern plains. Not only is this at odds with most plains literature but the definitive works of Fried (1967) and Service (1971) are not included in the discussion.

The first chapter examines the resource structure of the region. Binnema argues that the "exceptional bison habitat of the northwestern plains greatly influenced the region's human history" by attracting "Indigenous societies from all directions" (p. 35). He concurs with Bamforth (1988) that bison enjoyed more abundant forage on the

northwestern plains than in any other area of the plains and that the abundance of forage varied seasonally and annually in the region. His "bison hourglass" graph (p. 19) illustrates how bison numbers fluctuated during a typical year, as food supplies declined in the fall and winter. Binnema makes good use of the extant literature on grassland ecology to argue that forage quality is likely more important than abundance in determining the concentration of bison and thus the human population of the area. He provides, however, a limited discussion of the impacts of drought, prairie fires and ungulates on forage. Given the variable nature of the plains environment where drought is likely present in some region every year and where Altithermal and Scandic Period droughts affected human occupation and adaptation in the region, a more in-depth examination of the effects of drought on vegetation in particular would be useful.

Binnema introduces the reader to the seasonal cycles of bison and their human predators in the second chapter. A determinant of these cycles is the change in forage quantity and quality in three ecological zones, fescue/park/riverine, mesic (moist) mixed prairie, and xeric (dry) mixed prairie. A series of figures illustrate the movement of bison amongst these zones and the corresponding response of hunters. Drawing from the work of Arthur (1975), Morgan (1979) and others, Binnema adopts the view that bison movements are cyclical and predictable, a view that continues to be debated. He deftly avoids an environmental determinist label by acknowledging that "environment alone did not determine the course of human history" and by noting that humans "responded to the environment in different ways" (p. 54).

The prehistory of the northwestern plains is the subject of the third chapter. Beginning with the Besant and Avonlea Phases and proceeding through the Mortlach Phase, Old Woman's Phase and the One Gun Phase, Binnema relies on secondary sources (e.g. Reeves 1983, Schlesier 1994) and provides a highly speculative interpretation of the Late Prehistoric Period. As an archaeologist I am concerned with many parts of this chapter. In a quick overview of communal bison hunting (p. 61), the author ignores the Altithermal and its impact on bison hunting at sites such as Head-Smashed-In Buffalo Jump. His treatment of the Avonlea and Besant Phases suggest that he has adopted the "culturalist approach" which he earlier denigrated. He mentions the drought of the Scandic Period but fails to tie this to his model in any meaningful way (p. 65). Furthermore, his idea that the bow and arrow was absent from the Besant Phase ignores the presence of Samantha points which are presumed to have been arrow points. One source which Binnema could use to buttress his ideas about interethnicity and interethnicity is

Blackeslee's (1975) study of the Plains interband trade system.

Binnema hits his stride in the fourth through eighth chapters which detail the dawn of the fur trade, the dramatic depopulation owing to newly introduced diseases, and the changing coalitions, affiliations, and associations of Indigenous societies and fur traders (p. 15). Drawing from primary documents such as those in the Hudson's Bay Company Archives, Binnema provides abundant supporting evidence for his contention that the northwestern plains's past was far more complex that the historical documents suggest.

Common and Contested Ground is an apt title, evocative of the author's thesis, that interethnicity and intraethnicity shaped human interaction on the northwestern plains between A.D. 200 and 1806. His summary of exonyms by which Indian groups are known, the use of maps, the detailed treatment of human presence and interaction in the region, coupled with detailed endnotes make this book a useful addition to public and private libraries.

In closing one should heed Binnema's statement, "I understand the process of historical research and interpretation well enough to realize that this book does not represent a definitive and objective reconstruction of the past. Every work of scholarship is, in part, autobiography. I hope, however, to advance our understanding of an elusive past" (p. xiii).

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Laurie Milne
Division of Arts
Medicine Hat College
Medicine Hat, Alberta
Canada, T1A 3Y6

Coates, Ken and Robin Fisher, eds. *Out of the Background: Readings on Canadian Native History.* Toronto: Irwin Published, 1998. ISBN 0772527075, Paper CDN$19.95.

