

ARTICLE

# FEASTING JUDICIAL CONVERGENCE: RECONCILING LEGAL PERSPECTIVES THROUGH THE POTLATCH COMPLEX

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## INTRODUCTION

The following article is an initial formulation attempting to illustrate a potential trans-systemic approach to Aboriginal rights based on an equitable balance and convergence of the perspectives, legal systems, and traditions of the numerous Aboriginal peoples in Canada and the Eurocentric common law perspective, system, and tradition.<sup>1</sup> The inspiration for both this article and the larger project is drawn from John Borrows' challenge to create a Canadian law that is truly indigenous in its origins and application by acknowledging the traditional and contemporary place of Aboriginal law among (and not subsumed to) Canada's legal traditions.<sup>2</sup> This article will explore the convergence of the practice or institution commonly known to outsiders as 'potlatching' and common law judicial decision-making in Aboriginal rights claims. Again, this is an initial formulation that I hope, similar to Borrows, represents an invitation for those interested and more knowledgeable in this topic to join.<sup>3</sup> I begin with an overview of the potlatch system<sup>4</sup> among some coastal British Columbia First Nations peoples, paying particular attention to its role in decision-making and its role within the wider cultural meshwork in which Eurocentric boxes like politics, economics, and law are intertwined and interwoven in the lives and interactions of people. This overview will then lead into a discussion of convergence and my fledgling proposal regarding the coastal potlatch system and common law judicial decision-making.

Before continuing, some qualifications are in order to ensure clarity. First, by suggesting the convergence of the potlatch system and common law judicial decision-making, I am *not* equating the former institution with the court of the common law. While some have made this parallel, as will be noted below, I focus on the potlatch system as a significant historic and contemporary legal and political arena for many coastal First Nations peoples.

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1 This article is one facet of a larger research project aimed at formulating a potential trans-systemic legal framework for Aboriginal rights.

2 *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 11, 15, 21 [Borrows, *Indigenous Constitution*].

3 *Ibid* at 10.

4 I will explain my reasons behind using "potlatch system" below.

Second, while I talk about the ‘potlatch’ system of the First Nations peoples of coastal British Columbia, I do not imply that there is a pan-indigenous system or collective. There are important variations in both the potlatch systems and cultural meshworks in the region.<sup>5</sup> My hope here is to attempt to develop a general framework that, as alluded to, particular peoples and those with more intimate and comprehensive knowledge of them can elaborate. As I will discuss below, it is because I am seeking to develop a general framework that I have chosen to refer to the gatherings focused on here as ‘potlatch systems’, recognizing that a distinction is often made with the practice of ‘feasts’, to allow for flexibility within this cultural variation. That being said, much of my discussion draws on the ethnographic literature regarding the Tsimshian peoples generally (though there are important variations within that collective), reflecting the prominence of court cases involving them in the development of the Supreme Court of Canada’s (SCC) doctrine of Aboriginal rights.

The following discussion is an attempt at developing a procedural mechanism such that, on a case-by-case, nation-by-nation basis, the Court can more readily account for and apply distinct Aboriginal perspectives and laws. The Court itself has held that the scope and content of Aboriginal rights “must be determined on a case-by-case basis,”<sup>6</sup> and if the Aboriginal perspective is to seriously and truly inform the determination of Aboriginal rights claims, the Court must fully realize the implications of their case-by-case approach.

Finally, I am mindful of the devastation wrought by colonialism and colonial policies, some of which continue today. Thus, there is variation in terms of the preparedness and abilities of specific Aboriginal communities to apply their laws. Each nation will determine their readiness, but it should not be used by the Court (or the Crown) as an added burden similar to the ‘organized society’ standard that still lurks in the background of the Court’s thinking. The proposed mechanism for reconciling coastal First Nations and common law legal traditions should be reciprocal and beneficial to the communities as they continue to revive and strengthen their cultural meshworks within which their legal traditions and laws are intertwined.

## I. FALLACIOUS RECONCILIATION

In *Van der Peet*, the first factor that Chief Justice Lamer identifies for a court to take into account in assessing Aboriginal rights claims is the Aboriginal perspective.<sup>7</sup> The reason that he gave for this was that it was part of “truly” reconciling “the prior occupation of Canadian territory by aboriginal peoples with the assertion of Crown sovereignty over that territory” that is demanded by section 35(1) of the *Constitution Act, 1982*.<sup>8</sup> Yet, highlighting Borrows’ criticism of this definition of the reconciliation process,<sup>9</sup> Chief Justice Lamer reifies the colonial dominance and dispossession of Aboriginal peoples by holding that the Aboriginal perspective “must be framed in terms cognizable to the

5 For a theoretical treatment that involves or draws on the variation in potlatch systems among the peoples of the region, see Abraham Rosman & Paula G Rubel, *Feasting with Mine Enemy: Rank and Exchange among Northwest Coast Societies* (New York: Columbia University Press, 1971).

6 *R v Van der Peet*, [1996] 2 SCR 507 at para 69, [1996] 9 WWR 1 [*Van der Peet* (SCC)].

7 *Ibid* at para 49.

8 *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11; *Van der Peet* (SCC), *supra* note 6 at para 49.

9 “Domesticating Doctrines: Aboriginal Peoples after the Royal Commission” (2001) 46 McGill LJ 615 at 660-61 (“Courts have read Aboriginal rights to lands and resources as requiring a reconciliation that asks much more of Aboriginal peoples than it does of Canadians”).

Canadian legal and constitutional structure.”<sup>10</sup> Chief Justice Lamer goes on to relegate this perspective to the final phase of his test for Aboriginal rights by restricting the Aboriginal perspective to rights which “exist within the general legal system of Canada.”<sup>11</sup>

While both dissenting opinions in *Van der Peet* were critical of Chief Justice Lamer,<sup>12</sup> neither of the justices questioned his ‘cognizable’ approach to the Aboriginal perspective. In fact, when Chief Justice McLachlin reiterated the Court’s position regarding reconciliation with the Aboriginal peoples of Canada in *R v Marshall*; *R v Bernard*, she, too, neutralized the Aboriginal perspective by maintaining Chief Justice Lamer’s ‘cognizable’ approach:

The evidence, oral and documentary, must be evaluated from the aboriginal perspective. [...] Having evaluated the evidence, the final step is to translate the facts found and thus interpreted into a modern common law right. The right must be accurately delineated in a way that reflects common law traditions, while respecting the aboriginal perspective.<sup>13</sup>

Thus, instead of reconciliation being a ‘lateral’ process of restoring “harmony between persons or things that had been in conflict,”<sup>14</sup> it becomes a ‘vertical’ process of translation. By inverting reconciliation into a vertical process, Chief Justice McLachlin perpetuates a legal hierarchy that has its roots in the colonialist assumptions imported into Canadian jurisprudence via *Baker Lake (Hamlet of) v Minister of Indian and Northern Development*,<sup>15</sup> resulting in Canadian law becoming integral to Aboriginal law,<sup>16</sup> all under the guise of restoring harmony.

