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Owning as Belonging/Owning as Property: The Crisis of Power and Respect in First Nations Heritage Transactions with Canada

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[There are] many issues associated with protecting and repatriating First Nations cultural heritage in Canada ... At the core of the struggle there sometimes lies “[a] ... gulf between Western concepts of private property and the primacy of the relationship between property and identity in Aboriginal societies.”

– Catherine Bell *et al.*¹

In this chapter I take up two central points from Bell’s decidedly anthropological observation – respect and difference. These points are among those most forcefully transmitted by the First Nations participants in this project. It is upon their statements and positions that this chapter is grounded. I identify respect as a crucial transcultural touchstone for developing practices of political relationship between Canada and First Nations. The “gulf” between concepts of property is demonstrated through the profound disparity between participant and non-aboriginal (especially Euro-Canadian) social and political understandings surrounding practices of ownership and transaction, and the relation of this to problems of identity and autonomy.²

My analysis considers First Nations positions on the ownership and protection of cultural heritage primarily within the context of liberal state conditions animated by histories of colonial hierarchy and power. Western law and property practices continue to displace, or “trump,” historic and contemporary indigenous law and property practices. For example, some of the case studies demonstrate a stark contrast between practices emphasizing “owning as property” and “owning as belonging” – a contrast that goes to the heart of social and political formation. The phrase “owning as property” describes a system that emphasizes property as a commodity capable of individual ownership and alienation for the purposes of resource use and wealth maximization. In contrast, “owning as belonging” places greater emphasis on transactions that strengthen relationships of respect and responsibility between people and what they regard as “cultural property.” It assumes a largely inextricable connection and continuity between people and

the material and intangible world. Differing understandings of ownership have long preoccupied anthropologists,³ but very rarely have anthropological considerations been applied to such a rich array of thematically unified and indigenous-sourced case studies. The promise of these case studies is that they afford an opportunity to see clearly the fuller and deeper contours of the ongoing crisis regarding respect for First Nations practices of owning and transaction of cultural property and heritage. This crisis also raises larger questions regarding power, recognition practices, and how to conceive of the mutual “sovereignties” of First Nations and the Canadian state – yet another interest of contemporary anthropological inquiry.⁴

While cultural property, repatriation, and heritage issues are the focus of the case studies, my focus is an analysis of the economic, political, and cosmological philosophies informing them. I look at how, and in what contexts, ideas of respect, transaction, autonomy, and power collide, and I seek to offer clues regarding how we might imagine new legal and political arrangements. Drawing on the cumulative findings of the studies, I consider a modest proposal advanced by one participant for parallel reciprocal “recognition spaces” as opposed to a singular approach to rights recognition that continues to privilege the Canadian state. The premise is that the parallel model can go much further in redressing fundamental, historical imbalances of power and issues of respect in cultural heritage relations than can the singular model. It does so, in part, by being resolutely serious about the existence of the crisis in power and respect between Canada and First Nations and by allowing for the advancement of First Nations autonomous practices of “owning as belonging” rather than acquiescing to the problematic liberal political trend of translating First Nations practices into various versions of “owning as property.”

The first half of the chapter concentrates on examining some of the entangled issues arising in the case studies – issues of respect, difference, power, and owning – as a means of honing and restating some critical questions suggested by the overall project. This is followed by a discussion of possible strategies of recognition that arise from and address crises of respect and power.

Respecting Difference through Ways of Owning

First Nations in Canada continue to experience locally variable conditions of economic disparity, political marginality, and social inequality and, with regard to relations of power, are subordinate to the Canadian state. In this historical and contemporary context, First Nations peoples have long been facing economic practices that are preponderantly based on Western liberal notions of property and autonomy. Indigenous practices of owning and autonomy, and the social and political differences engendered by them, have largely been eclipsed.⁵

The case studies have brought home the importance of respecting difference. For example, in the *Poomaksin* report, Herman Many Guns remarks, “Canada always kind of throws us all into one big pot, one big culture and ... like we have the same kind of problems. We [live] differently. We [relate to each other] differently. Our language is different; our customs are different.”⁶ Similarly, in the *Adawx* case study, Susan Marsden concludes: “for the Tsimshian and Gitksan the greatest issue associated with what the Euro-Canadian world calls ‘intellectual property’ is the lack of acknowledgment and respect for their identity in its fullest and deepest sense.”⁷ Narcisse Blood of the Kainai describes this quite plainly and aptly as “worlds colliding.”⁸ To reiterate, there is a deep and pervading crisis in Canada with regard to respect for difference.

The explicitly collaborative nature of this project has brought us face to face not only with respect for difference in the general sense (as in you are Hul’qumi’num, Kainai, or Haida and I am Anglo-Canadian or Indo-Canadian, etc.) but also in the more specific sense of considering how First Nations societies and the wider plurality that makes up Canadian society *practise respect for difference differently*. This contrast in forms of practice is evident in different practices of ownership: how one owns, how one transacts, how one relates to the matter that is being transacted, and how social (and natural) relations are made, reinforced, weakened, or broken. In every sense then, owning is a relational term. It signals both the *kinds* of attachment between people and things and the *modes* of making and breaking such attachments when people transact culturally important matters.

Listening carefully to the words of those participating in this project, one gradually comes to see that the central distinction between owning as property and owning as belonging is repeatedly asserted as a key to the crisis in matters of cultural heritage. While expressed in different ways, this basic distinction came up over and over again. For example, in her response to the question, “What does cultural property mean to you?” Andrea Sanborn described how totalizing the idea of owning things cultural is to the Kwakwaka’wakw: “[C]ultural property, to me, is anything about us, for us, given to us by our Creator and is ... to be used by all of us with respect.”⁹ This positions Kwakwaka’wakw ideas of ownership far from Western notions of transacting alienable “property,” which implies the *severability* of things from “us.” In addition, she couples this deep sense of attachment to an obligation to respect. Bell *et al.* are explicit about this sense of belonging in Kwakwaka’wakw practices:

The traditional concept of “belonging” associated with masks, dances, stories, and songs does not anticipate wrongful appropriation but, rather, common knowledge and compliance with Kwakwaka’wakw protocols on use and responsibility. Relationships of “belonging” were traditionally

demonstrated through performance and verified through being witnessed by the community. Songs, dances, and masks were an integral part of family identity.¹⁰

Implicit in the distinction between owning as belonging and owning as property are the problems of (1) who should exercise power over indigenous cultural property and (2) the internal and external means by which this issue might best be resolved. This leads to a consideration of the issue of power imbalances and, in particular, whose practices of owning and transaction are given greater or lesser agency, accorded greater or lesser primacy, and in what circumstances. Exploring concepts of ownership also leads to a consideration of how differences in power among individuals, and between individuals and the state, are affected by owning. Along with political philosophers, anthropologists have recently considered the connection between liberal state power and the apportioning exercise of exclusive property rights.¹¹ What continues to be lacking is a persuasive analysis of how to bring non-Western practices of owning into a mutually powerful relation with, alongside, or against Western property practices in matters of cultural heritage. Few have considered the complex and pragmatic issues of whether and how Western laws, policies, programs and other initiatives may be effectively advanced by strong forms of mutual respect for *both* distinctive and shared ways of engaging ownership and difference.¹²

Given all this, in a project that also queries the validity and impact of the possible reform of Canadian/First Nations heritage law, one could reformulate its central question as follows: Is there a mutual and deeply respectful way for multiple indigenous laws and practices relating to ownership of things cultural to coexist and corelate with Canadian laws and practices of heritage ownership? To answer this question it is imperative to discuss the possibility of *mutual respect* across divides of difference and to explore, as Mary Ellen Turpel suggests, how “each culture is capable of sensitivity to the basic conditions of difference.”¹³ This, too, is an implicit theme echoing throughout the case study reports. Thus, an even more basic question is: How might we move together from cursory to very deep forms of mutual respect for difference? With this in mind, I now consider contrasting and overlapping ideas of respect.

