
Public Reason and the Disempowerment of Aboriginal People in Canada

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Abstract

Aboriginal perspectives are often not viewed as persuasive or reasonable in contemporary political and legal discourses, and Aboriginal people are compelled to articulate their claims in the normative vocabulary of the majority. Many see this as an injustice. Part I of this essay argues that some incarnations of the idea of public justifiability, a cornerstone of political theory, provide a normative justification for that injustice. Part II argues that the idea is at work in the Canadian courts, even as judges attempt to create space for Aboriginal views. The ambivalent stance of the courts is explored through a case study.

Keywords: justifiability, Aboriginal jurisprudence, Aboriginal rights, Rawls, legitimacy, public reason, neocolonialism

Résumé

Les perspectives autochtones sont souvent considérées comme peu convaincantes ou raisonnables au sein des discours politiques et légaux contemporains, obligeant les Autochtones à articuler leurs revendications à l'aide du vocabulaire normatif de la majorité. Plusieurs individus considèrent ce fait une injustice. En premier lieu, l'auteur soutient que certaines interprétations du concept de « justification publique », pierre angulaire de la théorie politique, viennent essentiellement justifier une telle injustice. En second lieu, l'auteur soutient que ce concept est présent dans les cours canadiennes, même aux moments où les juges essaient de créer un espace pour les points de vue autochtones. L'auteur se penche sur la position ambivalente des cours à l'aide d'une étude de cas.

Mots clés : justification, jurisprudence autochtone, droits autochtones, Rawls, légitimité, raison publique, néocolonialisme

Introduction

The Supreme Court of Canada has said that the purpose of Aboriginal rights is the reconciliation of Aboriginal societies with the broader Canadian

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community.[1] An emerging theme in the literature on Aboriginal law is that this reconciliation cannot be achieved unless Aboriginal jurisprudence, or the time–honored laws and customs that are indigenous to Aboriginal communities, is recognised and given effect within the Canadian legal system.[2] This is an exciting and challenging prospect, and one that will no doubt feature more prominently in legal debates as scholarship on Aboriginal jurisprudence develops and Aboriginal groups become more assertive of their own legal traditions. However, many serious obstacles stand in the way of realizing that goal. One such obstacle is the idea of public justifiability, a central idea of contemporary political theory, which says that to be legitimate the laws of a democratic state should be justified to all its citizens.

This article argues that the idea that Aboriginal laws and normative perspectives should be given effect within Canada's legal system sits in uneasy tension with the idea of public justifiability. On the one hand, the requirement of legitimacy says that the laws, especially the constitution, must be justifiable to all, which implies that they should be justified with reasons that all reasonable citizens should be able to accept, and not ones that are only persuasive to a subset of the population. On the other hand, many today believe that Aboriginal people must participate in the legal and political discourses of the state on their own terms, in their own voices, which implies offering reasons that not all reasonable people can accept and that are grounded in a worldview that only a subset of the population holds.

This article is divided into two parts: Part one begins with a brief introduction of what I call the fact of *conceptual hegemony*, that Anglo-European, especially liberal, concepts of justice are hegemonic in Canada. The result is that Aboriginal people must constrain themselves to the moral lexicon and justificatory practices of the dominant culture in order to successfully assert their rights and interests. I call this the *hegemonic constraint,* and many see it as an injustice. Next, I argue that the hegemonic constraint implicates the idea of public justifiability. On this point my discussion focuses on John Rawls's influential theory of public reason. I argue that, while Rawls's theory can provide a defense for Aboriginal groups against unreasonable exercises of state power, it also provides a normative justification for the fact of conceptual hegemony. In so doing, it contributes to the disempowerment of Aboriginal people.

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1 See, for example, *Mikisew Cree First Nation v Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para 1; also *R v Gladstone*, [1996] 2 SCR 723 at para 73. The concept of reconciliation has evolved over time. See Dwight Newman, "Reconciliation: Legal conception(s) and faces of justice," in *Moving Toward Justice*, ed. John D. Whyte (Saskatoon: Purich Pub., 2008); and Kent McNeil, "Reconciliation and the Supreme Court: The Opposing Views of Chief Justices Lamer and McLachlin," *Indigenous Law Journal* 2, no. 1 (2003).

2 Rachel Ariss and John Cutfeet, "*Kitchenuhmaykoosib Inninuwug* First Nation: Mining, Consultation, Reconciliation and Law," ibid. 10, no. 1 (2011); Dale Turner, *This is Not a Peace Pipe* (Toronto: University of Toronto Press, 2006); John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010); Wapshkaa Ma'Iingan (Aaron Mills), "Aki, Anishinaabek, kaye tash Crown," *Indigenous Law Journal* 9, no. 1 (2010): 107; Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (New York: Oxford University Press, 2009); James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon: Houghton Boston Printers, 2006).

The issue comes into particularly clear focus when we consider the place of Aboriginal perspectives in the common law of Aboriginal rights. In recent years the courts have become increasingly cognizant of the unfairness of holding Aboriginal people to laws that do not incorporate their perspectives. Yet the law is supposed to be objective or neutral between the different cultural and religious groups in society. Judges feel acutely the demand that they render impartial justice. Part two of this essay argues that the tension between the injustice of the hegemonic constraint and the requirements of public justifiability is evident in the Canadian jurisprudence. Ultimately, though, I conclude that the idea of public reason operates in our legal system to exclude some Aboriginal voices. While much has been done to make space for Aboriginal views, Aboriginal *normative* perspectives remain ineligible as grounds for the evaluation of legal claims. To bring out the uncertain relationship that the common law has with Aboriginal laws, I focus on a set of cases involving the *Kitchenuhmaykoosib Inninuwug* First Nation. This article does not offer a solution to the vital and vexing question of the place of Aboriginal laws and normative perspective in the Canadian legal system, but merely clarifies a dilemma that advocates of First Nations jurisprudence must confront.

Part I: Public Reason and the Hegemony of Western Liberal Justice

A major theme in postcolonialist literature is that the primary tool in today's world for the oppression of Aboriginal people is not brute force but a particular Anglo-European conception of "reason." In Canada, Aboriginal people are invited to integrate fully into Canadian society, to pursue their aspirations within its political structures, and to assert their rights in its legal system. Aboriginal people may offer their opinions and positions, on an equal footing with those of other Canadians, to be judged on their merits according to objective standards of rationality and reasonableness. The concern, however, is that these "objective" standards are often deeply rooted in Canada's Anglo-European cultural heritage and favor Anglo-European claims of reason and value. The upshot for Aboriginal people is that in order to successfully assert their rights and interests in Canada's legal and political systems, they must adopt the moral lexicon and justificatory practices of the dominant culture. In other words, the price of effective entry into the Canadian political community is cultural assimilation.[3]

In light of these concerns, the Anishinaabe political philosopher Dale Turner asserts, "As long as the Canadian state unilaterally enforces its power over Aboriginal peoples, I do not see how they have any other choice but to engage the discourses of the dominant culture," which is to say, "the language of the oppressor."[4] Will

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[3] Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002); Anthony Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (Ithaca: Cornell University Press, 2001); Turner, *This is Not a Peace Pipe*; Alfred, *Peace, Power, Righteousness*; James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (New York: Cambridge University Press, 1995); Gordon Christie, "Law, Theory and Aboriginal Peoples," *Indigenous Law Journal* 2, no. 1 (2003): 67.