## II. POTLATCHING, FEASTING, AND DECISION-MAKING ON THE PACIFIC COAST

The concepts of potlatching and feasting are but one instance of how the Court has imported concepts from anthropology as they sought to develop the doctrine of Aboriginal rights. The potlatch, as an anthropological concept, has captured the ethnographic imagination of many an observer and has been important in the development of cultural anthropology.<sup>17</sup> Both feasting and potlatching are processes of discussion, consultation, and negotiation that culminate in the gathering of invited people to witness the claims made by the host or hosts. They are a nexus that can, depending on the particular peoples, interweave land, law, the ancestors, trade, governance, kinship, inheritance, and

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10 *Van der Peet* (SCC), *supra* note 6 at para 49 [emphasis added].

11 *Ibid.*

12 See e.g. *ibid* at paras 145, 313.

13 2005 SCC 43 at para 69, [2005] 2 SCR 220.

14 *Black’s Law Dictionary*, 8th ed, *sub verbo* “reconciliation”, quoted in *Tsilhqot’in Nation v British Columbia* 2007 BCSC 1700 at para 1339, [2008] 1 CNLR 112.

15 [1980] 1 FC 518, 107 DLR (3d) 513; Michael Asch, “Calder and the Representation of Indigenous Society in Canadian Jurisprudence” in Hamar Foster, Heather Raven and Jeremy Webber, eds, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 101 at 106-07.

16 See e.g. James Youngblood Henderson, *First Nations Jurisprudence and Aboriginal Rights: Defining the Just Society* (Saskatoon, SK: Native Law Centre, 2006) at 203 [Henderson, *First Nations Jurisprudence*].

17 See e.g. Regna Darnell, “The Pivotal Role of the Northwest Coast in the History of Americanist Anthropology” (2000) 125/126 BC Studies 33; Michael Harkin, “Potlatch in Anthropology” in Neil J Smelser & Paul B Baltes, eds, *International Encyclopedia of the Social & Behavioral Sciences* (New York: Elsevier, 2001) 11885.

social structure.<sup>18</sup> Many outside observers have attempted to explain their purpose and goal, though due to the atomism of Eurocentric thought that divorces the institutions from their cultural meshwork, most only capture part of what, following Marcel Mauss, we could call a “total social phenomena.”<sup>19</sup> As a result, outside observers have suggested that potlatching and feasting among various Northwest Coast peoples<sup>20</sup> are analogous to a redistributive mechanism,<sup>21</sup> a banking or loan system,<sup>22</sup> a metaphorical substitution for warfare,<sup>23</sup> or as something cognizable to the common law legal tradition.<sup>24</sup>

While none of these framings are totally incorrect, they again only capture an aspect of the potlatch system found on coastal British Columbia, thereby circumscribing its ‘totality.’<sup>25</sup> Part of the problem arises from the word ‘potlatch’ itself as it is “an invented omnibus word” that has its origins in the Nuu-chah-nulth word ‘patshatl,’ which has been glossed as ‘gift’ or ‘giving.’<sup>26</sup> Around the 1860s, the term entered into general use through the Chinook trade jargon.<sup>27</sup> Highlighting the variability of gatherings both intra- and inter-culturally encompassed by the term, many authors have pointed out how problematic it is. For example, among the Coast Salish of Washington State, the use of the term in the ethnographic literature has been criticized as being “too general in meaning and as not applying specifically to any single ceremonial form.”<sup>28</sup> Throughout the general Northwest Coast region, then, if ‘potlatch’ is used at all, it is an umbrella term that envelops finer gradations of gatherings and ceremonies.<sup>29</sup> Thus, among the Gitksan, each type of event or gathering—which range from totem pole- or gravestone-raising feasts to weddings, divorces, and other gatherings marking changes in status<sup>30</sup>—

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- 18 See e.g. Richard Daly, *Our Box was Full: An Ethnography for the Delgamuukw Plaintiffs* (Vancouver: UBC Press, 2005) at 31; Antonia Mills, *Eagle Down is Our Law: Witsuwit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994) at 43; NJ Sterritt, “Unflinching Resistance to an Implacable Invader” in Boyce Richardson, ed, *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) 267 at 277.
- 19 Marcel Mauss, *The Gift: The Form and Reason for Exchange in Archaic Societies* (London: Routledge, 2001) at 48-49. For a discussion of atomism, see Deborah Gordon, “Tenacious Assumptions in Western Medicine” in Margaret Lock & Deborah Gordon, eds, *Biomedicine Examined* (London: Kluwer Academic Publishers, 1988) 19.
- 20 For a more comprehensive list than what follows, see Barbara Saunders, “Kwakwaka'wakw Museology” (1995) 7 *Cultural Dynamics* 37 at 54-55; Agnes Alfred, *Paddling to Where I Stand: Agnes Alfred, Qwiqwasutinixw Noblewoman*, ed by Martine J Reid, translated by Daisy Sewid-Smith (Vancouver: UBC Press, 2004) at 244-45.
- 21 See e.g. Stuart Piddocke, “The Potlatch System of the Southern Kwakiutl: A New Perspective” (1965) 21:3 *Southwest Journal of Anthropology* 244.
- 22 See e.g. Franz Boas, *The Social Organization and the Secret Societies of the Kwakiutl Indians*, Report of the US National Museum for 1895 (Washington: Government Printing Office, 1897) at 341-342; Kenneth D Tollefson, *The Cultural Foundation of Political Revitalization Among the Tlingit* (PhD Thesis, University of Washington, 1976) [unpublished] at 65, 73.
- 23 See e.g. Helen Codere, *Fighting with Property: A Study of Kwakiutl Potlatching and Warfare, 1792-1930*, Monographs of the American Ethnological Society 18 (New York: J.J. Augustin, 1950).
- 24 See e.g. *Lax Kw'alaams Indian Band v Canada (AG)* 2008 BCSC 447, [2008] 3 CNLR 158 at para 32 [*Lax Kw'alaams* cited to CNLR]; Margaret Seguin Anderson, *The Allied Tribes Tsimshian of North Coastal British Columbia: Social Organization, Economy and Trade* (Expert witness report submitted for *Lax Kw'alaams*, 2006) at 2-3, 69.
- 25 See too Rosman & Rubel, *supra* note 5 at 1.
- 26 Douglas Cole & Ira Chaikin, *An Iron Hand Upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver: Douglas & McIntyre, 1990) at 6.
- 27 *Ibid.*
- 28 William Elmendorf, *The Structure of Twana Culture* (Pullman: Washington State University Press, 1960) at 329.
- 29 See e.g. Jay Miller, *Lushootseed Culture and the Shamanic Odyssey: An Anchored Radiance* (Lincoln: University of Nebraska Press, 1999) at 147-48; Alfred, *supra* note 20 at 122-23.
- 30 Sm'ooygit Hannamauxw, “Preface” in Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitssegukla: William Beynon's 1945 Field Notebooks* (Vancouver: UBC Press, 2000) ix at ix.

