

# Indigenous Indeterminacy: Auditioning Post(-)coloniality in Canadian Aboriginal Land Claims

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## I. Introduction

Louise Profeit-Leblanc, storyteller of the Nacho N'y Ak Dun First Nation of the Northern Tutchone people, has said that a story contains the past, the present and the future. Thus she tells the stories of “those who have gone on”, to “teach...about our rich past but also provide...the tools required for this generation to go forward with the wisdom and strength, by being able to access this knowledge”<sup>1</sup> Now, as the Aboriginal Arts Coordinator for the Canada Council of the Arts, she is a part of assisting other Aboriginal peoples to undertake the telling of their history.

It has not always been, however, that Canadian Aboriginal peoples were the bearer of their own cultural traditions and histories. Many other people, from midshipman<sup>2</sup> to archaeologists, have been the means through which non-Aboriginal peoples have come to know about Indigenous peoples. It is, very generally, through this species of cultural engagement that it has become necessary to address the question of who is the bearer of stories, how stories are told, and the implications in the mode, means, and mechanism of the telling.

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<sup>1</sup> Online <[http://www.banffcentre.ca/aboriginal\\_arts/faculty/profeit-leblanc\\_louise.htm](http://www.banffcentre.ca/aboriginal_arts/faculty/profeit-leblanc_louise.htm)>

<sup>2</sup> See G.P.V. Akrigg & H.B. Akrigg, *British Columbia Chronicle, 1778-1846* (Vancouver: Discovery Press, 1975) for a good collection and description of journals, letters, and other documents regarding the initial forays into British Columbia. In this chronicle, for example, there is reference to Midshipman Riou's description of the Nootka Aboriginal peoples as “a set of the dirtiest beings beheld—their faces and hair being a lump of red and black Earth and Grease.”

More specifically, it is the recognition that the variety of mythologies,<sup>3</sup> ideologies and theologies<sup>4</sup>, which over the centuries have justified the conquest and assimilation of peoples of non-European descent, are inadequate narratives for understanding contemporary mosaics of cultural difference. From one specific, but rather varied perspective, this inadequacy makes essential the directive to fray the edges of totalising western European imperial narratives. Post(-)colonial<sup>5</sup> theory, in its basic generality, is one form of engagement that attempts to develop “theoretical and critical strategies...to examine the culture...of former colonies of European empires, and their relation to the rest of the world.”<sup>6</sup> While this leads to an extraordinary amount of regional, theoretical, methodological and critical variants<sup>7</sup> included under the rubric of the post(-)colonial, there is a uniform insistence on engaging with the stories of the colonised, marginalised and sublated stories of those who can be argued to fit the classification of the colonised. The concern correlatively becomes the authority and modality of the narrative of the colonial. This paper will be concerned with how to draw upon post(-)colonial theory to look at the relationship between Canadian Indigenous peoples, land, law and Canadian

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<sup>3</sup> See P. Fitzpatrick, *The Mythology of Modern Law* (London: Routledge, 1992); and P. Fitzpatrick, *Modernism and the Grounds of Law* (Cambridge, Cambridge UP, 2001) for a discussion of the mythologies contributing to the imperialism of modern law.

<sup>4</sup> See F. De Vitoria, *Political Writings*, ed. A. Pagden & J. Lawrance (Cambridge: Cambridge UP, 1991) for a good example of imperial theology.

<sup>5</sup> The rather labour intensive use of the parentheses is an obscure way to furtively refer to the debate at the heart of post(-)colonialism about nomenclature and complicity. See Kumar, V, “A *Proleptic* Approach to Postcolonial Legal Studies ? A Brief Look at the Relationship Between Legal Theory and Intellectual History”, 2003 (2) *Law, Social Justice & Global Development Journal Online* at <<http://elj.warwick.ac.uk/global/issue/2003-2/kumar.html>>

<sup>6</sup> J. Hart & T. Goldie, “Post-colonial Theory” in I.R. Makaryk, Ed. *Encyclopedia of Contemporary Literary Theory* (Toronto: University of Toronto Press, 1993) 155.

<sup>7</sup> See H. Schwartz & S. Ray eds, *A Companion to Postcolonial Studies* (Oxford: Blackwells, 2000) for a good survey of the variations now abundant in post(-)colonial studies.

sovereignty through making use of some key concepts of post(-)colonialism to look at the basic legal-institutional genealogy of Aboriginal land claims in Canada.

## II. Post(-)colonialism

Typically, the concern of post(-)colonialism has been centred on a particular typology of colony. This tendency, I would posit, has less to do with any essential quality which the populations of the peoples included exude, but rather more to do with the astonishing work of the theorists who have brought the discussion of the post(-)colonial into the common canon of academic discourse. The contributions of Homi Bhabha and Edward Said are representative of this phenomenon through their nearly instant recognition as theorists of a resounding and commanding intensity. These engagements have clearly denoted the Indian and Oriental<sup>8</sup> experience as that of the post(-)colonial. While the countries of New Zealand, Canada, and Australia can and indeed have been theorised as post(-)colonial themselves; it has been argued that these countries are indeed also colonial powers vis-à-vis the Indigenous peoples residing within their national boundaries.<sup>9</sup> Thus, the nation of Canada, while representing itself as a species of post-colonial imagination<sup>10</sup> is contemporaneously situated in the position of the coloniser. It is within this ambiguous environment that the attempt to explore issues relating to Canadian Indigenous peoples must begin.

The traditional approach towards Aboriginal peoples in Canada has demonstrated a nefarious tendency to be polarized around the options of either complete assimilation or

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<sup>8</sup> It may be fairly obvious, but I am using the term in the Saidian sense.

<sup>9</sup> This is not to say that there is no contention about whether post(-)colonialism is applicable to indigenous peoples. See J. Weaver, "Indigenesness and Indigeneity" in H. Schwarz & S. Ray eds. *A Companion to Postcolonial Studies* (Oxford: Blackwell, 2000) 221

<sup>10</sup> See *supra* note 6 at 157

preservative segregation. Wilson Duff, an anthropologist who engaged in extensive work on British Columbia Indigenous peoples in the 1960's, for example, described the Aboriginals in British Columbia at that time in this way:

The period of decline is now over, and has been for generations. The Indian citizens of British Columbia are now rapidly increasing, and their leadership and sense of Indian identity are strengthening rather than weakening. Today they form only 2 \_ per cent of the population of the Province. With increasing intermarriage the definition of "Indian" is passing from the racial to the legal realm, and culturally, only remnants of the old Indian ways of life survive. But in spite of that they still form a distinct ethnic group within the larger society, and most of them still live in separate communities which are different in some respects from non-Indian communities. Some outsiders are disappointed that they have preserved so little of their cultural heritage. Others blame them for not having advanced to full equality with whites; that is, for not having gained control in a couple generations of a highly complex way of life which took Europeans many centuries to evolve, and which is changing so rapidly that many non-Indians too are being left behind. Their present situation, generally somewhat depressed between two ways of life, should not be used to judge either their past cultures or their capabilities for the future.<sup>11</sup>

Here, Duff reflects the polarities often expressed by outsiders in regard to Aboriginal peoples—assimilate, isolate, or a life depressed in the middle. There is seemingly no ground in between.