[4] Dale Turner, "Perceiving the World Differently," in *Intercultural Dispute Resolution in Aboriginal Contexts*, eds. Catherine Bell and David Kahane (Vancouver: UBC Press, 2004), 60.

Kymlicka makes a similar point in defense of his project of constructing a theory of minority rights applicable to Aboriginal groups:

> For better or for worse, it is predominantly non-Aboriginal judges and politicians who have the ultimate power to protect and enforce Aboriginal rights, and so it is important to find a justification of them that such people can recognise and understand. Aboriginal people have their own understanding of self-government drawn from their own experience, and that is important. But it is also important, politically, to know how non-Aboriginal Canadians—Supreme Court Justices, for example—will understand Aboriginal rights and relate them to their own experiences and traditions.[5]

Thus, Anglo–European concepts of justice are hegemonic in Canada—the fact of conceptual hegemony. And it compels Aboriginal people to articulate their concerns within Western normative frameworks—the hegemonic constraint.[6] Turner's response to this situation is ambiguous, between stoic acquiescence—"[t]his imperative may be unjust, but our survival as independent and self-determining nations demands that we bow to it"[7]—and palpable disgust:

> Indigenous peoples should not expect the dominant culture to change its ways of thinking, especially about Indigenous peoples . . . The dominant culture has dialogued with Aboriginal peoples on the assumption that Aboriginal peoples' ways of understanding the world can be explained away: it is simply a matter of finding the right words—English words.[8]

As a brief aside, it is worth explaining the relationship between Turner and Kymlicka on this point to give a sense of how my own thesis fits into the evolving scholarship. In his 1989 book *Liberalism, Community and Culture*, from which the above quote is taken, Kymlicka was responding to "the standard interpretation of liberalism," which saw Aboriginal rights as "matters of discrimination and/or privilege, not of equality."[9] That conception of liberalism reigned during the Trudeau era and saw all distinctions based on race or ethnicity as part and parcel of apartheid in South Africa or segregation in the American South. Attempting to open up space for Aboriginal rights within liberalism, and within Canada's political culture, Kymlicka argued, "Aboriginal rights . . . will only be secure when they are viewed, not as competing with liberalism, but as an essential component of liberal political practice."[10] When Turner's *This is Not a Peace Pipe* came out in 2006, minority rights were already a well-established pillar of liberalism.[11] Picking up on the same passage from Kymlicka, Turner noted that Aboriginal rights, though now on the agenda, were only taken seriously when articulated as part of a liberal theory of minority rights. Thus, the basic constraint—what he called "Kymlicka's constraint"[12]—remained. Turner sees the constraint as an injustice, but he is

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5 Will Kymlicka, *Liberalism, Community and Culture* (New York: Oxford University Press, 1989), 154.
6 In *This is Not a Peace Pipe,* Turner refers to this as "Kymlicka's constraint" (58).
7 Turner, *This is Not a Peace Pipe*, 10.
8 Turner, "Perceiving the World Differently," 66.
9 Kymlicka, *Liberalism, Community and Culture*, 154.
10 Ibid..
11 Turner, *This is Not a Peace Pipe*.
12 Ibid., 58.

doubtful that it will ever change; and so Aboriginal nations must "bow to it."[13] My thesis starts with the observation that there is a recent movement, gaining momentum, which represents a major deviation from the hegemony of Anglo-European justice; namely, the movement to give effect to Aboriginal legal traditions within Canada's legal system. This movement, however, must still confront the same challenge that Turner highlighted, which, as I understand it, includes both the political *and normative* challenge of reconciling itself with the fundamental principles underlying the idea of public reason.

Public Reason

If the hegemonic constraint represents an injustice, then what makes it unjust, and how might we respond? The idea of public justifiability provides some important answers. In its broadest form the idea is that the exercise of coercive power through the laws of a democratic regime is only legitimate if the laws are acceptable (or reasonable) from every citizen's point of view. It has been prominent in the Anglo-European tradition of political philosophy since the Enlightenment and can be discerned in the works of such canonical figures as Locke, Kant, Rousseau, Hegel, and Mill. Indeed, it may not be a stretch to say that as a general moral intuition about the legitimacy of law, the idea is a constituent part of the Western moral consciousness. Theories of public justification fall under many rubrics, but the most prominent accounts are associated with the theory of public reason. I will briefly introduce the (broadly-defined) liberal foundations of this idea, and then John Rawls's theory of public reason.

Classically, liberals are strongly committed to individual autonomy, the idea that each person should be allowed to decide for herself how she will live her life and to what traditions she will give her allegiance. For the justification of coercive law, this privileging of autonomy manifests in a concern for consent—only consent can justify the use of coercion against a person. From this is derived the familiar dictum, "a social and political order is illegitimate unless it is rooted in the consent of all those who have to live under it."[14]

The centrality of consent in justifying a political order has led many philosophers to adopt the metaphor of a social contract to account for the legitimacy of law. John Locke spoke as if giving consent to political arrangements is something that citizens actually do: "The only way whereby any one divests himself of his natural liberty, and *puts on the bonds of civil society*, is by agreeing with other men to join and unite into a community."[15] However, very soon philosophers started to conceive of the social contract as a hypothetical, not an actual, event. Immanuel Kant wrote, "[The original contract] is in fact merely an *idea* of reason, which none the less has undoubted practical reality; for it can oblige the legislator to frame his

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13 Ibid., 10.

14 Jeremy Waldron, "Theoretical Foundations of Liberalism," *The Philosophical Quarterly* 37, no. 147 (1987): 140.

15 John Locke, "Second Treatise of Government," in *Second Treatise of Government*, ed. C. B. MacPherson (Indianapolis: Hackett Publishing Company, 1980), §95. Emphasis in original.

laws in such a way that they could have been produced by the united will of the whole nation."[16]

In this manner the idea of a social contract leads liberal theorists naturally from their focus on consent to justification. If the social contract is a hypothetical and not an actual meeting of citizens, then the only thing that can secure their unanimous consent is an arrangement that all citizens *as citizens* have reason to accept.

> The aim of a contractual justification is to show that each member of society has a sufficient reason to agree to [the political] order, to acknowledge it, on the condition that other citizens acknowledge it as well. . . . [Consequently the] reasons invoked must be reasons from the point of view of each reasonable and rational person.[17]

Hence we secure legitimacy for a society of actual citizens by showing that the laws are justified according to reasons that all reasonable citizens accept, and which, by that very fact, each actual citizen, insofar as he or she is reasonable, also accepts.

Perhaps the most influential contemporary theory of public reason is found in Rawls's seminal book *Political Liberalism*.[18] I will only introduce enough of his theory to clarify his central claim, that legitimate public reasons are ones that all reasonable people can reasonably be expected to accept.

