

THE SUPREME LAW AND THE GRAND LAW

*Changing Significance of Customary Law for Aboriginal Women of British Columbia**

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DECOLONIZATION OF FIRST NATIONS in Canada comprises a range of political and legal strategies, some being the self-conscious efforts of politicians whose task is to confront and diminish state powers over their peoples, others being individual struggles for redress of personal injuries that rely upon the very state powers that politicians deplore. Yet other strategies combine deliberated political praxis and personal ploys. In the process, paradoxical consequences are neither unusual nor unanticipated. Colonial powers have divided the aboriginal peoples into distinct socio-legal categories comprising differing rights and privileges whose interests consequently collide. In the struggle for decolonization, a victory for one group may imply defeat for another.

Patriarchal powers and paternalistic pretensions heighten these tensions by setting women's and men's interests against one another, as has been made evident in constitutional struggles between First Nations and women's political associations.¹ In 1992, the Native Women's Association of Canada, supported by Women of the Métis Nation, were forced to take legal action to protest their exclusion from constitutional negotiations. This action resulted in partial legal victory and in aggravated tensions between these associations and the male-dominated associations privileged by other levels of government.

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¹ Joyce Green, "Sexual Equality and Indian Government: An Analysis of Bill C-31 Amendments to the Indian Act," *Native Studies Review* 1,2 (1985):81-95; Kathleen Jamieson, "Sex Discrimination and the Indian Act," *Arduous Journey: Canadian Indians and Decolonization*. J. Rick Ponting, ed. (Toronto: McClelland and Stewart, 1986); Lilliane Ernestine Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right: The Native Women's Association of Canada and the Constitutional Process on Aboriginal Matters, 1982-1987* (Saarbrücken, Germany, Verlagbreitenbach Publishers, 1993).

While the ramifications of this action are yet to be fully experienced, it is clear that the gender divisions that led to this legal contestation remain; legal victory may well prove to be social defeat.²

Less obvious but equally important are the implications of other legal contests, ones in which individuals and their local governments assert the rights of First Nations to self-determining status that includes inalienable rights to customary judicial processes and the recognition of these legal processes by the dominant legal order.³ A landmark decision of this nature was brought down in the British Columbia Court of Appeal in September 1993, and heralded in the local newspaper as "a precedent setting aboriginal rights decision."⁴

The plaintiffs, Mr. and Mrs. Casimel, an elderly couple of the Stellat'en Nation,⁵ successfully argued that adoption of their grandson, Ernest Casimel, according to customary law entitled them to qualify as dependent parents upon his untimely death in a car accident and hence to receive financial compensation offered by the Insurance Corporation of British Columbia. Recognition that the adoption constituted a legally binding relationship rested upon the court's assumption of the power "to determine the scope and content of the specific rights in the aboriginal society. . . ."⁶

Given that in this case, and indeed in the historic precedent upon which the judge drew, women's family obligations and rights were affirmed, a casual reader might surmise that indeed aboriginal peoples, and aboriginal women in particular, have scored an unequivocal victory in their struggle toward self-determination. However, the courts did not authorize unrestricted jurisdiction to First Nations (and none, of course, to aboriginal peoples designated non-status). Rather, the court asserted that a particular right in an aboriginal society must be examined in relationship to "the workings of the general law of B.C."

² Jo-Anne Fiske, "Child of the State Mother of the Nation: Aboriginal Women and the Ideology of Motherhood," *Culture* XIII,1 (1993):17-35; Jo-Anne Fiske, "The Womb is to the Nation as the Heart is to the Body: Discursive Formation of Gendered Nationhood in Aboriginal Canada." 13th World Congress, International Sociological Association, Bielefeld, Germany, 17-23 July 1994.

³ Jo-Anne Fiske and Claudine De Herlihy, "Courting Customs: Taking Customary Law to the B.C. Supreme Court," *International Journal of Race and Ethnicity*, (forthcoming 1995).

⁴ *Prince George Citizen*, 17 September 1993.

⁵ The Stellat'en Nation is one of several Yinka Dene Nations which were formerly known as the Carrier peoples of Central British Columbia. Their ancestral territories stretch from the Rocky Mountains west to the Lake Babine watershed. For some time now, the Carrier Sekani Tribal Council has represented most of the Yinka Dene. However, the Nat'oot'en Nation (Lake Babine Band) is now independent, and other groups once designated the Carrier are united with the Gitksan Wet'suwet'en Nations, the latter of which shares a language and cultural history with Nat'oot'en.

