Legal Victories for the Dene Tha?: Their Significance for Aboriginal Rights in Canada

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Abstract: In 2008, the Federal Court of Appeal upheld the 2006 Federal Court ruling that the federal government had failed in its fiduciary duty to consult with the Dene Tha of northwestern Alberta concerning the Mackenzie Valley Pipeline. The analysis of these significant legal victories for recognition of Aboriginal and treaty rights in Canada underlines the religious underpinnings of the Crown's understanding of Aboriginal rights, and identifies the competing interests that repeatedly take governments, industry and Aboriginal peoples before the courts.

Keywords: Aboriginal rights, Crown, Fiduciary Duty, Mackenzie Valley Gas Project, Dene Tha, Alberta

Résumé : En 2008 la Cour fédérale d'appel entérinait le jugement rendu en 2006 par la Cour fédérale selon lequel le gouvernement fédéral avait manqué à son devoir fiduciaire de consulter les Dènès Tha du nord-ouest albertain dans le cadre du projet du pipeline du Mackenzie. L'analyse de ces victoires légales significatives pour l'avenir des droits autochtones au Canada souligne la dimension religieuse des énoncés politiques de la Couronne et met en lumière les intérêts difficilement conciliables qui opposent les gouvernements, les milieux d'affaire et les peuples autochtones devant les tribunaux.

Mots-clés : Droits aborigènes, Couronne, obligation fiduciaire, Projet gazier de la vallée du Mackenzie, Dene Tha, Alberta

Introduction

"May your deliberations be guided by Divine Providence, may your wisdom and patriotism enlarge the prosperity of the country and promote in every way the well-being of its people" (Canada 2007a:19). The religious dimension of Canada's ambitions is obvious in this concluding sentence of the October 2007 Speech from the Throne. Such a speech is read by the Crown's representative, the Governor General of Canada, at the beginning of each legislative session of the Canadian parliament when the government of the day outlines its legislative agenda.[1] Every Speech from the Throne is read to the elected members of Parliament and to the members of the Senate appointed by the Prime Minister of Canada. It is they who, in the name of her Majesty, decide on the laws of the land. They claim to be doing so in the interest of all subjects. Aboriginal Peoples[2] disagree. As Deh Cho First Nations interim Grand Chief Gerald Antoine said in Ottawa in April 2008, "when you say our future must fit into your system, we think that system is unjust" (Deh Cho First Nation 2008). The unavoidable question must then be asked: is justice and constructive co-existence between the settler state and Aboriginal Peoples possible in Canada today?

The answer to this crucial question depends in part on the Crown. It is a prominent Canadian political and religious actor in whose name laws are promulgated and judgements of the courts are made. The law regulating the production and distribution of the dollar coin was promulgated in the name of "Elizabeth the Second, *by the Grace of God* of the United Kingdom, Canada and Her other Realms and Territories QUEEN, Head of the Commonwealth, *Defender of the Faith*" (Leblanc 1996:1, emphasis added). "God Save The Queen," widely known as the Royal Anthem is "played in the presence of members of the Royal Family or as part of the salute accorded to the Governor General and the lieutenant governors" (Canada 2007b:1). The Anthem not only mentions God six

times, it also equates God's enemies with the Queen's. These religious themes go back to the 16th century when nascent English nationalism was "sanctioned by religion" and a reformed religion took "perceptible nationalistic overtones." The British then saw "England as God's Peculiar People, and the Token of His Love." This religious stance gave a distinct and unique nation a sense that its prosperity and power were due to "divine intervention" (Greenfield 1992:60, 62).

The evolution of the government's relationship to the original inhabitants of the land depends also in part on the outcome of the long-standing pursuit of justice against unjust laws undertaken by Aboriginal Peoples since the arrival of Europeans in their midst. The historical, ethnographic and court records show that Aboriginal Peoples and the Crown disagree on the meaning and implications of the treaties they have entered into. Disagreements have given the Supreme Court of Canada a prominent role in defining Aboriginal and treaty rights. There is now general agreement that the 1982 constitutional protection of Aboriginal rights "represents the culmination of a long and difficult struggle in both the political forum and the courts for the constitutional recognition of [A]boriginal rights," a struggle led by "strong representations of native associations and other groups concerned with the welfare of Canada's [A]boriginal peoples" (*R. v. Sparrow* 1990:32). Over the past 25 years, Aboriginal peoples have argued successfully in numerous cases brought before the Supreme Court of Canada that laws enacted by the Parliament of Canada failed to respect their rights and interests.[3] This paper shows that such recognition on the part of the Supreme Court has yet to radically change the view taken by federal, provincial and territorial governments on Aboriginal rights.

Specifically, this article examines the events that led the Dene Tha to seek a court order in 2005 that would oblige the federal government to consult with them "about the MGP [Mackenzie Gas Pipeline], including the design of the environmental assessment process, the terms of Reference for the environment assessment, the treatment of the Connecting Facilities, and the program of financial and/or technical support to assist the Dene Tha' in participating in the process" (*Dene Tha' First Nation v. Canada (Minister of Environment)* 2006:122, henceforth Federal Court 2006).[4] The government maintained that the Dene Tha did not have a right to intervene in the MGP project because it pertained to the Northwest Territories and that limited consultation with them reflected the fact that the MGP would connect with an Alberta pipeline south close to Dene Tha reserves. In November 2006, the Federal Court of Canada rejected the government's view on what constitutes proper consultation of the Dene Tha and declared that "the duty to consult cannot be fulfilled by giving the Dene Tha' 24 hours to respond to a process created over a period of months" (Federal Court 2006:116). The presiding judge ruled that "The location of the Dene Tha's affected territory (south of 60) also is irrelevant to justification for exclusion because the scope of the JRP [Joint Review Panel] includes the Connecting Facilities [located in Alberta] as part of its consideration of the whole MGP" (Federal Court 2006:74). As discussed below, the federal government immediately appealed the decision, suggesting that Judge Phelan was in error.

The federal government's position is also the one taken by Alberta in recent court cases. It argued that treaties signed by the Crown before the Province was created in 1905 allow it to take land necessary for settlement or economic activity without consulting Aboriginal peoples (more on this issue of treaty interpretation below). In *R. v. Cardinal*, the Alberta Provincial Court agreed, ruling that "the duty to consult was fulfilled by negotiation of the treaty itself, and the subsequent survey of reserves, and the fulfilment of the treaty land entitlement requirement in the treaty" (Rath and Rana 2003:29). This judgment ran counter to the one rendered three years earlier by the same court in *R. v. Breaker* (2000). The case involved the right of an Aboriginal person, Mr. Breaker, to hunt in a provincial wildlife sanctuary. Judge Cioni then rejected the provincial position: "I find the Crown's argument to depend on 'bootstrap logic,' i.e., there are no rights to be breached because of the very effect of the Crown's action, and to ignore the jurisprudence of *Sparrow* and *Badger et seq*" (Rath and Rana 2003:28).[5] Undeterred, in *R. v. Cardinal* the Province was still maintaining that treaties had abolished Aboriginal rights in Alberta.