has a specific name in their language.<sup>31</sup>

With the use of both ‘potlatch’ and ‘feast’ in Aboriginal rights rulings,<sup>32</sup> and given I am attempting to develop a general framework or procedural mechanism, the problem with the term ‘potlatch’ provides a flexible starting point for Aboriginal litigants and their claims. It is important to be mindful that in the case of the Tsimshian and the Wet’suwet’en in particular, the term ‘feast’ appears to be used more often today.<sup>33</sup> Yet, as mentioned, even this use encompasses various kinds of gatherings. As a result, I will use ‘potlatch system’ or ‘complex’ to signal the general institution that, while varying in specifics, occasions, and purposes, is suggested as being a central feature of the cultures throughout the region<sup>34</sup> so that Aboriginal claimants can then use the appropriate terms *in their own language* for their claims. This use would also accord with both the Court’s position that Aboriginal rights must be determined on a “case-by-case basis”<sup>35</sup> as well as the “aboriginal specificity” that the phrase “distinctive culture” in their test is supposed to capture.<sup>36</sup>

Perhaps the most significant feature of the potlatch complex is the coming together of people, Houses, clans, and so on (depending on the culture) in a public venue so that

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- 31 Margaret Anderson & Marjorie Halpin, eds, *Potlatch at Gitsegukla: William Beynon’s 1945 Field Notebooks* (Vancouver: UBC Press, 2000) at 253, n 1. See also, more generally, Cole & Chaikin, *supra* note 26 at 6.
- 32 In a very cursory search, ‘potlatch’ appears in the British Columbia Supreme Court (BCSC) ruling in *R v Vanderpeet* ([1991] BCJ No 2573, [1991] 3 CNLR 161). It also appears in the BCSC ruling in *Delgamuukw v BC* ([1991] BCJ No 525, [1991] 5 CNLR xiii [*Delgamuukw* (BCSC) cited to CNLR]) but ‘feast’ is used by far more often there. ‘Feast’ is used in *R v Vanderpeet* at the British Columbia Court of Appeal (BCCA) ([1993] BCJ No 1401, [1993] 4 CNLR 221); ‘potlatch’ does appear in this ruling as well—though only in a quoted passage from the BCSC ruling. Similarly, ‘feast’ is used by the BCCA in *Delgamuukw v British Columbia* ([1993] BCJ No 1395, [1993] 5 CNLR 1), although a couple of times ‘potlatch’ is used but is distinguished from ‘feast’ without any discussion as to how and why. At the SCC, only ‘feast’ was used in *Delgamuukw v British Columbia* ([1997] SCJ No 108, [1997] 3 SCR 1010). While by no means consistent, the BCSC has continued to imply a distinction between potlatching and feasting, but has yet to really clarify what each refers to and how they differ. *Lax Kw’alaams* may provide some insights into this: in Justice Satanove’s discussion of the expert witness testimony, she recounts that, according to one witness for the plaintiffs, a “major feast was referred to as a potlatch.” *Supra* note 24 at para 184. Shortly thereafter, Justice Satanove writes that “Dr. Lovisek [an expert witness for the defendants] states that another difference between the pre and post-contact potlatch was that the gift giving of food during the pre-contact feast was from a group’s own territories and not outside of them.” *Ibid* at para 188. Whether Justice Satanove accepted the former use of ‘potlatch’ and the implications of it remains unclear though.
- 33 See e.g. Margaret Seguin Anderson, “Understanding Tsimshian Potlatch” in R Bruce Morrison & C Roderick Wilson, eds, *Native Peoples: The Canadian Experience*, 3d ed (Toronto: Oxford University Press, 2004) 408 at 408; Christopher F Roth, *Becoming Tsimshian: The Social Life of Names* (Seattle: University of Washington Press, 2008) at 113. Antonia Mills mentions this as well, but suggests that at least some Wet’suwet’en “also use the word ‘potlatch’ (the Chinook or trade language term) when speaking either English or Witsuwit’en.” *Supra* note 18 at 43. The use of ‘potlatch’ and ‘feast’ in the ethnographic literature may have a temporal aspect to it with more recent literature often favouring the latter (see e.g. Neil J Sterritt et al, *Tribal Boundaries in the Nass Watershed* (Vancouver: UBC Press, 1998); Richard Overstall, “Encountering the Spirit in the Land: ‘Property’ in a Kinship-Based Legal Order” in John McLaren, AR Buck & Nancy E Wright, eds, *Despotic Dominion: Property Rights in British Settler Societies* (Vancouver: UBC Press, 2005) 22) while older sources favour the former or both (see e.g. Viola E Garfield, “The Tsimshian and Their Neighbors” in Viola E Garfield & Paul S Wingert, *The Tsimshian Indians and Their Arts* (Seattle: University of Washington Press, 1966) 3). See generally in Jay Miller, “Feasting With the Southern Tsimshian” in Margaret Seguin, ed, *The Tsimshian: Images of the Past, Views for the Present* (Vancouver: University of British Columbia Press, 1984) 27; Cole & Chaikin, *supra* note 26 at 58, and in how the words appear in Anderson & Halpin, *supra* note 31 at 32.
- 34 See e.g. Daly, *supra* note 18 at 31.
- 35 *Van der Peet* (SCC), *supra* note 6 at para 69.
- 36 *R v Sappier; R v Gray*, 2006 SCC 54 at paras 42-45, [2006] 2 SCR 686.

claims being made by the hosts can be witnessed. Through the ceremonial distribution of property to guests invited to witness during these gatherings, assertions and demonstrations of social prerogative and status are recognized and validated. These are taken to be the general characteristics of the potlatch complex on the Northwest Coast.<sup>37</sup>