⁶ *Prince George Citizen*, 17 September, 1993.

Two questions arise from this decision: 1) Will the capacity to resort to legal customs of their people empower women in their daily lives? 2) Does the decision mark an historic turning point for First Nations governance? In seeking answers, I begin with an analysis of the political context from which the case arose. I focus on issues of First Nations/aboriginal identity, and consider who, and in what context, proffers "traditions," or "customs" as law. In doing so, I argue that the concepts of "customary," "traditional" or "Indian" laws are drawn upon as a political resource. I suggest that assertions of law constitute "materials of identity" and further that First Nations identity arises from a "consciousness of colonization" and is defined by strategies of decolonization.⁷ I then turn to external responses to the court decision and to the political strategies of First Nations. I ask questions regarding the impact of an unchanging state hierarchy and of the ministerial and judicial mandates as defined by the Constitution and Charter of Rights and Freedoms — the supreme law of Canada.

As I have argued elsewhere, in their struggle for self-determination, First Nations are drawn into competing images of "tradition" — of what constitutes an "authentic" identity — and into strategic battles over what actions should be taken and by whom in order to affirm the integrity of assertions of sovereignty.

The construction of an aboriginal identity has been achieved through a variety of processes at both local and national levels, all of which arise out of complex tensions among aboriginal peoples, their immediate neighbours, and the nation-state. This construction of aboriginal identity entails the classical development of ethnicity, by which is meant not only the existence of a people with a distinct language, cultural system, and unique social institutions, but more importantly, a community conscious of its need to construct an historical record, aware of communities hostile to it, and determined to defend its common interest. In fact, without an historical record to give meaning to the present reality, an autonomous aboriginal sense of being cannot be maintained. An historical record, moreover, constitutes a source of power from which an ethnic identity can be defended against domination by foreign cultural values.

Customary law, because it speaks to the past in the interests of the present, provides symbolic material of identity. Customary legal orders are, like all legal orders, a discourse or public conversation that

⁷ Gillian Cowlshaw, "The Materials for Identity Construction," *Past and Present: The Construction of Aboriginality*, Jeremy R. Beckett, ed. (Canberra: Aboriginal Studies Press, 1988); John Comaroff and Jean Comaroff, *Ethnography and the Historical Imagination*, (Boulder: Westview Press, 1992).

tells people how to think of themselves. To challenge a legal discourse is to challenge how individuals conceptualize themselves and their social order. To create a new or alternative discourse is to generate alternative self-conceptions. This new self-awareness, moreover, not only alters a sense of self vis-à-vis the dominant society — we are an independent nation with laws existing from time immemorial — it alters perceptions of internal social relations. Family relations, for example, that have emerged through generations of practice, that may be viewed as a social or moral obligation, and that may be appreciated as a choice in a series of options, take on a new meaning. That is, by law you are (or are not) my mother; by law I am (am not) your superior with clearly defined obligations and privileges. And furthermore, these redefined legal relationships are known not only to those who practise them but as well to the “outside” whose laws will now honour them as legal entities. Thus a key issue for First Nations women is what is represented as customary law as opposed to what is represented as less binding social practices, and what this representation implies for women’s daily lives. Stated otherwise, we must ask, “Who speaks and to whom and for whom do they speak?”

CASIMEL AND CASIMEL V. INSURANCE CORPORATION OF BRITISH COLUMBIA

The Casimels took their case to the Supreme Court of British Columbia at a historically significant moment. Their neighbours to the west, the Gitksan Wet’suwet’en, were before the Supreme Court arguing for recognition of their aboriginal title to land and resources and for understanding of their traditional order of governance, a matrilineal clan system in which hereditary chiefs held clearly defined rights to resources and obligations to manage these resources in the people’s collective interests. The political association of the Yinka Dene, the Carrier Sekani Tribal Council, to which the Stelat’en Nation belonged, was following this court case closely and simultaneously making its own efforts to resolve issues of aboriginal entitlement.

The ramifications of these political and legal struggles included an ever-expanding consciousness of colonization among grassroots communities; individuals hitherto alienated from political movements and silenced by their own experiences of colonization realized a new source of pride and a growing confidence in confronting their history of oppression. The Casimels’ court challenge provided a local catalyst

for expression of self-determination. Political leaders had long argued that self-governance was a return to the past; that the laws of ancestors could and should operate independently of "white man's courts." The situation of the elderly Casimels offered an opportunity to redress a personal wrong and to assert principles of customary law. As such, the Casimels and their advocates were speaking on behalf of all Yinka Dene in their representation of customary legal principles as well as on behalf of their immediate community. Simultaneously, those involved in the case spoke to and for their community before an audience of empowered, privileged representatives of the dominant legal order.