If governments and courts can act in this way today, how much more could they act in the past contrary to what the Supreme Court now recognizes as Aboriginal treaty and constitutional rights? Is justice ever done? Can it be done? Some argue that the courts are politicized and that "lurking behind the camouflage of justice is a game of redistributive politics that is just as dirty, narrow, and self-interested as the game played in the legislative arena" (James et al. 2002:4). Others object that by "reinterpreting treaties in the light of extrinsic evidence, including both historic documents and oral traditions," the courts are "rewriting treaties without the consent of both parties" (Flanagan 2002:135). In effect, more and more, litigation rather than political agreement becomes the context in which "the meaning of indigenous difference is produced" (Hamilton 2008:5). In this process, for better or worse, culture has entered the vocabulary of Aboriginal peoples,

politicians, commissions and the courts when trying to conceptualize their respective rights and obligations and so define their relationships.[6]

To analyze these competing views on Aboriginal rights, I proceed in four steps. First, I argue that disagreements in the field of Aboriginal rights reflect differences at the level of culture or social imagination. Second, I show that to understand these disagreements we must go back in time to the 1763 Royal Proclamation and discuss the Crown's unilateral definition of its relationships to Aboriginal Peoples. Third I document how, over the past century, Dene Tha resistance to policies that denied their ancestral rights frustrated government attempts to control their activities in their homeland. Fourth, I review the events that triggered the Dene Tha court challenge to the MGP and analyze the rulings in their favour to show that despite these legal victories, the federal government and the Dene Tha still disagree on the nature and extent of their respective rights.

Culture and the Collective Imagination

To understand disputes around Aboriginal rights obvious throughout Canada's history, I find useful the concept of culture as consisting of "the socially available 'systems of social significance'—beliefs, rites, meaningful objects—in terms of which subjective life is ordered and outward behaviour is guided" (Geertz 1973b:95). The focus here is on the relationship between ideas, subjectivity and action in public. "Contracting your eyelids on purpose when there exists a public code in which so doing counts as a conspirational signal is winking" (Geertz 1973a:12). Absent this code, the contracting of the eyelid is a meaningless twitch. In Canada, royal assent is required for legislation to become law, an assent signified by a nod of the head from the Governor General or her deputy: "It is this gesture that constitutes Royal Assent, and it is at this time that the bill comes into force as law" (Canada 1989). Absent this political code, the nod has no legal significance.

This understanding of culture is akin to that of social imagination defined "not according to the common usage of the term (the fictional or the illusory) but as a system of social representations that give meaning to natural and social phenomena" (Beaucage 2007:96, author's translation). Any social order is sustained in the world through images of how things ought to be. Numerous social processes, creation, competition, cooperation, cooption, et cetera, come into play, for if an idea "loses its grip on the minds of a sufficient majority, or of a minority with sufficient power to impose it on others, it cannot be sustained and is bound to vanish from the outside world as well" (Greenfeld 1992:18).

This view of culture is often criticized. For many, "the assumption that there are two separate levels—the cultural, on the one side (consisting of symbols) and the social and psychological, on the other—which interact" is highly problematic for it moves us away from "a notion of symbols that are intrinsic to signifying and organizing practices" (Asad 1993:32). In other words, if actions are of interest only because of "their symbolic content, not their mundane consequence," Geertz is "an extreme idealist" for whom "culture is the essential element in the definition of human nature, and the dominant force in history" (Kuper 2000:92, 120). Such charges are unwarranted. Caton, for instance, reminds us that following Geertz, "behaviour must be attended to, and with some exactness, because it is through the flow of behaviour—or more precisely, social action—that cultural forms find articulation," forms that "*draw their meaning from the role they play (Wittgenstein would say their 'use') in an ongoing pattern of life, not from any intrinsic relationship they bear to one another*" (Caton 2006:39). To Caton's observations I may add that critics forget that Geertz called upon anthropologists to "write a social history of the imagination" (1973b: 96). Interpretive codes not only change over time, at any given time actors may argue for different rules of interpretation. In a history of any collective imagination cultures "are not given, nor are they necessarily primary," they "are above all 'constructed'" as individuals and groups seek to establish boundaries between themselves (Schouls 2003:85). An interpretive approach to culture is therefore compatible with a view of culture as socially constructed or historically constituted, an evolving phenomenon "constantly remade through social encounters, ethical deliberations, political processes and writing" (Biehl et al. 2007:7).

Gérard Bouchard similarly sees culture as collective imagination, "the product of the totality of symbolic steps by which a society gives itself points of reference to anchor itself in space and time, to make possible communication between its members and to situate itself in relationship to other societies" (Bouchard 2001:14, author's translation) A collective imagination calls to political action and generates a "national culture ... that offers itself as the official symbolic framework of the collectivity as a whole" (G. Bouchard 2001:29, my translation). The Speech from the Throne, the stance of governments and the court rulings discussed above are all part of an evolving national culture in which different actors compete to constitute the social order in a given way and to define the language in which it will be affirmed.

Let us consider, for instance, the over-representation of Aboriginal peoples in Canadian prisons. According to

the Royal Commission on Aboriginal Peoples (RCAP), this fact is due to a failure of the criminal justice system and "the principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice" (Hamilton 2008:30). For some, framing the issue of justice in terms of a cultural divide "undermines any explicit discussion of race and of how racism structures Canadian society, undercutting any analysis of indigenous peoples generally, and indigenous women in particular, as a racialized group" (Hamilton 2008:92). For others, framing the issue of justice as the RCAP does in terms of culture or worldview opens the door to official recognition that "the creation of legal meaning—*jurisgenesis*—always take place through an essentially cultural medium" (Borrows 1996:632).

Following White, Borrows (Anishinabe/Chipewa) sees the creation of law as flowing from "'a culture of argument' that 'provide[s] a place and a set of institutions and methods where this conversational process can go on, as well as a second conversation by which the first is criticized and judged'" (Borrows 2005:192). Legal systems thus evolve through living cultures. "Each Aboriginal Nation has its own particular stories which categorize its legal relationships to different orders of Creation" (Borrows 1996:661, 632).[7] Napoleon (2007:3) of Cree, Saulteux and Dunne'za ancestry, and adopted member of the Gitanyow (Gitksan) House of Luuxhon, Ganeda (Frog) clan, similarly argues that "since our legal orders and law are entirely created within our cultures, it is difficult to see and understand law in other cultures." She adds that since "law is culturally bound, it is only law within the culture that created it. Gitksan law is not law to Cree peoples, and vice versa" (Napoleon 2007:3-4). In the same way, one may add, Canadian law is not law in the U.S. or in Mexico, which has not prevented them to enter a free trade agreement that does not diminish their sovereignty and ability to create laws each within their own cultural tradition. Is the same possible for First Nations within Canada? The Supreme Court suggests it is when it writes that "the challenge of defining [A]boriginal rights stems from the fact that they are rights peculiar to the meeting of two vastly dissimilar legal cultures" (*R v. Van der Peet* 1996). The Court must then decide "which legal culture is to provide the vantage point from which rights are to be defined" or "incorporate both legal perspectives" which is the "morally and politically defensible conception of [A]boriginal rights" (*R v. Van der Peet* 1996:507). How this is to be done remains to be seen.