Rawls's theory of public justification is a response to the profound diversity of ethical, cultural, and moral outlooks extant in all modern democratic societies. There are many different comprehensive religious, philosophical, and moral doctrines with many different perspectives on the nature of reality and the good life. Each person in society has a worldview informed by at least one. And importantly, they are all reasonable to either accept or reject. Rawls says, "Many of our most important judgments are made under conditions where it is not to be expected that conscientious persons with full powers of reason, even after free discussion, will all agree."[19] To the contrary, "[d]ifferent conceptions of the world can reasonably be elaborated from the different standpoints and diversity arises in part from our distinct perspectives. It is unrealistic . . . to suppose that all our differences are rooted in ignorance or perversity."[20] This is the fact of reasonable pluralism, and it creates a special challenge for public justification.

The question is, how can a law be justified to all citizens if they have different and incompatible beliefs about morality? It is natural to assume that when we exercise political power over our fellow citizens (by voting or legislating) we should do so according to the very best justifications we can come up with, where this implies that we exercise power according to what we believe is the moral truth. Rawls, however, disagrees. To offer justifications grounded in a comprehensive

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16 Immanuel Kant, "On the Common Saying: 'This may be True in Theory, but it does not Apply in Practice,'" in *Kant: Political Writings*, ed. H. S. Reiss (New York: Cambridge University Press, 1991), 79. Emphasis in original.

17 John Rawls, *Lectures on the History of Political Philosophy* (Cambridge: Harvard University Press, 2007), 14.

18 John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005).

19 Ibid., 58.

20 Ibid.

conception of the moral truth would be to offer justifications that some citizens—those who hold a different and incompatible comprehensive doctrine—could not accept. In such cases, we are assuming the stance of a dictator, "attempting to impose [our] own comprehensive doctrines" on them.[21] Instead, we must try to offer our fellow citizens reasons that they, given their comprehensive beliefs, can accept *as free and equal citizens*, "and not as dominated or manipulated, or under the pressure of an inferior political or social position."[22]

If we are not to appeal to comprehensive views for public justification, the question arises, "by what ideals and principles, then, are citizens as sharing equally in ultimate political power to exercise that power so that each of them can reasonably justify their political decisions to each other?"[23] The answer is that our public justifications must not attack or criticize any reasonable view,[24] and thus they must be "freestanding" or independent of any particular comprehensive view, appealing only to values and principles that are implicit in the public political culture of a democratic regime and that all reasonable people can be expected to accept.[25] These are public values, such as fairness, liberty, and a conception of citizens as free and equal. Public reasons are shared "in the sense that they are reasons for each in virtue of being reasons for all."[26]

This requirement leads Rawls to the idea of a political conception of justice. To help citizens offer each other acceptable public justifications, a political conception of justice tries to give a reasonably systematic account of the public values.[27] Thus it starts from premises that all reasonable people in a constitutional democracy endorse and from there constructs a freestanding account of those basic ideas, including a reasonable ordering of the political values, such that, if its reasoning is correct, it will be consistent with all of the reasonable views in society. It is important to note that there may be multiple possible political conceptions of justice; the theory of public reason does not specify one.[28] Citizens must decide for themselves what conception is most reasonable.[29] Nevertheless, to count as reasonable, Rawls tells us that a conception of justice must contain at least three elements: (*i*) it must specify a list of certain basic rights, liberties and opportunities ("such as those familiar from constitutional democratic regimes"); (*ii*) it must assign a "special priority to those rights, liberties and opportunities, especially with respect to claims of the general good and of perfectionist values"; and (*iii*) it must include "measures assuring for all citizens adequate all-purpose means to make effective use of their freedoms."[30] Although not all reasonable comprehensive doctrines are

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21 Ibid., 480.
22 Ibid., 446.
23 Ibid., xliv.
24 Ibid., xix, xlvi.
25 Ibid., 453.
26 Duncan Ivison, "The Secret History of Public Reason: Hobbes to Rawls," *History of Political Thought* 18, no.1 (1997): 126.
27 Rawls, *Lectures on the History of Political Philosophy*, 6.
28 Rawls, *Political Liberalism*, l-li. Rawls suggests his own theory of "Justice as Fairness" as one possibility.
29 Ibid., xlviii.
30 Ibid., 450.

liberal, all endorse a liberal political conception of justice.[31] By conducting our discussions of fundamental political matters in these terms, "we can realize the ideal expressed by the principle of legitimacy: to live politically with others in light of reasons all might reasonably be expected to endorse."[32]

Public Reason and Conceptual Hegemony

A strong argument can be made that public reason provides a powerful tool to protect Aboriginal people from the overwhelming power of the state. What I have called conceptual hegemony involves two interrelated problems: (*i*) the problem of the majority imposing its comprehensive views on Aboriginal groups or governing according to its own controversial conceptions of the moral truth, and (*ii*) the problem of Aboriginal people having to adopt the justificatory framework of the majority because the majority refuses to consider reasons outside its preferred view—the hegemonic constraint. Both problems touch on issues of illegitimate public justification, which the theory of public reason is designed to address.

According to Natalie Oman, in political situations in which one party holds the preponderance of power, "the almost overwhelming tendency . . . is for members of the dominant group to impose their standards of value and worldview upon the less powerful party."[33] Throughout Canadian history the government has adopted policies aimed at the assimilation of Aboriginal people to a common Canadian identity. Alan Cairns writes:

> Many of their cherished customs and rituals were banned—the potlatch on the West Coast in 1884 and the Sun Dance on the prairies in 1895. Residential schools were designed as agents of assimilation . . . The federal government in fact waged a cultural assault on the Indian peoples.[34]

Rawls's idea of public reason clearly condemns these actions. Any reasons rooted in imperial ideologies, or even more innocuous comprehensive conceptions of liberalism, would not count as legitimate public reasons because they are not compatible with the reasonable views of many Aboriginal people. On the other hand, without the ideal of public reason, the majority could rule according to its conception of the moral truth, and others would have no normative basis from which to resist. As Rawls says, if one group insists on governing according to its own comprehensive view, "others in self-defense can oppose [them] as using upon them unreasonable force."[35] This addresses problem (*i*).

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31 Ibid., xlvii.

32 Ibid., 243. In Rawls's view, public reason only constrains citizens discussing "constitutional essentials and matters of basic justice" (ibid. 228–30). Other theorists maintain that public reason applies to the justifications for all laws. The distinction does not affect my argument here, as Aboriginal law is part of Canada's constitutional law per s 35 of the *Constitution Act* (Schedule B to the *Canada Act 1982* (UK), 1982, c 11).

33 Natalie Oman, "Paths to Intercultural Understanding: Feasting, Shared Horizons, and Unforced Consensus," in *Intercultural Dispute Resolution in Aboriginal Contexts*, eds. Catherine Bell and David Kahane (Vancouver: UBC Press, 2004), 72.

34 Alan Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: UBC Press, 2000), 50.

35 Rawls, *Political Liberalism*, 247.

Problem (*ii*) implies the exclusion of certain Aboriginal perspectives from public discourses, in essence by ignoring them.[36] Those who do not assimilate to the modes of argument that the majority prefers are excluded from the decision-making process; those who do are only able to communicate their interests using the majority's moral lexicon, which limits them to calling attention to interests that already conform to the majority's moral vision. Again, Rawls recognises the danger of assuming the universal validity of one's own ideals. Public reason encourages us to set aside cultural biases and offer fair terms of cooperation that are acceptable to reasonable people from all cultures in our society.

