

ARTICLE

INSIDIOUS IDOLATRY: CANADA'S ABORIGINAL LEADERS AND THE LEGAL WHIPLASH

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"And our interest increases when we discern in the unhappy wanderer the germs of heroic virtues mingled among his vices, a hand bountiful to bestow as it is rapacious to seize, and even in the extremist famine, imparting its last morsel to a fellow sufferer; a heart which, strong in friendship as in hate, thinks it not too much to lay down life for its chosen comrade; a soul true to its own idea of honor, and burning with an unquenchable thirst for greatness and renown."¹

PROLOGUE²

Just after midnight on March 22, 2006, members of the Gitga'at First Nation in the community of Hartley Bay, on the coast of British Columbia, overheard an emergency transmission from B.C. Ferries' *Queen of the North*. Onboard were 101 souls and a number of vehicles. The *Queen* had missed a critical course change after exiting the Grenville Channel and was cruising just under its maximum speed of 20 knots before it slammed into the shore of Gil Island. Passengers sleeping in their cabins were immediately awakened by an ominous metallic shriek as the rocks ripped the hull from stem to stern. Preparations for abandoning the *Queen* began immediately.

Without hesitation, the community sprang into action. In the dead of the cold dark and

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1 Francis Parkman, *The Conspiracy of Pontiac and the Indian War After the Conquest of Canada: To the Massacre at Michillimackinac*, vol. 1 & 2 (Nebraska: Bison Books University of Nebraska Press, 1994) at 44 [Parkman].

2 The prologue was compiled from numerous news stories that have reported from various angles on the *Queen of the North's* accident on March 22, 2006. The ones I found most compelling include: Iona Campagnolo, "Presentation to the Village of Hartley Bay" (5 May 2006), online: Office of the Lieutenant Governor <http://www.lt.gov.bc.ca/whatsnew/sp/sp_may03_2006.htm>; "Hartley Bay residents in heroic rescue operation" *CTV* (23 Mar. 2006), online: *CTV* <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060323/rescue_ferry_060323/20060323/>; Gerry Bellet, "Rescuers gave clothes off their backs" *The Vancouver Sun* (23 Mar. 2006), online: *The Vancouver Sun* <<http://www.canada.com/vancouver/news/story.html?id=e1329b94-9598-45d0-9537-623700c97fe4&p=2>>; "Hartley Bay residents in heroic rescue operation" *CTV* (23 Mar. 2006), online: *CTV* <http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20060323/rescue_ferry_060323/20060323/>.

rainy night, the men jumped into their speedboats and gillnetters to commence the arduous task of navigating the rocky channels, guided only by the silhouettes of the mountaintops illuminated against the stars of the night sky. The rescuers traveled 16 kilometres, arriving within 45 minutes to find the remaining passengers and crew bobbing in rigid-hull inflatables, two life-boats and a few life-rafts, all tied together amidst the remnants of rafts which had malfunctioned and failed to inflate.

As the Gitga'at begin to coordinate the loading of the survivors onto their vessels, they were soon assisted by the crew of the Coast Guard's icebreaker, the *Sir Wilfrid Laurier*, accompanied and guided by its companion helicopter. Before long, an airplane was onsite doing flyovers, dropping flares to turn the night into day. The *Laurier* had taken longer to prepare and arrived just in time to see the *Queen's* death-throes immediately after wading through the unnerving sight of floating lifejackets whose straps appeared as limp arms under the limited visual conditions.

Laurier crewmembers recall the crashing of vehicles onboard the *Queen* as they collided into one another, blowing out windows in chorus with the scream of the hull crushing under the weight of the inverted vessel as it sought to defy the laws of the sea by reaching toward the sky. As the stern submerged, the vessel shot up three quarters out of the water before crashing down with a pressure so great that sheets of metal were torn free and blasted 30-50 feet over the bow.

Meanwhile, back at the village, the Gita'gat women had taken charge. They immediately opened up the church and community hall to serve as reception centers for the incoming survivors. Instinctively, they began to bake, prepare blankets and ransack their homes, searching for all the clothes that they could find. Everyone from children to elders in the community, even those who could hardly walk, worked to prepare for the arrival.

When 99 of the 101 passengers and crew finally made it to Hartley Bay they were all cold, wet and in shock. Many of them were still in their pyjamas and without footwear; many broke down when they realized that they had survived and were now invited into a community of warmth and love, far from their near fate at the bottom of Wright Sound. The villagers worked all night to ensure that the survivors were clothed, comforted and fed.

Due to Gitga'at's efforts, 99 of 101 passengers were saved. In recognition, Hartley Bay was awarded the first-ever community Governor General's Commendation for Outstanding Service Award for answering "the highest calling of what it is to be human, by meeting the desperate need of people in difficulty with compassion, concern and life-preserving action." In addition, B.C. Ferries has paid \$150,000 for a new boardwalk, rescue boat, playground and a community plaque. Shortly after the incident, B.C. Ferries proclaimed their intent to name the replacement vessel the "*Spirit of Hartley Bay*". Finally, the B.C. Lieutenant Governor General, Iona Campagnolo, invited the rescuers to a banquet in their honour in the capital of Victoria.

INTRODUCTION

Russel Lawrence Barsh contends that Canada's treatment of Aboriginals has been characterized by ambivalence.³ He notes the effect Aboriginals have in pressuring Canadian morality and directing Canadians' "need to be perceived, and to perceive themselves, as more tolerant...than other nations and peoples".⁴ In spite of this idealism, however, Canadians simultane-

3 Russel Lawrence Barsh, "Aboriginal Peoples and Canada's Conscience" in David Newhouse, Cora Voyageur & Dan Beavon, eds., *Hidden in Plain Sight: Contributions of Aboriginal Peoples to Canadian Identity and Culture* (Toronto: University of Toronto Press, 2005) at 270-274.

4 *Ibid.* at 280.

ously agree that Canada mistreats its Aboriginal peoples.⁵ Furthermore, “Canadians persist in the belief that they have achieved a high level of justice” notwithstanding this dissonance.⁶ The issue has become one where the impact that Aboriginals have on the Canadian conscience has been taken for granted. To the extent that Canadians do realize the extent of this contribution, they remain unwilling to expressly recognize or do anything to honour it.⁷

This is a very frustrating dissonance for Aboriginals, especially in light of the efforts and sacrifices they have made to contribute to our national character. The most perplexing circumstances have come from Canada’s failure to sustain a just recognition for the merits and contributions of Aboriginal leaders and heroes. George Woodcock contends:

[H]eroism is always a kind of imposition; the hero is dominating us by his strength, by his brute courage, and we have become suspicious of such qualities. ... We are suspicious because, as Canadians, we see ourselves generally imposed upon or...[ironically], colonized...we suspect the sheer gigantic irrationalism of the heroic, for we like to consider ourselves a reasonable people.⁸

It is high time for this issue to be confronted. To do so we can look back on three of the greatest Aboriginal leaders of all time and reflect upon their legal narratives to see how their efforts to protect their people were captured by the law and how the Canadian legal conscience has failed to honour their contributions. Oftentimes, Aboriginals look to their elders – their leaders – for guidance. This practice is not entirely unlike the advice given by the courts to aid in the formation of a just society. Aboriginals look to their leaders for help in understanding the law of the land, to draw on their experience to seek out higher paths. Vine Deloria Jr. pays tribute to the influence of these leaders by acknowledging each as having:

a sense of personal worth, of a mission to be accomplished, and of a relationship with the life forces of the greater cosmos in a measure that we have not seen since. Fighting overwhelming odds, suffering the loneliness of knowing the situation was hopeless, and maintaining their sense of person was an achievement few of us can conceive and none of us can match.⁹

Aboriginal leaders possess qualities the law should strive to acknowledge, honour and respect. This paper will trace the legal contributions and struggles of the Ottawa War Chief, Pontiac; the Métis hero, Louis Riel; and the first treaty Aboriginal elected to a provincial legislature,

5 *Ibid.* at 281-282. Barsh relies on survey information to back up his claim that “Canada has become a [stereotypical] middle-class country, preoccupied with individual material gain” with an increasing egocentric and materialistic agenda. In his analysis he includes a 1992 Angus Reid survey conducted amongst 4510 citizens in sixteen of the most industrialized countries where eighty-two percent of Canadian respondents were convinced that Canada is tolerant; twenty-eight percent “strongly agreed” that Canada mistreats Aboriginals.

6 *Ibid.* at 282.

7 Survey by Angus Reid Group, September 21-September 25, 1995, (January 26, 2008) online: CPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut. <http://roperweb.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/cPOLL/StateId/RnlnKli1Wt5_KogiAtX6WqQMX0GsP3-VjHJ/HAHTpage/Summary_Link?qstn_id=1651623>. In 1995, 21% of the Canadians polled believed that “no progress at all” had been made in addressing Aboriginal concerns; 51% believed that “not much” progress had been made. Of course, I do recognize the argument that Aboriginal rights have been entrenched in our Constitution via s. 35 of the Constitution Act, 1982. However, a full-fledged discussion on the scope of the rights therein and their substance is beyond the scope of this paper. See generally: Halie Bruce & Ardith Walkem eds., *Empty Box or Box of Treasures: Two Decades of Section 35* (Penticton: Theytus Books, 2003). Articles in this anthology analyze the 20 year history of the section to expose its lack of clarity and the role of judicial activism in defining its limitations.

8 George Woodcock, *Gabriel Dumont: The Métis Chief and his Lost World* (Edmonton: Hurtig Publishers, 1975) at 10.

9 Vine Deloria Jr. quoted in Taiaiake Alfred, *Wasase: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005) at 79.

Elijah Harper.¹⁰ I will argue that their vision and uncompromising dedication to justice for their peoples has had a significant impact upon Canadian law. In reaction to the law's initial recognition, Canada's colonial reflexes sought immediately to subvert, manipulate and mitigate these leaders' efforts to protect the sovereignty, rights and status of their peoples. This phenomenon, which I have termed the "legal whiplash", has corrupted the significance of the Aboriginal impact on Canada's legal history and crippled the legacies of these great leaders.