Inasmuch as customary law speaks to national or ethnic identity, the Casimel case can be understood as a statement regarding Yinka Dene identity and history. In arguing their case, the Casimels and their advocates described social and legal principles upon which Yinka Dene identity rests. As has been recorded since the nineteenth century, kinship ties are the community's foundation. Yinka Dene Nations were united with their neighbours to the west in the clan/potlatch complex, an intricate relationship of trade, political alliances, ceremonial exchange, and intermarriage. Social identity was marked by membership in a matrilineal clan; these ties determined rights to resources and trading routes. Property rights and access to positions of prominence remained within a clan; for example, a man commonly inherited property and rights from an elder brother or from one of his mother's brothers. Matrilineal descent still takes priority over paternal ties; each individual is born into and remains through life a member of her/his mother's clan.⁸

A father's family and clan are obliged to offer social and economic support to a person throughout her/his life, but do not carry the same responsibilities. Orphans, for example, remain with the "mother's people" whenever possible; if the mother's immediate kin cannot adopt the child, other clan members are likely to do so. When this is not possible, the father or his clan will do so. In fact, the significance

⁸ For a discussion of nineteenth century kinship organization, see: A.G. Morice, "The Western Denes: Their Manners and Customs," *Proceedings of the Royal Canadian Institute*, 3rd Series, Vol. III, (1890); "The Great Dene Race," *Anthropos*, Vol. I, (1906). For discussions of contemporary matrilineality see Jo-Anne Fiske, "Carrier Women and the Politics of Mothering," *From the Periphery: Essays on Women in British Columbia*, Gillian Creese and Veronica Strong-Boag, eds. (Vancouver: Press Gang, 1992); "Gender and the Paradox of Residential Education in Carrier Society," *Women and Education: A Canadian Perspective*, 2nd edition; Jane Gaskell and Arlene McLaren, eds. (Edmonton: Detsilig Enterprises Ltd. 1991); Douglas R. Hudson, *The Historical Determinants of Carrier Social Organization: A Study of Northwest Athabaskan Matriliney* (unpublished MA thesis, McMaster University, 1972).

of the father's clan was itself asserted before the B.C. Supreme Court in 1990, when the Wet'suwet'en (a Nation closely tied to Yinka Dene), successfully argued that a father's clan be given guardianship of five children when their mother and her clan could not provide for them.⁹ Moreover, family is never understood as a nuclear patriarchal unit or as a unit of mother/children. Rather, family is inevitably thought of as an extended unit of minimally three generations comprising grandparents, parents, parents' siblings, etc.

Adoption practices that traditionally arose (and continue to arise) from this kinship structure do not appear to have been delineated in a narrow fashion. Traditional tales are replete with stories of orphans raised by "grandmother" or "old woman."¹⁰ Elders recall the varied experiences of their youth, which was marked by successive waves of deadly epidemics. Following the 1918 influenza epidemic, children were adopted by maternal grandparents, mothers' sisters, and maternal cousins. Transformation of the economy from a mix of trapping and fishing to one of migratory wage labour also led to adoptions as young adults left their home region to earn wages.¹¹

In presenting their case to the court, the Casimels were obliged to prove that their family relations were consistent with traditions and were recognized as such by community elders. They did so by invoking oral history. They led evidence based on elders' lived experiences as adopted children and on elders' knowledge gained from their ancestors, who of course had memories extending back to periods of early white settlement. This history reasserted what is taken for granted as traditional family organization by Yinka Dene Nations, and which in fact had been recognized as such in another case taken before the B.C. Supreme Court by members of the Stellaquo Nation. In *Michell v. Dennis and Dennis* (1984) the plaintiff brought a claim under the Family Compensation Act, R.S.B.C. 1979 c.120. In this instance the child, the plaintiff (the adopted mother), and the birth mother were all members of the Yinka Dene Nation of Stellat'en. The plaintiff argued before the court that, under Yinka Dene law, a woman's sister is obliged to take responsibility for children the mother

⁹ This case is not reported by the court because no contrary arguments were raised against the Wet'suwet'en. A discussion of the case and its significance can be found in Jo-Anne Fiske and Claudine de Herlihy, "Courting Customs."