Prima facie, public reason would seem to condemn conceptual hegemony and give a plausible account of the harm it engenders. Yet many are not convinced that the constraints of public reason are to the benefit of Aboriginal groups. In particular, writers like Dale Turner worry that public reason is complicit in the very injustice it seeks to address: it may actually provide a normative justification for the hegemonic constraint.

We have seen that Rawls's theory of public reason says that it is illegitimate for one group to impose its preferred justificatory framework on others, and that instead, reasons should be put in terms of a liberal political conception of justice. He writes, "A feature of public reasoning, then, is that it proceeds entirely within a political conception of justice" and references only public values having to do with individual rights, liberties, and the general welfare.[37] But when Aboriginal people complain of being constrained to the language of the majority, they are primarily referring to the language of liberalism.[38] Thus, to say with Rawls that reasons grounded in a uniquely Aboriginal worldview (an Aboriginal "comprehensive doctrine") are not appropriate for public discourses appears to confirm Turner's criticism exactly: "The kinds of explanations that are embedded in Aboriginal philosophies are not viewed as legitimate 'claims of [public] reason.'"[39] The complementarity between the hegemonic constraint and the constraints of public reason cannot, I think, easily be denied.[40] Turner writes:

> The irony of course is that contemporary discourses of political liberalism, whether expressed in the courts or policy frameworks for negotiation, are viewed to be the most just way of accommodating Aboriginal rights into a constitutional democracy. That Aboriginal peoples have their own understandings of their rights is secondary for political liberalism . . . In other words, political liberals do not recognise that a just political relationship

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36 Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity*, 8.

37 Rawls, *Political Liberalism*, 453.

38 Turner, *This is Not a Peace Pipe*; Alfred, *Peace, Power, Righteousness*; Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity*.

39 Turner, *This is Not a Peace Pipe*, 73.

40 In earlier articulations of his theory, Rawls was unequivocal that we are not to appeal to comprehensive doctrines at any time when debating fundamental political matters (Rawls, *Political Liberalism*, 224-5). He later revised his position, adopting the "wide view" of public reason, according to which nonpublic reasons can be introduced into public discourse at any time, provided that in due course sufficient public reasons are offered to justify the same conclusions. This is an important revision, but I do not believe that it answers the present challenge. Rawls says, "[the proviso] does not change the nature of justification itself in public reason" (ibid., 463).

> demands that Aboriginal peoples tell their own stories and that these stories be given some effect through resolution of rights claims.[41]

In the end, public reason as Rawls articulates it continues to subordinate nonliberal registers of justice, and it thereby disempowers those who reason in nonliberal terms. Reasons are instruments of power, and when one group can dictate that only reasons that are grounded in its tradition count, it usurps much decision-making power for itself. This describes the historical experience of many Aboriginal people. And it appears that Rawls's idea of public reason grounded in a liberal political conception of justice would endorse and reinforce that situation.

I will not go into depth evaluating how Rawlsians may be able to answer this charge. However, I must consider one obvious response. Rawls may admit that his theory holds that distinctively Aboriginal perspectives should not, by and large, enter into public reason. And if the hegemonic constraint is understood as constraining Aboriginal people to the terms of a political conception of justice, then clearly public reason endorses it. But this goes for everyone else in society as well. Indeed, the whole point of the theory is to prevent unreasonable coercion justified by nonpublic reasons. Why, then, should Aboriginal people be an exception? Presumably they are not arguing that their particular philosophies should be imposed on everyone else, but only that the philosophy of the majority should not be imposed on them. For public matters, we adopt *liberal* conceptions of justice because liberalism is the philosophy of justice that seeks to respect reasonable pluralism. The common standpoint provided by a political conception of justice manifests a universal concern for others "as ends in themselves, as free and equal persons."[42]

Strange as it may seem, my sense is that most Aboriginal writers would not disagree with this response. Aboriginal commentators do not want to see *their* worldviews imposed on the majority. Taiaiake Alfred writes, "The kind of justice that indigenous people seek in their relations with the state has to do with restoring a regime of respect."[43] It would seem that most Aboriginal people do not reject the most basic value that underlies the idea of public reason, namely, respect for others as free and equal persons. Having said that, Aboriginal commentators clearly reject Rawls's way of trying to realize the ideal of legitimacy. The fact is that public reason is often perceived by those on the margins of society as exclusionary and disrespectful.[44] Whatever the merits of the ideal of public reason, Aboriginal writers are adamant that Aboriginal explanations need to play a larger role in how Aboriginal rights in Canada are theorized.[45] It may be that a more nuanced version of Rawls's theory can accommodate these concerns. I will not address that question here.[46] But as things stand, this is a real problem for public reason.

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41 Turner, "Perceiving the World Differently," 62.
42 Sharon Krause, "Partial Justice," *Political Theory* 29, no. 3 (2001): 327–28.
43 Alfred, *Peace, Power, Righteousness*, 86.
44 Tully, *Strange Multiplicity*; Turner, *This is Not a Peace Pipe*; Krause, "Partial Justice"; Bryan Garsten, *Saving Persuasion: A Defense of Rhetoric and Judgment* (Cambridge: Harvard University Press, 2006).
45 Turner, *This is Not a Peace* Pipe, 7.
46 For one interesting proposal in this regard, see Laden, *Reasonably Radical*.

Part II: Public Reason and the Canadian Jurisprudence

The canon of Anglo-European moral philosophy informs the moral culture of Canadian society—the values and principles many habitually draw upon when confronting questions of political justice. Though it would clearly be a stretch to say that all Canadian judges are Rawlsians, I do want to claim that most judges are aware of the fundamental ideas of public justifiability, of which Rawls's theory is the most prominent exemplar. Henceforth in this essay, "public reason" refers merely to the general idea that the laws should be justified according to reasons that all reasonable citizens should be able to accept, as opposed to ones that are persuasive only to this or that subset of the citizenry. It is this general principle, and not the systematized details of Rawls's particular theory, that we might expect to see in the Canadian jurisprudence if the idea of public reasons has an effect.

The question of whether public reason has functioned to exclude Aboriginal perspectives in the Canadian jurisprudence has no simple answer. I will, however, argue that it has greatly limited the degree to which Aboriginal *normative* perspectives have been allowed in. Yet in some respects judges have gone against the typical strictures of public reason to make space for Aboriginal views. Thus, in the case law we see judges wrestling with the tension between the requirements of legitimate public justification and the injustice of the hegemonic constraint.

The Inclusion and Exclusion of Aboriginal Perspectives in the Jurisprudence

In recent years, the Supreme Court of Canada has been increasingly cognizant of the unfairness of holding Aboriginal people to laws that do not incorporate their perspectives. The court said in *Delgamuukw v BC* that the goal of Aboriginal rights is "the reconciliation of the prior occupation of North America by distinctive aboriginal societies with the assertion of Crown sovereignty over Canadian territory."[47] Further, this must be achieved by the "bridging of aboriginal and non-aboriginal cultures"; consequently, "a court must take account of the perspective of the aboriginal people claiming the right . . . [T]rue reconciliation will, equally, place weight on each [perspective]."[48] On this principle, the court has done much to bring Aboriginal perspectives into the common law of Aboriginal rights, and considering the state of the law prior to the landmark case of *Calder v BC*, I think it cannot be denied that there has been a great deal of positive change.[49] I will briefly outline the main ways in which this has been accomplished.