In the era of post(-)colonial studies, however far more subtle, thought not contested, alternative approaches are available for understanding the dynamics resultant from the project of colonization. One, I will focus on in particular is Homi Bhabha's attempt to re-conceptualize the relationship precipitated by colonial expansion, and the significant postscript of globalisation. I will engage with Homi Bhabha in an attempt to find a position whereby the binaries of inside/outside and past/present can give way to a

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<sup>11</sup> W, Duff, *The Indian History of British Columbia*, Vol. 1 (Victoria: Provincial Museum of Natural History and Anthropology, 1964) 9

positioning which better reflects interrelationship between Canadian Indigenous peoples and the sovereignty of Canada.

### III. Hybridity

An important notion found in Homi Bhabha's work that forwards the project of moving beyond binary conceptualisation is the recognition of hybridisation, which recognises that the borders of cultural contiguity are not impermeable. Indeed, the process of cultural translation and transposition occurs in a "third space"<sup>12</sup>, "liminal"<sup>13</sup> area, or is affected by a "time-lag"<sup>14</sup> which creates sites of hybridity. This third liminal, interstitial space allows the creation of meaning that is "neither one nor the other"<sup>15</sup>. The third space is essentially, the specific temporal and situational aporia between the speaker of an enunciation and the receiver of an enunciation. Bhabha uses the semiotic process of enunciation to describe how there becomes a creative space where no enunciation can be translated in a pure and unadulterated form. He writes that:

The linguistic difference that informs any cultural performance is dramatized in the common semiotic account of the disjuncture between the subject of a proposition (*enonce*) and the subject of the enunciation, which is not represented in the statement but which is the acknowledgement of its discursive embeddedness and address, its cultural positionality, its reference to a present time and a specific space. The pact of interpretation is never simply an act of communication between the I and the You designated in the statement. The production of meaning requires that these two places be mobilized in the passage through a Third Space, which represents both the general conditions of language and the specific implication of the utterance in a performative and institutional strategy of which it cannot 'in itself' be conscious. What this unconscious relation introduces is an ambivalence in the act of interpretation. The pronominal I of the proposition cannot be made to address—in its own words—the subject of

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<sup>12</sup> See H. Bhabha, *The Location of Culture* (London: Routledge, 2004) 52-56

<sup>13</sup> *Ibid* at 199-244, See also M. Perloff, "Cultural Liminality/Aesthetic Closure?: The 'Interstitial Perspective of Homi Bhabha'" Online <<http://wings.buffalo.edu/epc/authors/perloff/bhabha.html>>

<sup>14</sup> Bhabha, *supra* note 12 at 274-5

<sup>15</sup> *Ibid* at 53

enunciation, for this is not personable but remains a spatial relation within the schemata and strategies of discourse. The meaning of the utterance is quite literally neither one nor the other. This ambivalence is emphasized when we realize that there is no way that the content of the proposition will reveal the structure of its positionality; no way that context can be mimetically read from the content.<sup>16</sup>

Therefore, the interstitial or liminal space can be described also as this space in-between.

Time-lag, Bhabha's other conceptual model for this aporia, has the added dimension of time, whereby there is a

process of reinscription and negotiation—the insertion or intervention of something that taken on new meaning—[which] happens in the temporal break in-between the sign, deprived of subjectivity, in the realm of the intersubjective. Through this time-lag—the temporal break in representation—emerges the process of agency both as a historical development and as the narrative agency of historical discourse.<sup>17</sup>

The result of these conceptual aporias is the opening of a space whereby the “articulation of culture's hybridity”<sup>18</sup> can be enunciated. Cultures are not, then, represented merely as self-enclosed unassailable ideological bubbles that can merely either be destroyed or subsumed. Instead there is the ability for translation and modulation of culture through a pause where there are no privileged enunciations.

The performativity of culture is also essential to the idea of hybridity. This aspect, focussing on the continual production of culture, evades an obsession with an originary or pure culture. Indeed, this insistence of origin only masks the actual process of cultural identification, which he places in “terms of cultural engagement”<sup>19</sup> which are “produced performatively”.<sup>20</sup> As such:

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<sup>16</sup> *Ibid* at 53

<sup>17</sup> *Ibid* at 274-5

<sup>18</sup> *Ibid* at 56

<sup>19</sup> *Ibid* at 3

<sup>20</sup> *Ibid*

The representation of difference must not be hastily read as the reflection of *pre-given* ethnic or cultural traits set in a fixed tablet of tradition. The social articulation of difference, from the minority perspective, is a complex, on-going negotiation that seeks to authorize cultural hybridities in moments of historical transformation.<sup>21</sup>

The telling of any cultural story, whether it be of the past or the present is therefore a present production of cultural meaning, not simply the telling of an ‘authentic’ tradition. The identification of cultural difference becomes not an archaeological process of excavating the origin of a culture in order to haphazardly compare current cultural practices to this authentic tradition; but rather a continual process of re-creation. Here, referring back to the function of storytelling mentioned earlier, we see how the telling of the past does indeed create the present and the horizon of possibility for the future.

The performative paradigm of cultural production, however, is not typical to how Aboriginal peoples are approached in Canadian legal accounts. Culture tends to be identified through reference to the similarities the current culture shares with a vision of historical cultural purity. An example of this obsession with cultural origin and authenticity, and its problematic consequences, can be found in relation to Aboriginal rights<sup>22</sup> in Canada. After entrenching “existing Aboriginal and treaty rights” in section 35(1) of the Constitution Act 1982, it fell to the Supreme Court to determine how to identify an Aboriginal right. In a much cited passage then Chief Justice Lamer stated that the “court must define the scope of 35(1) in a way that captures *both* the aboriginal and the rights in aboriginal rights.”<sup>23</sup> In attempting to do so, the test became one whereby

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<sup>21</sup> *Ibid*

<sup>22</sup> A distinction must be made between claims for land and aboriginal rights. The test for Aboriginal title is different than the test for Aboriginal rights.