An important aspect of the potlatch complex for our concerns is its role in governance:

Here, a complex system of ownership and jurisdiction has evolved, where the chiefs continually validate their rights and responsibilities to their people, their lands, and the resources contained within them. The Gitksan and Wet'suwet'en express their ownership and jurisdiction in many ways, but the most formal forum is the feast, which is sometimes referred to as a potlatch. Here Gitksan and Wet'suwet'en government occurs.<sup>38</sup>

While there are various ways of manifesting status and leadership along the coast, perhaps the most important status markers throughout the region are names. Names are often considered to be a form of property held by the significant social units of a particular people. For example, among the Gitksan, each House (or '*wilp*')<sup>39</sup> has the rights to a collection of inherited, ranked names of several types.<sup>40</sup> Each of these names "indicates the holder's status in the House."<sup>41</sup> During the course of one's life they will usually serially hold a number of names until they reach one of high rank.<sup>42</sup> In other words, names equal a social rank and role. For example, there are names for those who serve as councillors and speakers for the chiefs and for those who will someday inherit a chiefly name.<sup>43</sup> The highest ranked names in a *wilp* are those held by the *simgigyēt* or *sigidim haanak'a*—both of which are often glossed as 'chief'<sup>44</sup>—and the highest ranked chief's name of a House is also the name of the House.<sup>45</sup> The taking of a name among the Tsimshian, though common throughout the region, must be formalized through the holding of a feast which, in turn, signals the individual's membership in a House.<sup>46</sup>

It is possible, in some Northwest Coast cultures, to elevate a name through hard work and by distributing goods through the potlatch complex. By holding the highest ranking name in the House, a Tsimshian *simgigyēt* then serves as the steward for the House's

37 See e.g. Homer G Barnett, "The Nature of the Potlatch" (1938) 40:3 *American Anthropologist* 349; Helen Codere, "Kwakiutl: Traditional Culture" in Wayne Suttles, ed, *Handbook of North American Indians*, vol 7 (Washington: Smithsonian Institution, 1990) 359 at 370.

38 Sterritt, *supra* note 18 at 277.

39 The *wilp*'s membership is based on kinship, and it is considered to be the primary political unit in Gitksan society today. Overstall, *supra* note 33 at 31.

40 Anderson & Halpin, *supra* note 31 at 22.

41 Overstall, *supra* note 33 at 31.

42 *Ibid.*

43 Anderson & Halpin, *supra* note 31 at 22; Daly, *supra* note 18 at 88.

44 The reason for the two terms is that the title/role is distinguished based on gender—*simgigyēt* being for men, while *sigidim haanak'a* for women. P Dawn Mills, *For Future Generations: Reconciling Gitksan and Canadian Law* (Saskatoon, SK: Purich Publishing, 2008) at 18. While these terms clearly distinguish between male or female, in practice, the holder of a specific chiefly name might be of another gender. In such circumstances, though, the holder is treated publicly by behaviour that is appropriate for the name's gender. Thus, a woman with a man's chiefly name is/was treated as a male chief at feasts (Jay Miller, pers comm, 2010).

45 Anderson & Halpin, *supra* note 31 at 22; Overstall, *supra* note 33 at 31.

46 *Ibid.*

property—including its traditional territory and resource sites.<sup>47</sup> In other words, names, their holders, kinship, the land, and the rest of the cultural meshwork are interwoven. Highlighting this interweaving, and the chief's role in it, is Delgam Uukw's opening statement to the Supreme Court of British Columbia (BCSC):

For us, the ownership of the territory is a marriage of the Chief and the land. Each Chief has an ancestor who encountered and acknowledged the life of the land. From such encounters come power. The land, the plants, the animals and the people all have spirit—they all must be shown respect. That is the basis of our law.

The Chief is responsible for ensuring that all the people in his House respect the spirit in the land and in all living things. When a Chief directs his House properly and the laws are followed, then that original power can be recreated. That is the source of the Chief's authority.<sup>48</sup>

But while the head chief is responsible for the actions of the House and its members, leadership and authority is not outright, and the head chief must consult other chiefs and Elders within the House and, depending on the importance of the decision, the chiefs of other Houses.<sup>49</sup>

The potlatch system is important to both the host's status and authority, as it is during the performance and telling of the House's histories, songs, dances, and other displays of property that the host's power is embodied. For a Tsimshian chief, by hosting a feast they are able to publicly demonstrate the wealth of the House, and therefore, the prestige of the chiefly name through those performances and through gifting and feeding those who have been invited. Accordingly, Tsimshian feasting displays that the chief(s) have respected the land and House members and, as a result, "the law, the Chief, the territory, and the Feast become one."<sup>50</sup> The general potlatch complex validates authority and provides a forum to exercise it according to indigenous laws; the chiefs can use this authority "to settle disputes and breaches of [...] law both inside and outside the feast hall."<sup>51</sup>

The public aspect of the potlatch complex is also key to chiefly authority as the forum it provides allows for the formalization, elaboration, and ratification of important social and political decisions through giving gifts to the head chiefs and other leaders of those invited to attend as witnesses.<sup>52</sup> In this respect, Richard Daly has referred to Gitksan and Wet'suwet'en feasts as "publicly and jurally witnessed activities."<sup>53</sup> It is only through this witnessing by members of other kin groups and communities that any claims and social transitions are recognized and validated. The status of the claim being made and

47 Marjorie M Halpin & Margaret Seguin, "Tsimshian Peoples: Southern Tsimshian, Coast Tsimshian, Nishga, and Gitksan" in Wayne Suttles, ed, *Handbook of North American Indians*, vol 7 (Washington: Smithsonian Institution, 1990) 267 at 274. While the chief is considered to be a steward of property, it is actually held by the House. All of the forms of House property are similar, in a way, to 'property' in the Canadian legal sense in that people from other Houses can only speak of or use another House's property with permission. See, for example, Daly, *supra* note 18 at 258.

48 Gisday Wa & Delgam Uukw, *The Spirit in the Land: The Opening Statement of the Gitksan and Wet'suwet'en Hereditary Chiefs in the Supreme Court of British Columbia May 11, 1987* (Gabriola, BC: Reflections, 1989) at 7.