Colliding Collective Imaginations

History shows that in the past quite different views of what was morally and politically defensible prevailed. The religiously legitimated British national culture alluded to above invested the King of England with the power to abrogate the laws of infidels (i.e., Aboriginal Peoples) "for that they be not only against Christianity, but against the law of God and of nature" (Asch 2002:25). Views such as these arose at a time when "an ideology proclaiming European superiority over all other people of the earth was taking hold" (RCAP 1996:12). In 1698, for instance, when writing about America, Locke maintained that "the 'Indians' have property in the fruit and nuts they gather, the wild corn they pick, the fish they catch and the deer they hunt, but not in the land on which they hunt" for they are in a "state of nature," not of civilization (Tully 1995:72). In Canada, this ideology discredited the notion of Indian ownership since, in the words of Stephen Leacock, they "were too few to count" and "their use of resources of the continent was scarcely more than that by crows and wolves, their development of it nothing" (Smith 2005:87).[8] Accordingly, "Canadian law has often been applied on the assumption that First Nation cultures were inferior to European laws and culture" (Borrows 1996:633), thereby legitimating their dispossession (Williams 1989).

British law also developed the notion that the title to the lands occupied by native North American Indians rested with the Crown, a notion vigorously opposed by Indian nations of the time and of today (Borrows 1997). In the 1763 Royal Proclamation, the King, not the British Parliament, sought to rein in the expansionary views of colonists thriving far away from his eyes. He required "that *no private Person do presume to make any purchase from the said Indians of any Lands* reserved to the said Indians ... but that *if at any time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name*" (*Delgamuukw v. British Columbia* 1997:203). In 1990, following a reference to the Royal Proclamation of 1763 respecting the right of native populations "to occupy their traditional lands," the Supreme Court had noted that "there was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title to such lands vested in the Crown" (*R. v. Sparrow* 1990:30). Hence "the treatment of '[A]boriginal title' as a compensable right can be traced back to the *Royal Proclamation, 1763*" (*Delgamuukw v. British Columbia* 1997:203).

According to this Proclamation, colonial governments, religious groups, entrepreneurs, et cetera, cannot extend

their land holding by purchasing lands from Aboriginal Peoples who live on them. The King seeks less to protect Indians than to restrain the ambitions of his British subjects—nascent political foes and rebels—colonizing the eastern shores of North America. In 1748, at the age of 16, George Washington (1732-99) was working as a surveyor "for the Fairfax family, the largest landowners in Virginia." Throughout his life Washington went on to survey "80,000 acres of land in more than 200 professional surveys" and became "an active land speculator" (Graham 1999:1). He purchased 70,000 acres of land in six present-day states and fought "over bounty lands promised to the veterans of the Virginia Regiment who fought with him in the French and Indian War" before the Revolutionary War (1775-83) (Graham 1999:2, 3).[9] After independence the alienation of Indians from their land proceeded relatively swiftly through military campaigns and other means. The American Declaration of Independence is an exemplary case in which the language proclaiming the birth of a nation simultaneously takes possession of the territory it claims from Britain and Aboriginal Peoples, "consecrating the existential reality of the United States of America in an action in which the world as language and the world-world are one and the same" (Giroux 2004:293, author's translation).

While this is not the place to compare and contrast American and Canadian policy toward Aboriginal populations it should be noted that "from the 17th Century to the 20th Century more than 400 treaties were signed between the British Crown and Aboriginal Peoples. Many of these treaties were meant to establish military or commercial alliances, or to simply accommodate each other at a particular place at a particular moment in time" (Dussault and Erasmus 1994:12, author's translation). This was the case with the 1764 Niagara Treaty signed between the British Crown and approximately 2,000 chiefs representing over 24 Nations gathered at Niagara. At that assembly, the 1763 Royal Proclamation was read to the Indians "and a promise of peace was given by Aboriginal representatives and a state of mutual non-interference established" (Borrows 1997:163). Read jointly, the 1763 Royal Proclamation, the 1764 Niagara Treaty, the wampum belt supporting oral tradition, and the reports of British officials who met with the Indians, all led to one conclusion, that the First Nations convened in 1764 received assurances that they would continue governing themselves in their territory. It follows that "colonial interpretations of the Royal Proclamation should be recognized for what they are—a discourse that dispossesses First Nations of their rights" (Borrows 1997:171-172).

Following the 1867 British North America Act, however, the colonial view of the Crown's prerogative guided the government. Treaties became the means to implement an immigration policy designed to enable hundreds of thousands of Europeans to establish themselves on "Indian" lands. Canada thus acquired an area equivalent to five times the size of France (543,915 square kilometres) or more than eleven times the size of the United Kingdom (244,101 square kilometres).The purpose then as today, as stated in the 2007 Speech from the Throne, was to "enlarge the prosperity of the country" and "promote ... the well being of its people" (Canada 2007a:19).

It is always in the name of the Crown that Treaty Commissioners appointed by the federal government tell Indians they must give up their territory in favour of Canada. The treaties stipulate that "the said Indians DO HEREBY CEDE, RELEASE, SURRENDER AND YIELD UP to the Government of the Dominion of Canada, for Her Majesty the Queen and Her successors forever, all their rights, titles and privileges whatsoever, to the lands included within the following limits" (Indian and Northern Affairs Canada 2007a). When confronted with this evidence, Chief François Paulette of the Treaty 8 Tribal Council (Yellowknife, Northwest Territories) retorts: "In my language, there is no word for 'surrender.' There is no word. I cannot describe 'surrender' to you in my language, so how do you expect my people to [have] put their X on 'surrender'?" (RCAP 1996:10). In the same vein, asserting her people's inalienable right to their homeland, Julienne Andre from Arctic Red River maintains that "This land is ours. I was born in it and God gave it to us. We didn't buy it. Why they want to buy it from us?" (Scott 2008:42). The religious dimension in her statement is often found in affirmations of Aboriginal identity and rights (Goulet 2008, In press).

To this day descendants of the chiefs who signed these treaties remind us that the Commissioners "negotiating treaties on behalf of the Crown often used a symbolic language that alluded to their perennial character: 'as long as the sun will rise, that the grass will grow and that the river will flow'" (Dussault and Erasmus 1994:12, author's translation). Treaty 8 is quite explicit in this matter: "Her Majesty also agrees that next year and annually afterwards for ever, She will cause to be paid to the said Indians in cash ... to each Chief twenty-five dollars, each Headman ... fifteen dollars, and to every other Indian of whatever age, five dollars" (INAC 2007a). Government officials call that day the "Treaty Day." Dene Tha refer to it as "the day on which people are given money."[10] Concerning this practice which I witnessed six times between 1980 and 1985, Dene Tha Elder Jean-Marie Talley, told

me, "this money was not to sell anything but to make us brothers and sisters. That is what my father, who saw them give money, used to say. It [the treaty] will not be a lie for God as long as night follows night, and as long as the sun lasts, and as long as the water flows." In other words, for the Dene Tha the Treaty established a kinship-like alliance with the government. Concerning Treaty 11 a Dhe Cho Elder in Wrigley similarly noted that "we are here to help each other and to live like brothers and sisters, one relation. This is a peace treaty" (Asch 2002:32). If the Dene Tha are hosts to foreigners they do so after the Crown promised them that they could continue living as they had done before in their traditional homeland. Briefly, in the minds of the Dene Tha Treaty 8 did not extinguish their ancestral rights. These are still alive and worth fighting for (INAC 1985).