<sup>23</sup> *Van der Peet, R. v.* [1996] 2 S.C.R. 507. at para 20

only rights that constitute “an integral part of their distinctive culture”<sup>24</sup> should be protected. More specifically, “the test for identifying aboriginal rights recognized and affirmed by s.35(1) must be directed at identifying the practice, traditions, and customs central to the Aboriginal societies that *existed in North America prior to contact with the Europeans.*”<sup>25</sup> Here, we find culture being identified by authentic practices without any recognition of the unavoidable impact of dramatic political, economic, and legal intervention in-between contact and the present. There is even a lack of the recognition of the changes that the slow marching of time often precipitates. Indeed, rather than allowances being made for such colonial or temporal interventions, the court further constricts the determination of Aboriginal rights by stating that “Aboriginal rights ... must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.”<sup>26</sup> This even further contributes to the conceptual strait-jacket by adding the additional requirement that the right must be able to be reconciled to a sovereignty unilaterally asserted.<sup>27</sup> As John Borrows has noted, there are some fundamental absurdities with this reasoning. He poses:

Why entrench Aboriginal rights in the constitution if the societies they were meant to protect cannot survive? Canadian courts have not yet come to terms with the fact that, like others, Aboriginal peoples are at once traditional, modern, and postmodern. Physical and cultural survival depends as much on attracting legal protection for contemporary activities as it does on gaining recognition for traditional practices.<sup>28</sup>

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<sup>24</sup> *Ibid* at para 58

<sup>25</sup> *Ibid* at para 44 (emphasis added)

<sup>26</sup> *Ibid* at para 31

<sup>27</sup> See J. Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002) at 111-137

<sup>28</sup> *Ibid* at 74-75

The Aboriginal peoples of Canada, as far as their entrenched rights go are limited to the activities and practices undertaken pre-contact, as this is the only the Canadian Supreme Court could express the essential characteristics of Aboriginal culture and identity. To be Aboriginal, therefore, is to perform activities that were undertaken around 100 years ago. Indeed, if British culture, for example, were restrained in such a way London would be a far different place! A conception such as Homi Bhabha's thus provides a way to register cultures as contemporary performance, rather than archaic originary identification.

#### IV. The Politics of Doubling

While the idea of hybridity may have a descriptive relevance to Canadian Aboriginal peoples it may also express a mechanism of positive political and legal change, as the concept of hybridity is not only a mechanism for conceiving of the translation and transformation of minority cultures. Its most meaningful operation, Bhabha posits, is as a strategy of resistance and transformation, in relation to the dominant culture. In fact, as Peter Fitzpatrick and Eve Darian-Smith have commented, "postcolonialism, in our view, exists in an ambivalent belonging to the West. It speaks of the West and in a way comes from it. But postcolonialism is a disruption or fracturing of the West."<sup>29</sup> Indeed, as Bhabha, in a passage discussing the manifestation of the English book, explains:

Hybridity is a problematic of colonial representation and individuation that reverses the effects of the colonial disavowal, so that other 'denied' knowledge enters upon the dominant discourse and estrange the basis of its authority—its rules of recognition... What is irremediably estranging in the presence of the hybrid—in the revaluation of the symbol of national authority as the sign of colonial difference—is that the difference of cultures can no longer be identified

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<sup>29</sup> P. Fitzpatrick & E. Darian-Smith, "Laws of the Postcolonial: An Insistent Introduction" in *Laws of the Postcolonial* (Ann Arbor, University of Michigan Press, 1999) 1 at 2

or evaluated as objects of epistemological or moral contemplation: cultural differences are not simply there to be appropriated.<sup>30</sup>

Colonial discourse, much like Toni Morrison's reader thus finds itself, as Bhabha describes, "snatched, yanked, thrown into an environment completely foreign."<sup>31</sup> The unassailability of colonial authority on its own territory becomes questionable when deprived of its own history, geography, and ideology. The post(-)colonial thus operates as both a cite of the colonised culture's operation, and the destabilisation of the coloniser's cultural hegemony. It makes apparent the other within ourselves.

#### V. Post(-)colonial Doubling

This dual movement must be further interrogated so as to distinguish between the colonial doubling and the post(-)colonial doubleness, for it is through the operation of both of these movements that the full scope and effect of Bhabha's form of resistance may be measured. The first form of doubling, influenced heavily by Frantz Fanon's work, *Black Skin/White Masks*<sup>32</sup> is that of the subaltern identity. In taking this stance Bhabha positions himself "amidst a celebrated gathering of poststructuralist thinkers"<sup>33</sup> in insisting that identity is a creation of the contemporary production thus in origin is interminably elusive. This state of the emergence of the subject, then, rather depends on discursive production, rather than any closed or complete essential totality. For Bhabha, "for identification, identity is never an *a priori*, nor a finished product; it is ever the problematic process of access to an image of reality."<sup>34</sup> Subaltern identity, affected by both the colonised and coloniser's discursive and ideological worlds, thus becomes a

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<sup>30</sup> Bhabha, *supra* note 12 at 163

<sup>31</sup> *Ibid* at 285

<sup>32</sup> (New York, Grove, 1967)

<sup>33</sup> Bhabha, *supra* note 12 at 80

<sup>34</sup> *Ibid* at 73.

dual, but partial, evocation of both. In other words, “the desire for the Other is doubled by the desire in language, which *splits the difference* between Self and Other so that both positions are partial; neither is sufficient unto itself.”<sup>35</sup> The repetition of transparent language (devoid of essentiality) only creates a metonymy of presence, and can never carry presence itself of any cultural identification. Thus, hearkening to Foucault’s transparent statements “inhabited by the other, the elsewhere, the distant; it is hollowed out by distance.”<sup>36</sup> The discursive production of the post(-)colonial position becomes not the doubling in the sense of a dual identity (Canadian-Aboriginal) but rather neither one nor the other (neither fully Canadian, nor fully Aboriginal).