¹⁰ Diamond Jenness, "Myths of the Carrier Indians of British Columbia," *Journal of American Folklore* 47 (1934):97-257.

¹¹ Jo-Anne Fiske, *And Then We Prayed Again: Carrier Women, Colonization, and Mission Schools* (unpublished MA Thesis, University of British Columbia, 1981). For descriptions of more recent adoption practices see Bridget Moran, *Judgement at Stoney Creek* (Vancouver: Tillicum Library, 1990).

is unable to care for. This responsibility is recognized as an adoption by the sister, and from the time the responsibility is assumed, the community at large recognizes the mother's sister and the child(ren) as constituting a mother/child(ren) bond. As in the Casimel case, evidence was based on oral history of adoption experiences and on knowledge of oral traditions of precontact family relations. (In this case the court did not question customary adoption practices but refused to recognize them as legally binding, arguing that customary obligations were ones of moral not legal responsibility.)

As the Casimel case makes clear, recognition of a parent/child relationship relies upon the quality of social relations, not upon biological ties *per se*. Ernest's parents were his parents because they were known to have behaved as such; they were dependent parents precisely because they could and did depend upon Ernest. For Ernest had not left the parental home as had his siblings (in white terms his aunts and uncles, as they were birth siblings to Mary who gave birth to him). He remained to provide for his elderly parents, sharing his income when he could and caring for them and their home. He washed dishes, purchased food, cut wood, repaired the house, and so forth so they could remain in the family home.

Articulation of the parent/child relationship between the elderly Casimels and Ernest delineated significant differences between Yinka Dene law and culture and that of Euro-Canada in a series of dichotomies: matrilineal ties as opposed to patrilineal; obligation of adult child for parent as opposed to parental responsibilities; priority of responsibilities over individual rights; and the extended matrilineal family as opposed to the patriarchal nuclear family. By asserting these differences of kinship, the Yinka Dene also established a second level of cultural differences: the reverence for elders and their integration into the community in contrast to the dominant society's conceptualization of "senior citizens" whose needs are met by specialized housing and social services. Moreover, what was made equally clear was the primacy of the quality of lived relationships over codifications of law; parent/child units are constituted not by legal fiat but by social acknowledgement.

In short, evoking a discourse of customary law allowed Yinka Dene to denounce colonial practices that had devalued customary legal obligations. By refusing to accept the British Columbia Supreme Court's decision, in which it was stated that customary adoption constituted a moral obligation but not a legal obligation, the Casimels were able to successfully position their family structure against the

destructive practices of the state: child apprehension, adoption by foreign parents, seclusion of elders, etc. If in fact the parents had acted within customary law, then it becomes evident that the Stelat'en, and by extension all Yinka Dene, did and continue to recognize customary laws as meaningful, compelling, and beneficial. By arguing, and having the argument recognized in court, that adoption by maternal grandparents was in accordance with customary laws, the Stelat'en were able to reassert their identity as a nation, a unique social group that has the right to and the capacity for an autonomous jurisdiction vis-à-vis family and civil law (which is not to say that the Stelat'en would limit their legal order to these two dimensions). In so doing, they evoked history and entered into the written record that history and the one which they were simultaneously creating. By evoking oral history (and ethnographic studies in support of oral history), plaintiffs transformed the very nature of their past. It has become a written record of court evidence and, hence, a record open to future subjection to the tests of truth upheld by historians and by law. It is also now a "truth narrative" against which future interpretations of customary law and the past will be tested.

Because they were eventually successful in having their claim recognized by the Court of Appeal, the Stelat'en had moved a step closer to decolonization, a step shared by all First Nations. In reaching their decision the Court of Appeal turned to a legal precedent of 9 July 1867 wherein the Quebec Superior Court examined customary marriage law and ruled that whereas the customary law in question did not violate the inherent principles of Canadian marriage law, voluntariness, permanence, and exclusivity, it would be recognized by the courts. The decision was upheld by the Quebec Queen's Bench upon appeal.¹² The B.C. Court of Appeal described the 1867 decision as "a leading case and the most remarkable authority in the field." Henceforth First Nations will again be legally empowered to regulate families and communities according to customary law and to have those laws accorded the same dignity as the laws of the provinces and the country.