By recounting the legal narrative of each leader, I will trace the evolution of the legal discourse between Aboriginals and the state from the battlefield to the political arena. I will show this evolution has done nothing to prevent the legal whiplash from stifling Aboriginals' impact upon Canadian law. It is worth recounting these injustices because, "[s]ometimes, in telling the story of a fight against an old injustice, we help to bring about something nearer to justice in the future."¹¹ The consequent subversion of their contributions will bring home the fact that the laws they created were initially intended to protect the sovereignty, rights and status of Aboriginal peoples. With this knowledge, Canada can begin to come to clear terms with the Aboriginal heritage embedded within our laws and the Canadian legal consciousness. Canadians must overcome their inherent suspicion of heroism – especially Aboriginal heroism – to grant these leaders the recognition they deserve and acknowledge the injustices they endured for the sake of our nation's prosperity.

The road ahead is not easy. To advance an era of true reconciliation, we cannot move forward without looking back at a past marred with the unjust legal and political subversion that has stained the virtues of these great leaders and the initial spirit of the laws they inspired. By redressing this injustice and restoring to these leaders the respect they deserve, the government can begin to recognize and reconcile the significance of Aboriginal contributions to the formation of Canada with what it means to be Canadian. The stories of these leaders will be told with a view toward clarifying their historical plight and the obstacles they were forced to overcome in order to appeal to Canada's higher virtues. Only then can the merits of these great Aboriginal leaders and their contributions to the judicial nature of our country be understood, accepted and endorsed. We must seek to appreciate their pursuit for justice in protecting the sovereignty, rights and status of their peoples by honouring their memory: only then will a legitimate reconciliation follow – not before.

PONTIAC'S PROCLAMATION, 1763

Often referred to as a "fundamental document"¹² in delineating Aboriginals' legal relationship with Canada, the *Royal Proclamation of 1763* was intended to be a treaty with the Crown – not a unilateral declaration of the Crown.¹³ Looking to the circumstances surrounding the issuance of the *Royal Proclamation* supports this claim.

10 Although Harper was the first Treaty Indian elected to the provincial legislature, Dr. Frank Calder of the Nisga'a Nation in British Columbia was the first Aboriginal elected to a provincial government in 1949. Dr. Calder's contribution to Canada through his efforts to bring the *Calder* case before the Supreme Court of Canada was instrumental to the genesis of modern day Aboriginal rights in Canada. See: *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, a decision referred to throughout this paper. It is my hope that his legacy endures the legal whiplash evident in the evolution of case law that, in my view, contorts and limits Aboriginal rights by refusing to have them challenge assumed Crown sovereignty.

11 Woodcock, *supra* note 8 at 20.

12 *Calder*, *supra* note 10 at 395, Hall J.; *St. Catharine's Milling and Lumber Co. v. The Queen*, [1887] 13 S.C.R. 577 at 652, Gwynne J.. Gwynne J. refers to it as the "Indian Bill of Rights."

13 *Royal Proclamation of 7 October 1763* (U.K.), reprinted in R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*]. To avoid a word for word enumeration of this lengthy document, it is assumed that the reader is familiar with its terms. "[T]he Royal Proclamation of 1763 was entirely unilateral and was not, and cannot be described, as a treaty": *R. v. Kruger and Manual* (1976), 60 D.L.R. (3d) 144 (B.C.C.A.) at 147; *R. v. Tennisco* (1982), 131 D.L.R. (3d) 96 (Ont. H.C.J.) at 104 cited in John Borrows, "Constitutional Law from A First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 at 3 note 11 [Borrows, "First Nation Perspective"].

Without the assurance of stability in North America, British advancement and settlement in the Age of Imperialism was threatened. The Crown, under King George III, sought to appease the First Nations by recognizing their sovereignty and thereby eliminate the threat of further insurrection after the Seven Years' War.

After the French signed the *Treaty of Paris*, they confirmed their defeat and promised to cease further hostilities against Britain.¹⁴ However, this 'peace of paper' could not ensure the French would honour its terms, especially in the New World; after the defeat of Montcalm on the Plains of Abraham in 1759, the French were incapacitated, but not incapable of regrouping at any moment, even after the signing of the *Treaty of Paris*.¹⁵ Nevertheless, the British intended to gain reprieve from hostilities to consolidate their foothold in the New World. Further evidence of this is apparent upon review of the great Ottawa War Chief Pontiac and his armed resistance against the British after the *Treaty of Paris* which led directly to the issuance of the *Royal Proclamation*.

Duplicity before and after the war was all too common. Aboriginal groups in the Great Plains and Woodlands were in a constant tug-of-war between the French and English, each vying for their favour to strengthen their armies during the bloody contest, and each with feigned interest in honouring this friendship beyond procuring control over the land.

The French regaled their allies with "all their machinery of conciliation," using gifts, praise and declarations of their superiority over the British – Francis Parkman described their attempts as caressing with one hand while maintaining a firm grasp on a drawn sword with the other.¹⁶ Genuine or not, by honouring Aboriginals this way the French were welcomed with open arms.

Witnessing the growing strength of their rivals, and the mounting "arbitration of the sword," the English followed suit and allied with the Iroquois through a treaty of friendship.¹⁷ Parkman, whose racial overtone reflects the imperial sentiments of the time, concludes that "the savages did not become French, but the French became savage", whereas the "English colonies displayed no such phenomena of mingling races, for there a thorny and impracticable barrier divided the white man from the red.... though they became barbarians, they did not become Indians".¹⁸ Even if "they did not become Indians", Aboriginal alliances were vital in order to offset the growing threats to the Crown's power in the New World. Thus, the English, out of necessity rather than ingenuity, took up the gift-giving diplomacy pioneered by the French.

With the temporary cession of hostilities created by the *Treaty of Paris*, trade with the Aboriginals began in earnest. In their zeal to establish forts for trading, English soldiers trespassed upon the lands of Pontiac. They were greeted by his delegation and instructed to advance no further. Pontiac himself soon came to greet the soldiers and demand their reasons for intruding upon his people's lands without permission.¹⁹ After being informed of the defeat of the French and the general intent of the English to restore peace to these lands, Pontiac thought long before replying that he would "live at peace with the English, and suffer them to remain in his country as long as they treated him with due respect and deference."²⁰ Before allowing the soldiers to move on, Pontiac, his chiefs and the soldiers smoked the calumet to honour their

14 Definitive Treaty of PEACE between France, Great Britain and Spain, 10 February 1763, G.B.T.S. 1763 No.1, Cons. T.S. 1763 279 (entered into force 10 March 1763, signed and ratified by Great Britain, France, Spain and Portugal) [Treaty of Paris].

15 Parkman, *supra* note 1, at 161.

16 *Ibid.* at 76, 88.

17 *Ibid.* at 93, 102.

18 *Ibid.* at 77-79.

19 *Ibid.* at 166.

20 *Ibid.*

arrangement and to restore harmony between their nations.²¹

After consolidating and fortifying their footholds in the Ohio Territory, senior British administrators began to treat the gift-giving protocol as “extravagant and unnecessary,” rather than essential to the maintenance of peaceful relations.²² Noting the subsequent wane in trade, Parkman writes:

In truth, the intentions of the English were soon apparent. In the zeal for retrenchment, which prevailed after the close of hostilities [with the French], the presents which it had always been customary to give the Indians, at stated intervals, were either withheld altogether, or doled out with niggardly and reluctant hand; while, to make the matter worse, the gents and officers of the government often appropriated the presents to themselves, and afterwards sold them at an exorbitant price to the Indians.²³

These trade restrictions resulted in extreme Aboriginal hardship. The lack of promised ammunition severely limited their ability to hunt and, in turn, what they could trade for essential goods. Allan Eckert confirms that “[s]oon most of the tribes were reduced to near starvation, with no relief in sight.”²⁴ As the Aboriginals grew more vulnerable, the English began to ignore the agreement that the soldiers had made with Pontiac and further intrude upon the lands of his people.

Under these conditions, the Aboriginals held to an ever-slipping odious *détente* until they could no longer stand the British alleviating themselves of their promises. Seeing an opportunity to slight the British, the French encouraged an uprising amongst their former allies with assurance of their support. For them, Canada had been lost “beyond hope of recovery; but they still might hope to revenge its loss.”²⁵ Pontiac could stand no more and soon arose to strike back at the heart of the British footholds in the Ohio Valley.

Pontiac worked to assemble the surrounding tribes of the Great Lakes: the Ottawas, Chipewas, Potawatomies, Hurons, Delewares and Shawnee.²⁶ Heeding his call, the surrounding tribes came bearing war-belts of wampum and the red-stained tomahawks, each gifted from Pontiac to honour the commitment to an alliance for the upcoming war against the British. Pontiac convinced each tribe that in order to retain control of their lands “they must lift the hatchet and drive [the British] away.”²⁷ His masterful oratory had successfully incited in his brethren a renewed lust for English blood.

The first pan-Aboriginal confederacy gained entrance into the forts under the guise of peace before revealing the tomahawk.²⁸ They struck hard and fast: in total, the alliance attacked 13 English forts beginning with Detroit. Although progress at Detroit was stalled by an informant,²⁹ they still took down the forts at Sandusky, Miami, Ouiatenon, Green Bay, Edward Augustus, LeBoeuf, Venango and the Presque Isle.³⁰

21 *Ibid.*

22 Allan Eckert, *A Sorrow in Our Heart: The Life of Tecumseh* (New York: Bantam Books, 1992) at 24 [Eckert].

23 Parkman, *supra* note 1, at 173.

24 Eckert, *supra* note 22 at 25.

25 Parkman, *supra* note 1 at 177; Eckert, *supra* note 22 at 25.

26 Eckert, *supra* note 22 at 27-28.

27 Borrows, “First Nation Perspective”, *supra* note 13 at 13 note 42; Eckert, *supra* note 22 at 27-28; Parkman, *supra* note 1 at 186-187.

28 Tony Penikett, *Reconciliation: First Nations Treaty Making in British Columbia*, (Vancouver: Douglas and McIntyre, 2006) at 41.

29 *Ibid.* at 43-44.

30 *Ibid.* at 41; Eckert, *supra* note 22 at 28-29.