This rather bleak statement, seemingly reiterating the narrow and unattractive options related by our anthropologist friend cited earlier, is seen by Bhabha instead as a starting point for recreating the political field. As he hopefully writes

Taking my lead from the ‘doubly inscribed’ subaltern instance, I would argue that it is the *dialectical* hinge between the birth and the death of the subject that needs to be interrogated. Perhaps the charge that a politics of the subject results in a vacuous apocalypse is itself a response to the poststructuralist probing of the notion of progressive negation—or sublation—in dialectical thinking. The subaltern or metonymic are neither empty nor full, neither part nor whole. Their compensatory and vicarious processes of signification are a spur to social translation, the production of something else besides which is not only the cut or gap of the subject but also the intercut across social sites and disciplines. This hybridity initiates the project of political thinking by continually facing it with the strategic and the contingent, with the countervailing thought of its own ‘unthought’. It has to negotiate its goals through an acknowledgement of differential objects and discursive levels articulated not simply as contents but in their *address* as forms of textual or narrative subjections—be they governmental, judicial, or artistic. Despite its firm commitments, the political must always pose as a problem, or a question, the *priority of the place from which it begins*, if the authority is not to become autocratic.<sup>37</sup>

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<sup>35</sup> *Ibid* at 72

<sup>36</sup> M. Foucault, *The Archaeology of Knowledge*, Trans. A.M. Sheridan (London: Routledge, 2001) at 81

<sup>37</sup> Bhabha, *supra* note 12 at 92

This approach, or starting point, then offers a locus from which to decentre discursive authority through the rethinking of the political. If hybridity results in identities that are not entirely sufficient, the political movement would be towards questioning the social constellations that demand identities disjunctive to contemporary cultural scenarios. This splitting thus does not leave Indigenous peoples merely depressed in-between the lack of two identities, but rather creates an elusive identity “occupying two places at once”<sup>38</sup> that challenges the limits of colonial authority.

An interesting articulation of this doubling, and its seditious effects, is represented, rather insistently, in the work of Thomas King. In one particularly entertaining short story entitled “Borders” the protagonist, a twelve-year old Blackfoot child, narrates the experience of visiting his sister, who had moved to Salt Lake City, with his mother. The mother had not exactly enthusiastically supported the move, commenting that the exciting things Salt Lake City had to offer could also be found on the northern side of the border. The mother also articulates an overt difficulty with the coffee over the border, because at the border “It’s the water. From here on down, they got lousy water.”<sup>39</sup> Laetitia, however, insistent that she wants to see other parts of the world, decides to move anyway. In relation to America, then, the mother situates herself on the Canadian side. This positioning changes, however, when at the American border the guards inquire as to her citizenship. At this point, after denying possession of

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<sup>38</sup> *Ibid* at 89

<sup>39</sup> T. King, “Borders” in *One Good Story, That One* (Toronto: Harper Collins, 1993) at 134

firearms and tobacco, she states that her nationality is “Blackfoot”.<sup>40</sup> The problem with this response, as articulated by one of the border guards, is that

“Now, I know that we got Blackfeet on the American side and the Canadians got Blackfeet on their side. Just so we can keep our records strait, what side do you come from?”<sup>41</sup>

Undaunted, the mother replies, “Blackfoot side”.<sup>42</sup> This response prevails, and after “talking to almost everyone there”<sup>43</sup> they are finally turned away. This same scene replays with the Canadian border guards, because, once again, Blackfoot is not a sufficient answer. As the Canadian guard responds to the mother’s declaration of citizenship, “I know...and I’d be proud of being Blackfoot if I were Blackfoot. But you have to be either American or Canadian.”<sup>44</sup> After a couple nights trapped between the American and Canadian border stations a media frenzy attracted by the manager of the duty-free store compels the American border guards to allow the narrator and his mother to pass to into the USA despite their proclaimed nationality. The doubling of identification, not the hyphenating of identification, thus acts as a destabilising force on the normal rules. The mother, through insistence on a nationality outside the acceptable legal responses forces the acceptance of her determined answer anyway. Her nationality vis-à-vis the non-Aboriginal border guards is Blackfoot; even though in other situations she positions herself as a supporting the superiority of things that are exist on the north of the border—like the water.

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<sup>40</sup> *Ibid* at 135

<sup>41</sup> *Ibid* at 135

<sup>42</sup> *Ibid* at 136

<sup>43</sup> *Ibid*

<sup>44</sup> *Ibid* at 138-9

This type of post(-)colonial interpretation is not, however, without its antagonists. Indeed the author of the text discussed in the last paragraph is included in this group of dissenters.<sup>45</sup> Therefore, it is at this point I must proceed with a sincere and wholehearted apology for terminology. In King's "Godzilla vs. Post-Colonial" the term post(-)colonial as applied to literature takes a thorough beating. King's fundamental qualm being that the term itself categorises Native literature vis-à-vis Europeans, and further has implied assumptions which he finds erroneous and offensive. He writes

While post-colonialism purports to be a method by which we can begin to look at those literatures which are formed out of the struggle of the oppressed against the oppressor, the colonized and the colonizer, the term itself assumes the starting point for that discussion as the advent of Europeans in North America. At the same time, the term organizes the literature progressively suggesting that there is both progress and improvement. No less distressing, it assumes that the struggle between guardian and ward is the catalyst for contemporary Native literature, providing those of us who write with method and topic. And, worst of all, the idea of post-colonial writing effectively cuts us off from our traditions that were in place before colonialism ever became a question, traditions which have come down to us through our cultures in spite of colonization, and it supposes that contemporary Native writing is largely a construct of oppression. Ironically, while the term itself—post-colonial—strives to escape to find new centres, it remains, in the end a hostage to nationalism.<sup>46</sup>

Instead, King proposes four categories of Native literature he would prefer: tribal, interfusional, polemical, and associational. Tribal literature encompasses literature contained and maintained within the original language. Interfusional literature is the "blending of oral literature and written literature".<sup>47</sup> Polemical literature, he proposes, deals with the "imposition of non-Native expectations and insinuations (political, social,

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<sup>45</sup> See also J. Weaver, "Indigenes and Indigeneity" in *A Companion to Postcolonial Studies*, eds. H. Schwartz & S. Ray (Oxford: Blackwells, 2000) 221, for a good discussion of the debates around indigenous peoples and post(-)colonial theory.