Making treaties through interpreters, between parties whose most basic assumptions about land, autonomy, respect, were so different, is inherently ambiguous.[11] Each party left the negotiations thinking they had achieved their respective goals, the Crown in extinguishing the ill-defined rights of Indians in exchange for defined rights to education, health care, freedom to hunt, et cetera, the Indian in having established a peace treaty intended to establish a pattern of co-existence allowing them to pursue their activities in their homeland. The dismay of the Dene when confronted with government actions stem from their fundamentally different understanding of the Treaty.

Dene Tha Resistance to Government Policies

If, "in the history of colonial invasion ... maps are instruments of conquest" (Said 1996:xxix), they also indicate where conflicts are likely to occur. Conflicts between the Dene Tha and outside parties—government, government agencies and industry—arise in part because foreign political boundaries cross their homeland and new jurisdictions are created without consultation and due consideration of their ancestral rights and treaty rights.

After the Dene Tha signed Treaty 8 in 1900, they continued to move freely in their homeland. In 1905, the central government created the province of Alberta and appointed an Albertan, Frank Oliver, as Minister of Interior and Superintendent General of Indian Affairs (Fumoleau 1994:142). New political and legislative entities entered the lives of the Dene Tha without their consent. In Edmonton, the capital of the newly established province, politicians pursued their interests in the northern parts of "their" territory. Immigration of settlers, followed by the construction of rail transportation, soon made possible the transfer of resources and crops from the north to the south.[12]

In 1906, cognizant of these developments, the federal government amended the Indian Act "to ensure that games laws in the prairie provinces and in the NWT [Northwest Territories] would not apply to [A]boriginal people without the consent of the Superintendent General of Indian Affairs" (Bouchard 2006:13). Provincial game laws might still apply to Indians without their consent, as long as the federal government looking after the interests of its wards consented. More followed. "In 1930, without consulting Aboriginal Peoples, Canada transferred ownership and administrative control of Crown lands and natural resources to the province of Alberta under the Natural Resources Transfer Agreement (NRTA)" (Ross 2001:4). The federal government assumed that the province would allow for Aboriginal subsistence activities on Crown lands.

Provincial authorities were determined, however, to regulate hunting and trapping within their jurisdiction. As of 1939, the government of Alberta forbade all residents, Aboriginals or not, to hunt and trap without a provincial license. Everyone then became liable to prosecution for hunting or trapping on a trapline other than one's own. The Dene Tha obtained licences for individual traplines but did not change their behaviour. A government official reported: "The whole body of trappers followed age-old inclinations, simply followed the game and fur and could not or would not confine their operations to individual areas" (Bouchard 2006:16).[13] The Dene Tha were exercising their best judgment: "Our people lived and travelled all over Dene Tha traditional lands following the animals and hunting them in their best habitats ... My grandparents went wherever animals moved. Their life was based around where and when the animals moved and could be found" (J.-B. Talley N.d.:20). "I would travel through my line but would go further into BC and the NWT ... Even though we [the Dene Tha] had a trapline, we went out on the land wherever we wanted," says another Dene Tha (Didzena N.d.:2).

This practice offended government authorities. In 1950, to emphasize their authority over their respective territories, the provinces of Alberta and British Columbia blazed the border between the two provinces. In 1951, the border between Alberta and the NWT was bulldozed. Despite clearly drawn borders, the Dene Tha carried on with their activities throughout their homeland. As shown by Brody (1981) for Dunne-za, whose territory in British Columbia is adjacent to that of the Dene Tha, it is through their movements that hunters and trappers politicized their identity and asserted their rights over a given geographical area. In other words, "the national territories of [A]boriginal hunters are continuously invented, reaffirmed

not only through speech but through journeys over the land" (Desgent and Lanoue 2005:11, author's translation). Governments may blaze boundaries as they wish; doing so does not take away Dene Tha rights, including that of self-government and of moving unimpeded in their homeland as agreed to at the time of Treaty 8. As Chief Ahanassay reminded the MGP JRP, "as Dene people, we did not create those NWT boundaries, BC-Alberta boundary, that kind of stuff ... We have Dene people all around us ... As a people, we all share lands" (Joint Review Panel (JRP) 2006: 3853).

In her study of Dene Tha youth's attachment to their community and homeland, Spyce emphasized that "place is more than a location; it involves human experiences, emotions, and meanings attached to the lived environment" (Spyce 2009:51). In this sense, Dene Tha territory is more than a geographical space. As place, it is the focus of collective attachment and identity, the context "within which interpersonal, community, and cultural relationships occur" (Spyce 2009:58). The issue is how to maintain the historical relationship to the land and community in the face of so many interventions by outside interests. In 1995, to improve relationships with government and industry, the Dene Tha agreed to participate in a Traditional Land Use and Occupancy Study (TLUOS).[14] The study revealed two important differences in the perspective of the parties involved.

First, "land" and "occupied land" had different meanings for the Dene Tha and for the government and industry. A Dene Tha interviewed said, "we did this study to show our land. Drilling on the water, that too is our land. To the people the water is part of the land we need to show that—under the Land and Water Act it is not so" (Horvath et al. 2001:17). The government takes the view that once it grants land around Dene Tha reservations to industry, "these lands are 'occupied' and are no longer accessible to the Dene Tha' for traditional use" (Horvath et al. 2001:22). In the eyes of the Dene Tha these lands continue to be theirs even when others have access to them.

Second, for reasons of their own, the Dene Tha withheld from investigators locations associated with traditional healing practices, particularly the areas where they collect plants with healing properties. As a Dene Tha stated, "not everyone should know about them [medicine, or powers]" and "any person cannot just pick ground medicine. It is dangerous if one does not know how to use it" (Dene Tha Nation 1997:38).[15]

Dene Tha are also cognizant and appreciative of the sites of ceremonies held over time across their homeland, sites that are strong identity markers.[16] All agree that the area in which they hunt, trap, fish and gather plants "is Dene Tha' territory" which needs protection for the well-being of Dene Tha today and tomorrow (Horvath et al. 2001:18). As a result of the study, community pride and awareness of the importance of traditional sites and knowledge increased (Horwath et al. 2001:36).[17]

"While issues of the ownership and territory seemed to be at the forefront of community members' minds, the TLUOS has not had the desired impact in terms of outside recognition of these issues" (Horvath et al. 2001:17). The provincial government allocates sub-surface rights to industry without consulting Aboriginal peoples. When Treaty 8 signatories in northern Alberta complained about the devastating impact of the "Cheviot Coal Project approved in neighbouring Treaty 6 territory," the Alberta government "argued that neither treaty rights nor a duty to consult exist at all when it exercises its authority under the NRTA [Natural Resources Transfer Agreement] to take up lands for mining" (Szatylo 2002:223). Companies therefore come to the Dene Tha with permits issued by the Alberta Department of Energy giving them rights "to drill for and recover oil and gas in a specific area" (Ross 2001:5). Since "industry's communication with the Dene Tha' comes late in the process of resource development making process," it tends to "revolve around mitigating impacts and considering the concerns of the Dene Tha'" (Horvath et al. 2001:28).