Ten years have elapsed since this anthology was first published. As the editors point our, much has happened in Aboriginal Canada during that decade: Elijah Harper's contribution to the collapse of the Meech Lake Accord; the confrontation at Oka; the Royal Commission on Aboriginal Peoples; Justice Alan MacEachern's decision concerning the Gitskan We'etsewewten' the halting of major hydro-electric projects; and the removal of the residents of Davis Inlet, Labrador. Other issues involving Canadian Indian life have also come to the fore: the role of Native women; the cultural and spiritual ramifications of the interaction between Aboriginal and European cultures; disease and related environmental issues; and the aftermath of the residential school system.

Many of these issues are researched and discussed in the twenty

articles that make up this recent volume. Authors have contributed a range of writings that extend from the days of European arrival to the present. Although a high proportion of the compositions relate to the northern and western section of the country—a percentage justified by the editors as compensation for their exclusion from the previous volume—Aboriginal people from eastern and central Canada have not been overlooked. Accounts as diverse as the role of women in the fur trade, the marketing of an imaginary Indian, and the biography of a Cree elder from his drunken youth to his role as community leader provide insights into Aboriginal life that make no effort to trivialize the often harsh reality.

The editors acknowledge that this collection is designed to whet the appetite for further reading and research. A worthwhile and much needed project that they might in the near future wish to consider would be Aboriginal voices providing their perspective of events already discussed by non-Native writers. One such that comes to mind is the volume edited by Colin Calloway, *The World Turned Upside Down: Indian Voices from Early America* (Boston, 1994).

A very useful selection of bibliographies, historiographical essays and additional writings provided at the end of the book adds to its value. Overall, the compilation would be a beneficial addition to libraries and the personal collections of those interested in Aboriginal Canadian history. As the editors explain, their "greatest hope (is) that this book contributes to a search for knowledge and awareness—the necessary aspects of that attempt to address the present and future needs of the First Nations of Canada."

David Norton
P. O. Box 52
Belmont, Ontario
Canada, N0L 1B0

Elledge, Kim (Editor) Peter Lang, Publisher. 2002. *Gay Lesbian, Bisexual and Transgender Myths from the Arapaho to the Zuni: An Anthology*. ISBN 0820452866, Paper CDN$29.95

The title announces a collection of gay, lesbian, bisexual and transgender myths from Native North America. In the content list, however, the terms used on the cover have been substituted by the commonly used term 'Two-Spirits.' Whilst mentioning gay, lesbian, and

transgender in the title will seem appropriate for a collection that features tales of woman-to-woman intercourse, gender mixing, sodomy, and cross-dressing some readers may question the conflation between past and present forms of Indigenous contemporary identities and centuries old cosmologies.

Undoubtedly, the main merit of this anthology is the context it offers for further exploration. For instance, why do such anthologies appear today? To whom do they speak? And under what criteria are they being compiled?

The editor has chosen 29 myths about Two-Spirits from 21 tribes of the United States. The myths have been divided into seven sections according to a common theme such as 'Men Who Became Women,' 'Love Between Women,' 'Origins of the Two-Spirits,' and 'Pregnant Men' to name a few. Gender shifting and sexual acts prominently figure in all the myths. However, it would have been helpful to offer the reader a context for each of the elements that characterize each section (i.e. pregnant men, gender crossing) to avoid tempting analogies between them.

The collection contributes to the growing field of lesbian and gay scholarship.

Massimiliano Carocci
Anthropology Department
Goldsmiths College,
University of London
London, United Kinhdom

Gerso, Carole and Veronica Strong-Boag, eds. *E. Pauline Johnson, Tekahionwake: Collected Poems and Selected Prose.* Toronto: University of Toronto Press, 2002. ISBN 0802036708, Cloth CDN$65.00, ISBN 0802084974, Paper CDN$25.95.

In 2000, these same editors collected some of Pauline Johnson's poetry under the title *Paddling Her Own Canoe: The Times and Texts of E. Pauline Johnson*. At that time they argued that much of Johnson's poetry and prose had been neglected. This second volume, which includes over 165 poems and 20 items of prose, attempts to address that problem and is, as they argue, "more complete than any collection yet available."