Differentiating Respect: Duty and Awe

Respect can be a complex and slippery concept, especially when considered in a transcultural context. The case studies suggest that First Nations and Euro-Canadian notions of respect are often divergent. In the English lexicon, “to respect” is defined in terms akin to the verbs “to defer,” “to heed,” or “to pay attention,” as is discernible in the *American Heritage Dictionary* entries: “1. To feel or show deferential regard for; esteem. 2. To avoid violation

of or interference with: respect the speed limit. 3. To relate or refer to; concern.”¹⁴ However, in everyday practice, acts of respect are not simply demonstrative in the manner posed by these definitions. They are also framed in terms of exchange or transaction: one *pays* or *owes* respect and *earns* respect; one *gives* and *receives* respect; one *gains* or *loses* respect. Often respect conjures the creating or sustaining of balance or imbalance, pointing to reciprocal power transactions in the making (or breaking) of relationships.

As an everyday act of discursive power, respect usually requires the voluntary humbling of oneself to another.¹⁵ A related question then becomes, How humble need two parties be to create balance? Further, to really respect people or their society, “Can you be humble towards them some of the time but not all of the time? How much respect is owed to redress histories of deeply hurtful disrespect?” Put in strictly transactional terms, we might ask: How do we calculate depth with regard to respectful relations and debts of respect owed?

It follows that, depending on the measure of obligation and reciprocity applied in the interchange, respect will be strong or weak, deep or superficial. In a more cursory form, respect is offered by momentary acts of deference, such as lowering one’s head, speaking reverently, not speaking out of turn. This is what people often do in a courtroom, in ceremonies, or while listening to a teacher or an elder. On their own, these are gestures, rhetorical acts, and expressions – ephemeral exchanges of respect.

In a much stronger and deeper form, such as that most often discussed in the case studies, one pays respect by *recognizing*, humbling oneself, and acting upon the source of power and authority of the other not simply in the moment but also in the perpetual unfolding of relations. In this sense of respect, people act not because they are forced to do so nor because they are fulfilling a moral duty. In this way, notions of respect articulated by participants contrast with the Western individualist philosophy expressed most famously in Kant’s ends/means, or dutiful, formula of respect – *achtung*¹⁶ – which demands that one “[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”¹⁷

Consider, for example, the multiple layers of respect invoked by Hul’qumi’num speaker Roy Edwards when discussing human remains:

The old people said, when you see remains, honour it, “‘ethu ‘i’ch mus-timukw” [Take care of each other]. If you take care of them, they’ll help you. You help them, they help you later on. They will thank you for the little bit of respect you showed them. Help each other, never argue. If you argue, you never know, it might be your children they will take it out on. Always be careful, help each other. Honour and respect.¹⁸

There is a contrast between a Kantian dutiful deference to the humanity of persons and a relational and visceral awe and fear for the sources of power giving life and authority to persons – as is frequently noted in the case studies.¹⁹ Unlike Kant's ends/means distinction, in First Nations thinking the concepts of ends and means practically evaporate, collapsing into one another in a relational process. Everything is Creator-given. One is part of creation and is always being cared for by others, so one needs to take care of others. If one cares for others, things will go well for all and there will be no retribution. Whether living or deceased people; tangible or intangible things of the earth, water, and sky; or things "cultural," every animated *thing* and every animated *being* needs to be respected since we are always in a relationship of exchange with all of this, with all of them.

Participant understandings of respect go considerably beyond the ephemeral acts of cursory, deferential expressions of respect. These are profound, highly consequential, and enduring exchanges of respect. In transactional terms, profound respect extends into the past and far into the future of all relationships, and it is produced and maintained through greater degrees of reciprocity. While it may be hard to continue to respect others if they do not respect you, one needs to respect them all the same since we cannot escape the fact that we are mutually entangled. From this perspective, there will be consequences if one does less than this.

As an observer of Canadian-First Nations relations, it is my sense that Canada has mostly extended a cursory form of respect in these relations, usually in consequence of implicit or explicit moral and legal senses of duty. This occurs despite the fact that First Nations peoples attempt to practise and call for stronger forms of mutual, transactional, and relational respect in their relationships with Canada. For example, case law and public pressure have resulted in governments developing more meaningful consultation processes to address the impacts of resource development on First Nations lands rather than developing an enduring deep form of respect for rights, interests, and difference. The consequence is a historic and ongoing imbalance in power surrounding exchanges of respect in First Nations-Canadian state relations. Differing principles and practices of respect also help us to understand the historic incapacity of Canada to generate lasting beneficial relations with its indigenous peoples.

So, where might we look to see how contrasting notions of "respect" intersect in legal relations between Canada and First Nations concerning ownership of cultural property? One telling occurrence appears in Bell *et al.*'s survey of repatriation and heritage law in this volume, where the authors cite the text of the Nisga'a Final Agreement.²⁰ The Nisga'a Final Agreement incorporates other agreements negotiated with the Royal British Columbia Museum (RBCM) and the Canadian Museum of Civilization (CMC) to return certain Nisga'a items from their collections. While those

to be returned by the CMC are mostly of a sacred or ceremonial character, those to be returned by the RBCM are wider in scope. Both museums are to negotiate custodial agreements with respect to Nisga'a items remaining in their collections as well as with respect to those that might be acquired in the future. Para. 15 provides that the Nisga'a "share possession" of items remaining in the CMC collection, and Paragraph 17 specifies that the terms of sharing are to be set out in a custodial agreement that must "respect Nisga'a laws and practices relating to Nisga'a artifacts and comply with federal and provincial laws of general application and the statutory mandate of the Canadian Museum of Civilization."²¹

The vagueness of the phrase "respect Nisga'a laws and practices relating to Nisga'a artifacts" stands in sharp contrast to the legal precision and obligatory nature of the phrase "comply with federal and provincial laws of general application and the statutory mandate of the Canadian Museum of Civilization." Where Nisga'a law is general and unspecified, but something that parties must "respect," the relationship with federal and provincial laws and with the mandate of the CMC are something with which parties must "comply." This could be due to a number of factors, including Nisga'a oral traditions, understandings of respect, the nature of material at issue (included, among other items, are spoons, earrings, baskets, and arrows), the reluctance of the CMC to be obliged to comply with laws not clearly articulated in a manner familiar to it, and the retention of custody by the CMC, which must act within the confines of Canadian law. However, the choice of words still offers insight into power differentials and respect for different legal orders. While Canadian law is held to operate through a very robust and traceable obligation of compliance, First Nations practices are limited to an unspecified notion of "respect" – and this is within the terms of a Western legal instrument that could readily have incorporated some kind of instruction on how one goes about properly respecting Nisga'a law on its own terms.²²

Through this kind of statement, respect for Nisga'a law is subordinated and displaced by respect for Canadian law. One has to treat difference differently, and this applies to differences in laws as much as it does to differences in social formations and practices. Without more clarity regarding the sort of practices that constitute respect and that must be respected, a non-First Nations reader or government interpreter of this text might conclude that a gesture of deference and reverence would suffice or, at most, that the internal legal machinations of the Nisga'a, once resolved, would ultimately be subject once and for all to the laws of Canada. Although Nisga'a law is paramount in some areas, there are still other important areas (*e.g.*, environmental protection, timber processing, etc.) in which federal or provincial law will prevail should there be a conflict. Even in those instances in which Nisga'a law is formally recognized as paramount, it is no different from the federal or provincial laws when it comes to appeal:

the system under which all parties resolve legal conflicts is represented by the courts of Canada. Nowhere in the Final Agreement is there an explicit or implicit notion that the Nisga'a system could be the decisive venue for resolving such conflicts.