In *R v Van der Peet*, the court adopted the "integral to the distinctive culture" test for Aboriginal rights. The test says that "in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right." In judging this matter, "a court must take into account the perspective of the aboriginal people claiming the right."[50] In *Van der Peet*, Aboriginal perspectives are allowed into the

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47 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 at para 81 [*Delgamuukw*].
48 Ibid.
49 *Calder et al. v Attorney-General of British Columbia*, [1973] SCR 313, 1973 CanLII 4.
50 *R v Van Der Peet*, [1996] 2 SCR 507 at paras. 46, 49 [*Van der Peet*].

articulation of Aboriginal rights in order to give content to those rights. That is, Aboriginal perspectives contribute to defining the *activities* that Aboriginal people may have a right to pursue. Further, the court admits that, due to the fact that Aboriginal traditions of knowledge and history are oral traditions, the rules of evidence must be relaxed to accommodate the special difficulties that come with trying to prove Aboriginal rights. *Van der Peet* has been the subject of much criticism for, among other reasons, its requirement that Aboriginal rights be framed in terms cognizable to the Canadian legal system, and the claim that judges are qualified to determine what was or was not of central importance to the group in question. At a minimum, however, it is clear that Aboriginal perspectives are meant to play a prominent role.[51]

Aboriginal perspectives are also allowed into the analysis of Aboriginal title. Part of the test for Aboriginal title is exclusive occupation prior to the assertion of crown sovereignty. Again, the court is aware of the evidentiary difficulties this test imposes, and so it has made allowance for oral histories to be used as evidence to establish a claim.[52] Further, Aboriginal title contains an inherent limitation: "[L]ands subject to aboriginal title cannot be put to such uses as may be irreconcilable with the nature of the occupation of the land and the relationship that a particular group has [with it]."[53] Again, Aboriginal perspectives are relevant to describing the content of Aboriginal rights.

These represent important and remarkable developments, despite the many persuasive critiques made and the great distance yet to go. However, it would be misleading to point to them as evidence that the idea of public reason does not operate in our jurisprudence to exclude Aboriginal perspectives. The theory of public reason is about the *justification* of law, or the evaluation of legal claims. For that reason we must look to the stage of justification to see if Aboriginal perspectives play a role. The above canvassed developments, however, do not concern normative evaluation. Instead, the use of Aboriginal views is limited to developments in the rules of evidence and the effort to describe the practices and content of aboriginal rights and title. In discussions of Aboriginal rights, *what we are talking about* is defined in part by the Aboriginal perspective, but *how we evaluate the debate* is not.

Aboriginal principles of justice remain largely absent from the jurisprudence. For example, in *R v Sparrow* the court held that some infringement on Aboriginal rights will be justified when values of sufficient importance to the broader community are at stake.[54] Similarly, in *R v Gladstone* the court mentioned the pursuit

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51 For a critique of the integral to the distinctive culture test see Russel L. Barsh and James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand," *McGill Law Journal* 42 (1996-1997): 993; John Borrows, "Frozen Rights in Canada: Constitutional Interpretation and the Trickster," *American Indian Law Review* 22, no. 1 (1998): 37. For the sake of argument, and to give credit where credit is due, I have included the *Van der Peet* test as an example of the inclusion of Aboriginal perspectives in the jurisprudence. But these issues are by no means simple or settled; the test might also be charged with excluding, or distorting, Aboriginal perspectives, in the *way* it attempts to include indigenous views.

52 For a critique see John Borrows, "Listening for a Change: The Courts and Oral Tradition," *Osgoode Hall Law Journal* 39, no. 1 (2001).

53 *Delgamuukw v British Columbia* at para 128.

54 *R v Sparrow*, [1990] 1 SCR 1075.

of economic and regional fairness as a ground for infringement but made no mention of Aboriginal perspectives on justification.[55] *Delgamuukw* expanded the list of possible reasons for infringement to include the development of agriculture, forestry, mining, the general economic development of the province, the building of infrastructure, and the settlement of foreign populations.[56] Ideas of common law equity and justice were referenced; conspicuously absent was any mention of Aboriginal principles of justice, morality, or politics.

In response to *Delgamuukw*, John Borrows has argued that the oral histories that the *Gitksan* and *Wet'suwet'en* witnesses offered in support of their land claim contained, in addition to a *description* of land use practices, an account of a "normative order" that questioned the legitimacy of the state by offering "a competing jurisprudential narrative."[57] However, "[t]he Court did not strongly acknowledge the binary nature of this testimony, which comprised both a 'subjective and evaluative' aspect and a 'scientific and objective aspect.'"[58] But to remove the normative dimensions of Aboriginal oral histories and appropriate only their descriptive aspects is to fundamentally change the nature of those claims. The *adaawk* and *kungax*, or the songs, stories, laws, and rituals that attest to the people's legal regime, are not the observations of an anthropologist, something merely to be evaluated. Rather, they are themselves standards of evaluation; they "are something to be evaluated and something to evaluate by."[59] Thus, though the court has incorporated Aboriginal perspectives into its analyses, it has problematically distilled out the normative dimensions of those perspectives—what Borrows calls the "subjective and evaluative aspect"—leaving only descriptive claims.

It should be noted that this point has not gone totally unnoticed by the Supreme Court. In *R v Marshall; R v Bernard*, LeBel J. wrote in a concurring opinion: "The role of the aboriginal perspective cannot be simply to help in the interpretation of Aboriginal practices in order to assess whether they conform to common law concepts of title. The aboriginal perspective shapes the very concept of aboriginal title."[60] And then, quoting Borrows, he wrote:

> Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the standard of the indigenous people before the court.[61]

Case Study: Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation

Aboriginal perspectives have also been allowed into the jurisprudence through the test for the granting of interlocutory injunctions. Though the analysis for

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55 *R v Gladstone* at para 75.
56 *Delgamuukw v British Columbia* at para 202.
57 Borrows, "Listening for a Change," 26–27.
58 Ibid., 27–28. Internal quotes from *Delgamuukw v British Columbia* at para 268.
59 Ibid., 28.
60 *R v Marshall; R v Bernard*, [2005] 2 SCR 220 at 130 [*Marshall; Bernard*].
61 Ibid. Internal quotes from John Borrows, "Creating an Indigenous Legal Community," *McGill Law Journal* 50 (2005): 173.

injunctions cannot establish an Aboriginal right or title claim, the cases in this area display the tension between the requirements of public justification and the injustice of the hegemonic constraint. I will discuss this in relation to a particularly interesting line of cases in which the *Kitchenuhmaykoosib Inninuwug* (KI) First Nation of Ontario applied for an interim injunction against a mineral prospecting company, Platinex Inc., to prevent it from drilling on lands over which KI had a disputed claim.