The time for the French to honour their promise to reinforce Pontiac was apparent, but they soon revealed the true nature of their loyalty by deferring to the terms of the *Treaty of Paris*; when the time came to drive their drawn swords into the heart of their sworn enemy, they chose instead to drive them into the backs of their allies with the sting of betrayal. Without support from the French, the British were able to hold out. Consequently, the rebellion languished and, eventually, Pontiac's alliance crumbled. However, it was not before instilling a fear great enough to force the British to forego trade into remote areas occupied by Aboriginals for two years.³¹

The duplicity of the times had created a climate of fear and distrust. It was to this fear that the *Royal Proclamation* spoke. In Pontiac and his pan-Aboriginal confederacy's moment of triumph, the British had come to see that Aboriginals were a force to be reckoned with. The tomahawk cut deep into the imperial psyche, demanding recognition for Aboriginal sovereignty and respect for their autonomy. Pontiac took back the power robbed from his trust in the English. In a Nietzschean moment of roughly equal power, the *Royal Proclamation* was invoked to recognize and accommodate these fundamental rights to prevent further abuses.³² Subsequent events surrounding the treaty at Niagara elucidate this point.

Aboriginal law professor John Borrows argues that one must strive to interpret the *Royal Proclamation* from an Aboriginal perspective.³³ He re-introduces legal historians to the wampum exchange that took place at Niagara in 1794, immediately after the issuance of the *Royal Proclamation*. Through the exchange of the sacred wampum belts, it was ratified by Aboriginal acceptance of British representations and promises to recognize their sovereignty over their lands and rights to remain undisturbed therein. Thus, the *Royal Proclamation* officially became a treaty.

Without the alliance of peace forged by this treaty, it is very likely that the British reign would have fallen back into earlier patterns of treating the Aboriginals with disrespect and allowing tensions to remount. At the time, the terms of the *Royal Proclamation* were relatively generous; the increasing advancement of the American settlers and the discriminatory American policies that followed which promoted this advancement were not. Consequently, many tribes under American control were forced into the Ohio territory under the protection offered by the British under the *Royal Proclamation*.³⁴

In this respect, Pontiac's uprising was successful and even beneficial to the British in the long-term. His resistance influenced the next pan-Aboriginal alliance led by the legendary Tecumseh, Chief of the Shawnee: "the real hero of the [War of 1812],"³⁵ described best by his sworn enemy, Governor and former American President William Henry Harrison, as "one of those uncommon geniuses which spring up occasionally to produce revolutions and overturn the established order of things."³⁶ Without the aid of Tecumseh and his alliance in the War of 1812, Canada would have been overrun by the Americans.³⁷

31 Borrows, *First Nation Perspective*, *supra* note 13, at 17 footnote 57.

32 Friedrich Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality*, Maudemarie Clark and Brian Leiter, eds., (Cambridge: Cambridge University Press, 1997) "On the Natural History of Rights and Duties," Book II, s. 112 at 111-112. Nietzsche argues that rights prevail in relationships where conditions and degrees of power are maintained: "diminution and increment[s] warded off."

33 Borrows, "First Nation Perspective", *supra* note 13. Borrows specifically advocates for the use of the "First Nation" perspective. This is technically different from the "Aboriginal" perspective, which includes the Métis perspective, and which I use throughout this paper. Though the specific meanings of these words in the legal realm are important, I don't wish to split hairs; I know that Borrows' argument was intended to open the door to a multitude of perspectives.

34 *Ibid.* at 26.

35 John Sugden, *Tecumseh: A Life* (New York: Henry Hold and Company, 1997) at 294.

36 William Henry Harrison quoted *ibid.* at 215.

37 *Ibid.* at 310-311, 391.

It is unfortunate that the historical ambivalence espoused by Canadians toward their Aboriginal heritage has been taken advantage of by the legislature and judiciary. Despite the fact that the *Royal Proclamation* has been constitutionalized in s. 25 of the *Constitution Act, 1982* ("*Constitution Act*")³⁸ and is cited expressly in our common jurisprudence, the first pan-Aboriginal confederacy under Pontiac and the largest gathering of Aboriginals ever, hosting approximately 2000 chiefs and 24 Nations extending from the Mississippi, to the Hudson Bay, to Nova Scotia, have both been relegated to historical and legal nonevents.³⁹ As a treaty, the *Royal Proclamation* would fall under the protection of s. 35(1) of the *Constitution Act*, thereby confirming an inherent right to self-government. Any changes would have demanded consent from the Aboriginals. This has dishonoured the spirit of the *Royal Proclamation* to protect Aboriginals from further abuse at the hands of the state. Moreover, it has dishonoured the memory of Pontiac, the significance of the wampum exchange, and the resulting treaty delineating the terms of a relationship of shared sovereignty envisioned from the Aboriginal perspective.

Borrows claims this perspective "discredits the claims of the Crown to exercise sovereignty"⁴⁰. Pontiac and the pan-Aboriginal alliance fought to remain as free peoples on their own lands. Such resistance is proof of the "desire of Indian people to continue to exercise responsibility over [themselves], their institutions and their surroundings."⁴¹

The hegemonic interpretations by Courts that found the *Royal Proclamation* to be a "unilateral declaration of the Crown" have exacerbated the problem. Dickson C.J.'s view that the *Royal Proclamation* proved "there was never any doubt that sovereignty and legislative power and indeed the underlying title to such lands vested in the Crown" is a fallacy that blatantly disregards the resistance of Pontiac's confederacy.⁴² Neither Pontiac's uprising nor the treaty at Niagara have influenced the court's interpretation of the *Royal Proclamation* to recognize Aboriginal sovereignty and inherent rights to self-governance in spite of the instrumental roles played by each in its creation.

The *Royal Proclamation* was intended to capture and eliminate the condition of fear that prevented the British from gaining ground in the New World. The *Royal Proclamation* promised that the British would reserve "hunting grounds" wherein the First Nations would remain "unmolested"; these lands would be protected from advancing settlers, and they could only be surrendered to the Crown and only through a public transaction.⁴³ These were seemingly very attractive terms. However, given the Janus-faced nature of the times, it is not surprising that this document has been allowed to deviate from the intent to appease Aboriginals and respect their sovereignty; it would appear that there is no place in history for an admission that the Crown acquiesced to the threat of force from a justified Aboriginal insurrection. Make no mistake: the *Royal Proclamation* was a document born of fear, yet we need not fear its rightful interpretation.

Borrows brings to light an opportunity dormant within the "moments of accommodation"⁴⁴ provided by recent Supreme Court of Canada decisions. These decisions could open the door to re-interpreting the *Royal Proclamation* and acknowledging its treaty status. In *R. v. Sioui*, Lamer J. referenced the Aboriginal perspective in acknowledging the *Royal Proclamation* as a

38 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11, s. 25.

39 Borrows, "First Nation Perspective", *supra* note 13.

40 *Ibid.* at 24, 28.

41 John Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L. J. 291 at 302-304. Borrow's concentration in this article is on Tecumseh's alliance with Britain in the War of 1812. His argument, however, is intensified with regard to Pontiac, who had only marginal aid from the French.

42 *R. v. Sparrow*, [1990] 56 C.C.C. (3d) 263 (QL) at para. 49 quoted in Borrows, "First Nation Perspective", *supra* note 13 at 38.

43 *Royal Proclamation*, *supra* note 13.

44 Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L. J. 382 quoted in Borrows, "First Nation Perspective", *supra* note 13 at 40.

means of recognizing Aboriginal "autonomy" by alleviating the "dangerous trouble among the Indians".⁴⁵ Furthermore, in *R. v. Simon*, Dickson C.J. upheld a previous ruling that treaties should be "given a fair and liberal construction in favour of the Indians" with "doubtful expressions resolved in [their favour]" so as to construe the terms of the document in the "sense they would naturally be understood by the Indians."⁴⁶

It is time to re-enshrine the legacy of Pontiac and the *Royal Proclamation* by attributing to each the Aboriginal perspective that places them in their rightful places. It is not surprising that this was among the first recommendations made by the Royal Commission on Aboriginal Peoples:

The new relationship should be heralded by a symbolic step to demonstrate that a lasting commitment has been made. For this reason we recommend that the Sovereign issue a Royal Proclamation to signal the new beginning at a special gathering called for the purpose. The proclamation would set out the principal elements of the new relationship and outline its central institutions.⁴⁷

Renowned treaty negotiator Tony Penikett has argued that the *Royal Proclamation* and Pontiac's uprising are what forced the British, the Americans and the Aboriginals to make treaties in the first place.⁴⁸ His summation of Pontiac's contribution in this respect is both informed and admirable:

Pontiac's proclamation protected Indian hunting grounds. The spirit of that [Proclamation], if not the treaties it inspired, is accommodation, not assimilation; reconciliation rather than conquest. That is, or should now be, the Canadian way.⁴⁹

LOUIS RIEL: FATHER OF CONFEDERATION AND SON OF CANADA

With no alternative, Pontiac was forced to protect his people by resorting to violence. Although Louis Riel's resistance would end similarly, this was not his intent. His primary contribution to Canada came from his role in peacefully negotiating the terms of Manitoba's entrance into Confederation. Through the *Manitoba Act, 1870* ("*M. Act*"), Riel sought to ensure the protection of Métis land rights. For these efforts, the Canadian government, under John A. Macdonald, invoked the legal whiplash to conspire and renege on promises made to the Métis in order to facilitate the systematic dispossession of their lands. To defend his people, Riel was forced to resort to violence. Consequently, he was branded a traitor and his legacy has yet to escape this controversy.

While it may often be wondered what more can be said about Riel, the tragic hero of the Métis martyred between the pillars of justified resistance and unrelenting westward expansion, I choose instead to wonder whether enough has been said. Riel's life was one of incessant contestation with Macdonald, who would rather have him hanged as a traitorous madman than in his rightful place by his side as a fellow Father of Confederation. Some legal scholars have

45 *R. v. Sioui*, [1990] 1 S.C.R. 1025 at paras. 74 & 98 (QL) cited in *ibid.*

46 *Nowegijic v. The Queen*, [1983] 1 S.C.R. 29 at para. 25 (eC); *R. v. Simon* (1985), 24 D.L.R. (4th) 390 at para. 24 (eC) quoted in Borrows, "First Nation Perspective", *supra* note 13 at 38-39.

47 Canada, Report of the Royal Commission on Aboriginal Peoples, *Renewal: A Twenty-Year Commitment*, Vol. 5 Chapter 1 "Laying the Foundations of a Renewed Relationship," (Ottawa: Ministry of Supply & Services, 1996), online: < http://www.ainc-inac.gc.ca/ch/rcap/sg/sk1_e.html#1.%20A%20New%20Beginning > [emphasis added].