In this respect, the Alberta government falls short of its obligation to protect the rights of Aboriginal peoples. In other words, "despite the statement, in the Aboriginal Policy Framework (Alberta 2000), that government will meet its constitutional obligations to Aboriginal people in the context of land and resource developments and honour their treaty rights, it has yet to develop the necessary tools to implement this commitment" (Ross 2001:6). According to Chief Ahnassay, "the time has come for Alberta to scrap their unconstitutional Consultation Guidelines and to sit down with the Dene Tha and other First Nations in Alberta to negotiate a mutually satisfactory consultation process" (Dene Tha' First Nation 2008:1).

The Mackenzie Gas Project Yesterday and Today

In 1973, governments and industry proposed to build a pipeline from the Mackenzie Delta in the Arctic to Alberta in the south across Dene territories, without consulting them, much as Quebec was proposing then to invest in major hydroelectric developments in the James Bay area without consulting with the Cree. In both cases, Aboriginal Peoples asked the Courts to prevent government from

proceeding with initiatives that ignored their rights. Judge Malouf in Québec and Judge Morrow in the NWT issued injunctions to stop the projects, reminding the respective governments of the Crown's fiduciary duty to protect the interests of Aboriginal Peoples. Governments were instructed to negotiate agreements with Aboriginal Peoples whose lands and livelihoods would surely be impacted by major developments beneficial primarily to urban centres in the south.

In the NWT, through the Berger Inquiry, the federal government initiated consultation with all the Dene, Metis and Inuit communities along the Mackenzie River. The Berger Commission concluded that the projected Mackenzie Pipeline ought to be postponed by ten years to allow all parties to reach an agreement on the development that would eventually take place. The federal government accepted this recommendation and the Dene communities from the Mackenzie delta down to the Alberta border coalesced as one negotiating body presenting itself to the world as The Dene Nation (Goulet 2001). At the end of lengthy negotiations, the parties arrived at an agreement in principle (Dene Nation and the Metis Association of the NWT 1982) which the Dene Nation Assembly rejected in June 1990.

The vote against the agreement followed a speech by Georges Erasmus, President of the Dene Nation. He reminded the Dene that while they were negotiating with the federal government to extinguish their rights on large tracts of land in return for jobs and monetary compensation, the Supreme Court was recognizing important Aboriginal rights. By accepting the agreement would the Dene not relinquish the rights recognized by the highest court? This is precisely the view taken by the Supreme Court in the same year. Interpreting Section 35(1) of the Constitution, the Court concluded that "the word 'existing' makes it clear that the rights to which s. 35(1) applies are those that were in existence when the Constitution Act, 1982 came into effect. This means that extinguished rights are not revived by the Constitution Act, 1982" (*R. v. Sparrow* 1990).

The rejection of the agreement in principle meant the end of the Dene Nation as an umbrella negotiation organization for Dene communities throughout the NWT. The federal government proceeded to negotiate with regional groupings, reaching agreements that included an extinguishment clause with the Dinjii Zhuh (Gwich'in) in 1992, with the Sahtu (Bearlakers) in 1994 and the Dogribs in 1999. Immediately south of the Dogribs, the Deh Cho First Nation (DCFN) did not settle its claims with the federal government. With Chief negotiator George Erasmus, the DCFN are still seeking an agreement that would not include an extinguishment clause. Its lands, which overlap in part with those of the Dene Tha, comprise 40% of the NWT territory through which the MGP would have to go before reaching Alberta. Indeed, were it not for the existence of the boundary set at the 60th parallel, the Dene Tha would most probably be part of the Deh Cho First Nations with whom they share "significant familial and cultural relationships" (Federal Court 2006:7).[18]

In 2001, Yukon and the NWT Aboriginal communities were bluntly reminded that corporations looking around the world "for competitive tax regimes, competitive royalty rates, available skilled workers, and governments who honour their commitments ... will not be held hostage to a multitude of artificial and unnecessary barriers," such as land claims based on Treaty rights, "that do not exist elsewhere" (Morgan 2001). The reference to unnecessary barriers underscores the importance of mobility of capital and labour for the corporate world. The image of the liberal-minded capitalist held hostage by Aboriginal peoples claiming their treaty rights calls to mind that of a rescuer, a role that the business sector expects the government to fill. This is the role taken by the Minister of Indian Affairs and Northern Development when he declares that "the Deh Cho is the largest bit of unfinished business North of 60 in this country" and it is an open question as to "whether it will be resolved prior to the pipeline" (Baily 2006). In other words, negotiations should not impede the multi-billion dollar MGP project meant to fuel prosperity in Canada and beyond.

To this end, while negotiating with the Deh Cho First Nations, government officials and business corporations established the regulatory framework for the MGP. Key stakeholders were identified, the principles to guide the expert assessment of the pipeline on sensitive environments and remote communities were established, and a public consultation process was announced (NGPS 2003). The stakeholders' first initiative was to create the Aboriginal Pipeline Group (APG). This was done in 2000 following meetings in Fort Liard and Fort Simpson of Aboriginal politicians and businessmen representing the Inuvialiut, the Gwich'in, and the Sahtu. The APG's motto is "Maximizing economic benefits through ownership in a Northern pipeline." In June 2001, APG "negotiated a Memorandum of Understanding with the Mackenzie Delta Producers—Imperial Oil, ConocoPhillips, Shell and Exxon Mobil" whereby it would eventually gain one third ownership of the MGP (APG N.d.). Assuming a 33% ownership of the project, the APG estimated its share of future profits in the order of $100 million per year, a profit to be distributed among APG shareholders (APG 2004:2).[19] With this agreement the Mackenzie Valley Producers

Group was formed, including three oil corporations (Imperial Oil, ConocoPhillips and Shell Canada) and one Aboriginal partner (APG).