If the case studies in this volume are a useful guide to thinking about practices of other First Nations in Western Canada, and I believe they are, then one might interpret respect for Nisga'a laws as the enduring, profound, relational, and transactional sort of awe discussed so far. It is this strong practice of respect, which should apply not simply in Nisga'a territory but also in Nisga'a's dealings with provincial and federal jurisdictions. This is likely the form of respect the Nisga'a had in mind in agreeing to this wording.

This gets at the next puzzle I wish to address. Specifically, if we are to discuss the possibility of coexistence and respect for difference in practices in which First Nations and mainstream Canadian ideas of heritage or cultural property meet, we need to also ask: Is it necessary, and is it respectful, for any set of laws or practices to be able to trump others?

Trumping Inseparability

Consideration of respect for difference and practices of difference have led us to questions about the legitimization of different practices of law and cultural property. These questions have historical underpinnings. Despite almost twenty-five years of First Nations political and legal engagement in a post-section 35 constitutional environment, the crisis pertaining to respect for indigenous control of indigenous lives persists in Canada, and much of this crisis still crystallizes around questions of respect for "ownership."²³ Heritage and culture are but one element of this larger issue. Comprehensive claims, aboriginal rights and title litigation, and various efforts in law reform have been moving ahead since 1982, all grappling with questions of control, respect, co-management, and partnerships.

Protection, repatriation, and control, what we might call "effective ownership" of cultural heritage, are inseparable from the larger historical crisis of power between Canada and First Nations that s. 35 is intended to address. Heritage and culture are part of a broader struggle that is rooted in European-aboriginal contact, which occurred over two hundred years ago. Whether framed as a crisis of power or as a crisis of respect, the inherent dilemmas concern *who owns* (i.e., controls) and *who has say over ownership* (i.e., arbitrates the practice of owning and transaction) not just things cultural but also lands, resources, sea beds, knowledge, bodily matter, lives, rights, relationships, and more.

It is worthwhile, therefore, to look more carefully at distinctions between First Nations and mainstream Canadian notions of owning. Many of the community participants in this project have stated directly that cultural property is part and parcel of an inalienable, completely interconnected

complex. Echoing Andrea Sanborn and other members of her community, Kwakwaka'wakw participant Andrea Cranmer provided details regarding the idea that cultural property consisted, literally, of everything that the Kwakwaka'wakw own:²⁴

Okay, my whole existence as Andrea is cultural property. It's who I am. It's all the traditions of the Kwakwaka'wakw that belong to me and belong to our people. It's the language, the Kwakwala language and, most importantly, our values we have as a people, *maya'xala*, which means respect or treating someone good or something good. It's protecting all our songs and dances and history. It's protecting our land because all the land base comes out of our creation stories in this area. That's cultural property. So those are the things. It's family passing on family values and the history of each family and all the treasures they own culturally.²⁵

This matter of the inseparability of indigenous practices from that upon which they act reminds us yet again of the complex issue of how one owns all of this. It also anticipates the eventual challenge we face in addressing whether and how multiple ways of distinctive owning and transacting can coexist in a respectful and uncompromising way.

Virtually all the case studies discuss problems with the use of the terms "property" and "ownership." The Kwakwaka'wakw tended to speak of owning in terms of belonging, of entitlements and responsibilities that are transferred intergenerationally through complex clan relations. Similarly, the Ktunaxa/Kinbasket report states: "Although there are many similarities between Western and Ktunaxa concepts of ownership, the former cannot adequately describe participants' perceptions of their relationship to material culture, information, and land."²⁶ Instead, we find statements such as that of one Ktunaxa elder, "[W]e are stewards[] of the land. That's all I can say is, hey, we were put here for that."²⁷ In Gitanyow, owning as belonging also means that which makes a person real, and it entails a complete relation between one's attachment to things cultural and one's attachment to the land. Amsisa'ytxw (Victoria Russell) explains this: "'We actually have a place in this world, it makes a difference for me as a Luuxhon House member emotionally because it makes me feel proud to know I own land.' Without the land, the songs, the crests, the history, she says, 'I would be nothing.'"²⁸

In a different vein, Hul'qumi'num speaker Abner Thorne inverts the relation of belonging: "Some people say my Indian name is mine. It belongs to me. And [in Hul'qumi'num] teaching ... it's the other way. It's I belong to the name. That's not mine alone, my name, is not mine alone, anybody in my family or from that ancestry can take that name. They belong to the name also."²⁹

In other instances, concepts of transferred rights and responsibility were set directly against ideas of property. One Skinnipiikani speaker, Heather Crowshoe-Hirsch, notes:

The use of the term “property” is inadequate as that which is transferred does not, technically speaking, belong to anyone. The possession of these items is “Creator-given” and, as such, cannot be owned or deemed property as such. Rather than “property,” perhaps it is better to say that all of these items are “physical representations of these rights.”³⁰

There is a curious parallel between Crowshoe-Hirsch’s final statement and the now mainstream legal concept of Western property, which sees it not as a thing but, rather, as a bundle of rights to which certain things are subject. However, in Skinnipiikani terms, the physical object represents the abstract right, whereas in Western thinking the abstract right is an adjunct to, not a representation of, the object of transaction. That said, the two approaches diverge on the distinction of Skinnipiikani “property” as “Creator-given” and so specifically subject to the highly distinctive practices of *Poomaksin* (reciprocal transfer) and *Siikapistaan* (reciprocal payment).

It is clear that, while there are some consistencies in certain principles underlying concepts and practices of ownership, the case studies demonstrate a remarkable diversity of specific means for differentiating how people own, or form attachments to, cultural property. All of the case studies point to very strong attachments and obligations associated with owning and transacting items of significant cultural value to the community. Among these significant materials are clan and ceremonial items (*e.g.*, clan crests in carved work or shawls, songs that signal rights to territory, and ceremonial bundles for community healing). Just as important, transfer and other forms of exchange of cultural property tend to strengthen, deepen, and extend social and emotional connections among people, their histories, their material productions, their knowledge, their lands, their kin groups, and the Creator, rather than to effect a separation, as would be expected of the predominantly Western understanding of property as commodity.³¹

While participants emphasize the importance of tangible and intangible cultural property to revival and to the continuity of cultural knowledge and identity, to reduce this connection to a simple relation between property and identity is to be too narrow. Modes of exchange, and relationships and obligations created through exchange, are also crucial to social and political formation. In this light, there is an astonishing consistency between the First Nations case studies and the generalized anthropological distinction between commodity exchange and gift exchange systems as articulated by Chris Gregory.