The KI Nation is an Anishinaabe First Nation from Northern Ontario, which holds reserve land on Big Trout Lake, 377 miles north of Thunder Bay. Its traditional lands, however, extended beyond the reserve and were the subject of a Treaty Land Entitlement Claim (TLE claim) against the Ontario government to determine whether it had Aboriginal title to some of those lands under Treaty 9. Platinex Inc. was a prospecting company that conducted exploratory drilling in search of mineral deposits. It had a number of mining claims and leases on KI's traditional territories. Platinex was on notice of KI's unresolved claim. Nevertheless, it wanted to begin drilling. It was in contact with KI prior to commencing its work and KI was receptive to the possibility of exploiting these mineral deposits. However, KI was clear that it would need to be involved in the planning process, to be sure that its interests in its traditional lands would be respected. Dialogue between the two parties broke down when Platinex refused to sign KI's consultation protocol.

KI's legal saga in relation to this dispute took place in three main stages:

1. After it became clear that Platinex would not engage its consultation protocol, KI applied to the court to enjoin them from further drilling. They were successful at trial in 2006, and Platinex was ordered to stop its work and enter into consultations with KI.[62]
2. The parties then made a bona fide attempt to negotiate a settlement but were unable to do so. When the interim injunction was set to expire, the parties appeared in court again in 2007 to determine whether to make the interim injunction permanent pending the resolution of KI's land claim. Platinex was successful, giving them permission to drill.[63]
3. Some members of the KI First Nation were unable to accept this decision in light of their duty, according to their own laws, to act as stewards to their traditional territories, and so they defied the court order and maintained certain roadblocks. Platinex took them to court again and in 2008 eight members of KI were charged with contempt of court and sentenced to six months in prison.[64]

I will consider each stage of this saga in light of this essay's theme of public justification and the exclusion of Aboriginal normative perspectives.

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62 *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, [2006] OJ No 3140, 2006 CanLII 26171 [*Platinex 2006*].

63 *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, [2007] OJ No 1841, 29 CELR (3d) 116 [*Platinex 2007*].

64 *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, [2008] OJ No 1014, [2008] 2 CNLR 301 [*Platinex 2008*]. This sentence was reduced on appeal to 10 weeks: *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 533 (CanLII).

KI stage 1

From the outset, it was clear that this was a case where competing standards of evaluation were at play. Justice G. P. Smith began his 2006 judgment saying:

> This case highlights the clash of two very different perspectives and cultures in a struggle over one of Canada's last remaining frontiers. On the one hand, there is the desire for the economic development of the rich mineral resources . . . Resisting this development is an Aboriginal community fighting to safeguard and preserve its traditional land, culture, way of life and core beliefs.[65]

The requirements for granting an injunction are as follows:

i) That there be a serious question to be tried as to the existence of a right and possible breach thereof
ii) That without an injunction, irreparable harm will occur
iii) That the balance of convenience favours the grant of the injunction

KI passed the first stage, on account of its TLE claim. At the second stage, it was clear that Smith J. was receptive to KI's account of the harm that it would suffer if an injunction were not granted. He said, "Irreparable harm may be caused to KI not only because it may lose a valuable tract of land in the resolution of its TLE claim, but also, and more importantly, because it may lose land that is important from a cultural and spiritual perspective." And again:

> It is critical to consider the nature of the potential loss from an Aboriginal perspective. From that perspective, the relationship that Aboriginal peoples have with the land cannot be understated. The land is the very essence of their being. It is their very heart and soul. No amount of money can compensate for its loss. Aboriginal identity, spirituality, laws, traditions, culture, and rights are connected to and arise from this relationship to the land. That is a perspective that is foreign to and often difficult to understand from a non–Aboriginal viewpoint.[66]

In light of these considerations, Smith J. found that KI stood to suffer irreparable harm.

These passages indicate that Aboriginal perspectives were not excluded from the court's reasoning, even when it came time to *evaluate* states of affairs. In determining if Platinex's drilling would cause KI to suffer harm, Smith J. considered the centrality of land to Aboriginal spirituality, culture, law, and identity. I do not want to unfairly downplay the significance of this. However, it is worth considering the statements in light of the factum that KI submitted to the court, in order to see what arguments KI made in court and which ones were persuasive to Smith J.[67]

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65 *Platinex 2006* at para 1.
66 Ibid. at para 80.
67 Kitchenuhmaykoosib Inninuwug et al., "Factum of the Moving Party, on Motion for Injunction" (19 June 2006), Thunder Bay 06-0271, http://www.pdac.ca/pdac/conv/2007/pdf/ts-kempton-ki-offence-factum.pdf.

In KI's factum, which set out its arguments at trial, KI made two distinct claims about the importance of indigenous laws. First, it argued that the court should give respect to KI's beliefs about its laws because to fail to do so would undermine its culture and the social well–being of KI people. Second, it argued that the court should take heed of its laws because they are real and authoritative laws, which are sufficient by themselves to create real legal obligations.

Regarding the first, KI argued that its history has involved repeated foreign impositions and outside influences, leaving the community with little control over its own destiny. This has contributed to "psycho-biological, situational, socio-economic, and cultural stress."[68] By "cultural stress" they meant

> the loss of confidence in the ways of understanding life and living that have been taught within a particular culture. It comes about when the complex of relationships, knowledge, languages, social institutions, beliefs, values, and ethical rules that bind a people and give them a collective sense of who they are and where they belong is subjected to imposed change.[69]

The loss of land and of control over their lives has "weakened social and political institutions" and contributed to high levels of poverty, alcoholism, and suicide. Further, the factum argued that KI believes it has a "spiritual stewardship relationship" with the land and an obligation assigned to it by the Creator to protect the land for future generations. "All of these are viewed by KI as core elements of its identity and culture."[70]

Clearly, these arguments speak to a distinctive aboriginal perspective. But the reasons—the values—that they try to engage *in the judge* are not distinctively Aboriginal. They are indeed public values: respect for others as free and equal, regardless of their religious, moral, or philosophical comprehensive doctrines. They ask the judge to avoid making laws that unfairly attack their Aboriginal identity, or their "reasonable comprehensive views," to use the Rawlsian term. And they also point to noncontroversial public values of social and physiological well–being to explain why their beliefs should be shown respect. The point is not that KI traditional laws and values are themselves grounded in the liberal value of respect for citizens as free and equal; rather these arguments, offered to the judge, are couched in such public reasons.

Justice Smith found this reasoning persuasive. Indeed, few would deny that the public values that KI connected with its distinctive beliefs are compelling. Furthermore, accepting Aboriginal perspectives into a judgment in this way is nonthreatening to the Anglo-European value structure of the common law. The law is familiar with the idea of respect for diverse belief systems. The unique KI relationship with its lands might be, as Smith J. said, "difficult to understand from a non-Aboriginal viewpoint,"[71] but the law can still connect it to public values that we can all understand and can accord it due respect, as one might respect another's religious beliefs. However, to respect another's religious, spiritual, or cultural

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68 Ibid., 5.
69 Ibid.
70 Ibid., 9.
71 *Platinex 2006* at para 80.

beliefs is not the same thing as to use those beliefs as a foundation for making normative judgments.