Second, in June 2003, the Mackenzie Valley Producers Group, of which APG is a partner, filed with the Minister of Resources a Preliminary Information Package (PIP), a 205-page document describing the scope of the project and its implementation timetable (Imperial Oil et al. 2003). The filing of the PIP triggered the creation of the Northern Gas Project Secretariat in December of the same year. This development followed the Interim Resource Development Agreement signed by the federal government with the Deh Cho First Nation on 17 April 2003 (Deh Cho First Nations 2003; INAC 2003). Third, on 18 August 2004, the Minister of the Environment appointed a Joint Review Panel (JRP), "a seven-member, independent body that will evaluate the potential impacts of the project on the environment and lives of the people in the project area" (Northern Gas Project Secretariat N.d.). Finally, also in August 2004, the Minister of the Environment issued the JRP's Terms of Reference, a 77-page document outlining the MGP and the scope of the assessments to follow (Northern Gas Project Secretariat 2004).

The appointment of the JRP and the issuing of its Terms of Reference, followed a presentation by Robert Reid, President of APG to the Senate Standing Committee on Energy, on 8 March 2004. Reid noted that the Deh Cho had yet to sign on to the APG Memorandum of Understanding which had "the potential to significantly delay this important project [the MGP]—a delay that could jeopardize both the project itself and the significant benefits that APG's ownership in the pipeline would bring to NWT Aboriginal Groups" (APG 2004:2). Reid urged the government to reach an agreement that would bring the Deh Cho Nations within the fold of the MGP. The following month, in response to the difficulty of reaching a common ground with the Deh Cho First Nations, the federal chief negotiator Tim Christian suggested that if a negotiated settlement was not reached, "any decision in the future would not be his, but that of the Canadian government" (Deh Cho First Nation 2008).[20]

What might the government do? Reflecting on his role in the MGP in 1970, Chrétien wrote: "I was in conflict with myself: as Minister of Indian Affairs I was on the side of the Indians; as Minister of Northern Development I was in favour of development" (Chrétien 1986:61). Comprehensive land claims negotiated with the Gwitch'in, Sahtu and Dogrib extinguished Aboriginal rights and opened the way to development. The MGP is again high on the national agenda and the Minister of Indian and Northern Affairs Canada has "no intentions to either support or fund procedures that are dysfunctional, non-constructive, or systematically in opposition to the interest of Canada or the interest of the majority of northerners" (INAC 2006). In other words, Canada could cease funding current negotiations with the Deh Cho First Nation and walk away from negotiations. If ministers have to take sides, they give primacy to national interests. This, maintain Aboriginal Peoples, leads to injustice. As poignantly stated by Dene Tha band member, Gloria Silver at the MGP JRP hearing in High Level:

> Yes, you're going to sit here and you're going to talk and then you're going to say "Well, we talked to you, but the Prime Minister of Canada wants it, the President of the United States want it, the town of High Level wants it, Zama wants it, we want it. The almighty dollar, that's what we're after. The hell with your way of life, your culture, your water, your animals, your children, your grandchildren. We'll go ahead and do our thing. It doesn't matter what you say." [Joint Review Panel 2006:3832]

In other words, Canada's expertise at developing natural resources and responding to continental energy demand has yet to be matched with a capacity to protect the land and Aboriginal communities.

In March 2005, the APG appointed former Alberta Premier Peter Lougheed to its board. In the press release announcing this appointment, APG President Robert Reid said about Lougheed that "his experience in developing oil and gas resources in Alberta during his tenure as Premier in the 1970s and 1980s, will serve Northerners well as they work towards developing the Mackenzie Gas Pipeline" (APG 2005). Not mentioned in the press release is the key role Lougheed played in the formulation of section 35 of the 1982 Constitution Act. In November 1981, Lougheed agreed to section 35 "if the word 'existing' were added to the constitutional provision that [A]boriginal and treaty rights 'are hereby recognized and affirmed'" (Smith 2000). Lougheed insisted on this wording "as it was feared that without it the section would create new rights that were not previously recognized in law" (Smith 2000). As seen above, the Crown has repeatedly defended the view that rights claimed by Aboriginal peoples do not exist in law because they were extinguished by Treaty.

This stance is the one taken in 2005 by the consortium of oil companies and the APG. In their Community Reports pertaining to the environmental impact of the Gas Project in Rainbow Lake and Zama City, two communities in Dene Tha territory, five categories of ownership of land were distinguished, none of them Aboriginal:

federal Crown lands administered by Indian and Northern Affairs Canada (INAC), Crown lands administered by the territorial government, provincial Crown lands, municipal lands and private lands (Imperial Oil et al. 2005). The report, which recognizes that the MGP may run into zoning conflicts at the municipal level, does not mention potential conflicts with the Dene Tha.

"In July 2004 the Dene Tha' were given copies of the draft EI [Environmental Impact] Terms of Reference (a 70-page highly technical document) and the draft JRP [Joint Review Process] Agreement, and were told that the deadline for input on both was the following day" (Federal Court 2006:44). The determination of the federal government to sideline the Dene Tha in the development of the MGP led them to appeal to the Federal Court, which they did on 18 May 2005. The Dene Tha also filed a motion with the JRP asking that the hearings scheduled to be held in High Level Alberta in July 2006 be suspended until the ruling of the Federal Court. The Chair of the JRP denied the motion, writing that "the matters under consideration by the Federal Court of Canada ... are beyond the jurisdiction of the Panel and are to be resolved by the court" (Northern Gas Project Secretariat 2006).

Following a lengthy trial, on 10 November 2006, Justice Phelan of the Federal Court found the federal government in breach of duty to consult the Dene Tha' with respect to the MGP (Foisy 2006a, 2006b). While he noted that all parties recognized the existence of the Crown's "duty to consult," he ruled that four federal Ministers had "breached their duty to consult" and reminded them that "the duty to consult cannot be fulfilled by giving the Dene Tha' 24 hours to respond to a process created over a period of months (indeed years) which involved input from virtually every affected group except the Dene Tha'" (Federal Court 2006:116).

Justice Phelan noted that in three recent cases, the Supreme Court had described the duty to consult as a duty more general than the fiduciary one, a duty "arising out of the honour of the Crown" (Federal Court 2006:77). It is worth recalling here that article 35(1) of the Constitutional Act, 1982 stipulates that "the existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed" (Canada 1982) and that article 25 of the Canadian Charter of Rights asserts that none of its parts "shall be construed so as to abrogate or derogate from any [A]boriginal treaty or other rights or freedoms that pertain to the [A]boriginal peoples of Canada" (Canada 1982). Consistent with this view the Supreme Court ruled that "Section 35(1) is to be construed in a purposive way. A generous, liberal interpretation is demanded given that the provision is to affirm [A]boriginal rights" (*R. v. Sparrow* 1990). In *Mikisew Cree First Nation* (2005) the Supreme Court affirmed the Treaty 8 First Nations right to object to developments that might impact negatively on their environment. Against the view of the provincial and federal governments, "the Court held that any consultation must be undertaken with the genuine intention to address First Nation concerns," underlining that this "right to consultation takes priority over the rights of others" (Federal Court 2006:103-104).

In light of these constitutional rights and legal precedents, Justice Phelan recognized that a remedy was called for. He noted, however, that "the difficulty posed by this case is that to some extent 'the ship has left the dock.' How does one consult with respect to a process which is already operating?" (Federal Court 2006:130). The Court decided to hold further remedies hearings and the JPR was "enjoined from considering any aspect of the MGP which affects either the treaty lands of the Dene Tha' or the [A]boriginal rights claimed by the Dene Tha'" and "from issuing any report of its proceedings to the National Energy Board" (Federal Court 2006:133).