While the quantity and topical scope of the writings in this edition

are admirable, it is the introductory chapter and endnotes which are the highlights. Johnson's personal history is interspersed with references from her writing, her compositions being interpreted against the backdrop of what she was experiencing in her daily life. For example, her upbringing as the daughter of a Mohawk chief whose family took pride in generations of traditional leadership and culture, and of an English-born mother whose ancestors included Quaker abolitionists, made her acutely aware of living within and between two very different worlds. Although not mentioned by the authors, the lessons learned from growing up in a house with two front entrances, one facing the Grand River reflecting her father's way of life and the other identical in style but looking out onto the road that reflected her mother's culture, must have made an impression on the young Johnson. As a Native woman attempting to create her own identity in late nineteenth-century Canada when male authority and Indian assimilation dominated, Johnson voiced her desire for recognition both as a Native female writer and as a member of Canadian society. The authors' attention to these details in Johnson's writing makes the introduction extremely valuable. Similarly, references in Johnson's writing to her interest in travel, sports, Canadian geography, Indian storytelling, romance and nature are more easily appreciated when encountered prior to reading her actual material. It is a pleasure to see the postage stamp issued in her honour in 1961 being critiqued for the mistakes in its composition that arose due to the lack of historical research prior to its printing. In addition, the copious notes at the end of the volume provide the detail needed to appreciate some of the finer points in Johnson's references within her writing. They also reveal the considerable exposure her compositions have had through being printed in a wide range of texts, magazines and newspapers since her death in Vancouver in 1913.

The authors indicate that this volume is "offered to Canadians of all origins, as well as to readers in other countries, in the same spirit of exchange and desire to further communication" that Johnson herself desired when first composing her writings. The book should certainly be included in the library of those interested in the study and appreciation of Native literature, women's history, and the interaction between differing cultures both past and present.

David J. Norton
Box 52
Belmont, Ontario
Canada, N0L 1B0

Goulding, Warren. *Just Another Indian: A Serial Killer and Canada's Indifference.* Calgary: Fifth House Ltd., 2001. 219 pps. ISBN 1-894004-51-5, Paper CDN$22.95.

The journalistic habit is to assign the designation of "issue" to the murder of Native people and, in particular, the murder of young Native women in Canada. This is an atrocity. A tour through the underside of many Canadian cities will at least arouse the suspicion that young Native women are in danger. But the paucity of reportage in both the print and electronic media suggests that the cool category of "issue" is as far as the media is prepared to go.

Goulding's finely documented investigation into the rape and murder of four Native women in western Canada reveals not only weak motivation on the part of the media in getting such "news" before the public, but also an indefensibly phlegmatic response from police authorities. Avoiding blanket condemnation, he separates a tangle of factors, scrupulously aligning and reweaving them to present an analysis of how the serial killer, John Martin Crawford could take the lives of four or more Native women with nary a peep of indignation save for the frustrated attempts by some victims' families to initiate action.

Having served less than a decade for his 1981 slaying of Mary Mane Serloin in Lethbridge, Alberta, Crawford was sentenced to 1996 to three concurrent life sentences for the murders of Shelley Napope, Eva Taysup, and Calinda Waterhen. But he may well have murdered more women. In addition to his detailed coverage of the investigation, trial and appeal, Goulding has included a chapter on Dakota medicine man, Clifford Youngbear. Youngbear's extraordinary insights into the disappearance of Shirley Lonethunder, another suspected Crawford victim, were accepted by police but then filed away in oblivion. Police have for years enlisted the aid of person of paranormal talents in murder investigations. The decision not to act on the insights of Youngbear reveals not only an unfortunate cultural bias, but ill-advised tactical restraint in a situation that demanded nothing less than absolute thoroughness.

A well-researched, powerful study of an unconscionably long-ignored national disgrace.

Alfred Fisher
School of Music
Queen's University
Kingston, Ontario
Canada, K7L 3N6

Michelson, Karin and Mercy Doxtator. *Oneida-English / English-Oneida Dictionary.* Toronto: University of Toronto Press, 2002. ISBN 0802035906, Cloth CDN$150.00.

There should be a better word than dictionary for this masterpiece, for that word conjures up an image of a scholarly tome to which a writer turns when precision and accuracy are required. This compendium of knowledge contains so much more. As expressed by the authors in the preface, the book is indeed intended for exact spellings and meanings of words. But it is also designed for teachers who wish to convey the beauty of the language to their classes, for linguists interested in the formation of and interrelation between words, and for "people who simply want to brows through some of the entries or some of the appendices in order to see what the Oneida language is like."