Viewed from this angle, the Casimel case affirms what is now a taken-for-granted feature of customary law: law provides symbolic materials of identity that can be employed as political resources and as boundary markers between ethnic communities. As a site of struggle against enduring colonization of identity, the case shows how customary law is embedded in the discursive processes of historic thought and

¹² *Connolly v. Woolrich and Johnson*, Quebec Superior Court, July 1867.

how its invocation creates a counterdiscourse to domination by foreign cultural values. At the same time it challenges the ways in which an aboriginal population thinks of itself and its contemporary social relations within its own community and between itself and the dominant society. As Cowlshaw has stated, construction of customary law is “one strategy for powerless groups . . . to create their own area of dignity.” It is a discursive process within the construction of an “oppositional culture . . . the active creation and protection of this arena of social meaning in an embattled situation.”¹³

Given the success of the Casimel case in resolving the immediate disadvantage suffered by an elderly couple and in reinstating customary law, is it fair or meaningful to suggest that the case may not empower First Nations women?

YINKA DENE WOMEN AND LEGAL CUSTOM

Despite the implications of the decision, it was not reported by community leadership throughout the Yinka Dene Nations. When the Court of Appeal’s decision gradually became known to them, Yinka Dene women expressed mixed reactions. A series of interviews and informal conversations with ten Yinka Dene women from three different communities and with Nat’oot’en women, all of which were initiated in the course of research, revealed the complexity of the issues raised by the court.¹⁴ At first, each of the ten women focused her attention on personal experiences with adoption practices. Three women reared by adopting grandparents spoke of the mixed emotions they felt as they watched their birth mother raise the rest of her children. Women recalled the conflicts created within family units as they reached adulthood and came to accept responsibility for aging (adoptive) parents while their own birth mother and her siblings did not. In fact, such was the case with Ernest; he cared for his parents when their other children could not. As the youngest, he was expected to do so — not an uncommon expectation of Yinka Dene families.

Another young woman spoke of her “two mothers”; adopted at birth by her birth mother’s cousin, she calls her birth mother by her

¹³ Gillian Cowlshaw, “The Materials for Identity Construction,” 97.

¹⁴ At the time of these interviews, I was engaged in researching issues of customary law and the implications of aboriginal justice systems for women. Working with Betty Patrick and hereditary chiefs Gordon Joseph and Ted Williams, all of the Office of Hereditary Chiefs, Nat’oot’en Nation (Lake Babine Band), I was engaged in recording principles of customary laws and the traditional justice order of the potlatching system. The Casimel decision was rendered at the onset of this research project, and given its implications led to interviews drawn upon here.

given name, her adoptive mother "Mom," and all the children of her birth mother her siblings. She takes pleasure in an extraordinarily close relationship with her mother while retaining warm friendship with the birth mother. For her, adoption has unequivocally offered love and maternal care and she carries no sadness or hurt at the mothers' joint decision to raise her in this way.

Traditional adoption practices were questioned by three young women who are struggling with the heavy demands of motherhood, waged labour, and subsistence production. The romance associated with nuclear families and companionate marriages appeals to many women. Multiple family responsibilities disrupt this conception of family life and interrogate the premises of what is and what should be appropriate family relations. In most cases of adoption, ties to the birth mother are not broken; in fact, the child adopted by the grandparents is likely to retain close ties to her siblings and may become an important care-giver to the youngest of her birth mother's family. As sister to her birth mother's siblings, her associations, and hence responsibilities, as sibling and aunt quickly multiply. Tensions naturally follow, and conflicting demands on time, money, and other resources must be balanced and understood within changing fields of significance.

Four older women, now mothers to adult children, have different concerns. Economic opportunities and obligations for them have also shifted. Whereas in the past adoption of grandchildren was so common as to be taken for granted, that is not the case today. Middle-aged grandmothers find other ways of expressing kinship obligations; they undertake wage labour, participate in community voluntary associations, hold political office, and engage in traditional subsistence activities. Many will also provide essential services outside of the reserve community; as voluntary or paid language and cultural instructors, or as representatives on regional boards, for example. Adoption of grandchildren, in particular the very young or those with special needs, conflicts with these other social obligations.