<sup>46</sup> T. King, "Godzilla vs. Post-Colonial" *World Literature Written in English*, Vol. 30 No. 2 (1990), 10-16 at 11-12

<sup>47</sup> *Ibid* at 13

scientific) on Native communities and the methods of resistance employed by Native peoples in order to maintain both their communities and cultures.”<sup>48</sup> Finally, associational literature is the work of contemporary Native writers which “describes a Native community” using a communal focus and unheroic narrative which operates to create a fiction “which eschews judgements and conclusion.” This functions, according to King, to allow non-Natives a “limited and particular access”<sup>49</sup> to the Aboriginal world. For Native readers he posits that

Associational literature helps to remind [Natives] of the continuing value of our cultures, and it reinforces the notion that, in addition to the useable past that the concurrence of oral literature and traditional history provide us with, we also have an active present marked by cultural tenacity and a viable future which may well organize itself around major revivals of language, philosophy, and spiritualism.<sup>50</sup>

Polemical and interfusional literature are thus both descriptive of the species of literature that is typically seen as post(-)colonial.

This invective against the idea of the post(-)colonial as a valid descriptor of Native literature takes some effort to negotiate. It is difficult to deny that the descriptor itself seems to categorise literature around the arrival of the Europeans. Post(-)colonialism also presupposes the topical importance, if not a catalytic effect, of colonialism on Indigenous literatures. Post(-)colonialism, also, in its obvious interest on the relationship between the colonised and coloniser also often disregards the pre-colonial subaltern traditions that increasingly gain importance in modern racial and ethnic relations.<sup>51</sup> In short, post(-)colonialism seems to still be a rather European discourse. It

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<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid* at 14

<sup>50</sup> *Ibid*

<sup>51</sup> The revival of cultural traditions such as the sundance, and oral story telling are now playing a vital role in contemporary Aboriginal relations with non-Aboriginal peoples.

has even been said that post(-)colonialism is merely another way to re-examine Western metaphysics via engagements with the ‘Other’.<sup>52</sup> Homi Bhabha, for example, is quite undeniably working from within the western European academic and theoretic canon. However, the debate itself can be said to demonstrate the uncomfortable spaces that are a result of the insistence upon cultural difference. Indeed, it truly creates the effect enunciated by Bhabha as “culture becom[ing] as much an uncomfortable, disturbing practice of survival and supplementarity.”<sup>53</sup> Rubrics, even ones couched as emancipatory discourses, become problematic. Another way, possibly, to see King’s position, is described by Bhabha as the refusal to satisfy the colonial demand for narrative— “[t]he narratorial voice articulates the narcissistic, colonialist demand that it should be addressed directly, that the Other should authorize the self, recognize its priority, fulfil its outlines, replete, indeed repeat its references and still fractured gaze.”<sup>54</sup> King, however, refuses such demands. He will not be hastily filed in any neat European literary category.

While King’s refusal of the post(-)colonial rubric is compelling, there are however some responses that must be made, many in the form of evasion. The first evasion is found in King’s own admission about the angle of his critique. Upon the insistence of a friend that post(-)colonialism is indeed concerned with “centres, difference, totalizing, hegemony, margins”<sup>55</sup>, he hesitatingly responds that if “then it is unfortunate that the method has such an albatross—at the term—hanging around its

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The Yukon Storytelling Festival, for example, won the 2001 National Attractions Canada Award for a Cultural Event. See Online <<http://www.yukonstory.com/>>

<sup>52</sup> See *supra* note 45

<sup>53</sup> Bhabha, *supra* note 12 at 251

<sup>54</sup> Bhabha, *supra* note 12 at 140

<sup>55</sup> King, *supra* note 46 at 12

neck.”<sup>56</sup> Additionally, he never claims to conduct a theoretical engagement with post(-)colonialism as “critical method.”<sup>57</sup> Thus, one can carefully, and apologetically, attempt to use it as such. Another evasion lies in the topic of study. If one were to be examining Native literature, I personally would be very tempted to indeed throw out the term post(-)colonial for the aforementioned quartet of classifications found in King’s argument. If one, however, is not engaging with literature, but rather a multifarious variety of enunciative productions such as that of a historical and legal event, one may more easily justify the use of the theory, while being cognisant of its Eurocentric classification scheme.

## VI. Colonial Doubling

Colonial doubling is the other aspect functioning to decentre colonial authority. This movement can be described in one way as the loss of the “rules of recognition”<sup>58</sup> mentioned earlier in relation to hybridity. This doubling or spitting is recognised and articulated in different ways. In a general sense, it can be described as

...a strategic displacement of value through a process of the metonymy of presence. It is through this partial process, represented in its enigmatic, inappropriate signifiers...that we begin to get a sense of a specific space of cultural colonial discourse. It is a ‘separate’ space, a space of separation—less than one and double—which has been systematically denied by both colonists and nationalists who have sought authority in the authenticity of ‘origins’. It is precisely as a separation from origins and essences that this colonial space is constructed.<sup>59</sup>

In this articulation of colonial splitting there is a distance expressed spatio-temporally which alienates, or rends the origin of colonial authority/authenticity from its enunciation

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<sup>56</sup> *Ibid*

<sup>57</sup> *Ibid* at 11

<sup>58</sup> Bhabha, *supra* note 10 at 162

<sup>59</sup> *Ibid* at 171

thus destabilizing it. This is the spatial “problematic enunciation of cultural difference”.<sup>60</sup> Bhabha also, however, posits a more important temporal rendering which acts to decentre colonial authority. This temporal break, the time-lag, operates as more than a mere strategy of resistance. Indeed, this is the aporia where Bhabha locates agency when dealing with the oppressive aspects of poststructural thought whereby there is no escaping, resisting, or avoiding power. Bhabha, however, uses discursive temporality to inject the room for agency to act upon the fixity of meaning. There is a “contingent moment”<sup>61</sup> between an event and its enunciation, or “discursive eventuality”<sup>62</sup> that allows for an intervention or a “negotiatory space”.<sup>63</sup> Whether conceived metaphorically, transcendently or temporally a reductive expression of the general notion of the colonial splitting of authority is the denaturalising of colonial discourse. Colonial discourse is no longer adequate to express the nature of its own situation.