49 Overstall, *supra* note 33 at 32.

50 Gisday Wa & Delgam Uukw, *supra* note 48 at 7; Mills, *supra* note 44 at 89.

51 Mills, *supra* note 18 at 43; Borrows, *Indigenous Constitution*, *supra* note 1 at 40.

52 Daly, *supra* note 18 at 168-69.

53 *Ibid* at 57. Though the parallel between the potlatch system and the courts of the common law should again not be made too strongly.

of the individual(s) making it is publicly illustrated by the status of the attendees and the contributions, payments, and gifts distributed.<sup>54</sup> In this way, the potlatch system also provides a public display of the relative ranking of an individual and/or kin group.<sup>55</sup>

An important part of witnessing and the potlatch complex is the role of food. As Antonia Mills writes: “The feast is literally a feast.” Food served at the gatherings is often taken from the host’s territory, affirming the relationship for the Tsimshian, at least, between the House and its territory and displaying the respectful and proper treatment of the latter.<sup>56</sup> Serving food from the House’s territory serves to reaffirm ownership of the land as well. Accepting hospitality, partly through the food given to them to take home, is also part of a witness’ duties.<sup>57</sup> Again, we see the interweaving of authority, land, and law in the feast hall.

Another significant aspect of witnessing is in its role in decision making. Again, the potlatch system provides a forum in which claims are made and validated publicly; any change in social status, etc., must be witnessed and approved publicly.<sup>58</sup> Through speeches and other performances, food, and gifting, the host/chief makes their jurisdiction clear to all those in attendance.<sup>59</sup> Notably, often the majority of the work and decisions performed and presented at a feast or potlatch happen beforehand. This work includes much of the exchange and accumulation of goods needed to host a feast or potlatch, as well as the negotiations and discussions.<sup>60</sup> That the potlatch complex involves more than an atomized, isolated public event makes Chief Justice McEachern’s rejection of most of the evidence presented by the plaintiffs in *Delgamuukw* (BCSC) confusing and absurd:

For example, the fact that the plaintiffs’ claim has been so much discussed for so many years, and the further fact that so much of the evidence was assembled communally in anticipation of litigation, or even during this litigation, is a fact which must be taken into account.<sup>61</sup>

Conversely, Mills recounts that these ‘meetings’ held by the Wet’suwet’en were in fact feasts and were held “to clarify and to validate, before and with neighbouring Native groups, the outer boundary of the Witsuwit’en territory, [...] and, in particular, to settle issues of overlapping claims.”<sup>62</sup> Mills continues that they could have held actual meetings to discuss their land claims and to clarify the boundaries of their territory, but they chose to have a feast instead, “for that is the proper forum in which to discuss such matters.”<sup>63</sup> Again, this is because the feast is where “ownership and jurisdiction of territory is spoken about, passed on, witnessed, and validated.”<sup>64</sup> Furthermore, the public forum provided in the feast hall also provides a place where “differences of opinion can be aired calmly and witnessed, thus setting in motion the process of resolving the disagreement.”<sup>65</sup>

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54 Anderson & Halpin, *supra* note 31 at 32; Barnett, *supra* note 37 at 351.

55 *Ibid* at 356. This can even include, among some peoples, where the individual is announced and seated by the hosts at the gathering. Daly, *supra* note 18 at 82.

56 *Supra* note 18 at 61.

57 *Ibid*.

58 Overstall, *supra* note 33 at 35.

59 Mills, *supra* note 18 at 43.

60 My thanks to Charles Menzies who pointed this out to me and Val Napoleon who also reminded me.

61 *Supra* note 32 at 41.

62 Mills, *supra* note 18 at 44.

63 *Ibid*.

64 *Ibid*; Borrows, *Indigenous Constitution*, *supra* note 1 at 40-41.

65 Mills, *supra* note 18 at 71.

This last point emphasizes the idea that the potlatch complex is a process and not an atomized single event (or ‘snapshot’). More specifically, it plays an important role in consensus- and decision-making processes, because, as Richard Overstall writes, “political decisions are by consensus.”<sup>66</sup> Therefore, decision-making requires the specific forum and protocols that the potlatch system provides. Decision-making is democratic in the sense that “greater weight [is] given to the thoughts of those with proven ability, experience, and wisdom,” and status.<sup>67</sup> Decision-making is determined more by authority than anything else, and, again, this authority is derived from the power that Delgam Uukw discussed above.<sup>68</sup> Consensus is reached about the history of the House and its territory and jurisdiction over it through the “formal telling of the oral histories in the Feast, together with the display of crests and the performance of the songs, witnessed and confirmed by the Chiefs of other Houses.”<sup>69</sup>

The consensus- and decision-making aspects of the potlatch complex is a process that is ever changing and fluid as each gathering further develops authority, jurisdiction, and precedent through the unfolding of events in the feast hall: “Public behaviour is not only witnessed and remembered, but also comprises the historical record passed down through the memories of succeeding generations.”<sup>70</sup> Therefore, a particular feast or potlatch is like a snapshot taken during a continually unfolding process that is not limited to the public gatherings and extends both forward into the future and backwards into the past:

By following the law, the power flows from the land to the people through the Chief; by using the wealth of the territory, the House feasts its Chief so he can properly fulfill the law. This cycle has been repeated on my land for thousands of years. The histories of my House are always being added to.<sup>71</sup>

According to Borrows, this deliberative aspect of the potlatch complex has tremendous potential not only for the continued development and operation of potlatching and feasting, but also for the development of Indigenous law.<sup>72</sup> For example, he suggests that the formal announcing of law in feast halls and other public settings allows “ancient and contemporary legal ideas [to] mingle together and become the basis for bylaws, statutes, conventions, and protocols.”<sup>73</sup> Thus, the potlatch system interweaves the past and the present in a way that allows ‘tradition’ to continue to respond to the issues and needs of the contemporary.

Further highlighting the fluidity and the adaptability of the potlatch system (and culture generally), Delgam Uukw continues by including the events unfolding in the BCSC:

My presence in this courtroom today will add to my House’s power, as it adds to the power of the other Gitksan and Wet’suwet’en Chiefs who will appear here or who will witness the proceedings. All of our roles, including yours, will be remembered in the histories that will be told by my grandchildren. Through the witnessing of all the histories, century after century, we have exercised our jurisdiction.<sup>74</sup>

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66 Overstall, *supra* note 33 at 35.

67 *Ibid.*

68 *Ibid.* See also text accompanying note 48.

69 Gisday Wa & Delgam Uukw, *supra* note 48 at 26.

70 Daly, *supra* note 18 at 58.

71 Gisday Wa & Delgam Uukw, *supra* note 48 at 8.

72 *Indigenous Constitution*, *supra* note 1 at 41.

73 *Ibid.* at 47.