The second line of argument appears on its face very similar to the first. It also points the judge to KI's distinctive beliefs about land, spirituality, and law. But this line of argument asks the judge to respect them not as reasonable *beliefs* but as real *law*. The factum claimed that the mere apprehension of harm to the earth brought about by Platinex's drilling operations "is enough to disrupt KI's relationship with and trust of the lands." Accordingly, the cautious approach to development that they recommend "is based on experience of KI people over millennia, and is entitled to respect as an aspect of KI's own Aboriginal law."[72] Later they stated that "Aboriginal perspectives are not merely points of view, they are Aboriginal law. As such, they have become part of the constitutional law of Canada." And as authority for this point they cited Lebel J. in *R v Marshall; R v Bernard* (who quotes John Borrows):

> The Aboriginal perspective shapes the very concept of Aboriginal title [and other rights]. "Aboriginal law should not just be received as evidence that Aboriginal peoples did something in the past on a piece of land. It is more than evidence: it is actually law. And so, there should be some way to bring to the decision-making process those laws that arise from the indigenous people before the court."[73]

Thus, they argued, the moratorium that the KI community placed by consensus on Platinex's activities was "a manifestation of KI's own law, deriving from the Law of the Creator, which includes making decisions that ensure protection of KI's traditional territory for this and future generations . . . To defy the moratorium . . . is, to KI, to defy the Law of the Creator. This is irreparable harm."[74]

It is clear that this line of argument is distinctly, though subtly, different from that found in the first line. Part of the irreparable harm that was argued at trial had to do with the harm of violating a real law, regardless of the effect that may have on the KI identity. Smith J.'s judgment did not address the claim that KI law is sufficient on its own to create legal obligations. He did not speak to the status of Aboriginal norms as standards of evaluation in their own right.[75]

KI Stage 2

The second stage of KI's legal saga began when the parties reconvened in 2007 to determine whether the initial interim injunction should be extended.[76] By

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72 Kitchenuhmaykoosib Inninuwug et al., "Factum of the Moving Party," at 11–12.

73 Kitchenuhmaykoosib Inninuwug et al., "Factum of the Moving Party," at 23–24; *Marshall; Bernard* at 130; Borrows, "Creating an Indigenous Legal Community," 173. The addition in brackets is from the KI factum.

74 Kitchenuhmaykoosib Inninuwug et al., "Factum of the Moving Party," at 24.

75 Ariss and Cutfeet make a similar point: "…Justice Smith separated KI's cultural and spiritual perspective from legal rights as narrowly defined in Euro-Canadian terms" ("*Kitchenuhmaykoosib Inninuwug* First Nation," 37). Ariss and Cutfeet's paper, which came to the author's attention only after this article had been written, offers an insightful discussion of the KI cases.

76 KI's Land Claim Entitlement Claim was rejected while the case was being heard in 2007, raising concerns of sharp practice on the part of the Crown (Ariss and Cutfeet, "*Kitchenuhmaykoosib Inninuwug* First Nation," 30).

this time the parties had tried to reach a settlement but were unsuccessful due to their very different ideas about the consultation and accommodation KI was owed. Again, Smith J. went through the analysis for interlocutory relief. Whereas previously he ruled that allowing Platinex to drill would cause irreparable harm, this time he ruled that KI had not proven this aspect of its case. On the other hand, Platinex would suffer irreparable harm, since to extend the injunction would mean the loss of investment and profits and the likely bankruptcy of its business.

The key point of contention was again the question of irreparable harm. Platinex argued that the potential harm of its drilling operations to the land was minimal, claiming that exploratory drilling is merely "transient."[77] KI disagreed, claiming that from an Aboriginal perspective even "minimal" alteration can be, and in this case was, very serious.[78] The disagreement did not appear to concern the mere physical impact of the drilling. KI was certainly more concerned about unanticipated effects of the operations; but both parties knew basically the planned extent of Platinex's proposal. Rather, they disagreed over whether this counted as minimal harm because they had very different understandings of what it means to harm the land.

Among the documents that KI submitted to the court was a 1983 report titled "Keeping our Land in the Way that Has Been Handed On to us From our Ancestors," which described KI's understanding of land. The report, which Smith J. quoted in his 2007 judgment, says, "the concept of natural resources is foreign to the cultural worldview of the Big Trout Lake First Nation." On the other hand,

> in [the] non-Aboriginal world view "people" and "natural resources" are conceptually set against each other . . . The term natural resources implies that natural resources are objects. They are spiritually disconnected from human beings . . . For the people of the Big Trout Lake First Nation what non-aboriginal society refers to as natural resources are the centre of the expression of the created order with which our people are in intimate relationship . . . [Our] emphasis is on retaining an intimate relationship with everything the Creator placed in our lands. This is a character of dialogue between our people and our land.[79]

In his study on Anishinaabe law, Aaron Mills echoes these claims. Speaking to the Anishinaabe's fundamentally relational understanding of reality, Mills writes, "for the Anishinaabek, everything is alive. In our language, *Anishinaabemowin*, almost everything is considered alive—even rocks, drums or tea kettles."[80] Moreover, "Anishinaabe world views hold that many animate nonhuman beings are full persons with temperaments, volitions, and preferences."[81] Similarly Paul Driben writes, "Above all, [the Anishinaabe] philosophy is based on the principle that the plants, animals, and minerals which coexist with humankind must be treated

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77 *Platinex 2007* at para 76.
78 Ibid. at para 77.
79 Ibid. at para 119.
80 Mills, "Aki, Anishinaabek, kaye tash Crown," 115.
81 Ibid., 116.

with the utmost respect."[82] And John Borrows claims that "[m]any Anishinabek people characterize the Earth as a living entity who has thoughts and feelings, can exercise agency by making choices, and is related to humans at the deepest generative level of existence."[83] If this forms the background for making judgments about what harms the land, it is hardly surprising that Platinex and KI disagreed over the meaning of "minimal" harm. And it is not surprising that Smith J. decided that "the fear of cultural, environmental, and spiritual harm . . . cannot reliably be linked to Platinex's proposed development."[84]

In the end, Smith J. ruled in Platinex's favour. "Aboriginal rights," he said, "deserve the full respect of Canadian society and judicial system. Those rights do not, however, automatically trump competing rights, whether they be government, corporate, or private in nature."[85]

KI Stage 3

The last stage of the drama took place after Smith J.'s ruling that Platinex could commence drilling. A group of KI band members decided that they could not accept that possibility and undertook a direct action initiative to deny Platinex access to areas necessary to pursue its work. They did so in violation of a court order and were held in contempt. Six of the eight did not defend their charges.[86] According to Mills, their defiance of the court order "was about fulfilling a sacred obligation under KI's own law."[87] Interestingly, Smith J. came closest to addressing the issue of the status of Aboriginal laws within the Canadian legal system in his reasons for holding the KI members in contempt, saying: "If two systems of law are allowed to exist—one for the aboriginals and one for the non–aboriginals, the rule of law will disappear and be replaced by chaos."[88]

In the end, though KI's Aboriginal perspective was factored into the court's reasoning, its laws and norms were not given effect. I will not speak to the difficult question of whether Smith J.'s judgment was correct in that regard. However, I will briefly gesture at how Aboriginal laws might enter into the reasoning of a court in appropriate situations in the future. According to Mills, "the vast majority of Anishinaabe law is codified in stories, dances, songs and ceremonies, not in treatises or court reporters."[89] But how do you get those into the law, especially at the stage

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82 Paul Driben et al., "No Killing Ground: Aboriginal Law Governing the Killing of Wildlife among the Cree and Ojibwa of Northern Ontario," *Ayaangwaamizin:* The International Journal of Indigenous Philosophy 1, no. 1 (1997): 101 (citations omitted).