The result of this denaturalisation is the ambivalent, hesitant, and anxious production of what Bhabha calls colonial non-sense. He explains:

Splitting constitutes an intricate strategy of defence and differentiation in the colonial discourse. Two contradictory and independent attitudes inhabit the same place, one takes account of reality, the other is under the influence of instincts which detach the ego from reality. This results in the production of multiple and contradictory belief. The enunciatory moment of multiple belief is both a defence against the anxiety of difference, and itself productive of differentiations. Splitting is then a form of enunciatory, intellectual uncertainty and anxiety that stems from elision; it is a strategy for articulating contradictory and coeval statements of belief. It is from such an enunciatory space, where the work of signification *voids* the act of meaning in articulating a split-response—‘Ouboum’,

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<sup>60</sup> *Ibid* at 179

<sup>61</sup> *Ibid* at 263

<sup>62</sup> *Ibid*

<sup>63</sup> *Ibid* at 264

‘true time in two longitudes’—that my texts of colonial nonsense and imperial aporia have to negotiate their discursive authority.<sup>64</sup>

It is this ambivalent enunciation where the decentring effect of colonial hybridity is discernible. It is through this type of anxious enunciative manifestations that, Colin Perrin, for example has traced the anxious “insistence on the postcolonial in the declaration on the Rights of Indigenous Peoples”.<sup>65</sup> He finds, through the “ineffable character of indigenous bonds to blood and soil, in the Declaration’s failed attempts to clarify them, an indecision”,<sup>66</sup> that “threaten[s] to introduce the immanence of a relation to blood and soil which would upset the consistent modernity of the nation.”<sup>67</sup>

## VII. Post(-)coloniality and Canadian Aboriginal Land Claims

Thus we find that through the work of Homi Bhabha a project to elaborate the subaltern, or colonised peoples histories in a way that tries to evade the priority and authority of totalising western imperial narratives. As Bhabha best expresses:

The postcolonial perspective—as it is being developed by cultural historians and literary theorists—departs from the traditions of sociology of underdevelopment or ‘dependency’ theory. As a mode of analysis, it attempts to revise those nationalist or ‘nativist’ pedagogies that set up the relation to the Third World and First World in a binary structure of opposition. The postcolonial perspective resists the attempt at holistic forms of social explanation. It forces a recognition of the more complex cultural and political boundaries that exist on the cusp of these often opposed political sphere.

It is this hybrid location of cultural value—the transnational as the translational—that the postcolonial intellectual attempts to elaborate a historical and literary project. My growing conviction has been that encounters and negotiations of differential meanings and values within ‘colonial’ textuality, its governmental discourses and cultural practices, have anticipated, *avant la letter*,

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<sup>64</sup> *Ibid* at 187

<sup>65</sup> C. Perrin, “Approaching Anxiety: The Insistence of the Postcolonial in the Declaration of Indigenous Peoples” in E. Darian-Smith & P. Fitzpatrick ed. *Laws of the Postcolonial* (Ann Arbor: University of Michigan Press, 1999) 19-38

<sup>66</sup> *Ibid* at 28

<sup>67</sup> *Ibid* at 32

many of the problematics of signification and judgement that have become current in contemporary theory—aporia, ambivalence, indeterminacy, the question of discursive closure, the threat to agency, the status of intentionality, the challenge to ‘totalizing’ concepts, to name a few.<sup>68</sup>

The dual movement explored earlier whereby there is both the subaltern doubling of identity and the colonial splitting of authority suggests two angles whereby this destabilising post(-)coloniality can be explored in relation to Aboriginal land issues in Canada. The one aspect being the colonial denaturalising of authority and conceptual integrity: the other being the destabilising effect of subaltern ineffability. In this section, these movements will be explored in relation to the general legal background necessary for approaching any land claim issue in Canada—the case law. This is the formulation of the concept of Aboriginal land title emanating from the legal establishment and authority of the courts. Indeed, the progressing of this development demonstrates the gradual fracturing of the traditional conceptions of property in relation to Aboriginal claims through the introduction of cultural difference. The result is a luscious ambiguity—the opening of, quite literally, the negotiative space of hybridity.

The first seminal case to broach the issue of Aboriginal title was *St. Catherine’s Milling*.<sup>69</sup> In this case Lord Watson characterized Aboriginal title as a personal usufructary right that could be exercised only against the federal Crown. As Lord Watson explains, “the tenure of the Indians was a personal and usufructary right, dependant on the good will of the Sovereign.”<sup>70</sup> Slattery explains the state of Aboriginal interests in land at this time as “something like a mere licence to use the land which the

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<sup>68</sup> Bhabha, *supra* note 12 at 248

<sup>69</sup> *St. Catherine’s Milling and Lumber Company v. R.*, (1888) 2 C.N.L.C. 541 (J.C.P.C.) at 549

<sup>70</sup> *Ibid* at 549

Crown could unilaterally revoke at any time by executive act.”<sup>71</sup> Indian tenure, the reasoning goes, was rooted in the *Royal Proclamation*, 1763.<sup>72</sup> Indian interests, would thus be dependent on the willingness of the Crown to recognize them, and not rooted in a pre-existing un-extinguished interest. As Lord Watson explains, Aboriginal interest in land had not “chang[ed] since the year 1763 in the character of the interest which its Indian inhabitants had in the lands surrendered by the treaty. Their possession, such as it was, can only be ascribed to the general provisions made by the Royal Proclamation.”<sup>73</sup> The underlying “substantial and paramount estate”<sup>74</sup> in the land was thus “all along vested in the Crown.”<sup>75</sup> The extent of any potentially maintained “personal and usufructary” interest by Aboriginal peoples is not approached. Rather, Lord Watson explains that while there may still be jurisdictional questions with regard to which government—federal or provincial—has the power determine “the extent, and at what periods...over which the Indians still exercise their avocations of hunting and fishing... none of these questions are raised for decision in the present suit.”<sup>76</sup> The interest in land ascribed to Aboriginal populations was thus characterised as an *in personam* right exercisable as against the crown to undertake activities such as hunting and fishing on lands held by the Crown. Thus, this initial expression of Aboriginal title, embedded in a case where the Aboriginal group involved was merely an alternative argument invoked on behalf of the non-Aboriginal parties to the dispute, is nicely fitted into a non-

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<sup>71</sup> See B. Slattery, “Understanding Aboriginal Rights” (1987) 66 Canadian Bar Review 727 at 736-741

<sup>72</sup> (U.K.), reprinted R.S.C. 1985, App. II, No. 1 [hereinfter *Royal Proclamation*]

<sup>73</sup> *Supra* note 69 at 549.

<sup>74</sup> *Ibid* at 550.

<sup>75</sup> *Ibid*

<sup>76</sup> *Ibid* at 555.

threatening category of interest that can be dismissed at the will of the Crown. Also, rather to the advantage of the Canadian government—what had been given could also be taken away.