74 Gisday Wa & Delgam Uukw, *supra* note 48 at 8.

In this quote from Delgam Uukw, we can see much of what is being discussed in this article. Both his and Gisday Wa's testimony in the *Delgamuukw* proceedings could provide further insights into how the potlatch system could be converged with judicial reasoning—that is, if the common law legal system (*qua* judges) is amenable to creating a common law procedural mechanism for adopting Aboriginal laws and legal traditions on their own merits as substantive. This ontogenetic trait of the potlatch system is then not only important for the restoration of Indigenous law, but also for convergence.

### III. CONVERGING POTLATCHING AND JUDICIAL REASONING

As an entrée into how to go about converging the potlatch complex and common law judicial decision-making, let us begin with Chief Justice Lamer's point in *Van der Peet* that Aboriginal rights cannot “be defined on the basis of the philosophical precepts of the liberal enlightenment.”<sup>75</sup> If the Court truly subscribes to this belief and seeks to realize the challenge issued by section 35, then should this not automatically allow the (at least equitable) interweaving of Aboriginal legal traditions, practices, and mechanisms? Moreover, such a use of and reliance on Aboriginal jurisprudences and perspectives by the courts is also consistent with section 27 of the *Canadian Charter of Rights and Freedoms* (“Charter”), which requires the interpretation of the Charter “in a manner consistent with the preservation and enhancement of the multicultural heritage of [all] Canadians.”<sup>76</sup> This question, though, still remains unrealized, partly because of the failure of the Court to fully consider Aboriginal jurisprudences. For example, James Youngblood Henderson notes that the SCC in *Van der Peet* “did not explain how different jurisprudence can be compared or reconciled in a manner that does not undermine First Nations jurisprudences.”<sup>77</sup> Not only did the Court undermine Aboriginal jurisprudences in this way, they also failed to look at and consider Stó:lō or Salish jurisprudence in deciding that particular case.<sup>78</sup> Even if they had looked at Aboriginal jurisprudences, attempting to make Aboriginal perspectives “cognizable” to Canadian law maintains and reifies Eurocentric hegemony, and distorts and fragments Aboriginal cultures and jurisprudences.<sup>79</sup> Incorporating Aboriginal legal traditions does not entail the abandoning of law; rather, what is needed is the discarding of discriminatory *interpretations* of law.<sup>80</sup> Yet if making Aboriginal perspectives cognizable to the Canadian one is not appropriate, how can they then be reconciled?

Henderson's argument for “constitutional convergence” appears to be a better and more legally defensible way forward.<sup>81</sup> Henderson acknowledges that the “interpretative doctrine of constitutional convergence” was in fact created by the Court itself,<sup>82</sup> arising through Aboriginal peoples becoming “an essential part of the Canadian federated sovereignty” with the patriation of the Constitution in 1982.<sup>83</sup> In theory, “the convergence

75 *Van der Peet* (SCC), *supra* note 6 at para 19.

76 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; Henderson, *First Nations Jurisprudence*, *supra* note 16 at 124, n 40.

77 *Ibid* at 108.

78 *Ibid* at 110.

79 Moreover, as I have mentioned above, the ‘cognizing’ process reduces Aboriginal rights to a subcategory of Canadian law. *Ibid* at 199.

80 Borrows, *Indigenous Constitution*, *supra* note 1 at 20.

81 James (Sa'ke'j) Youngblood Henderson, *Treaty Rights in the Constitution of Canada* (Toronto: Thomson Carswell, 2007) at 815ff [Henderson, *Treaty Rights*].

82 *Ibid* at 819.

83 Henderson, *First Nations Jurisprudence*, *supra* note 16 at 87.

and reconciliation of Aboriginal right[s] with government power” has also been affirmed by the Court as necessary.<sup>84</sup>

The convergence doctrine does not involve making Aboriginal jurisprudences ‘cognizable,’ but instead these jurisprudences “are to be implemented and respected in the same and equal way as the common law and the French civil law are respected in Canada.”<sup>85</sup> Important to implementing this convergence is reading all the forms of jurisprudences together to generate a “symbiosis” of different constitutional orders.<sup>86</sup> A result of the convergence analysis should be that “neither governmental powers nor Aboriginal and Treaty rights [can] be absolute,” but through reading together the “distinct constitutional rights of First Nations [...] with other constitutional principles and traditions,” *all* rights are equally protected in their own right.<sup>87</sup> This will entail that the courts understand Aboriginal jurisprudences on their own terms and reinforce the need for a trans-systemic legal framework.

Importantly, this understanding cannot be gained by approaching these jurisprudences in an atomistic fashion but by, in part, understanding Aboriginal languages.<sup>88</sup> This is a tough process, as I have learned, but my cultural father has continually highlighted the importance of learning the language and the insights and lessons that one can learn about the culture generally. Moreover, in the context of where I have done research, I have heard that an understanding of the cultural meshwork prior to contact is best achieved through oral narratives.<sup>89</sup> Convergence means that the Court must change their approach to oral histories. As alluded to above, they are more than sources of evidence—they are intimately intertwined with status, jurisdiction, and laws. Furthermore, they are not like Eurocentric ‘history,’ as Borrows has discussed.<sup>90</sup>

Convergence is neither a mirror of the ‘cognizable’ approach, nor is it unidirectional. Henderson also places a duty on Aboriginal peoples:

Aboriginal Elders and knowledge-keepers have corresponding constitutional responsibilities to teach Aboriginal jurisprudences, through dialogue with the legislatures, with the bureaucracy, with the judiciary, and with Canadians generally.<sup>91</sup>

Thus, with the laws of a particular First Nations peoples being performed in the feast

84 *Ibid* at 58 citing *R v Sparrow*, [1990] 1 SCR 1075 at 1109, [1990] 3 CNLR 160.

85 Henderson, *Treaty Rights*, *supra* note 81 at 821.

86 *Ibid*.

87 *Ibid* at 827-28.

88 James (Sákéj) Youngblood Henderson, “Aboriginal Jurisprudence and Rights” in Kerry Wilkins, ed, *Advancing Aboriginal Claims: Visions, Strategies, Directions* (Saskatoon SK: Purich Publishing, 2004) 67 at 73 [Henderson, “Aboriginal Jurisprudence”].