Gregory describes commodity exchange as “an exchange of alienable

objects between persons who are in a state of reciprocal independence which establishes a quantitative relationship between the objects exchanged.”³² He contrasts this with gift exchange systems based on “an exchange of inalienable objects between persons who are in a state of reciprocal dependence that establishes a qualitative relationship between the persons involved in the exchange.”³³ Notably, commodity-centred practices amplify and sustain an impersonal separation. Parties remain “in a state of reciprocal independence” by being able to *alienate* the objects in the transaction. In gift-centred practices, it is the *inalienability* of the objects being transacted that amplifies the reciprocal social dependence of the parties.

To some extent, Gregory’s contrasting systems reduce complex, culturally diverse practices of transaction to a strict categorical opposition – one that we ought not essentialize. However, his representations get at radically different relations of power and respect regarding the way in which people engage each other at the moment of transaction and far into the future once the transaction is completed. Understood in this sense, that which has been (and is still being) trumped in historic and contemporary relations between Canada and First Nations is not only First Nations systems of ownership and transaction but also their central mode of economic, social, and political formation.³⁴ Relationships and obligations created through transactions of things cultural are central elements of self-definition – the socio-political fabric that First Nations refer to and mobilize in fashioning their self-determination. In practice and effect, by means of privileging liberal property transaction, Canada is trumping and displacing, though as the case studies demonstrate not fully erasing, the crucial inseparability of First Nations people from their land, their societies, their modes of governance, their material heritage, their knowledge, their practices, and much, much more.

Of course, while Gregory’s contrasting systems are highly germane to this argument, the complex manner in which a First Nation conducts its social and economic life in relation to cultural property can only be understood in specific historical and contemporary contexts pertaining to particular First Nations/state relations. However, all participants in this research attest to how Western property law and the commodity exchange system are privileged over their own.³⁵ They contend, as in the Ktunaxa/Kinbasket study, “that significant [cultural] loss could not have occurred independent of Canada’s legal and political environment, which intentionally undermined aboriginal cultures.”³⁶

Given the historical and contemporary legal, social, economic, and political environment, it is little wonder that Canadian laws incommensurability between First Nations practices of owning as belonging and predominant Canadian practices of owning as property.³⁷ It is also not surprising that participants frequently expressed hesitation regarding the effectiveness of Canadian law to address this issue in practical ways. For example, Ktunaxa

speaker Gina Clarricoates remarks, "Why am I not too keen on laws? Because sometimes laws are broken and then [*laughs*] they find ways to go around it."³⁸ Hul'qumi'num speaker Charles Seymour agrees: "We need more than the *Heritage [Conservation] Act* because people have ways around it ... If you want to work in a known area, you can still get a permit."³⁹ However, caution is necessary as legislation directly constrains one's practices and rights, including those that would otherwise be protected by customary legal claim.

Intercultural Recognition through Cultural Property?

What I have proposed thus far is that, in the larger Canadian society, the idea of owning is dominated by notions that *privilege property*, whereas in First Nations societies *owning privileges belonging*. However, it should be remembered that members of First Nations and the wider pluralities constituting Canadian society understand both owning as property and owning as belonging.⁴⁰ Why? One reason is that we have lived on these lands together for more than two centuries. Another is that we have all experienced the connective social force of inalienable reciprocity (*e.g.*, gift-giving with an implicit expectation of return) and the easy disconnective force of alienable trade (*e.g.*, buying consumable goods with money). We are already, and have long been, "intercultural," which Marilyn Strathern describes as "the condition of already inhabiting one another's cultures."⁴¹ In the end, we can talk about these differences because we *all* have a sense of these two subsidiary ways of engaging the world: property and belonging. Essentially, most of us have the basic skills for developing mutual respect for how we differentiate notions of "ownership."

What happens when we bring together the interculturality of owning practices with ideas of cursory or deep forms of respect? What is the best way to secure and extend the strong forms of respect that have for so long eluded Canadian law and politics? How do we get beyond the history of non-recognition when thinking about law reform, policy development, and programming initiatives? Is it possible to produce an outcome that fully recognizes and respects the highly varied social practices of owning as belonging?

In response to these questions I present two propositions: one from Australia and one derived from the Skinnipiikani community study. The first proposition includes the idea of "recognition spaces" – an idea that has emerged in the context of Australian aboriginal land rights discourse.⁴² Coined by aboriginal Australian lawyer and land negotiator Noel Pearson, the term was meant to describe the sort of recognition afforded by the 1993 *Native Title Act*, which arose after the famed *Mabo* decision of 1992.⁴³ Where, in Pearson's words, *Mabo* states that "native title is not a common law title but is instead a title recognized by the common law,"⁴⁴ native title

has to be sourced outside the common law. Citing Pearson and the working of the *Native Title Act*, Mantziaris and Martin summarize the notion of recognition space as follows:

A space within which the Australian legal system gives formal recognition to the relations between indigenous people and their physical environment (e.g., land and waters), which have been defined by the traditional laws and custom of the indigenous group.⁴⁵

This proposition supports the idea that legislation can recognize and respect indigenous peoples as the driving force in defining their own laws and customs regarding what is ownable, how people own, and how they belong or relate to the land.⁴⁶

Anthropologist James Weiner has offered a number of strong arguments regarding how the idea of recognition space hinders a fuller comprehension of intrinsic differences between cultural practices.⁴⁷ The central critique is that recognition presumes two things: (1) the ability to communicate indigenous ways in a manner cognizable to the Western legal system and, (2) that there is a fixed and recognizable notion of First Nations cultures and laws. This has two implications. First, it subtly fashions First Nations cultural practice into something that is commensurable with and understood by Western law and culture. For example, although a First Nation may consider an item and the songs associated with it as inextricably linked, in order to be recognized in Canadian law, the item and song may have to be treated separately under separate categories of property law. Second, Weiner points out that the bracketing of indigenous law places it in a separate domain from Western law, as though the two sets of laws have nothing to do with one another. This is contrary to the nature of cultural interaction and relational practices such as treaty making, which are at the heart of First Nations principles of respect.

There are other, more ominous, practical effects of adopting a simple recognition space concept. For example, in the instance of the *Native Title Act*, the authority for formally recognizing indigenous law remains squarely in the authorized domain of the Australian legal system. Indeed, Povinelli argues that indigenous law is cunningly made to perform according to the needs of the Australian multicultural state by the very recognition work undertaken by the courts and in the implementation of legislation.⁴⁸ Like some Nisga'a laws under the Nisga'a Final Agreement, indigenous law is still subordinated and subjected to the definitions of Western law. Such legal entailment exercises are quite familiar to us in Canada, where decisions such as *R. v. Van der Peet* have specifically framed the terms for what can be understood as aboriginal "custom" deserving of protection as a constitutional right when asserted independently of claims to title. As framed

within the aboriginal rights deliberations of Chief Justice Lamer: “the test for identifying the aboriginal rights recognized and affirmed by s. 35(1) must be directed at identifying the crucial elements of those pre-existing distinctive societies.”⁴⁹ Legitimate rights-bearing customs are recognized through non-indigenous doctrines of contact, continuity, and change.