48 Penikett, *supra* note 28 at 46.

49 *Ibid.* at 123.

attempted to delineate the virtues of Riel's character through his tenuous grasp on sanity.⁵⁰ Others paint him as a visionary leader and the unfortunate victim of his own success in challenging Macdonald.⁵¹

The fact remains that Riel's martyrdom marked a very low point in the administration of Canadian law. It would take Parliament over 100 years to acknowledge Riel as the Founder of Manitoba and begin mending relations with the Métis. The Manitoba Legislature and Federal Parliament have both since passed unanimous resolutions that acknowledge Riel's historic role.⁵² Nonetheless, a substantive legal recognition and endorsement of Riel's contribution has yet to come.

The Métis Nation has noted that no fewer than 14 exoneration Bills have been introduced by private members in the House of Commons and the Senate since 1982, only to falter before enactment.⁵³ Recent attempts include Bill S-35, *An Act respecting Louis Riel*, proposed in 2001.⁵⁴ The initial Bill proposed to "vacate" Riel's conviction for treason and to honour May 12th as "Louis Riel Day," the day the *M. Act* was assented.⁵⁵ Later this Bill was revised and introduced as Bill S-9, *An Act respecting Louis Riel and the Métis Peoples* – without mention of an exoneration. After its second reading, this Bill was referred to the Standing Senate Committee on Legal and Constitutional Affairs, which dissolved shortly thereafter.⁵⁶ Recognition of Canada's greatest Métis leader has yet to transcend the lip service of politicians to take root within the law: currently, Riel remains both the *de facto* "founder of Manitoba"⁵⁷ and traitor *de jure!*⁵⁸

Seeing the original Bill through to exonerate Riel would go a long way toward repairing the relationship between Métis peoples and the government of Canada. Advocates such as Senator Gerry St. Germain challenge Canada's innate suspicion of heroes:

[I]t is right to recognize and remember those individuals who played a political role in protecting the rights of their people, or heroes. Honestly, I do not believe Canada does enough to educate its people about our history, our culture and what makes us truly unique in the world.⁵⁹

However, Riel has yet to be exonerated for his "crimes" in defending the Métis people against the unjust overtures of an advancing Canada. Furthermore, no admissions have been made as to the injustices he and his Métis people have suffered as a result.

It must be remembered that inasmuch as Riel was Aboriginal, he was also French: the em-

50 For examples, see generally: Thomas Flannigan, *Louis 'David' Riel* (Toronto: University of Toronto Press, 1979) [Flannigan, *Louis*]; Thomas Flannigan, ed. *The Diaries of Louis Riel* (Edmonton: Hurtig Publishers, 1976) [Flannigan, *Diaries*].

51 See generally: George Goulet, *The Trial of Louis Riel: Justice and Mercy Denied* (Calgary: Tellwell Publishing, 1999) [Goulet].

52 *Resolution to Recognize the Historic Role of Louis Riel*, Manitoba Legislative Assembly, May 1992; *House of Commons Debates*, vol. VI (10 March 1992) at 7879. Both referred to in Jean Teillet, "Exoneration for Louis Riel: Mercy, Justice, or Political Expediency?" (2004) 67 Sask. L. Rev. 359 at 361 [Teillet].

53 Jean Teillet, "Métis Law Summary 2006," online: <<http://www.Métisnation.ca/pdfs/MLS-2006.pdf>> at 104-105 [Teillet, "Law Summary"].

54 Bill S-35, *An Act to honour Louis Riel and the Métis People*, 1st Sess., 37th Parl., 2001.

55 *Ibid.*, cl. 3-5.

56 Parliament of Canada, "Senate bills not passed by Senate – 1867 to Date," online: <<http://www.parl.gc.ca/information/about/process/info/senbills.asp?Language=E>>.

57 Teillet, *supra* note 52 at 361.

58 It should be noted that the current *Act Respecting Louis Riel* was introduced by Pat Martin of the NDP in the House of Commons on May 5th, 2006 in Bill C-258. It has received its first reading and is currently in legislative limbo awaiting further action. Unlike its predecessors, this Bill moves for a direct exoneration with the express purpose of reversing Riel's conviction "to formally recognize and commemorate his role in the advancement of the Canadian Confederation and the rights and interests of the Métis people..." See Teillet, "Law Summary", *supra* note 53 at 105.

59 *Debates of the Senate (Hansard)*, 89 (19 February 2002) at 16:20-16:30 (Hon. Gerry St. Germain) [Debate, St. Germain].

bodiment of both the “Indian Problem” and the “French Fact.” As such, I believe that lawyer and Riel’s great-grandniece Jean Teillet would agree with Woodcock’s contention and add that it has exacerbated Canada’s suspicion of heroes. She argues that the exoneration movement has been more about political expediency than justice.⁶⁰ After the defeat of the Meech Lake Accord and the resulting Oka Crisis, Canada was “[f]aced with what seemed to be a disintegrating social fabric on two fronts – Quebec and Aboriginal peoples – [therefore], provincial and federal ministers took steps to appease both at the same time.”⁶¹

Teillet notes both sides of the exoneration debate even among Riel supporters. Advocates for exoneration seek the restoration of Riel and his family’s honour to strengthen the argument that his actions were justified. They also seek an official commemoration of his contribution to Canada; by contrast, others would rather “let the stain remain” on Canada’s honour as a reminder of the past injustices committed against Aboriginals.⁶²

Acts of Métis resistance began well before Confederation. In 1849, when the Métis were settling the Red River area along with their neighbours, the Selkirks and the French, the Hudson Bay Company (“HBC”) monopolized fur trading in the area with the legal authority to demand enforcement for violations. When the HBC tried to convict four Métis locals for illegally trading furs to feed their families, Jean Louis Riel led an armed mutiny outside the courtroom, threatening to forcibly free the accused were they found guilty and jailed.⁶³ The judge met Riel Sr. halfway. Although he did convict, mercy was granted and punishment stayed. This resistance devastated the stranglehold imposed by the HBC monopoly and pulled Métis traders out from under its despotism.⁶⁴ The clash would leave a lasting impression on young Riel: justice was in his blood.

After Macdonald negotiated the sale of Rupert’s Land to Canada in 1870 with the British Parliament and the HBC, he would have done well to acknowledge this history. Instead, he immediately sought to overrun the western Métis settlements along the Red River without consultation.⁶⁵ Although the Métis were not adamantly opposed to joining Canada, they wanted to do so peacefully, on their own terms.⁶⁶ With this intent, Riel established a democratically elected provisional government. After his election as President, Riel and the “Convention of 40” – 20 French and 20 English – quickly began to negotiate the terms of enjoining Confederation.⁶⁷

Viewed as an act of political dissidence, this did not sit well with loyal Canadians within the colony. Uprisings immediately followed. Even though they were put down with little effort, they did lead to “catastrophe for Riel” for his role in overseeing the execution of Thomas Scott, a bigot and an ardent rival of the Métis.⁶⁸ The audacity of such drastic action proved too much for English Canadians to bear. It was also exactly what Macdonald would use to discredit Riel and amass support against the Métis insurgence: “In the long run, the Scott affair brought

60 *Ibid.*

61 Teillet, *supra* note 52 at 366.

62 Paul Chartrand quoted *ibid.* at 362 footnote 12.

63 Flannigan, *Louis*, *supra* note 50 at 4-5.

64 Goulet, *supra* note 51 at 17-18.

65 Chester Brown, *Louis Riel: A Comic Strip Biography* (Montreal: Drawn and Quarterly Publications, 2006) at 4 & 8-10 [Brown]. The extent of Brown’s research into Riel is expansive. Upon review of his bibliography and the accolades provided at the end of the book by Time Magazine, The Globe and Mail and Maclean’s it is apparent that his choice of the comic book medium is as progressive as our times demand “in telling the story of a fight against an old injustice... to bring about something nearer to justice in the future” quoting Woodcock, *supra* note 8. For those that doubt the power of comic books in relating powerful historical events, see: Art Spiegelman, *Maus, A Survivor’s Tale I: My Father Bleeds History* (New York: Pantheon, 1986) and *Maus, A Survivor’s Tale II: And Here My Troubles Began* (New York: Pantheon, 1991). Spiegelman won a Pulitzer Prize for both volumes in 1992.

66 *Ibid.* at 16.

67 *Ibid.* at 44-45.

68 Flannigan, *Louis*, *supra* note 50 at 29.

about Riel's downfall. When English Canadians learned of Scott's fate, there was widespread outrage; and Riel became such a controversial figure that he was prevented from having any future in Canadian politics."⁶⁹ As a result of Scott's execution and his resulting infamy amongst English Canadians, Riel was denied his right to sit in Parliament, notwithstanding his three elections to the office.⁷⁰

Despite Scott's execution, negotiations with Macdonald and delegates sent to Ottawa on behalf of the provisional government continued and culminated in the creation of Manitoba (Cree for "the God that speaks") through the *M. Act*.⁷¹ It is unfortunate that the treatment of this agreement has mirrored the treatment of the *Royal Proclamation*. The *M. Act* was not a "unilateral declaration" as it has since been interpreted; from the Aboriginal perspective, it was also a treaty ratified by the provisional government once the delegates returned.⁷² Acknowledging the *M. Act* as a "unilateral declaration" aided the subsequent dispossession of Métis lands, which otherwise would not have occurred – as a treaty, consent would have been required before any of the dubious legal manoeuvres that facilitated this dispossession and Canada's breach of its promises.

Unfortunately, after the negotiations, Macdonald realized that the amnesty promised to Riel as a precondition to the *M. Act* would result in political suicide and anything he could do to harm Riel would actually gain him the votes he required to stay in power. As a result, troops were soon sent to the Red River to terrorize the Métis.⁷³ Macdonald still lost the election to the Liberals under Mackenzie who campaigned that Riel would not be granted the amnesty promised even though he continued winning his seat in Parliament. Unfortunately, with all the animosity for Riel in Ottawa held by the members of Parliament and the threat of his immediate arrest, Riel never took his seat. As a result he lost his seat and was banished from Parliament. However, Mackenzie shied away from his stance against Riel somewhat after Riel embarrassed him by getting re-elected – again! Mackenzie eventually granted amnesty to all those responsible for the "North West troubles" – except Louis Riel. Riel then fled to the United States under the protection of President Ulysses S. Grant.⁷⁴ Once rid of Riel, Mackenzie was free to advance Macdonald's calculated legislative scheme to dispossess the Métis of the 1.4 million acres of land guaranteed under s. 31 of the *M. Act*.⁷⁵

Unlike the collective and inalienable tracts reserved for the First Nations, Métis lands were individualized, alienable and issued in scrip. These scrips were nothing more than feeble paper promises for lands that took three years to survey. Métis law professor Paul Chartrand recounts the story of Métis dispossession as one which challenges the rule of law to make right "a great

69 *Ibid.* at 30.