In paragraph 68 of his judgment, Justice Phelan noted that the Deh Cho First Nation, while not having a final land claim settlement with Canada, had "entered an Interim Measures Agreement and an Interim Resource Development Agenda that gives the Deh Cho rights in respect of its claimed territory" (Federal Court 2006:69). Moreover, "as a result of litigation initiated by the Deh Cho alleging that Canada had failed to consult with it adequately regarding the MGP, the Deh Cho received a generous agreement," including settlement funds of millions of dollars "to prepare for the environmental assessment and regulatory review of the MGP," along with "$15 million in economic development funding for this same time period to facilitate the identification and implementation of economic development opportunities relating to the MGP, and $3 million each fiscal year until 2008 for Deh Cho process funding" (Federal Court 2006:27).

On 30 November 2006, 20 days following the judgment of the Federal Court, Jim Prentice, Minister for Indian Affairs and Northern Development, appointed "Tim Christian as Chief Consultation Officer for the Dene Tha' First Nation" and charged him with the task of "negotiating a Settlement Agreement with the DTFN, as part of Canada's commitment to fulfilling its obligations to consult" (INAC 2007c). Notwithstanding these negotiations, on 5 December 2006 "Canada filed a Notice of Appeal of the Federal Court decision of November 10th, 2006, concerning the Dene Tha' First Nation and the Mackenzie Gas Project," arguing that it was doing so "in

the interest of seeking greater clarity of the law on Aboriginal consultation" (INAC 2007c:1). The appellants, the Minister of Environment, Minister of Fisheries and Oceans, Minister of Indian and Northern Affairs Canada and the Minister of Transport, failed to convince the Federal Court of Appeal that Judge Phelan had "imposed on the Crown an obligation that is different or more onerous than is justified by the jurisprudence" and that "in assessing whether there had been adequate consultation, [Justice Phelan] applied a standard of correctness rather than reasonableness" (*Canada (Environment) v. Imperial Oil Resources Ventures Ltd.* 2008:8, 10). In January 2008, to the great satisfaction of the Dene Tha, the Federal Court of Appeal upheld Judge Phelan's 2006 ruling and dismissed the government's request.

In the meantime, on 23 July 2007, the federal government had signed an agreement with the Dene Tha. The agreement is similar to that in place with the Deh Cho First Nations. If the MGP is approved, Canada will provide $25 million to the Dene Tha First Nation to assess the impact of the project on culture and heritage as well as "on asserted or existing Treaty or Aboriginal rights" (INAC 2007d). The parties also decided to cease litigation and agreed to "set out a time-frame for Canada's review of a Dene Tha First Nation claim to Aboriginal Rights and Title in the Southern Northwest Territories" (INAC 2007d).

What is the significance of the 2007 agreement and the Dene Tha 2006 and 2008 legal victories? They reveal that the Crown and Aboriginal Peoples still disagree on the nature and extent of their rights, not only because they pursue different interests, but also because these are pursued within distinctive cultural understandings, or collective imaginations, defining who they are as people, how they are to relate to land and to each other. Briefly, because they do not see the world and each other through the same system of significance, they inevitably end up in adversarial positions.

Following the 2007 agreement, the minister of INAC was careful to distinguish between Treaty and Aboriginal rights: "The Dene Tha' First Nation (DTFN) hold Treaty 8 rights in this area [northern Alberta], which Canada acknowledges. The DTFN also assert Aboriginal rights to lands in the southern NWT, which Canada does not recognize" (INAC 2007c). Briefly, the minister reaffirms the position of the Crown: Treaty extinguishes Aboriginal rights. Aboriginal peoples who pursue traditional activities on Crown land have no title to the land. Not so for the Dene Tha for whom Treaty affirms Aboriginal rights and extends Dene Tha peaceful cooperation with newcomers to their homeland. According to Chief Ahnassay, "this Settlement Agreement is a signal that, going forward, governments and industry will work with us to ensure our Treaty and Aboriginal Rights, and our rights as first peoples of this great land, are respected" (INAC 2007d).

The Dene Tha and the Deh Cho First Nations are currently working on "an accord which would lay out how we're going to use our shared territories within the NWT" according to Chief Ahanassay. Rather than define the issue as one of overlap, they want to refer to "a shared area" where they "have a common harvest area and land use." The goal is not to assert exclusive rights but to "show to industry [and] the government, that we are still Dene people, that we work together and we share lands" (JRP 2006:3852, 3853, 3856). The Deh Cho First Nations and the Dene Tha hope that the government will adopt a similar perspective on access to shared land. They do so in the knowledge that the Federal Court of Appeal has called upon all parties to reach agreement out of court. What does the future hold? A final settlement with the Deh Cho First Nations and the Dene Tha that extinguishes their Aboriginal rights to "enlarge the prosperity of the country and promote in every way the well-being of its people" (Canada 2007a:19)? A final settlement based on shared ownership of a territory on which many nations build a sustainable future? The answer to these questions will define the national culture for years to come.

Conclusion

This article highlights the strategies deployed by the Crown to assert its sovereignty and interests over those of Aboriginal peoples and describes how the Dene Tha have acted over more than a century to protect their collective rights and interests. The relationship to Aboriginal peoples was defined unilaterally by the Crown who did not question the subjection of others to its policies. An ideology of supremacy led governments and Canadians to view Aboriginal objections to economic development projects as obstacles to orderly exploitation of the nation's resources. Too often, Aboriginal Peoples have had to take their case to provincial courts and to appeal to the Federal Courts and to the Supreme Court of Canada to reverse adversarial lower-court decisions. Despite these decisions upholding Aboriginal and treaty rights, governments are inclined to interpret these rulings in the narrowest sense possible. The fight between Aboriginal Peoples and the Crown is unending.

Aboriginal Peoples have also sought recognition of their rights at the international level through the UN Declaration on the Rights of Aboriginal Peoples signed in 2007. It is from the UN that Aboriginal Peoples, in

Canada and elsewhere, received recognition of their right to exist and develop as enduring, self-governing societies in their ancestral homelands. At the time, four Anglo-Saxon countries, Canada, the U.S., Australia and New Zealand, did not sign the Declaration. The deeper roots of this resistance to recognition of Aboriginal rights are found in a particular system of social significance, or in a specific form of social imagination, namely that of a Sovereign Crown which takes under its tutelage Aboriginal peoples, claiming their territory as its own so as to introduce them to the universal movement toward civilization. The failure to radically question this system of social significance formed in a Christian world inevitably leads to the repetition of similar conflicts in which Aboriginal Peoples and settlers are continuously at odds. Justice and peaceful co-existence are possible; they are a matter of radically re-imagining our joint destinies.