As legal scholar Robert Cooter explains, “courts do not invent custom, but by articulating it, they shape it decisively.”⁵⁰ They make the determination of what is customary and “indigenous” and, in so doing, have the power over the sorts of social arrangements that any given custom or customary law can regulate. Of course customary law operates independently of judicial recognition, but in the event of conflict, recognition by external courts determines what laws shall prevail. Judicial recognition is given within a narrow context and only as specific cases arise, without consideration of the broader social, cultural, economic, and historical contexts in which they are embedded. This can put limitations on what may be seen as acceptable customary practice.

As noted in the Ktunaxa report, “Most participants, when asked about what prevents the community from exercising its laws in relation to cultural property, interpreted this question as: What prevents the community from practising traditional ways?”⁵¹ This statement tells us, yet again, that we cannot separate the practice of First Nations law from the totality of social, political, and economic practice. How is it that one aspect of custom – laws in relation to cultural property – can be defined outside of the totality of customary law or outside the context of relations with other First Nations or Western legal systems?

A vital point is that legislation and other legal acts of recognition reflect the views of those who subscribe to the social and political discourse from which the act of recognition emerges and in which it is authorized. Legislation creating recognition spaces remains an extension of the rule of the state. It may well represent an honest and even conditionally respectful attempt to provide an inclusive view of the practices of others. Nonetheless, it is highly questionable whether legislation can escape its own social field of force.⁵² We need simply ask the question: If First Nations people want to appeal an application or interpretation of a legislative regulation recognizing their customary practices, where can they turn? The jurisdiction is with Canadian courts. But does the power of recognition always have to be so?

Beyond Trumping: Parallel Recognition Spaces

So, where do we begin to look for stronger ways to accord enduring, motivating, and mutual respect? While the case studies are replete with examples of First Nations practices and understandings being trumped by Canadian law, there are few examples of how to move beyond this situation.

There is mention of treaty negotiation in the general sense, provided such negotiations are underwritten by the activation of First Nations practices of recognition. For example, as then Gitanyow chief Godfrey Good suggested, hunting rights may be recognized through song. Speaking of his uncle, he explains: "He sang the song that belonged to a man from Gitanmaax. He would tell who the song belongs to. He knew many songs; he would then say who this song belongs to."⁵³ The acknowledgment of hunting territory rights by means of owned and transferable intangibles such as rightful songs could be built into treaty understandings, negotiations, and agreements. For example, evidence of aboriginal title could be advanced through the singing of songs rather than through speaking and written documents. In terms of strong translegal reciprocity, this is the sort of distinctive practice that needs to be *respected* when we speak of comparably distinctive ways of exercising Gitksan law, Stó:lō law, Nisga'a law, Secwepemc law, and so on.

The need for mutual and uncompromising respect is also addressed in the Skinnipiikani community study. As Reg Crowshoe put it:

[H]ow do you work with two paradigms? One cannot trump the other side. So, in order not to trump the other side, you've gotta be able to work with recognition and awareness of both sides. And this is where [the] concept of ... paralleling came in: *Nitooii*.⁵⁴

Nitooii translates into "the same that is real." In this concept of paralleling, each and every Western legal action, definition, or differentiation is set against the alternative culturally based rights or legal practice of a First Nation in the context of an everyday issue in need of regulation or judgment. The *Poomaksin* report of the Skinnipiikani is a partial demonstration of this practice. Laws concerning verbal interchange on rightful topics are demonstrated in practice, while, at the same time, being spoken about and expanded upon.

The Skinnipiikani community study's process for addressing cultural heritage followed the protocols and practices of the Sundance and Brave Dog Society in order to achieve a strong sense of rightful interaction, positions, and principles. A similar process could apply, for instance, in the case of child custody disputes. Such disputes could be directed simultaneously and in parallel to both provincial court processes and to Skinnipiikani-Nitsiitapii processes. The latter might be associated with major community bundles that have clear protocols regarding venue, actions, language, and songs. Thunder Medicine Pipe Bundles, for example, are transferred to rightful holders from specific clans and, therefore, readily invoke the kin-related connections and commitments of those clans. In such a process, the players, family members, and disputants would engage in a proceeding within, for example, the general context of an All Night Smoke ceremonial hosted

and led by transferred bundle keepers. Everyone would sit in the prescribed circle arrangement for witnessing and would observe the ascribed statuses for discussion, protocols for ordering speech, and songs for affirming rightfulness. Both the authority of the bundles and of the non-Piikani laws would be activated, addressed, and paralleled in this arrangement. The generalized functions of ceremonialist, host, drumming support, ceremonial service, and advisory support would be filled, adapted, and directed towards the terms of the legal dispute and the issue it is addressing. Opening with smudging and prayer, the action follows the appropriate protocols but focuses upon pointed discussion and adjudication in an environment of practice-driven customary authority, support, common witnessing, and responsible participation.⁵⁵

Such a process could just as readily be applied to discussions concerning the rightful repatriation of cultural materials, for instance. Indeed, it is the authority and rightfulness of cultural materials that would be used by practitioners to deliberate on such rights being considered in relation to other cultural materials held outside the community. In relation to the broader landscape of First Nations involvements in Canada, this sort of approach would be sourced in the practices of right and law of each First Nation and would operate, therefore, according to the culturally specific rules and principles of respect, autonomy, and authority of the First Nation in question.

The general notion of dual or parallel practice is evident in the comments of other First Nations participants in this volume. For example, John Nicholas of the Ktunaxa/Kinbasket makes reference to balanced, dual practices with regard to the regulation of sacred sites:

You can't have all natives enforcing the rules because the non-natives are going to turn against them because they don't want to be bossed around by a group of natives. And then you have, on the other hand, non-natives enforcing laws on natives. That is wrong. They've got to have something to do with the natives personally. One-sided just doesn't work. They have to get together ... If it means having to expose ... things that you don't really want to show people, so be it. You have to show them to gain their respect and let them know what it means to you.⁵⁶

To be sure, one has to consider whether a parallel recognition process implies the engagement of two self-determining parties and sovereign nations, even in a provisional sense. That is a much larger conversation than what we can offer here as it necessitates addressing the matter of how to manage disputes and conflicts among parties. That said, the potency of paralleling is in how it accords a mutual respect, thereby offering an unthreatening means of advancing such a conversation. Another question is whether, by way of Western law reform, it is possible to create *parallel*

recognition spaces where the First Nations practices formally recognize and respect the authority of Canadian laws and, reciprocally, where Canadian laws formally recognize and respect the authority of the First Nations laws.

The Kainai report demonstrates the potency of mutual, reciprocal recognition in Kainaiwa relations with the Glenbow. As Narcisse Blood remarks:

[L]ook to the example that has been set ... by [the] “[n]obody loses, everybody wins” [policy] ... look at [the] Glenbow Museum. They’re a lot stronger ... I think they can say we have a relationship with the Blood Tribe ... Relationships, in our ways, are very important. The point being that we can cooperate.⁵⁷

Parallel recognition and respect by the Glenbow and Kainai have resulted in repatriation, enactment of repatriation legislation that acknowledges the legitimate moral interests of the Glenbow and Blackfoot tribes in Blackfoot material and that enables transfer of title, and co-management agreements for Kainai material remaining in the Glenbow’s possession.