70 Goulet, *supra* note 51 at 30; Paul Chartrand, "Aboriginal Rights: The Dispossession of the Métis" (1991) 29 *Osgoode Hall L. J.* 457 at 466 [Chartrand].

71 Brown, *supra* note 65 at 75.

72 John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2000-2001) 46 *McGill L. J.* 615 at 656 [Borrows, "Domesticating"].

73 Report of the Royal Commission on Aboriginal Peoples, Perspectives and Realities, Vol. 4 (Ottawa: Ministry of Supply & Services, 1996), online: <http://www.ainc-inac.gc.ca/ch/rcap/sg/sj22_e.html#2.%20The%20M%20E9tis%20Nation>.

74 When he was in power Mackenzie could not stop Riel from running and continuing to win his seat in Parliament. His decision to grant conditional amnesty to Riel was most definitely a result of this political embarrassment. Brown, *supra* note 65 at 102-105; Goulet, *supra* note 51 at 30-31.

75 *The Manitoba Act, 1870*, S.C. 1870 c. 3, s. 31. For brevity, the wording of the provision has not been provided. Frankly, the history of s. 31 is a horrible legislative morass. Debate has centered the claims of D. N. Sprague and Thomas Flannigan as to the legitimacy of the government in its implementation and subsequent amendments. While Flannigan has argued that the government "generally fulfilled, and in some ways overfulfilled, the land provisions of the Manitoba Act," Sprague and Chartrand have argued convincingly that such claims are completely false. The Royal Commission endorsed these latter views. See generally: D.N. Sprague, "Government Lawlessness in the administration of Manitoba Land Claims, 1870-1887" (1979-1980) 10 *M. L. J.* 415; Chartrand, *supra* note 70; Royal Commission on Aboriginal Peoples, Perspectives and Realities, Vol. 4 (Ottawa: Ministry of Supply & Services, 1996).

historical wrong."⁷⁶ The policy of carving out individual parcels from a communal land base ensured a "fast track version" of Indian enfranchisement.⁷⁷ Against the Métis preference for long narrow riverfront lots that would have ensured their communal security and maintenance of their way of life as farmers, Macdonald's preference for devious political solutions would eventually – and purposely – adopt the American quadrilateral system, disbursing the Métis across the province upon his re-election in 1878.⁷⁸ Métis leader Clem Chartier wrote: "[T]he government allowed gross injustices to be perpetrated against the half-breed people through the implementation of a [land] grant and scrip system, leaving the half-breeds landless."⁷⁹

Section 31 implemented neither "the long established policy of extending governmental protection over the lands given in exchange for Indian title...[nor] the policy of keeping such lands [from] the public".⁸⁰ Consequently, speculators arrived in droves to buy up all the scrip they could get their hands on for "a mere song."⁸¹ By 1886, all Métis claims to the lands granted under s. 31 had been disposed of with over 90% delivered directly to banks and speculators.⁸² This drove the Métis further west in order to stay ahead of the advancing settlers:

Their traditional economy was destroyed by the disappearance of the buffalo, the decline of the fur trade, and the introduction of new forms of transport superior to their cart trains and boat brigades. Their language and religion were jeopardized by massive English and protestant immigration. Their ownership of land was threatened...by problems with the survey and issue of patents.⁸³

As if that was not enough, after his re-election, Macdonald began desperately advancing his plans for the oncoming railway: a project on the verge of bankruptcy, threatening Macdonald's legacy and his vision of expanding Canada "from sea to sea."⁸⁴ In spite of his opposition to s. 31 under Mackenzie's Liberals, Macdonald continued his legacy of procrastination in addressing Métis concerns west of Manitoba, rekindling the spirit of resistance that drew Riel out of exile!⁸⁵

Upon his return in 1884, Riel spared no time in creating a second provisional government, provoking the cycle of peaceful process, government denial.⁸⁶ After peacefully attempting to petition the government for terms similar to those granted under the original *M. Act*, Macdonald responded with a vague set of promises that included the establishment of a commission – the favoured Canadian device for procrastination – to examine the extent of Métis grievances.⁸⁷

Rebuffed for the last time, and seeing no other choice, Riel and the Métis of Saskatchewan took up arms.⁸⁸ What followed was a series of battles between the Métis, led by Riel and his

76 Chartrand, *supra* note 70 at 467.

77 *Ibid.* at 470.

78 Woodcock, *supra* note 8 at 126-127.

79 Clem Chartier, quoted in Borrows, "Domesticating", *supra* note 72 at 657.

80 Chartrand, *supra* note 70 at 470.

81 John A. Macdonald quoted in Chartrand, *supra* note 70 at 474; Clem Chartier, "Aboriginal Rights and Land Issues: The Métis Perspective" in Menno Boldt and J. Anthony Long, eds., in association with Leroy Little Bear, *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1988) 54 at 57-60.

82 Chartrand, *supra* note 70 at 471; Chartier, *ibid.*

83 Flannigan, *Louis*, *supra* note 50 at 182-83.

84 See generally: Pierre Berton, *The Last Spike: The Great Railway, 1881-1885* (Canada: Anchor Canada, 2001) [Berton].

85 Goulet, *supra* note 51 at 37-38; Woodcock, *supra* note 8 at 140.

86 Woodcock, *supra* note 8 at 151; Teillet, *supra* note 52 at 395; Berton, *supra* note 84 at 340.

87 Berton, *supra* note 84 at 343.

88 Flannigan, *Louis*, *supra* note 50 at 134.

military commander, Gabriel Dumont, and the Canadian army led by Macdonald. Even though the Métis were grossly outnumbered, they still chose to fight because their freedom and pride as peoples were threatened. Despite early successes, the Métis were overwhelmed by the Canadian troops, dispatched with the aid of the new railway. Riel was captured and carted off to Regina to be tried for treason.

Riel's trial provides another example of how the rule of law was manipulated by the legal whiplash to cast a pall over his achievements for the Métis – and for Canada. George Goulet has argued, most convincingly, that Riel's trial was an abysmal exercise that failed to render justice at every turn. The list of discrepancies uncovered by Goulet are outrageous: Macdonald purposely relocated the trial from Winnipeg to Regina to exploit the less advanced laws of the Northwest Territories and guarantee his conviction;⁸⁹ Riel was charged with high treason for levying war against a Queen to whom he owed no allegiance, under a statute rehashed after 530 years for the sole purpose of ensuring that he received the death penalty for levying war against a Queen to whom he owed no allegiance;⁹⁰ the presiding Stipendiary Magistrate, Hugh Richardson, appointed at the pleasure of the federal government, was biased in favour of conviction;⁹¹ the jury was formed solely by English Canadians, each personally selected by the magistrate;⁹² and worst of all, Riel's own counsel conspired to pursue an unauthorized defence of insanity doomed to fail.⁹³

Not surprisingly, this concerted effort brought about Riel's downfall. The jury's verdict was an ominous recast of the one overturned by his father. Unfortunately, this time there was no riot outside the courtroom threatening to set right the enforcement of an unjust punishment to a just soul. When the six jurors returned, the foreman issued the guilty verdict and then pleaded with the magistrate to grant Riel mercy and spare him the death penalty while "crying like a child":⁹⁴ dramatic, but futile as Macdonald promptly refused this request.

Riel's overwhelming power of influence and the plight of the Métis forced the jury to come to terms with the injustice of playing a part in Riel's execution under such deplorable circumstances. In his final speech, Riel was relieved to finally be able to speak from a position beyond that of defending his sanity. After putting his life on the line, he stated that "it seems to me I have become insane to hope for justice."⁹⁵

The magistrate officially condemned Riel as a man "'guilty of a crime the most pernicious and greatest that man can commit' – high treason; that he had let loose the flood gates of rapine and bloodshed; aroused the Indians; and brought ruin on their families." Goulet highlights

89 Goulet, *supra* note 51 at 46-48. Goulet argues that MacDonalld fully conspired to have the trial located to Regina to take advantage of the *Northwest Territories Act* of 1880. This Act limited the make-up of the court and trial procedure. In Winnipeg Riel would have been entitled to a 12 member jury split half-and-half between French and English speakers. He would have also been entitled to a superior court judge with security of tenure instead of a stipendiary magistrate whose office was held at the pleasure of the federal government.

90 *Ibid.* at 48-55, 67-72, 201-202.

91 *Ibid.* at 56-62. Goulet condemns Richardson for a multitude of reasons. However, upon further research I was directed to the Thesis of Shelley Ann Marie Gavigan, *Criminal Law on the Aboriginal Plains: The First Nations and the First Criminal Court in the North-West Territories, 1870-1903* (Toronto, University of Toronto: 2007), albeit only recently! Gavigan is much more objective in her analysis of Richardson as the man most responsible for molding a relationship of relative understanding with Aboriginals under his jurisdiction in the Northwest Territories, especially when compared to other magistrates in the area. Though, she does not take head on Goulet's criticism, she does combat authors who have taken similar positions regarding Richardson's bias against Riel and lack of experience by arguing their lack of knowledge of the rigors of his jurisdiction, workload, questioning the extent of their research and their conclusions. Unfortunately, I cannot comment further on her article at this date other than to point out that she appears to have deliberately deemphasized Richardson's role in the Riel trial to highlight his other contributions to the evolution of the criminal law in the Northwest Territories.

92 *Ibid.* at 63-66.

93 *Ibid.* at 117-124. Goulet enumerates a long list of injustices perpetuated throughout Riel's trial. To me, these were the most straightforward and striking.

94 *Ibid.* at 168.