A glimpse through the contents reveals the vast preparation that has gone into the volume. In the Oneida-English section, for example, quotations from tape recordings made at the homes of Oneida speakers are included when they assist in providing a clearer meaning of the word or concept being discussed. The complexity and beauty of the Oneida language becomes evident in the English-Oneida section; there are a dozen entries for the word "wash," for example, and within each are numerous variations depending on what it is that one is washing. For the grammatical purists there are tables indicating orthography and constructions regarding such items as aspect conjugation classes, dirivational suffixes and base-initial modifications. And for someone like myself who has had the privilege of frequently hearing the Oneida language spoken at the Oneida First Nation of southwestern Ontario, the appendices are a pure joy. Words and phrases involve aspects of nature from animals to weather, interpersonal relations, body parts and grooming, furniture, tools and toys, even exclamations and slang.

The authors are extremely well-qualified. Michelson's interest in linguistics was nurtured by her father's production of two mohawk dictionaries, and her personal involvement with leaders and elders of the Oneida First Nation. She was hired by the Department of Anthropology at the University of Western Ontario in London, Ontario as director of the Centre for the Research and Teaching of Canadian Native Languages and was a frequent visitor to the home of Mercy Doxtator during the project's compilation. Doxtator is a resident member of the Oneida First Nation and is herself fluent in her language. Since 1974 she has been teaching in her community, at the Standing Stone elementary school and at the Oneida Language Centre, of which she has been the director. The final product of their labour of love serves as a shining example of two cul-

tures cooperating both for their mutual benefit and as an example to others who believe their language is at the core of their self-identity.

David J. Norton
Box 52
Belmont, Ontario
Canada, N0L 1B0

Rekmans, Lorraine, Keith Lewis and Anabel Dwyer, eds. 2003. *This is My Homeland: Stories of the Effects of Nuclear Industries by People of the Serpent River First Nation and the North Shore of Lake Huron* Cutler: Serpent River First Nation and Anishinabe Printing. xxiv + 123 p.; maps and photos; references.

> "Here," said the spirit, "are the twelve million Americans killed in their native land..." "My God! why did you not leave these frightful bones to dry in the hemisphere where their bodies were born, and where they were consigned to so many different deaths? Why assemble here all these abominable monuments to barbarism and fanaticism?" "To instruct you" (Redman 1977, 189).

Voltaire was illustrating, rather than "instructing," on the genocide of Indigenous Peoples of the Americas by European colonials. He wrote the world as it was seen through the eyes of a European philosopher of the 1700s, to highlight the folly and misery of men. His words are nonetheless instructive today; in particular for the subject of the book under review. *This is My Homeland*, brings us to look upon the words of a disposed people on the north shore of Lake Huron (Ontario, Canada), affected by nuclear industries. Rather than build a monument, editors Lorraine Rekmans, Keith Lewis and Anabel Dwyer, brings forth the bones of the dead from the Serpent River First Nations, in a study of post modern decolonization. In reading we hear many voices. We are carried by the advocacy of struggle to become aware of our own chains of ignorance: to search for cultural strength, to understand the political-economy of mineral development, the environmental science of contamination, and the public and personal histories of government policy and neglect.

The book opens with two "in memory of" sections for Keith Robert Lewis and Henri Eugene Groulx. By the time you have read this brief book review, the effects and side effects of the cumulative and chronic/

acute exposure to contaminants will have killed many more. While the mines are mostly gone, there remains an insidious and silent spring. The book is painfully personal, written almost entirely from first person narrative, but also conveys a thoughtful historical narrative of the mining industry, copper and uranium around Elliot Lakes (p. vii-xxii).

There have been authors whose books assert many things about Aboriginal peoples, many written by Europeans and newcomers, some written by Aboriginal people themselves. *This is My Homeland* reflect several voices: Ojibwe and Canadian, man and women, elders and youth. It speaks without the "academic speak" and literary citations and research commonly found in university bookstores. While it stands as a complement to the authors to tell the story "as is," with minimal interpretations, this is also the book's major weakness.

Readers have no record of how the research was conducted, under what circumstances, what is different then to the publication now, were the tapes edited, who was spoken to/ who was not (and why), whose voices were erased? I have no doubt that it would be difficult to have everyone's views attached and reflected in any book. Criticism of the researcher's methodology aside, some additional support of the work carried out by Serpent River First Nation, i.e. testing car air filters following bolus events, could have been used to support the statements made by former employees, Chiefs and councillors. *This is My Homeland* speaks with an honesty that is difficult to ignore; however, as a case study in ethnography and oral history research, it demonstrates strengths and weaknesses of publishing interviews. This book was written for a general audience, not for university courses/teachers/students/research; however, it contains valuable lessons about research

> in terms of studies and what have they accomplished—not a lot, in terms of putting to rest the fears that people have [about] the Serpent River watershed.... Whether the studies do any good for us, no, they don't do any good for us. (p. 12-13)

Research done to Aboriginal communities, regardless of attempts of responsible research results returned to communities, disempowers and can even, if careless, leave communities worse off that before research is conducted.