While one might argue that the Kainai-Glenbow relationship may not yet be the full-blown manifestation of the parallel recognition spaces discussed above, by underscoring the principle of the necessary mutuality of respectful interaction, it certainly moves in this direction. The Kainaiwa case study emphasizes how mutual and enduring respect is the crucial touchstone for successful repatriation negotiations and for creating powerful relations:

Positive experiences were associated with non-adversarial relationships built on mutual trust, respect, and the understanding of cultural differences ... Negative experiences occurred when parties lost respect for one another or when no opportunity presented itself for relationship building to occur.⁵⁸

Similarly, in 2001, Reg Crowshoe of the Skinnipiikani identified a relationship he referred to as “re-repatriation.” Re-repatriation involves the ongoing reciprocal trade of cultural matter between public institutions/government museums and First Nations – trade that extends mutual respect for distinct practices in perpetuity.⁵⁹ This proposition, perhaps not surprisingly, mirrors historic First Nations understandings of the treaty relationship as opposed to such modern versions as the Nisga’a Final Agreement, which appear to skew to by conventional contractual principles of certainty.⁶⁰

Ultimately, then, what Reg Crowshoe points us to is the development of strong parallel and reciprocal recognition spaces rather than state recognition practices, such as the Nisga’a Final Agreement, *NAGPRA* in the United States, or Australia’s *Native Title Act*. It returns us to the premise that each

society has within it all the capacities and sources of authority to engage universes of natural and social relations. It gets at the idea of two (and more) coexisting worlds of practice, both fully activated, differentiating difference by their respective means, both fully respectful of the interests of the other, reciprocally engaged with each other (or at least moving in that direction). When First Nations and Canadian practices are paralleled, the mutually respectful dialogue we have so far been unable to achieve, or have achieved only very rarely, may emerge.

Conclusion: The Deeper Challenges of Cultural Property

In the beginning we have our own laws that was – that was used by our people, the Gitksan people, *aluugiyet*. These laws were used and after the arrival of white people, they forced us to use their laws, they pushed their laws onto us ... The white people have always tried to make us follow their ways, and they don't realize that we have our own laws and our own ways, and now they say this is – this land belongs to the Crown. This is not true, because the Crown never did – never bought this land from us ... And it's not for us to give our land away to her [the Queen], this is our land, not hers ... [W]e've always had this law and we are going to put it into action.

– Stanley Williams⁶¹

When First Nations peoples assert that they *belong* indivisibly to their cultural property, they are stressing the all-encompassing idea of *owning as belonging*, an idea that is fully animated by culturally distinct, practised systems of internal legal sanctions. This idea recapitulates the often-heard statement by First Nations peoples that they also belong indivisibly to the land. In the case studies we repeatedly encounter this very easy move between indigenous attachment to land and indigenous attachment to things cultural. As Stanley Williams notes above, these are implicitly and explicitly connected matters that are enmeshed within and protected by the power of indigenous law.

In addition to asserting the power of Gitksan law, Williams reminds us that the Crown did not make use of its (“her”) own inherent system of property transaction to acquire Gitksan territory. Moreover, he suggests that “it’s not for us to give our land away to her.” How, or indeed why, would a people give away that to which they belong? Given such strong commitments to their inherent inseparability from the land, to suggest they could give the land away is to suggest they could give themselves away. From all that is presented in this volume, it appears that this same premise applies to the

relations to certain forms of cultural property, which are also indivisible from the people and the land. It follows that to ignore that is to commit a deeply disrespectful act.

If future discussions of First Nations cultural property move forward by privileging non-First Nations ways and non-First Nations procedures for recognizing ownership, or if the notion of owning as property dominates the notion of owning as belonging, we will have done little to find a fulsome, strong form of respect. If, for example, these issues continue to be resolved solely through legislation and legal decision-making processes external to First Nations communities, at best we will have merely performed dutiful acts of deference, arguably the easier kind of respect. We will have side-stepped what all these case studies call for – a deep, robust, reciprocal, and enduring respect across state-enacted divides. In my view, this is the most fundamental challenge posed by the First Nations contributions to this project and to any future initiatives it might trigger. It is the challenge that Canada must address if it is to avoid perpetuating the existing crisis of power and respect.

Charles Seymour, a Hul'qumi'num elder, reminds us of the gift of respect he has received. His sense of care and honour towards the ancestors could as easily apply to the culturally important tangible and intangible matter described throughout these reports:

Have I received any teachings from my parents or elders? Yes. I've always been told to be, to be careful and be mindful [of] our, of our ancestors. You always pay respect. It's like when you visit, visit a gravesite, you have to carry yourself in a certain way. You always have to have a prayer in your heart and *tsiit sul'hween* [thank the ancestors] I guess. Thank them, and in a very respectful way.⁶²

Gauging from the case studies, such teachings are familiar terrain for First Nations peoples, and they continue to recognize and act upon the challenges they pose. The more difficult challenge lies with Canada and the Canadian polity. The simple question to which we must return, over and over, is: "How deeply respectful are we actually prepared to be?"

Notes

- 1 Catherine Bell *et al.*, "First Nations Cultural Heritage: A Selected Survey of Issues and Initiatives," this volume at 404.
- 2 I use the term "transaction" throughout this chapter in a broad anthropological sense to refer to practices of exchange in all their cultural diversity, in local contexts, and in historical flux. In a general way, transaction can refer to the exchange or transfer of goods, tangible and intangible things, rights, land, knowledge, even people (as in marriage exchange). Following standard dictionary meanings, it can also refer even more broadly to interpersonal or intergroup, even interspecies, exchanges as in "a communicative action or activity involving two parties or things that reciprocally affect or influence each other."

Merriam-Webster Online Edition, s.v. "transaction," online: <<http://www.m-w.com/dictionary/transaction>>. A broad concept like this is useful with regard to addressing views raised by indigenous peoples that they do not simply enter into exchange with people but, indeed, with animals, land, spirits, objects, "cultural property," the Creator, and more. Significantly, I use the term to embrace multiple possibilities of exchange practices, so I am not intending to signal narrow legal notions of transaction from, for instance, sale of goods or contract law; rather, those specific forms are not excluded from this idea and can stand as examples. In relation to this, see my discussion of Strathern's proposition of an "owner," *infra* note 40.