95 *Ibid.* at 171.

the fact that the *North-West Territories Act, 1880* required that a death sentence could not be carried out until “the pleasure of the Governor” was known; meaning, “John A. Macdonald and his Cabinet would eventually determine that it was their ‘pleasure’ that Louis Riel be hanged.”⁹⁶

Macdonald was at all times the orchestrator of Riel’s demise; the allegations of insanity and the concerted efforts by Riel’s own lawyers to uphold this defence would prove his *coup de grace*. This defence proceeded, despite Riel’s express wishes, and has remained inexorably linked to his historical and national character. In this respect, Macdonald’s victory was twofold: not only did he conspire to guarantee Riel’s conviction and subsequent death; he also managed to sabotage Riel’s legacy as a great leader and defender of justice for his Métis people throughout the pages of history. There is no shortage of these pages that critique Riel’s shortcomings. I am not prepared to judge what it must have taken for him to endure the gross injustices he suffered for the sake of his Métis people. I choose instead to acknowledge the respite offered by even the most ardent and unsympathetic opponent of Aboriginals, Thomas Flannigan, after his thorough review of Riel’s alleged plunge into madness:

His insanity – if it may be called that – was a message of hope. Common conceptions of what is normal may suffice for normal times, but they do not encompass the range of human response to adversity. We need a broader view of sanity to comprehend the actions of men in dark times.⁹⁷

The legal whiplash has crippled Riel’s legacy long enough. Having borne the “criminal brand” of a “traitor” over the generations after giving “their best and brightest son to the Métis cause”, the Riel family issued a statement demanding their participation in the enactment of a Bill that grants Riel his rightful place in history as a Father of Confederation and founder of the province of Manitoba and acknowledges his wrongful conviction to the effect that his innocence is proclaimed.⁹⁸ Without the political will to admit the government’s part in condemning Riel to death, any progress made toward reconciling its relationship with the Métis will be minimal. Canada has shown in its treatment of Riel and promises made to the Métis that concern for reconciliation is sorely lacking. It is time for the politicians of this country to pass the legislation required to officially remove the legal whiplash and elevate Riel’s status to accord with his family’s wishes.

ELIJAH HARPER AND THE MEECH LAKE DISCORD

Inasmuch as it is important to accept the effect that armed conflicts have had in shaping the laws that surround Aboriginal sovereignty, rights and status, instances where this conflict transcended the traditional resort to violence must also be acknowledged. This evolution underscores Aboriginal attempts to engage the Canadian government and the reach of the legal whiplash in subverting these attempts to subvert and minimize accomplishments made under the banner of peaceful democratic dialogue. One such instance came from Elijah Harper’s refusal to grant Manitoba’s endorsement of the Meech Lake Accord. The first treaty Indian MLA’s filibuster successfully stalled negotiations in the provincial legislature past the Accord’s self-imposed deadline, giving Newfoundland the political leverage to follow suit in its free vote that officially marked the death of the Accord.

When Harper whispered his barely audible final dissent to the suggestion that deliberations continue past the normal sitting hour of the Manitoba legislature in June of 1990, he was

96 Goulet, *supra* note 51 at 172.

97 Flannigan, *Louis*, *supra* note 50 at 186.

98 Riel Family Press Statement, Winnipeg, April 1998 [unpublished] quoted in Teillet, *supra* note 52 at 363.

stroking the grains of the Eagle feather, a gift in honour of his courage and acknowledgment of Aboriginal support across the country. His dissent was to “hundreds of years of being ignored and to centuries of patiently waiting to be treated fairly by people welcomed to this country by the original inhabitants.”⁹⁹

Prime Minister Brian Mulroney’s initial description of the Accord as an agreement in which “no one loses” expressed the satisfied euphoria of successfully pressuring the First Ministers – all non-Aboriginal – into renewing their commitment to the agreement after an intensive week-long spectacle of deliberative endurance in his “roll of the dice meeting.”¹⁰⁰

Such a “roll of the dice” was only a veneer for the resort to dubious executive federalism foiled from the start by Mulroney’s obliviousness as to what Dale Turner has since coined the “Kymlicka Constraint”: a concept that has prevailed throughout Canada’s history, but only recently essentialized and put into words by Professor Will Kymlicka: “For better or worse, it is predominantly non-[A]boriginal judges and politicians who have the ultimate power to protect and enforce Aboriginal rights”.¹⁰¹ Drafted under the Kymlicka Constraint, the Accord had once again brought to the fore mounting tensions between Canada’s founding groups. J. Edward Chamberlin argues that this resulted in the fundamental flaw of the Accord:

[The Accord] is completely oblivious to the fact that the [A]boriginal people will be hurt by its provisions, though it has taken kindly concern about the welfare of everybody who in its view really counts. In constitutional terms, [A]boriginal people obviously don’t count...¹⁰²

The Accord would have officially divided Canada into two societies by constitutionalizing the absurdity that the English and French were the sole “founders” of Confederation. Thus, the future of the Aboriginal rights discourse would have found itself at the mercy of two societies when it was difficult enough just getting through to one!

The decade preceding the Accord was one of immense political turmoil. Quebec made its first attempt to separate from Canada by holding a referendum whose result was swayed by the promise of a revised federalism that would grant Quebec a special place in the Confederation – a promise that fell to the floor when Pierre Trudeau’s liberals left Quebec out of the decision to patriate the constitution.¹⁰³ Afterwards, there was a series of First Ministers Conferences on the topic of Aboriginal issues that ended bitterly when the provinces rejected the notion of constitutionalizing Aboriginal self-governance. Mulroney hammered home the failure of these meetings with the statement that Aboriginal governments would never “stand separate and apart” from the provincial or federal governments.¹⁰⁴

At the close of the last Conference, Métis leader Jim Sinclair delivered an impassioned speech charging Ottawa with not having the guts to put sovereignty on the table.¹⁰⁵ He predicted that the government would soon bring Quebec to the negotiation table to overshadow

99 Pauline Comeau, *Elijah: No Ordinary Hero* (Vancouver: Douglas and McIntyre, 1993) at 216 [Comeau].

100 Peter Hogg, “The Meech Lake Accord” (2003-2004) 30 M.L.J. 39 at 40.

101 Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press, 2006) at 58 quoting Will Kymlicka, *Liberalism, Community, and Culture* (Oxford: Oxford University Press, 1989) at 154.

102 J. Edward Chamberlin “Aboriginal Rights and the Meech Lake Accord” in K.E. Swinton & C.J. Rogerson, *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) 11 at 11 [Swinton, Rogerson].

103 Peter H. Russell, “Meech Lake and the Supreme Court” *ibid.* at 97.

104 Brian Mulroney cited in Comeau, *supra* note 99 at 126; Mary Ellen Turpel and Patricia Monture, “Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord” (1990) 15 Queen’s L. J. 345 at 350 [Turpel & Monture].

105 Jim Sinclair referenced in Comeau, *supra* note 99 at 127.

Aboriginal issues.¹⁰⁶ True to form, the Accord, concocted seemingly overnight, strove to give Quebec status as a distinct society, amongst other elevated provincial rights, to quell the nationalist movement that once again threatened to rupture the nation. However, though passed unanimously by the First Ministers, it was still subject to the unanimous consent of the provinces – including Manitoba, whose process also demanded unanimous consent – including Harper's. Once again, Aboriginals were forced to remind Canada that, contrary to 'unpopular' belief, this nation was not founded by "two nations warring within the bosom of a single state"¹⁰⁷ – it was founded on the land of Aboriginals!

Proponents of the Accord argued to convince Manitoba that it was a commendable first step in a series of accommodations that would address Aboriginal concerns in the future as a means of striking a new balance.¹⁰⁸ Ever mindful of Canada's lacklustre follow-through on promises and commitments to Aboriginals after the attainment of immediate objectives, Harper would give no credence to these claims. This time things would be different. No longer would the Aboriginal peoples be completely removed from the discourse. This time Harper would use Canada's own democratic principles to bring the government's historical maltreatment of Aboriginals into the limelight of the Canadian legal consciousness:

Our relationship with Canada is a national disgrace. What we are fighting for is democracy, democracy for ourselves and democracy for all Canadians. And we will use the democratic principles in this country to obtain our rightful place in Canada. We are prepared to hurt a little. What we are fighting for is for our people, for our children – for the future of our children, our culture, our heritage and what we believe in. Most of all, we are fighting for our rightful place in Canadian society...¹⁰⁹

This appeal to the fundamentals of democracy forced Canadians to take notice of the corruption at the root of the process. It also provoked an increasing amount of support for the Aboriginal cause. Most Canadians "felt they were seeing one honest politician. They saw integrity and honesty."¹¹⁰ Even ardent supporter and founder of "the Friends of Meech Lake" Jeremy Webber, who viewed the Accord as "a mere pittance" in granting the terms of Quebec's entrance into the constitutional family, couldn't really blame Harper.¹¹¹

Notwithstanding Webber's view, others have argued that the Accord was not only bad for Aboriginals; it was bad for Canada in general. Pierre Trudeau saw the Accord as encouragement for a provincial nationalist paradigm and argued vehemently that it would only benefit the political clout of the First Ministers promoting the issue to Quebec. He stated categorically that the Accord would summon "the peace of the grave for the Canada we know and love."¹¹² His fear was that Canada would be thrown into an unending debate surrounding the merits of federalism and the unequal distribution of powers amongst the provinces. Parliamentary supremacy would be devastated and the federal legislature would be compelled to cater to Quebec's elevated status.

106 Jim Sinclair paraphrased in Turpel & Monture, *supra* note 104 at 349.

107 The Report of the Earl of Durham, Her Majesty's High Commissioner & Governor General of British North America, 1839.

108 Thomas J. Courchene, "Meech Lake and Federalism: Accord or Discord?" in Swinton, Rogerson, *supra* note 102, 121 at 143.

109 Harper quoted in Comeau, *supra* note 99 at 197.

110 *Ibid.* at 185.

111 Interview of Jeremy Webber (7 March 2007). Friends of Meech Lake was a group that laboured in support of the Meech Lake Accord during the years leading up to Mulroney's meeting of first ministers.

112 Donald Johnston, ed., *Pierre Trudeau Speaks Out on Meech Lake* (Canada: General Paperbacks, 1990) at 35. In addition to other terms, Trudeau took issue with the constitutional veto the agreement would have given to Quebec. This would have, arguably, solidified the legislation and limited other provincial advancements and participation in future constitutional reform.