89 I always hesitate to use the word ‘myth’ or ‘mythic’ when talking about these narratives as I am mindful of the popular usage of the word ‘myth’—particularly in light of Chief Justice McEachern’s rejection of Gitksan and Wet’suwet’en oral traditions. P Dawn Mills writes with regards to the dismissing of Gitksan *adawaaks*, “McEachern, it would appear, placed emphasis on the mythological or legendary characteristics of the accounts instead of their legal meaning.” *Supra* note 44 at 68. Moreover, ‘myth’ implies a separation between the real and the mythical or between the natural and supernatural that is not found among the First Nations peoples of the Northwest Coast. See e.g. Michael E Harkin, “Person, Time, and Being: Northwest Coast Rebirth in Comparative Perspective” in Antonia Mills & Richard Slobodin, eds, *Amerindian Rebirth: Reincarnation Belief among North American Indians and Inuit* (Toronto: University of Toronto Press, 1994) 192 at 209; Frederica de Laguna, “Tlingit Ideas About the Individual” (1954) 10 *Southwestern Journal of Anthropology* 172 at 172; Wayne Suttles, *Coast Salish Essays* (Vancouver: Talonbooks, 1987) at 74-75.

90 *Indigenous Constitution*, *supra* note 1 at 65-72.

91 “Aboriginal Jurisprudence,” *supra* note 88 at 77.

hall, the potlatch complex provides a venue for this dialogue between jurisprudences and legal traditions. This dialogical approach to convergence is key, and can only benefit the Canadian legal system by adding a fluidity and flexibility to its approach generally. Indigenous peoples are resilient, and the fluidity and adaptability of their cultural meshworks and practices is evidenced in the potlatch systems of coastal British Columbia First Nations. Instead of ending this fluidity (as some of the approaches developed in the courts posit<sup>92</sup>), European contact in some cases increased it.<sup>93</sup> In one sense, Chief Justice McEachern was correct:<sup>94</sup> Aboriginal peoples and their cultures are flexible, but contrary to judicial interpretations like Chief Justice McEachern's, this flexibility and fluidity is a strength and not a weakness. *All* cultures are fluid, including the Eurocentric, yet the Court's approach to Aboriginal rights—particularly in their search for 'centrality'—assumes the opposite.<sup>95</sup>

This flexibility and fluidity has implications for converging the various potlatch complexes and common law judicial decision-making. As seen in *Delgamuukw*, perhaps the most obvious legal matter in which this convergence would be beneficial is with regards to claims involving territory and ownership.<sup>96</sup> In the Tsimshian feast, jurisdiction and ownership of territory are described through "naming the places or natural features at the outer reaches of the territory."<sup>97</sup> Names, as alluded to above, interweave individuals to these territories through the ancestors who have held the same name:

Names link members of a Tsimshian lineage to the past and to the territory on which that past unfolded. A Tsimshian name holder shares his or her name with a succession of matrilineally related predecessors stretching back to the ancient historical events that describe the origins of the name, of the house lineage, and of the lineage's rights to territories and resources.<sup>98</sup>

Because names must be formalized and maintained through feasting or potlatching, the potlatch system could also possibly be converged in the contexts of claims to commercial Aboriginal rights. While, for example, in *Lax Kw'alaams* feasts and potlatches were discussed in the contexts of determining the type and scale of trade, this use of the potlatch system maintains the vertical process of translation as it fragments the institution, reducing it to a 'cognizable' economic system, neutralizing its political and juridical functions, which can then be measured against Eurocentric concepts like the idea of the 'market.'<sup>99</sup> Future research in this context would be to explore how focusing on names, instead of particular holders of a name, may provide a better, and more culturally appropriate, approach for commercial rights.

The fluidity and flexibility of the potlatch complex does make it difficult to identify other legal matters for which this proposed convergence could work.<sup>100</sup> I am hesitant, in part,

92 For example, *Van der Peet* (SCC), *supra* note 6 at para 61.

93 Brian Slattery, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727 at 741, 747.

94 "It became obvious during the course of the trial that what the Gitksan and Wet'suwet'en witness describe as law is really a most uncertain and highly flexible set of customs." *Delgamuukw* (BCSC), *supra* note 32 at 206.

95 See e.g. Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand" (1997) 42 McGill LJ 993 at 1001.

96 See text accompanying notes 62-63.

97 Susan Marsden, "Northwest Coast *Adawx* Study" in Catherine Bell & Val Napoleon, eds, *First Nations Cultural Heritage and Law: Case Studies, Voices, and Perspectives* (Vancouver: UBC Press, 2008) 114 at 117.

98 Roth, *supra* note 33 at 30.

99 See *supra* note 32 at para 288 for an example.

100 Borrows does identify some other potential legal matters the potlatch complex could/can be applied to in *Indigenous Constitution*, *supra* note 1 at 41.

because I am mindful of Gloria Cranmer-Webster's words that resonate with the above:

There is some criticism that contemporary potlatches are not like they were "in the old days." How could they be? The world we live in today is vastly different from that in which our grandparents lived. [...] If a culture is alive, it does not remain static. Ours is definitely alive and changes as the times require."<sup>101</sup>

The various, particular potlatch complexes and their cultural meshworks have continually unfolded and enfolded with changing contexts since time immemorial, and this article hopefully serves as an impetus for discussing how Aboriginal perspectives and legal systems, such as that embodied in the potlatch complex, can equitably be converged with the common law legal system. As such, the most critical aspect of this proposal for converging the potlatch system and common law judicial decision-making is that it should provide an example of an avenue for a more true and equitable reconciliation of the distinct legal systems and perspectives of coastal British Columbia First Nations peoples and the common law courts on a nation-by-nation, case-by-case basis.

The potlatch complex has significant implications for the relationships between these peoples, the Court, and the Crown. I have mentioned above that the potlatch complex should not be required to be 'cognizable' to the common law courts. The onus, then, falls upon Canadian legal practitioners to be willing to listen and have enough understanding of Aboriginal cultures and jurisprudences, and to recognize that while aspects of law were part of and performed via the potlatch system, that is only part of the meshwork in which it is situated. Tsimshian law, for example, and its performance in the feast hall is *not* the same as the common law and its performance. As a result, converging the two systems will entail the latter adapting and expanding its practices and rituals as well. Perhaps a formal procedure for convergence could be created that would be general enough for it to be performed on a nation-by-nation basis. For example, because convergence is multidirectional, not only would claims be decided through the processes and procedures of the common law courts, but also through the process of the potlatch system. The Court, the Crown, or both could host a potlatch or feast as part of the culmination of the protocols I have been discussing as part of a claim-making process. What I mean by this is that the Court and the Crown could be enfolded into the unfolding processes and protocols of the potlatch system. In the case of the Crown, similar to coastal First Nations practices, they could host an honorary potlatch or feast to acknowledge the results of the dialogue between them and the particular First Nations peoples. Thus, the duty to consult and accommodate could be enfolded through the unfolding potlatch complex. For the Court, as part of converged legal outcomes, rulings could be delivered via the protocols of the feast hall that would express and validate the completion of a process of negotiation and consensus-making. Such convergences would acknowledge, in a respectful manner, the law-making mechanisms of Northwest Coast peoples whose claims are being addressed.