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Notes

1 Speeches from the Throne typically end with a similar reference to Divine Providence assisting Canadian legislators.

2 Following the Constitutional Law of 1982, Aboriginal Peoples denote First Nations (formerly known as Indians—with or without treaty, status or non-status), Inuit (formerly known as Eskimos) and Metis (also known as Half-Breeds).

3 See for instance, *Guerin v. The Queen* 1984, *R. v. Sparrow* 1990, *Delgamuukw v. British Columbia* 1997, *Mikisew Cree First Nation v. Canada* 2005.

4 *Dene Tha'* (with an apostrophe) is used by the Dene Tha band, governments and courts, in contrast to *Dene Tha* (without apostrophe), the linguistically more accurate spelling used in the anthropological literature.

5 Given the *Sparrow* test,

> In practice, the Crown would have to prove at trial that regulations had been infringed by the defendant: a *prima facie* case. Then the burden of proof shifts to the defendant to show that he or she has an existing [A]boriginal or treaty right that is frustrated to some degree by the regulation. If the exercise of the protected right is adversely affected by the regulation, then the Crown must justify its application in the face of section 35 protection, which is not absolute. This is the case despite section 52 of the *Constitution Act, 1982* which provides that any enactments inconsistent with protected rights are, to the extent of the inconsistency, "of no force and effect." [Virtual Law Office 1990]

6 The literature on this topic is vast. This paper draws upon the work of many authors, among them, Asch (2002), Beauchemin (2007), Borrows (2002), Hamilton (2008), Napoleon (2007), Niezen (2003), Poirier (2004), Schouls (2003) and Tully (1995).

7 Borrows demonstrates the importance of stories in shaping legal reasoning among his own people, the Anishinabe (1996: 649-652), the Navajo (2005:210-211) and the Blackfoot (2005:193-195). Tully (1995) does the same as he draws on *The Spirit of Haida Gwaii* to challenge dominant views on constitutionalism.

8 Leacock was a prominent political scientist at McGill University. His book was paid for by Samuel Bronfman, the owner of Seagram the liquor company. One hundred and sixty thousand copies were "distributed free of charge to schools and libraries" (Smith 2005:87).

9 "Later in the colonial period, a new crop of land companies composed of English and colonial speculators sought both title to and political control over great tracts in the Mississippi Valley ... [attracting] some of the ablest colonial leaders into their ranks, among them George Washington, Richard Henry Lee, Benjamin Franklin, the Whartons and George Croghan. The struggles of these rival companies for charters and grants played an important role in British colonial policy during the years before the Revolution" (Graham 1999:4). I thank Bruce Miller for bringing these facts to my attention.

10 Among the Chipewyan, Slavey, Hare and Dogrib, treaty is translated to English as "money is distributed," Indian Agent as "the one distributing money," July as "then month when money is given" and the first Treaty as "the first time money was given" (Kulchyski 2005:81).

11 The ambiguity inherent in making treaties is apparent in the report that Commissioner David Laird wrote to the Minister of the Interior on 22 September 1899, following his negotiations with the Aboriginal parties to Treaty 8. The Treaty specifies that "Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have the right to pursue their usual vocations of hunting, trapping and fishing ... subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty" (INAC 2007a). When the Dene asked the Commissioner if their "usual vocations" would be curtailed by the government, he answered that any reduction would not be such to prevent their making "a livelihood by such pursuits" (INAC 2007b). His verbal assurances were ambiguous at best, for it told the Dene Tha that by definition they were under tutelage, wards of the State. They were not to decide their fate.

12 As mentioned by a reviewer of this paper, one of the motivations for extending Treaty 8 to part of northeastern British Columbia was to open the territory for safe passage to the Yukon gold fields. See Duff and Petryshyn (1999-2000) for a special issue of Lobstick on the 100th anniversary of Treaty 8.

13 Similar attempts by the Quebec and Ontario governments failed to reallocate traplines so that Crees in each province would have their "traplines in the province where they 'resided'" because "the latter changes conflicted with Cree views of their 'residence' which was on hunting territories" that preceded provincial boundaries (Feit 2005:281).

14 The study was funded by Alberta industries and the federal government as well as the provincial governments of Alberta and British Columbia. Given the source of the funding, TLUOS did not consider Dene Tha traditional lands outside of Alberta on which the Dene Tha claim Aboriginal rights and where they continue to hunt, trap and harvest plants.

15 See Goulet 1998 for a discussion of Dene Tha views on danger, power and powerfulness. Dene Tha told the MGP Joint Review Panel recently of the importance of traditional ways. "My family gathers plants to use as medicine to remedy health ailments. My parents are well informed about the many different types of plants used for medicines as that knowledge is passed down" (G. Tallay N.d.:2). "We have many medicinal remedies to treat many kinds of illness or health ailments ... I know that some of the younger people of our family were taught what to look for and where to go look for it" (Didzena N.d.:3).

16 "There are tea dance [also known as the Prophet Dance] ceremony sites and spiritual cultural areas found on Dene Tha' traditional lands ... My father keeps me informed about those sacred places and sites" (G. Tallay N.d.:1). "There are also important ceremonial sites on the land ... We still have ceremonial offerings and give offerings at those places. We pray and give thanks to the creator at these sites and pray that it will be a good year for all who enter the circle" (J.B. Tallay N.d.:3).

17 Significantly, the photograph of Alexis Seniantha fills the whole cover page of the TLUOS publication. Until his death in the early 1990s, he was the head prophet who presided over the Dene Tha ceremonies of offerings and a major healer in his own right. The first chapter of *Those Who Know: Profiles of Alberta's Native Elders* by Diane Meili (1991) is devoted to Alexis Seniantha, a clear indication of the high regard he was held in Alberta.

18 In his submission to the JRP for the MGP, Dene Tha elder John Baptiste Tallay affirmed the closeness of the two people: "The Deh Cho people are closely related to the Dene Tha people. We use a similar dialect. Our language and traditional culture are similar. We share the same lands. We are related through blood and our extended families" (J.B. Tallay N.d.:1). While Tallay resides in Chateh, Alberta, his grandmother from Fort Simpson in Deh Cho territory had married a Dunne-za from northeastern British Columbia.

19 "The Sahtu Pipeline Trust is the largest single owner of APG with 34 partnership units; the Gwich'in Tribal Council is next with 20 partnership units; the Inuvialuit Regional Corporation holds 4 partnership units; and we have 34 partnership units set aside for the Dehcho Pipeline Management LP, who are in the process of joining APG" (Senate of Canada 2008:8-9).

20 Failing a land claim agreement what happens? Responding to Senator Nick Sibbeston from the NWT who had asked if the MGP could be built without a land claim settlement with the Deh Cho First Nations, Mr. Chambers, Executive Director of the Northern Gas Project Secretariat, referred to three diamond mines operating in the NWT in areas where land claims have not been settled: "It is not unprecedented that capital projects do proceed if there is goodwill on the part of everyone involved. While I cannot say whether the [MGP] project can happen prior to a land claim being settled, I can say that based on the experience of the diamond mines, it is not unprecedented if there is goodwill among the parties" (Senate of Canada 2008:17-18).

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