- 3 *Infra* note 11.
- 4 Michael Asch, "Self-Determination and Treaty-Making: Consent and the Resolution of Political Relations between First Nations and Canada," online: <http://hobbes.law.uvic.ca/demcon/papers/Asch_Demcon_f2-1.doc> in Mario Blaser *et al.*, eds., *In the Way of Development: Indigenous Peoples, Life Projects and Globalization* (London, New York: Zed Books in Association with International Development Research Centre, Ottawa, 2004); Robert Paine, "Aboriginality, Multiculturalism, and Liberal Rights Philosophy" (199) 64:3 *Ethnos* 325; Noel Dyck, ed., *Indigenous Peoples and the Nation-State: "Fourth World" Politics in Canada, Australia, and Norway* (St. John's: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985); Harry B. Hawthorn, ed., *A Survey of the Contemporary Indians of Canada*, vol. 11 (Ottawa: Queen's Printer, 1967); and see Ronald Niezen, *Defending the Land: Sovereignty and Forest Life in James Bay Cree Society* (Boston: Allyn and Bacon, 1998).
- 5 Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2 (Ottawa: Supply and Services Canada, 1996) in particular, "Part Two: False Assumptions and a Failed Relationship."
- 6 Brian Noble, in consultation with Reg Crowshoe and in discussion with the Knut-sumatak Society, "*Poomaksin: Skinnipiikani-Nitsiitapii Law, Transfers, and Making Relatives: Practices and Principles for Cultural Protection, Repatriation, Redress and Heritage Law Making with Canada*," this volume at 281.
- 7 Susan Marsden, "Northwest Coast *Adawx* Study," this volume at 146.
- 8 Catherine Bell *et al.*, "Repatriation and Heritage Protection: Reflections on the Kainai Experience," this volume at 223.
- 9 Catherine Bell *et al.* in consultation with Andrea Sanborn, the U'mista Cultural Society and the 'Namgis Nation, "Recovering from Colonization: Perspectives of Community Members on Protection and Repatriation of Kwakwaka'wakw Cultural Heritage," this volume at 39.
- 10 *Ibid.* at 64.
- 11 See, for instance, the following works (and their extensive bibliographies): Katherine Verdery and Caroline Humphrey, eds., *Property in Question: Value Transformation in the Global Economy* (London: Berg, 2004); Christopher M. Hann, ed., *Property Relations: Renewing the Anthropological Tradition* (Cambridge: Cambridge University Press, 1998); Marilyn Strathern, *Property, Substance, Effect: Anthropological Essays on Persons and Things* (London: Athlone Press, 1999).
- 12 See, for example, Rosemary Coombe *et al.*, "Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property" in Willem Grosheide, ed., *Articles in Intellectual Property: Crossing Borders* (Utrecht: Mollengafica/Intersentia, 2006).
- 13 Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Differences" (1989-90) 6 Can. Hum. Rts. Y.B. at 14, 45, quoted in Gordon Christie, "Law, Theory and Aboriginal Peoples" (2003) 2 *Indigenous L. J.* at 113.
- 14 *American Heritage Dictionary of the English Language*, 4th ed., s.v. "respect," online: <<http://www.bartleby.com/61/4/R0180400.html>>.
- 15 Though this chapter has a different approach to the question, in enlightenment terms the concept of "respect" has been thoroughly examined by Immanuel Kant. See his propositions on the idea of respect in dutiful – and therefore moral – relations between modern subjects in *Groundwork of the Metaphysics of Morals*, trans. H.J. Paton (New York: Harper and Row, 1964) at 437-38.

- 16 But contrast Kant's use of the term *achtung* with the connotation of respect in another German vernacular term for respect, *ehrfurcht*, meaning both fear and honor. According to the twentieth-century Roman Catholic theologian and religious popularizer Romano Guardini: "Respect is a strange word, this combination of fear and honor. Fear which honors; honor which is pervaded by fear. What kind of fear could that be? Certainly not the kind of fear that comes upon us in the face of something harmful or that causes pain. That kind of fear causes us to defend ourselves and to seek safety. The fear of which we shall speak does not fight or flee, but it forbids obtrusiveness, keeps one at a distance, does not permit the breath of one's own being to touch the revered object. Perhaps it would be better to speak of this fear as "awe." See online: <<http://www.jknirp.com/guarda.htm>>. While a theologian himself, as an Enlightenment thinker Kant held God in a separate, transcendent sphere beyond human reason. *Achtung* (literally "attention" or "regard") would have been a far less problematic term on which to base his naturalistic philosophical maxims than would a term like *ehrfurcht*, which contains an awe for otherworldly powers and their sanctions against improper conduct.
- 17 *Supra* note 15 at 429. This is Kant's "Formula of the Ends in Itself," which is one of the four elements of his "categorical imperative," described in his *Groundworks of the Metaphysics of Morals*.
- 18 Eric McLay *et al.*, "*A'lhut tu tet Sul'hweentst* [Respecting the Ancestors]: Understanding Hul'qumi'num Heritage Laws and Concerns for the Protection of Archaeological Heritage," online: <<http://www.ualberta.ca/research/aboriginalculturalheritage/researchpapers.htm>> at 57
- 19 See Michael Asch, "Some Considerations on Law, Ethics and Repatriation" (Paper presented to Glenbow First Nations Repatriation Workshop, Calgary, Alberta, 12-14 November 1998) [unpublished]; and Michael Asch, "Self-Determination of Indigenous Peoples and the Globalization of Human Rights Discourse: The Canadian Example" (Draft paper presented to CONGLASS III, New York University) [unpublished]. See also various papers from the conference entitled Consent as the Foundation for Political Community, University of Victoria, British Columbia, 1-3 October 2004, including <[http://www.hobbes.law.uvic.ca/demcon/papers/Jeremy Webber](http://www.hobbes.law.uvic.ca/demcon/papers/Jeremy%20Webber)> "Challenges of Consent" [unpublished]; Val Napoleon, "Living Together: Gitksan Legal Reasoning as a Foundation for Consent" [unpublished], available online: <<http://www.hobbes.law.uvic.ca/demcon/papers/>>; and Asch, *supra* note 4. Also Leroy Little Bear, "Aboriginal Relationships to the Land and Resources" in Jill Oakes *et al.*, eds., *Sacred Lands: Aboriginal World Views, Claims, and Conflicts* (Edmonton: University of Alberta Press, 1998) 15; and Leroy Little Bear, "Aboriginal Rights and the Canadian 'Grundnorm'" in Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland and Stewart, 1986) 243.
- 20 "Nisga'a Final Agreement," online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/agr/nsga/nisdex_e.html>. Enacted by the British Columbia Legislature as the *Nisga'a Final Agreement Act*, S.B.C. 1999, c. 2 and federally as the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7 [Nisga'a Agreement]. Bell *et al.*, *supra* note 1 at xxx.
- 21 Nisga'a Agreement, *Ibid*.
- 22 There are no clear statements either about the nature or operationalizing of "Nisga'a laws" in the Nisga'a Final Agreement; however, the subordination and incidentalizing of Nisga'a law in relation to a hierarchies of jurisdiction is laid out in c. 2, para. 53, "General Provisions" of the Nisga'a Final Agreement: "If a Nisga'a law has an incidental impact on a subject matter in respect of which Nisga'a Government does not have jurisdiction to make laws, and there is an inconsistency or conflict between that incidental impact and a federal or provincial law in respect of that subject matter, the federal or provincial law prevails to the extent of the inconsistency or conflict." While one must acknowledge that, in c. 11, Nisga'a Governance, the Nisga'a are assigned authority to make their own laws in such areas as government, citizenship, culture and language, property on Nisga'a lands, marriages, social services, health, child custody, education, and so on, these would be laws developed within the constraints of the Nisga'a Constitution and its attendant practices. Closer critical analysis needs to be paid to the subtle distinction in the Final Agreement between references to "Nisga'a law" and the "Nisga'a Constitution." My preliminary suggestion is that Nisga'a law refers to those customary practices that are more fully activated

by the modes of respect discussed earlier in this chapter, while the Nisga'a Constitution may well establish procedural techniques that are potentially less consistent with those modes of respect. In other words, it appears that the Agreement itself privileges a more non-Nisga'a practice of written law making through its legally fashioned Constitution, which is subtly displacing and subordinating unwritten customary law based in principles of reciprocity, obligation, and enduring respect. Certainly, these issues are complex and deserve a more thorough analysis than I am able to provide in this chapter.