This book is at times as raw as the wound that has been gouged out of the land by the blunt development and uncertain decommissioning of the twelve uranium mines. The devastation has been rendered on the Serpent River basin and the Anishnabe who remain therein. The book's main message is a caution to development, to mitigation, to remediation; that it is always less expensive and cleaner not to make a mess in the

first place. Not all development and not all jobs are good, some economic development costs us dearly, and Canadian governments are helpless to portion out the suffering equally.

Books that take as their subject tropes of the noble savage and the natural ecologists (Ellington 2001, Krech 1999, Lepore 1998, Francis 1992), so many now that they have begun to spill from my library, are nicely balanced by *This is My Homeland*. While many authors have struggled; without a doubt, to explain and describe, analyze, to fully comprehend the link between people and land, such is not the case for Rekmans *et all*. *This is My Homeland*, easily demonstrates the extent of the relationship between a people and their land, not surprising when the people are allowed to speak for themselves. I know little of the specific details that are talked about in the book, I have never been a miner, I am limited to what I have heard, read and lived. What struck me most about the interviews with Serpent River First Nation Chief Earl Commanda, former Chief Gertrude Lewis, councilors Keith and Loreena Lewis, Elders, uranium miners, sulfuric-acid plant workers, members of the Elliot Lake Women's Group and Algoma-Manitoulin Nuclear Awareness Group, and long time residents Henri and Linda Groulx, is their concerns for the land.

While specific to history and geography, the views gathered in this book are mirrored in many of the Aboriginal Homes I have had the honour to visit. Where people live on the land, to whatever extent, there is a dependence on keeping the land healthy, as if one's own health, the health of one's family, depended on it. This does not translate into zero development or some kind of romanticism. What it hinges on is where people have a say in the trade-offs, costs and benefits, of development. Where the land is damaged, these are places where outsiders have made decisions, where people who live with development in their backyards have had little opportunity to influence decisions; this is where people are most lost and grieving (Harney 1995). In Aboriginal and other rural/northern communities, where people have had a say in negotiating the cost/benefits of development, the results are very different.

This book speaks of the loss of rights (mineral and human), the struggle through governmental processes (*Canadian Environmental Assessment Act*), as well as the long journey of mourning to reclaim the land and therefore the people (Assembly of First Nations, E.A.G.L.E. project, World Uranium hearings). It ought to be a prerequisite read for resource management student/teachers, environmental studies students/teachers, geology and engineering student/teachers, health professionals. It ought to be read by government and company officials. It will find a hearing among those who are marginalized by industrial development.

Within the slender pages there are organizers' strategies for collective action: stockholder's meetings (p. 16-17), larger environmental studies (p. 20), legislation (p. 20), and networking (p. 21).

Canadians have an opportunity, with *This is My Homeland*, to look upon a side of the nuclear industries, its "barbarism and fanaticism," which has lead to such dramatic and cruel changes for the Anishinaabek at Serpent River. The rent for development has been paid in lives by the Ojibwe (Mole Lake) and Navajo to the south, the Dene (Deline) and Inuit (Voice Bay) to the north, in the South Pacific and northern Canada (NCP 2003). To have suffered the promises of jobs in exchange for the collapse of traditional ways and incomprehensible loss of ancestral lands is to suffer greatly.

There are few books that make it into wide circulation written by, therefore, from the perspective of First Nations. *This is My Homeland* was mostly written in 1999, as a deeply compelling collection, originally prepared by Serpent River First Nation for the Hauge Appeal for Peace Conference. Its writing was inspired by *Pacific Women Speak Out For Independence and Denuclearisation*. The journey to publication makes this book worth reading. As Voltaire reminds us, it is important to bear witness to those "slaughtered for their wealth," perhaps in hopes that it will shake the remote control from our hands and launch us from our recliners to reject our "cheap energy" (which always means someone else is paying the bill).

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Chris Paci
301, 5215 - 51st Street
Yellowknife, Northwest Territories
Canada, X1A 1S9

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