Harper may have had the last word on Quebec's drive to become Canada's eminent province alongside the federal government's attempt to casually dismiss Aboriginals, but this did nothing to quell the remaining tensions surrounding unresolved land claims. In fact, these tensions only escalated, culminating in the now infamous standoff at Oka; within just three weeks of the Accord's defeat, members of the Kanesatake Mohawks began their blockade to prevent the town's proposed golf course expansion over their sacred burial grounds.¹¹³

Harkening back to Pontiac's uprising and Riel's resistance, and once more exhibiting Canada's propensity to escalate and coerce resolution of Aboriginal issues through violence, Mulroney invoked the provisions of the *National Defense Act* without calling an emergency session of parliament to give Quebec premier and co-champion of the Accord Robert Bourassa permission to deploy over 4,000 Canadian troops to relieve the Surete du Quebec after an ill-planned attack left one officer dead and the rest retreating from their own tear gas.¹¹⁴

Harper immediately went to Oka to help defuse hostilities and offer his support. While there, he was permitted to cross over army lines to speak directly with the Mohawks under siege.¹¹⁵ After hearing their story, Harper warned the military to back off: "the constant pressure from the army was making it almost impossible to negotiate a solution".¹¹⁶ Soon after, three troops defied the military's promise to give clear warnings before advancing and proceeded to cross into the Mohawk camp in the dead of night where they then beat a Mohawk elder on watch to within an inch of his life.¹¹⁷

When hostilities finally ceased after 78 days, by way of diverting attention from his maladministration Mulroney followed through on his offer, initially rejected by Harper as a bribe, to set up the Royal Commission on Aboriginal Peoples.¹¹⁸

It has been over 10 years now since the Royal Commission on Aboriginal Peoples was conducted. The Assembly of First Nations has recently reported the resounding failure of Canada to implement its recommendations.¹¹⁹ Honourable mention in the report went to: the establishment of an annual "National Aboriginal Day"; the Aboriginal Healing Foundation, in lieu of the recommended public inquiry into residential schools; and the Aboriginal Sports Council, despite its insufficient funding. Dishonourable mention went to the overwhelming majority of other recommendations.¹²⁰

After Harper's refusal to grant the required support to the Accord, it was believed by many that Canada could no longer continue to ignore Aboriginal issues. Since that time, however, it has become apparent that Canada has found such a way. The current Conservative government has refused to issue the apology, promised by the Liberals under Paul Martin, for the administration of residential schools that forcibly extracted Aboriginal children from their homes, com-

113 Tiellet, *supra* note 50 at 366.

114 Philip Raphals, "Mohawks Rouse the Captive Nations," *The Nation* (October 15, 1990), online: Questia.ca <http://www.questia.com/PM.qst?a=o&d=5002157493>; Linda Pertusati, *In Defense of Mohawk Land: Ethnopolitical Conflict in Native North America* (Albany: SUNY Press, 1997) at 110-111.

115 Geoffrey York & Loreen Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown & Co., 1991) at 367.

116 *Ibid.*

117 *Ibid.* at 367-371.

118 Mulroney sent a number of promises to entice Harper into agreeing to the accord including the establishment of a Royal Commission on Aboriginal Affairs, to which Harper responded: "Mulroney had the power to call a royal commission at any time. We have had studies on [A]boriginal people for many years... There are a number of recommendations that are sitting on the government's desk. There is nothing in the Meech Lake accord that will benefit [A]boriginal people." Quoted in Comeau, *supra* note 98 at 192 & 197.

119 Assembly of First Nations "Royal Commission on Aboriginal People at 10 Years: A Report Card," online: < http://www.afn.ca/cmslib/general/afn_rcap.pdf >.

120 *Ibid.* at 7 and 18. National Aboriginal Day received the only 'A' in the Report. The Healing foundation and Sports Council each received a 'B+'. The report gave an 'F' to a total of 37 out of the 66 recommendations.

munities and culture and subjected many of them to abuse and neglect for over 100 years.¹²¹ Currently, one in ten Aboriginal children in Canada is a ward of the state compared to one out of every 200 non-Aboriginal children. This represents three times as many children than were in the residential schools at the pinnacle of their operation and a 65 percent increase in Aboriginal children in care since 1996.¹²² The Royal Commission highlights the current plight:

Aboriginal people are at the bottom of almost every available index of socio-economic well-being, whether [they] are measuring educational levels, employment opportunities, housing conditions, per capita incomes or any of the other conditions that give non-Aboriginal Canadians one of the highest standards of living in the world.¹²³

Yet the Kelowna Accord, which promised more than five billion dollars to upgrade health care, housing and education for Aboriginals, has similarly been dismissed despite a majority vote in the House of Commons and the support of the three opposition parties.¹²⁴ These are just a few examples of how Aboriginals continue to be ignored by the government despite agreements and promises to ameliorate and redress the enduring effects of colonialism.

In Harper's address to the Assembly of Manitoba Chiefs at the Winnipeg Convention Centre in the days leading up to his final dissent, the magnitude of his decision was as apparent as his devotion to this country:

[W]hat I am doing I feel... I feel it is not just for [A]boriginal people [but] also for [other Canadians]. I love this country, too. That's why I've said we shared this land... [T]he strength that I got was from all of you, and also from all the elders, the prayers that have been placed to our Creator. And I believe he has heard our prayers... [T]he elders at home have been building fires in the evenings and praying for us – not only for me but for the leaders, so that they may make the right decision. And I believe we have made that decision, the right decision...¹²⁵

When Canada begins to honour the spirit of Aboriginal people's capacity to share and contribute to our national character and legal framework it will be able to see the nation as Harper did. His dissent was a humble request for Canadians to reconsider Canada's Aboriginal heritage. It may not always be apparent, but history has shown that it has been no less effective in altering our laws and the shape of this country.

121 Bill Curry, "No residential school apology, Tories say: Indian Affairs Minister contradicts pledge made by Liberals two years ago" *The Globe and Mail* (27 March 2007), online: The Globe and Mail <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070327.wxnatives27/BNStory/National/>>; for information on residential schools see generally: Ward Churchill, *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools* (San Francisco: City Lights Books, 2004); John S. Milloy, *A National Crime: The Canadian Government and the Residential School System, 1879-1986* (Manitoba: University of Manitoba Press, 2003).

122 "First Nations Child and Family Services – Questions and Answers" (February 2007), online: Assembly of First Nations <<http://www.afn.ca/article.asp?id=3372>>. The AFN has indicated that it will pursue a human rights complaint and possibly a charter challenge unless the federal government does not commit to a timely, comprehensive national strategy, see "Leadership Action Plan on First Nations: Child Welfare" (February 2007), online: <<http://www.afn.ca/misc/afn-child.pdf>> at 11.

123 Royal Commission on Aboriginal Peoples, *Choosing Life, Special Report on Suicide among Aboriginal People* (Ottawa: Supply and Services, 1995) at 24.

124 Bill Curry, "Opposition force passage of Kelowna accord: Tory government ways it will regard the vote as merely a 'statement'" *The Globe and Mail* (22 March 2007), online: The Globe and Mail <<http://www.theglobeandmail.com/servlet/story/RTGAM.20070322.wxkelowna22/BNStory/National/>>.

125 Harper quoted in Comeau, *supra* note 99 at 181.

CONCLUSION

Despite the government's renewed commitment to combat the difficult realities of Aboriginal peoples resulting from generations of abuse and maltreatment at the hands of a colonial government, Aboriginals are still fighting for the recognition they deserve. They are also still fighting for the respect that they deserve, not only as the First Peoples, but also for the contributions that they have made to a legal framework that subverts the few moments of legal recognition achieved by Aboriginal leaders in order to serve colonial objects. This conspiracy has successfully invoked the legal whiplash to undermine justified Aboriginal resistances resulting from Canada's failures to uphold promises made to protect Aboriginal sovereignty, rights and status. Overshadowing legal contributions that all Canadians can be grateful for has not only dishonoured the memory of three of the greatest Aboriginal leaders of all time – it has also dishonoured Canada.

Without the pan-Aboriginal alliance led by the great Ottawa War Chief, Pontiac, the *Royal Proclamation* would not have drawn the support required to fend off the advancing Americans. Pontiac was a fearless leader who sought to uphold Aboriginal rights to remain undisturbed in their lands and to be respected for sharing them when they consented to do so. His vision of a united Aboriginal front inspired subsequent resistances that helped protect our nation in its time of need. His uprising was an awakening as to the consequences of dishonouring promises to Aboriginals. Heeding Penikett's respectful acknowledgment of the *Royal Proclamation* as "*Pontiac's Proclamation*" ought to set right the current misunderstanding surrounding the interpretation of the document that embodies the spirit of Pontiac's resistance. This acknowledgement will also serve in the drafting of a new *Royal Proclamation* that lays the foundation of a renewed relationship between Aboriginals and the government of Canada.

Louis Riel bore the brunt of Canada's early scorn for the Métis. As "Prophet of the New World," he forced Macdonald and the Canadian government to come to terms with the Métis' resistance to assimilation into the rubric of confederation without land rights and governance.¹²⁶ Riel steadied Macdonald's hand long enough to see his Métis people integrate on their own terms into what would become Canada's fifth province. In spite of all the obstacles that threatened his mission, Riel found the strength to resist the government's dictatorial drive to run roughshod over his brethren, to guarantee the foundation of Métis rights in the terms of the *M. Act*. What set Riel apart from Pontiac is that, although his struggle also ended in a violent insurrection, his main contribution to Canada was political. It is time for the honour of Canada's Métis son and one of the Founding Fathers of Confederation to be restored.

Were it not for the sole dissenting voice of Elijah Harper sending shock waves across the nation, Canada would have exacerbated the ramifications of colonialism by constitutionally entrenching the lie that the French and English were the only founders of Canada via the Meech Lake Accord. Moreover, elevating Quebec to distinct society status would have plunged the dream of a strong Canadian federalism into a raging political maelstrom regarding the unequal distribution of provincial powers.

In his plea to exonerate Riel, St. Germain sought admirably to pierce the armour of Canadians' innate suspicion of heroes:

One thing that makes this country unique is its leaders. People need leaders. They need heroes. People need leaders who have the ability to see what is going on around them, apply their knowledge and surmise what the future will bring. Leaders seek to move their people forward. They help steer them down better roads.¹²⁷

¹²⁶ Flannigan, *Louis*, *supra* note 50 at 172.