- 23 *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11. Section 35 provides that the aboriginal and treaty rights of the aboriginal peoples of Canada are "recognized and affirmed."
- 24 *Supra* note 9 at 39-40.
- 25 *Ibid.*
- 26 Catherine Bell *et al.*, in consultation with the Ktunaxa/Kinbasket Tribal Council and the Ktunaxa/Kinbasket Traditional Elders Working Group, "Protection and Repatriation of Ktunaxa.Kinbasket Cultural Resources: Perspectives of Community Members," this volume at 327.
- 27 *Ibid.* at 107.
- 28 Richard Overstall, in consultation with Val Napoleon and Katie Ludwig, "The Law Is Opened: The Constitutional Role of Tangible and Intangible Property in Gitanyow," this volume at 107.
- 29 *Supra* note 18 at 159.
- 30 Taken from transcripts for the *Poomaksin* case study, *supra* note 6. Knut-sum-atak circle discussion no. 2 (3 December 2003), Oldman River Cultural Centre, Brocket, Alberta.
- 31 I say "predominantly" given that the very idea of "commodity" is, in itself, an analytical formulation, as Marilyn Strathern reminds us: "Of course many anthropologists have argued that the commodity never was the pure product which its standing as an analytical category made it out to be" at *supra* note 11 at 25.
- 32 Christopher A. Gregory, *Gifts and Commodities* (London: Academic Press, 1982) at 41-43. For an overview of how complex and convertible reciprocity and commodity processes can be seen, see C.A. Gregory, "Exchange and Reciprocity" in Tim Ingold, ed., *Companion Encyclopedia of Anthropology* (London: Routledge, 1994) at 919-39.
- 33 Gregory, *Gifts and Commodities* at 41-43.
- 34 Arguably, all the First Nations in this report have had historical reciprocity relations in their systems of transaction. The most familiar of these practices are expressed in the Northwest Coast potlatch and winter ceremonials, and the Sundance complex of the Blackfoot. Both of these types of ceremonials have made their way into the interior of British Columbia.
- 35 This has transpired through historic colonial expansion into and encroachment upon all aboriginal territories in Canada and, with that, through the hegemonic assertion of liberal political economic regimes. The political effort to quash First Nations exchange practices has also been effected through the rule of law, through the banning of First Nations ceremonies (such as the potlatch and Sundance), causing significant disruption – though not wholesale loss – of such socio-economic attachments and means of transacting. Dimensions of this history of cultural suppression are discussed throughout the case studies presented in this volume. See also Katherine Pettipas, *Severing the Ties That Bind: Government Repression of Indigenous Religious Ceremonies on the Prairies* (Winnipeg: University of Manitoba Press, 1994).
- 36 *Supra* note 26 at 334.
- 37 For a critical discussion of radical incommensurability, see Elizabeth Povinelli, "Radical Worlds: The Anthropology of Incommensurability and Inconceivability" (2001) 30 *Annual Review of Anthropology* 319.
- 38 *Supra* note 26 at 335.
- 39 *Supra* note 18 at 180.
- 40 In a recent article on innovation and property, British social anthropologist Marilyn Strathern (in conversation with James Leach) offered a working definition of "an owner" as,

quite simply, “somebody with something to transact.” Marilyn Strathern, *Commons and Borderlands: Working Paper on Accountability and the Flow of Knowledge* (Oxon: Sean Kingston Publishing, 2004) at viii. Such a definition may be helpful in moving beyond oppositional categories and developing ownership terminology within an intercultural context as it is inclusive of differing concepts and practices of ownership. It allows for transactions of commodities (buying, selling, trading of alienable property), reciprocity transactions, transactions with the land (hunting, gathering, planting), transactions of people (marriage and kin relations), transactions with the Creator and other creative forces, transactions of respect, and so on. Strathern’s definition also allows for any combination of such practices.

- 41 *Ibid* at 1.
- 42 Community case studies of this very project are such a space. They provide a venue for recognizing the social, land, and transactional relations of different First Nations peoples, where interests in indigenous peoples’ tangible and intangible cultural matter intersect with interests of the Canadian state.
- 43 *Mabo and Others v. Queensland (No 2.)* (1992), 175 C.L.R. 1 (H.C.A.); *Native Title Act 1993* (Cth); Noel Pearson, “The Concept of Native Title at Common Law” (1997) 5 *Australian Humanities Review*, online: <<http://www.lib.latrobe.edu.au/AHR/archive/Issue-March-1997/pearson.html>>.
- 44 *Ibid*.
- 45 C. Mantziaris and D. Martin, *Guide to the Design of Native Title Corporations* (Perth, Australia” National Native Title Tribunal, 1999) 1.
- 46 A recognition space, produced in the context of legislation like Australia’s *Native Title Act*, or of the *Native American Graves Protection and Repatriation Act*, Pub. L. No. 101-601, 104 Stat. 3049 (1990) in the United States still narrows its considerations to “law,” whether substantive common law or what is termed aboriginal “customary law.” As James Weiner points out, we note 47 below, Western law, in itself, is not the total fabric of social practice but, rather, a “codification” of that totality. In contrast, what we hear about First Nations law in the community reports is that it is something that is inherent in the totality of practices. It is, in the words of Marcel Mauss, a set of total prestations.
- 47 James Weiner, “Eliciting Customary Law” (2006) 7:1 *Asia Pacific Journal of Anthropology* 15.
- 48 See Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham and London: Duke University Press, 2002) at 184-85.
- 49 *R. v. Van der Peet* [1996] 2 S.C.R. 507 at para. 44.
- 50 Robert Cooter discussing laws in Papua New Guinea, quoted in James F. Weiner, “The FoI Incorporated Land Group: Law and Custom in Group Definition and Collective Action in Kutubu Oil Project Area, PNG” (2001) *State, Society and Governance in Melanesia Project, Working Paper 01/2*, online: <http://rspas.anu.edu.au/papers/melanesia/working_papers/workingpaperjamesweiner.pdf>.
- 51 *Supra* note 26 at 353-54.
- 52 On “social fields of force,” see William Roseberry, “Hegemony and the Language of Contentment” in Gilbert M. Joseph and Daniel Nugent, eds., *Everyday Forms of State Formation: Revolution and the Negotiation of Rule in Modern Mexico* (Durham: Duke University Press, 1994) 355.
- 53 *Supra* note 28 at 96.
- 54 *Supra* note 6 at 305.
- 55 While some readers might see this as resembling sentencing circle processes, a crucial difference is that the process suggested here is socio-culturally specific and socio-culturally derived. It activates the lawful authority of transaction and respect implicit in the practices of the respective First Nation, and, although it is not subordinated to the legal determinations of non-native jurisdictions, it certainly promises to provide a means of producing a viable dialogue and collaborative set of outcomes with them.
- 56 *Supra* note 26 at 340.
- 57 *Supra* note 8 at 234.

488 *Reflections on Selected Themes*

58 *Ibid.* at 251.

59 Brian Noble, "Nitooii – The Same that is 'Real': Parallel Practice, Museums, and the Repatriation of Piikani Customary Authority" (2002) 44 *Anthropologica* 113.

60 See Asch, *supra* note 4.

61 *Supra* note 7 at 142 (Stanley Williams).

62 *Supra* note 18 at 158 (Charles Seymour).