This early characterisation of Aboriginal title betrays little of the ineffability, or anxiety that results from hybridity. Aboriginal title is pronounced rather confidently as merely an allowance to use land for traditional purposes bestowed by the Crown upon Indigenous peoples. This, however, is not surprising when exploring what Foucault would call the formation of the object, or the surface of emergence from which this case emanates.<sup>77</sup> This enunciation of Aboriginal title comes from a court situated firmly in a British legal (and physical) context, as this was an appeal from the Canadian Supreme Court to the Privy Council. Also, as mentioned above, the Aboriginal land question only came forward as an argument by the federal government and the appellant, whose logging lease was derived from it, that the federal government had jurisdiction over the land. Essentially, as the land in question was surrendered in 1873, after the British North America Act, 1867<sup>78</sup> was passed, if the Ojibwa had title in the land until it was surrendered then no interest in the land would have passed to the provincial government via the BNA Act. This result is avoided, however, by making the pronouncement that “the Crown has all along had a present proprietary estate in the land, upon which the Indian title was a mere burden.”<sup>79</sup> Consequently, jurisdiction over the land, and the power to grant a *profit a prendre* to the logs upon it, had passed to the province. The manifestations of hybridity, therefore, do not occur because this case is monological.

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<sup>77</sup> Foucault, *supra* note 36 at 40-49

<sup>78</sup> 30 & 31 Victoria, c. 3 [hereinafter the *BNA Act*]

<sup>79</sup> *Supra* note 69 at 553

There is neither any elements of cultural difference, nor any real appearance of Aboriginal peoples at all. There is only an instrumental legal use of an argument relating to a *Royal Proclamation* about Aboriginal peoples as understood in the British colonial legal/political mind.

While early judicial pronouncement easily dismissed Aboriginal land claims, by the 1970's it became apparent that Aboriginal demands would not simply assimilate away. The *Calder*<sup>80</sup> case, decided in 1973, was thus the next major milestone in the jurisprudential story of Aboriginal title in Canada. While the Nisga'a people were unsuccessful in their claim due to a division in the court on the issue of the extinguishment, this decision did recognize that Aboriginal interests in land were not solely dependant on the *Royal Proclamation*—the fracturing begins. In eastern Canada, it was possible to attribute Aboriginal interests in land to the *Royal Proclamation*. In British Columbia however, acquired long after the *Royal Proclamation* under the Treaty of Oregon<sup>81</sup>, the application of this royal pronouncement was questionable because of its geographic scope.<sup>82</sup> If an Aboriginal interest existed over land that was not subject to a treaty, it had to be founded on something other than the *Royal Proclamation*. As such, it was decided “aboriginal Indian title does not depend on treaty, executive order or legislative enactment.”<sup>83</sup>

As to the content and nature of Aboriginal title, the court offers little substantive guidance. Aboriginal land interests, not being something constructed or created by the

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<sup>80</sup> *Calder v. British Columbia*, [1973] S.C.R. 313. [hereinafter *Calder*]

<sup>81</sup> Martland and Ritchie JJ. Concurred with Judson, J. that the *Royal Proclamation* was inapplicable to British Columbia. Spence and Laskin J.J. concurred with Hall, J dissenting on this particular point.

<sup>82</sup> See, *supra* note 80 at para 4.

<sup>83</sup> *Ibid* at para 120

dominant legal system, were obviously not within the usual spectre of judicial discourse. The court, therefore, is somewhat paralysed in its ability to explain what indeed they are. To compensate, the court searches into the past in an attempt to describe what indeed an Aboriginal right to land is—an originary strategy of cultural identification. Justice Judson, thus states that characterizing Aboriginal land interests as “personal and usufructary” does not help to understand the nature of Aboriginal title. He explains:

Although I think that it is clear that Indian title in British Columbia cannot owe its origin to the Proclamation of 1763, *the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries*. This is what Indian title means and it does not help one in the solution of this problem to call it a "personal or usufructuary right". What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. There can be no question that this right was "dependent on the goodwill of the Sovereign".<sup>84</sup>

While upon first glance, this statement seems rather unambiguous; it has proven to be rather more complex. The general ambiguity this conceptual beginning has spawned results from the whether the ‘organized societies’ or the occupation of land as their forefathers had done’ should bear the main emphasis. If the former were to bear the emphasis, the spectre of First Nations governance emerges. If the latter is stressed, the issue becomes identifying these pre-contact patterns and determining the extent to which the contemporary situation compares. Indeed, even today it seems that this issue still remains obliquely ambiguous as the Canadian government is still rather hesitant to overtly, continually, and forcefully recognise First Nation continuing sovereignty.

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<sup>84</sup> *Ibid* at para 26 (emphasis added)

The *Guerin*<sup>85</sup> case, the next determining case in the history of Canadian Aboriginal land title, in its discussion of the nature of Aboriginal title undertakes the project of harmonizing the views expressed in *St. Catherine's Milling* with other decisions, such as *Calder*, that name Aboriginal title a legal interest. After a review of the preceding Aboriginal title jurisprudence, Justice Dickson explains that the unique nature of Aboriginal interests have been causing the disjunction between previous cases. He explains that:

Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law. There is a core of truth in the way that each of the two lines of authority has described native title, but an appearance of conflict has nonetheless arisen because in neither case is the characterization quite accurate.<sup>86</sup>

It is thus a semantic misunderstanding founded in the attempt to force the concept of Aboriginal title into the conceptual scheme of traditional land law, in Justice Dickson's view, which has caused the jurisprudential discontinuity in the description of Aboriginal title. He concludes that Aboriginal interests are "a legal right to occupy and possess certain lands." He further explains that their interest is neither beneficial ownership, nor a personal interest. He concludes that it is "best characterized by its general inalienability, coupled with the fact that the Crown is under an obligation to deal with the land on the Indian's behalf when the interest is surrendered."<sup>87</sup> We are hence left with the characterization of Aboriginal title as a *sui generis* interest in land that can be purchased by the Crown who is under a duty to be equitable. One is not supposed to extend the description further, according to Justice Dickson, as any further "description

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<sup>85</sup> *R. v. Guerin*, [1984] 2 S.C.R. 335 [hereinafter *Guerin*]

<sup>86</sup> *Ibid* at 382.

<sup>87</sup> *Ibid*

of Indian title which goes beyond these two features is both unnecessary and potentially misleading.”<sup>88</sup> Any doctrinal confusion is evaded by the underlining the ontologically ineffable nature of Aboriginal land claims that must only be described only in relation to the Crown’s position.