How these particular convergences would occur would be on a case-by-case basis through processes of negotiation that could then be adjoined to the converged system. As I discussed above, convergence involves a reading together of distinct legal perspectives. I am not suggesting a form of cultural appropriation, but a symbiosis that equally engages two different legal perspectives and systems. I argue that the potlatch complex is one means of creating a symbiosis for coastal British Columbia, as it provides a flexible and fluid procedural mechanism through which reconciliation can truly occur.

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101 Gloria Cranmer-Webster, "From Colonization to Repatriation" in Gerald McMaster and Lee-Ann Martin, eds, *Indigena: Contemporary Native Perspectives* (Vancouver: Douglas & McIntyre, 1992) 25 at 36.

Moreover, because the potlatch complex “is central in recreating the people’s primary relationship with the world,”<sup>102</sup> this convergence spills beyond regulatory offences and civil proceedings. For example, Don Ryan (*Masgaak*) writes that “[i]n our model for Confederation and reconciliation, the Gitksan jurisdiction, based on our pre-existing rights, fits right in between” the federal and provincial governments.<sup>103</sup> Ryan’s sentiment has been echoed by P. Dawn Mills: “The Gitksan feel that the Gitksan–Canada relationship should be based on privileged reciprocity”<sup>104</sup>—highlighting the continuing unfolding and enfolding of relationships as the world and contexts change. The potlatch complex, then, can provide a venue for not only these relationships, but also a forum in which to develop them. In this way, Canada (and British Columbia) would become reciprocally assimilated into the kin networks and relationships of ‘traditional’ Gitksan culture, instead of the current opposite, unidirectional assimilation.

As the potlatch system is situated as a nexus in various cultural meshworks—and not as an atomized practice, custom, or tradition that the Eurocentric tradition divorces from its context—it is perhaps best situated to accomplish this interweaving and convergence. Thus, in light of the role of the potlatch system in asserting jurisdiction over territory, the potlatch system would be the most appropriate venue for any sort of future treaty or other land agreement to be made:

No transaction concerning land is legally binding unless it takes place in the feast. [...] However, the Witsuwit’en find themselves in an awkward situation – a situation in which the surrounding immigrants and federal and provincial governments accept individual transactions as valid and are only peripherally aware of the feast as the proper mechanism for dealing with any and all transfers of property.<sup>105</sup>

Therefore, for the First Nations peoples of coastal British Columbia the potlatch system is the appropriate arena for convergence.

How the potlatch system has risen to meet contemporary demands also reflects continuing unfolding and enfolding:

I am not suggesting that the feast system of the Gitksan and the Witsuwit’en, the paradigm for this region’s gift-centred societies, has died and gone to the museum of antiquities as a result of *Delgamuukw*; rather, since the collective litigation, feasts have become a medium for new challenges in a rapidly changing world.<sup>106</sup>

Thus, because the potlatch system is fluid and flexible, the particular peoples in question are best placed to determine if they are ready and how their laws and potlatch system can enter into a convergence with common law judicial decision-making. Again, this should not be unidirectional nor co-optive, but a forum in which the ‘Aboriginal perspective’ can be truly be ‘taken into account’ in the contexts of Aboriginal rights claims.

For the First Nations peoples of coastal British Columbia, unfortunately, litigation seems to be the only current mode of recourse for attempting to enact the particular form of convergence discussed here:

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102 Overstall, *supra* note 33 at 28.

103 “Afterword: Back to the Future” in Daly, *supra* note 18, 299 at 300.

104 *Supra* note 44 at 135.

105 Mills, *supra* note 18 at 144.

106 Daly, *supra* note 18 at 289-90.

In my opinion the Witsuwit'en, through their Aboriginal title action, are seeking to develop a cooperative mechanism of integrating Canadian and Witsuwit'en law; just as they have developed a cooperative legal relationship, based on mutual respect, between themselves and the Gitksan, the Nutseni, the Nisga'a, and the Haisla.<sup>107</sup>

That the Wet'suwet'en develop these cooperative relationships is positive as too often the contexts of litigation have created an adversarial environment between Aboriginal peoples.<sup>108</sup> Yet still absent from these relationships are Canada and British Columbia. Section 35 constitutionalized such a relationship, though, so a procedural mechanism is needed that equitably balances the perspectives and needs of all those involved. The atomism of Eurocentric thought that pervades the Court's approach to Aboriginal rights hinders this goal. Thus, I assert that the convergence of the 'Aboriginal perspective' from the actual perspective of the peoples in question on a nation-by-nation, case-by-case basis provides valuable insights for reconciliation.

## CONCLUSION

There are many topics, concepts, and issues that I have not addressed here, but this article represents a first step in an important discussion and argument that needs to be raised. There is still much work to be done. My proposal here aligns with Borrows in his discussion of an Indigenous Canadian Constitution:

It is my hope that this work represents a further invitation for those interested in this topic to join with me and other willing scholars, practitioners, politicians, policy analysts, Elders, chiefs, and leaders in the identification, recognition, questioning, and further development of our legal traditions.<sup>109</sup>

For many reasons, some of which I have alluded to above, there is a constitutional justification for this work. As Henderson writes,

[c]laims of Aboriginal rights represent a right to disrupt ordinary politics and practice that encourage the entrenchment of racial, cultural, social, and economic hierarchy and legal classification that have obstructed and continue to obstruct First Nations' full participation in Canadian life.<sup>110</sup>

While the Canadian government has attempted to extinguish it in the past, potlatching and feasting, as illustrated in *Delgamuukw*, continue to not only be important parts of various legal traditions<sup>111</sup> but remain vital and central to the cultural meshworks and identities of contemporary Northwest Coast First Nations peoples. It is time that Aboriginal peoples finally sit at the table in the place that our constitution mandates. To do so means that we need to rethink the table.

107 Mills, *supra* note 18 at 164.

108 Regarding the way litigation creates an adversarial relationship among First Nations peoples see e.g. Richard Daly & Val Napoleon, "A Dialogue on the Effects of Aboriginal Rights Litigation and Activism on Aboriginal Communities in Northwestern British Columbia" (2003) 47:3 Social Analysis 108 at 115-16.

109 *Indigenous Constitution*, *supra* note 1 at 10.

110 *First Nations Jurisprudence*, *supra* note 16 at 203.

111 See e.g. Borrows, *Indigenous Constitution*, *supra* note 1 at 40.