83 Borrows, *Canada's Indigenous Constitution*, 242.

84 *Platinex 2007* at para 158.

85 Ibid.at para 171. To be clear, my claim is not that Smith J. was either right or wrong in his determination of the law of interlocutory injunctions, or in the disposition of the case. This discussion is simply meant to illustrate the way the court made use of reasons and normative argument grounded in the KI worldview. See Mills ("Aki, Anishinaabek, kaye tash Crown") and Ariss and Cutfeet ("*Kitchenuhmaykoosib Inninuwug* First Nation") for more in-depth commentary on the KI cases. See Henderson (*First Nations Jurisprudence and Aboriginal Rights*) for the proposition that traditional Aboriginal jurisprudence is even now authoritative within the Canadian legal system.

86 Mills, "Aki, Anishinaabek, kaye tash Crown," 158.

87 Ibid., 159.

88 *Platinex 2008* at para 44.

89 Mills, "Aki, Anishinaabek, kaye tash Crown," 118.

of normative evaluation? One answer is that Aboriginal law counsel must do the work of interpreting and analyzing law–bearing stories. There would need to be principled and structured ways of working with these laws and, as always, the onus would be on counsel to present the law to the judge. As Borrows suggests,

> [y]ou could have Aboriginal and non–Aboriginal lawyers learn the law of their clients, and not just introduce Western law into the legal argument (such as *Van der Peet* and *Delgamuukw*), but [Aboriginal legal narratives as well]. They could say, "Here is the broader ground upon which we invite you to make your decision."[90]

Conclusion

This paper has explored the tension between the demands of public reason and the sense that Aboriginal people should be able take part in the political life of this country without assimilating to an Anglo-European normative framework. That tension is evident in the Canadian jurisprudence. Judges are aware of the public nature of the institutions of law and their mandate to render impartial, public justice. They know that they are not at liberty to make law based on their own comprehensive views, and conversely, they are wary of accepting reasons that are unique to the religious, ethical, or philosophical views of any subset of the population. All of this raises a very difficult question about how to understand the relationship of Aboriginal laws and normative perspectives to the common law and our deep–seated ideas about public justification.

I have argued that, though significant space has been created for Aboriginal perspectives in the jurisprudence on Aboriginal rights, the gains have largely been limited to rules of evidence and the use of Aboriginal perspectives to describe the content of those rights. Reasons grounded in unique Aboriginal worldviews remain ineligible as standards of evaluation in themselves.

But why should we attribute that, even in part, to the idea of public reason? First, I have argued, given that the Anglo-European moral consciousness is conditioned by the canon of moral philosophy, and that public reason is at the centre of the canon, it seems likely that the idea of public reason has some effect on the kinds of reasons that are seen as legitimate for adjudication. Furthermore, I argued that the coincidence between the strictures of public reason and the use to which the courts have put Aboriginal perspectives—namely, distilling out their descriptive contents so that the normative dimensions remain supressed—is striking and suggestive of a connection. Finally, I offered a discussion of the KI cases to illustrate the ambivalent manner in which the court received reasons and arguments grounded in a unique Aboriginal worldview. My analysis of that line of cases suggests three reasons to suppose that the idea of public reason was at work in the background. First, we saw Smith J. filtering the reasons offered at trial in accordance with the strictures of public reason. In the 2006 proceeding, KI's line

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[90] Borrows, "Creating an Indigenous Legal Community," 174. Pioneering work is being done in this regard at the University of Victoria with the development of its *Juris Indigenarum Doctor* program, intended, in part, to promote the study and development of Aboriginal legal traditions. I am grateful to Val Napoleon for discussion on this point.

of argument that was rooted in public values was persuasive, and the line of argument grounded in KI's traditional values and laws was not addressed. Second, when arguments grounded in nonpublic values could not be avoided, the court disregarded them as ineligible as standards of evaluation. In Smith J.'s 2007 judgment, the KI perspective on land was explored in somewhat greater depth and with sincere respect, including the normative conclusions that flow from the conception of the earth as an entity that can suffer harm. However, though clearly in sympathy with the band members who testified, Smith J. was unable to find that their concerns of cultural, environmental, or spiritual harm were well–founded. Third, the KI litigants appeared to sense that their reasons were inert within the judicial system. Their sense of disempowerment and disillusionment was given expression when the band members asserted their power outside the system, challenging its claim to legal and moral supremacy by privileging their own traditional laws in an act of civil disobedience, knowing that it would result in incarceration.

This paper has not attempted to answer the profound and vexing question of the place that Aboriginal laws and norms ought to have in our legal system. It has merely attempted to expose a deep tension in contemporary political thought, between the sense of the injustice of the hegemonic constraint and the requirements, and fundamental values, of the liberal idea of public justifiability.[91] The allegation that this dilemma is inherent in liberal thinking is not new.[92] However, I think it remains insufficiently understood, and often under–appreciated, especially in relation to concrete legal and political conflicts.

More importantly, it remains unresolved. Some may suggest that the answer is to abandon liberalism and the ideal of public justifiability. However that, I think, is not a satisfactory solution. The values that underlie public justifiability—the basic intuition that the constitution must respect the reasonable views of all citizens, and that the laws must be justifiable to all who are subject to them—are not easily brushed aside. On the other hand, to assert the principle of public reason, at least in its Rawlsian form, and thereby to maintain the exclusion of the normative dimensions of Aboriginal perspectives is unsustainable as a foundation for the constitution. Aside from the moral dubiousness of that position, the political ramifications are grave. The reality of disempowerment and resultant social ills shows that the constitution is not working for many Aboriginal nations. A key theme of the factum that KI submitted to the court for its 2006 proceeding concerned its feelings of helplessness and powerlessness in the face of repeated foreign impositions on its territory and community. It is clear that KI's experience with the legal system perpetuated, rather than ameliorated, this sense of disempowerment. That, I suggest, is a profound political, and normative, problem—both for proponents of public reason and for advocates of Aboriginal legal traditions.

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91 Though it is tangential to my thesis I feel I must say that the question of the place of Aboriginal laws in Canada must be, in large measure, a question of treaty—where does a given treaty leave the laws and jurisdiction of the Aboriginal group? And if a treaty does not directly address that question, then it remains a fundamentally constitutional issue to be settled by the courts, or politically through further treaty negotiations.

92 Ivison, *Postcolonial Liberalism*; Laden, *Reasonably Radical*; Krause, "Partial Justice"; Angela Means, "Narrative Argumentation: Arguing with Natives" (2002) 9:2 Constellations 221.

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