Thus the *Guerin* case, a court faced with the impossibility of two coexistent characterizations of Aboriginal land title derived from the earlier jurisprudence, is faced with the inability of their discursive realm to encapsulate the concept of Aboriginal land title. It is here where the emergence of the destabilizing effect of hybridity begins to become manifestly apparent. Unlike the *St. Catherine’s Milling* case, the court is faced with precedent that recognises an anterior origin of Aboriginal title (although whether the origin was pre-existing physical occupation or political sovereignty still remains rather unclear). Correlatively, this implies an relationship to land anterior to western appearance and western understandings of land. The court, institutionally fixed within the Canadian cultural, legal and ideological institution, is forced to imagine the unimaginable—the substance of the cultural traditions of the other. The result of this is twofold. The first is to literally create another or third space in which Aboriginal land title is located—the *sui generis*. The second is to revert back into definition through relation to Crown obligations in which they could comfortably determine the content.

The 1997 decision in *Delgamuukw*<sup>89</sup> displays the most elaborated discussion of Aboriginal title found in Canadian case law. Despite its relative clarity in relation to other Aboriginal title cases the content of Aboriginal title is still defined dominantly through its relation to Crown sovereignty. Then Chief Justice Lamer writes that the three

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<sup>88</sup> *Ibid*

<sup>89</sup> *Delgamuukw v. British Columbia* [1997] 3 S.C.R. 1010. [hereinafter *Delgamuukw*]

unique characteristics of Aboriginal title is its inalienability except to the crown, its source in Aboriginal prior occupation, and the fact that it is communally held.<sup>90</sup> He summarizes that the content of Aboriginal title can only be described by two propositions:

first, that aboriginal title encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures; and second, that those protected uses must not be irreconcilable with the nature of the group's attachment to that land.<sup>91</sup>

While this discussion implies that the origin of Aboriginal title is pre-existing unextinguished political control of land, it is limited by the idea of 'irreconcilable uses' thus reviving the vestiges of an original definition of Aboriginal title. As such, while Lamer does not expressly limit uses to merely pre-colonial manifestation, there is a modulation of the potential possibility of these uses expanding by limiting them to ones that would not be irreconcilable with Indigenous peoples 'attachment to land.' This is a fairly inescapable tautology as an Aboriginal group's attachment to land is viewed through its consistency with pre-colonial uses. As Chief Justice Lamer writes: "lands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of that land and the relationship that the particular group *has had with the land which together have given rise to aboriginal title in the first place.*"<sup>92</sup> An "analogy" to English land law is even given by Lamer C.J. to help explicate this relationship. This is the "concept of equitable waste at common law," such that "a person

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<sup>90</sup> See *Ibid* at para 111-116. Here, the recognition of that the land is communally held begins to obliquely recognize the origin of Aboriginal land rights in pre-existing sovereignty rather than simply prior possession analogous to adverse possession.

<sup>91</sup> *Ibid* at para 117

<sup>92</sup> *Ibid* at para 128 (emphasis added)

who hold a life estate in real property cannot commit ‘wanton or extravagant acts of destruction’”<sup>93</sup> We are still, therefore, in a position that Aboriginal land claims are potentially limited by compatibility with pre-contact uses of land.

While the court’s musings on the nature of Aboriginal title in *Delgamuukw* offer some guidance to the content of Aboriginal land title, the case also contains a refusal. Each decision rendered insists that the decision was only intended to be a guideline to be followed. The judgement was intended to thus only to be seen as general principles to guide for the resolution of land claims through negotiation. As Justice LaForest writes: “I wish to emphasize that the best approach in these types of cases is a process of negotiation and reconciliation that properly considers the complex and competing interests at stake.”<sup>94</sup> As such, quite literally, the contiguity of Aboriginal insistence and Canadian obligation has resulted in a quite literal space of negotiation.

#### VIII. Conclusion

This basic foray through the legal highlights of Aboriginal land claims in Canada shows a movement from the dismissal of Aboriginal land interests by classifying them as subordinate ‘personal and usufructary’ rights, to recognition as enforceable interests that can neither be fully explained nor described from within the traditional Canadian judicial institution. In the face of this uncertainty the court has demonstrated a tendency to radiate to referencing visions of pure, original, traditional, notions of Aboriginal attachment to land in order to describe its features and characteristics, thus demonstrating an originary identification of cultural difference. Ultimately, however, the Canadian judicial institution, faced with the challenge of harmonising pre-existing Aboriginal

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<sup>93</sup> *Ibid* at para 130

<sup>94</sup> *Ibid* at para 207

entitlement with contemporary Canadian property rights, turned to negotiation as a mechanism to mediate the conflicting interests. The result, in British Columbia at least, since the threat of successful First Nations claims emerged on the horizon, has been the creation of a mediated space in the form of the B.C. Treaty Commission. This independent institution, authorised by federal, provincial and First Nations governments represents a hybrid institutional space for the negotiation of these claims. This process has the key goal to “establish a new relationship based on mutual trust, respect and understanding — through political negotiations”<sup>95</sup> between First Nations, Provincial, and Federal governments. While the effectivity of this institution is still plagued by what can be described in theoretical terms as Foucauldian power problems, and in political terms as the ‘lack of political will’; it still represents a remarkable shift from the unilateral imposition of both institutional legal mechanisms and substantive law on First Nations peoples. It is, therefore, not inappropriate to say that the destabilising effect of cultural difference articulated by Homi Bhabha does manifest in relation to Canadian Aboriginal peoples. Indeed, as Bhabha writes:

The postcolonial perspective forces us to rethink the profound limitations of a consensual and collusive ‘liberal’ sense of cultural community. It insists that cultural and political identity are constructed through a process of alterity...

Culture becomes as much an uncomfortable, disturbing practice of survival and supplementarity—between art and politics, past and present, the public and the private—as its resplendent being is a moment of pleasure, enlightenment or liberation.<sup>96</sup>

The contention and dissention felt within the Canada vis-à-vis Aboriginal land claims reflects this challenge to Canadian liberal democracy. Indeed, the emergence of First

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<sup>95</sup> *BC Treaty Commission Mission Statement* < Online at [http://www.bctreaty.net/files\\_2/aboutus.html](http://www.bctreaty.net/files_2/aboutus.html)>

<sup>96</sup> Bhabha *supra* note 12 at 251

Nations as both a political, cultural, and legal force has supplemented Canadian understanding of the demands of true multiculturalism within a liberal state.