¹²⁷ Debate, St. Germain, *supra* note 57.

The law has not yet honoured the fact that Canada, our legal framework, and our national sense of justice have all been shaped by the countless sacrifices of Aboriginal leaders and heroes. Yet, Aboriginal influence on the Canadian legal consciousness is not enough; Aboriginals must enter the Canadian consciousness, for Aboriginals are Canada's conscience. Each time, these heroes rose above the mire to capture the attention of the rule of law in an effort to steer Canadians toward higher virtues and conceptions of justice; each time, the ensuing legal whiplash conspired to ensure their fall from grace in the pages of Canada's legal history. This refusal to grant a just recognition for these leaders' efforts to contribute to Canada and our national character has been shameful. Canada owes each of these leaders a debt of gratitude – a debt that this country can begin to repay by honouring the object of their struggle: promoting a peaceful Canada, respect for its First Peoples, and a grateful recognition of the Aboriginal heritage embedded within our laws.

EPILOGUE¹²⁸

Nearly two years have passed since the *Queen* met her fate and the Gitga'gat were summoned from the comforts of their community to answer "the highest calling of what it is to be human". Instead of continuing to hail the efforts of the community, the focus has shifted to: the negligence of B.C. Ferries; the class action lawsuit by survivors that has limited disclosure surrounding the critical 14 minute time period where the *Queen* was to change course; and allegations of sexual activity and regular drug use taking place amongst the crew onboard.

The subtext of Campagnolo's request for the heroes of Hartley Bay to come to Victoria for their banquet was the expectation that they find and pay their own way. The band council was initially expected to pay the estimated \$25,000: a heavy blow to a fishing community with a 65 percent unemployment rate. After reports exposed the issue, the government stepped up and offered to pay for hotel rooms and incidentals; B.C. Ferries then offered to take care of the ferry traveling expense, including a free buffet dinner onboard. When a local airline began making inquiries, however, it simply offered to fly the heroes the whole way.

In the end, B.C. Ferries decided to renege on its initial proposal to name its replacement vessel after Hartley Bay. Apparently, the *Spirit of Hartley Bay* was not in line with its long term marketing strategy. Instead, the company has chosen to name the replacement vessel, the *Northern Discovery*. Chief Councilor of the Gita'gat, Bob Hill, says the solution is obvious: rename the village after the *Northern Discovery*!

128 Similar to the prologue section, the epilogue has been factually compiled from the news stories surrounding the anniversary of the *Queen's* demise. A few of the articles canvassed include: Sandra Mcculloch, "Hartley Bay upset with B.C. Ferries" *Times Colonist* (6 Jan. 2007), online: <http://www.canada.com/victoriatimescolonist/news/story.html?id=fc99ead1-7ec4-42df-b1ee-dd1db7709d5c&k=50647>>; Michael Smyth, "Heroes invited to Victoria, then stuck with tab" *The Province* (24 September 2006), online: <http://www.canada.com/theprovince/news/story.html?id=a27824af-48cf-46f0-b97a-465e84e12e01&k=40601>>; Michael Smyth, "Hawkair flies to the rescue of Hartley Bay heroes" *The Province* (29 September 2006), online: <http://www.canada.com/theprovince/news/story.html?id=a998cdde-770f-4f82-9333-2145ca423fc3&k=14028>>; Jack Knox, "Leaking of sunken ferry's fuel is source of much worry" *Times Colonist* (19 March 2007), online: <http://www.canada.com/victoriatimescolonist/story.html?id=67a07419-e9da-4d7e-afcd-7bc8d9e52ae1&k=20415>>; BC Ferries has since released a divisional inquiry into the matter to find out the reason for the incident. The report chalks the fault up to human error by failure "to maintain a proper lookout by all available means", and "casual watchstanding behavior" resulting in missing a critical route change 14 minutes before the crash. BC Ferries, "Divisional Inquiry #815-06-01: Queen of the North Grounding and Sinking" (March 26, 2007) online: http://www.bcferries.com/files/AboutBCF/815-06-01_DI_QON_Grounding.pdf>; See also BC Ferries, "Divisional Inquiry #815-06-01 ADDENDUM: Queen of the North Grounding and Sinking" (October 2, 2007) online: http://www.bcferries.com/files/PDFs/Addendum_to_Divisional_Inquiry_Queen_of_the_North.pdf>; Cindy Harnett, "Queen of the North should be drug tested: BC Ferries" *CanWest News Service* (18 October 2007), online: <http://queen-of-the-north-news.newslib.com/story/7588-116/>> "Sex may have sunk BC Ferry" *CanWest News Service* (8 February 2007), online: <http://www.canada.com/cityguides/winnipeg/story.html?id=c883f2b0-9c54-4331-822f-ba432cbd7e4f&k=720>>; Cindy E. Harnett, "Ruling stalls lawsuit in Queen of the North sinking" *Times Colonist* (18 July 2007), online: <http://queen-of-the-north-news.newslib.com/story/7588-104/>>; Scott Sutherland, "Queen of the North to stay sunk" *The National* (8 June 2007), online: <http://queen-of-the-north-news.newslib.com/story/7588-94/>>.

What is even more outrageous than these ridiculous oversights is that the *Queen* is still submerged in 425 metres of water. BC Ferries has confirmed that it now will remain, citing even more environmental damage will follow if attempts are made to have it raised. After the incident members of the community visited the site regularly only to smell fumes and see the ominous bubbling from the remnants of the 150,000 litres of diesel amongst other fuels and oils from the ship and onboard vehicles threatening the surrounding ecosystem, their livelihood and chief source of food. The community did not harvest seaweed this year and remains fearful of the mussels, clams and shellfish harvested from around the site now declared to be a “toxic time bomb” by the community.

REFLECTIONS

This episode is all too typical of the Canadian response to honour Aboriginal contributions to our national character. What is unfortunate is the effect this has on the struggle to cope with such a lack of recognition and respect. I cannot help but think that the Chief's comment, though glossed in humour, may be a submission to the hopelessness of having to watch helplessly as Canada allows another example of Aboriginal heroism to fade into obscurity. With history as our guide, however, expect Canada to invoke the legal whiplash to further disrespect the community's selfless efforts.

Despite the accolades received by Hartley Bay, Aboriginal leaders and heroes' attempts to elevate this country's conceptions of justice beyond traditional English-French cultures of domination have been rewarded with martyrdom, neglect and wilful blindness. The arguments for Aboriginal sovereignty, rights and status have not changed since they were first spoken and acted upon by these leaders. Thus, the situation has become one where Aboriginals are forced to wait patiently while Canadians and the government come to grips with the realization that these leaders' enduring struggle against injustice may have given them some notion of what real justice looks like. What is even more frustrating is that solutions are dormant within the laws themselves. If the government could just recoil the legal whiplash and allow Aboriginals the opportunity to restore the damage that has been done to the legacies of their leadership along with the initial spirit of the laws they influenced, reconciliation would be a great deal more realistic.

Throughout this paper I have tried to put forth the notion that Canadians and the government should strive to accept, endorse and respect Aboriginal contributions to our legal framework. These contributions have been essential to the evolution and formation of this country. Continuing to invoke the legal whiplash to mitigate and malign these contributions not only prevents a substantive recognition of what it means to be Aboriginal, but also what it means to be Canadian.

I believe that, for the most part, the law emanates from the life that we give to it. Sometimes, however, I also believe that the law breathes with a life of its own in order to serve a purpose higher than what we may be prepared for. In these cases, there is always a tension between what the law is trying to tell us and how we interpret this message to suit our purposes in the moment. When the law was exposed to the visions of Pontiac, Riel and Harper, it immediately responded to capture their spirits and dedication to justice. Unfortunately, political agendas within the structures of power, guided by the Kilmicka constraint, have forced each to bear the scars of Canada's propensity to twist the law to suit colonial machinations. Additionally, the ambivalence espoused by Canadians, who have failed to credit the Aboriginal struggle's influence on their morality, has assisted the legal whiplash by allowing the state to continue sabotaging genuine Aboriginal contributions to our legal framework and consciousness.

It is difficult to stay upbeat and positive when the government champions its intent to rec-

oncle its relationship with Aboriginals. Without the political will to recoil the legal whiplash and free the legacies of these Aboriginal leaders from the shadows of the laws they influenced that were subsequently corrupted to promote colonial objectives, there can be no reconciliation: the "stain will remain" and there will always be an animosity dividing Aboriginals, Canadians and the government.

Of course, I could blame this on the assertion of Crown sovereignty, but what if the problem is even more insidious? What if the internalization of colonialism has pervaded our society to the point where we are just too far gone? What if it has also begun to breathe with a life of its own, working consciously through the ambivalence of Canadians and the good intentions of legislators and the judiciary to dim the legacies of Aboriginal leaders: painting pictures of their inevitable subordination and the futility in challenging state supremacy with the banner of justice as the backdrop?

This is one view. It does explain how the effects of the legal whiplash have endured and how these Aboriginal leaders have failed to receive the recognition that they deserve. The intent is to corrupt the ambitions of future generations and create a culture of submission under the looming threat of the legal whiplash. I believe that, right now, Aboriginals are going through a major recovery period in the wake of the historical maltreatment that has done major damage to families, communities and their culture. Those who are struggling to hold on need to look up to the visions and teachings of our traditional leaders in order to work towards piecing back together that which has been lost. As long as these leaders' legacies continue to be marred by the legal whiplash, this becomes more and more difficult with successive generations who have little to look forward to and no one to look up to.

What this view does not explain, however, is why Aboriginals, such as the Gita'gat, continue working to assist Canadians and shape the legal framework if they know that their efforts will be hardly rewarded – maybe even punished! The adage that 'kindness is its own reward' just does not seem to accurately expound the depths of Aboriginal altruism and the capacity to tolerate generations of ignorance to their own detriment. Instead, I have found more solace in the belief that the years of abuse under a colonial regime have done nothing to stifle the inherent goodness and drive to assist those in need, regardless of the consequences inherent and central to the Aboriginal ethic. I believe these were the guiding principles that Aboriginal leaders sought to help form the basis of the relationship between their peoples, Canadians and the government. These are the principles that have been damaged by the legal whiplash; these are the principles Canada will recover once it is recoiled.