The salience of grandparent adoption is marked by ambivalence in other ways as well. In the past, and for many women today, adoption by a grandmother represented a special privilege. In the mythical foundations of Yinka Dene culture, stories of grandmothers and orphaned girls provide ideal images of special social relations, exceptional pragmatic skills, and extraordinary spiritual powers. Grandmothers who are elderly are repositories of past knowledge — keepers and teachers of tradition; the children they raise benefit in ways

children raised by young parents do not. For those who treasure foundations of traditional knowledge, this special relationship is not questioned. Two very elderly women praised the practice and referred back to their childhood when it was common and recalled that girls thus raised were especially honoured and respected for the knowledge gained from elderly parents. Nonetheless, the growing pressure to become proficient in other knowledge and skills can create conflict between (grand)parent and young child, who as she reaches adolescence or early adulthood may choose to walk a different path, seeking achievement in the world of post-secondary education, community administration, or other fields in which traditional knowledge by itself is insufficient.

Dilemmas arising from personal experience caused the younger women to question family traditions and thus to reconsider the implication and application of customary law. Their discomfort was shared in open conversation with others whose lives were not affected by customary adoption but who were concerned about the general implications of the court decision. They became uneasy when they found that traditional practices could be defined as legally binding, and particularly distressed when they realized that these definitions can emerge from individual applications to the provincial and federal courts. Not surprisingly, they asked, "Who says that is our law, and why did they do so?" None of this is to suggest that any woman felt that the Casimels and their advocates had misrepresented Yinka Dene law or that their case was either unwarranted or unjust. Rather, in seeing the far reaching consequences of a court decision, they wondered if, in fact, redress to the courts was wise and judicious. A common response was to question the right of the court to define customary rights. With pragmatic insight, three of the women quickly identified the central contradiction of the court's power: while arguing that First Nations have the right to customary regulation of family relations, the court simultaneously denied the First Nations the power to be the final authority for disputes regarding how to interpret, enforce, or adapt customary law. As one woman asserted, "If we have the right to our family law why are they telling us what it was?"

These women's questions force the issue as to whether or not taking customary laws to court does in fact create an area of dignity. For the power of the court is not lost on the general population. It is one thing to contest internal voices that assume the authority to define customary laws; it is another to dispute the authority of the bench, the power of common law grounded in precedence, and the motives and manip-

ulations of lawyers, judges, social workers, and others who, as experts and guardians of another culture's morality, presume to know what is best for First Nations women and children.

CONSTITUTIONAL PROTECTION AND PATERNALISTIC PRETENSIONS

For the first time in over a century, the Canadian legal order has inscribed customary laws as a co-existing legal code. No longer are customary laws social praxis arising from and understood within shifting historical contexts. They are now and for the future a fixed and compelling mandate. And this redefines social relations and obligations. For customary notions of obligation, duty and privilege, and of community harmony and extended family unity no longer define adoption practices; rather, adoptive relations are defined as "rights," the scope and content of which has been determined *for* the First Nations *by* the Court of Appeal. This is not a minor point. The ramifications are yet to be understood or fully felt. For the Court of Appeal has, with the stroke of a pen, and in accordance with Canadian legal conceptions, encoded obligatory and moral relationships as rights. And rights, as we all know *by* the history of litigation in common law, give rise to contestation and conflict. It is possible that if an individual feels customary legal obligations are not met, litigation may appear to be the best recourse. Moreover, the relationship between that right and the "general law" of British Columbia has also been determined. Women's family relations, in consequence, may be more constrained than liberated. Women may find themselves obliged by an outside court to enter into adoptive or other kin relations against their will. They may find themselves forced to resolve family conflict before the bench, not within their own communities under the guidance of the traditional keepers of law — elders and hereditary chiefs.

Consequences for women, however, extend beyond possible future litigation. Women's (dis)empowerment is conditional upon the course of identity politics. It is constrained by both individual and community recourse to the dominant legal order. In asserting the existence of customary law, the Casimels and their advocates were not merely seeking personal justice. They were seeking justice as lawful citizens of a distinct First Nation. The issue is the co-existing right to live under a distinct legal order without incurring disadvantages as citizens of the nation-state and thus suffering exclusion from the full benefits of the dominant legal order. Insofar as women have a collective voice in

defining customary laws and in directing the formulation of a written record, they are empowered. If they are excluded from these key processes, however, judicial recognition of customary law may well disadvantage them, should their culture be read against their favour.

And what are the dangers of this? Is there a real possibility of such a reading? To what extent do the external hierarchy of the judicial system and escalating appeals to the Supreme Court of Canada offer likely protection? There are very real dangers in this strategy.¹⁵ First, as was made most apparent in Justice McEachern's response to Gitksan-Wet'suwet'en claims to aboriginal entitlement, (*Delgamuukw v. B.C.* 1990) oral histories and oral traditions are vulnerable to the tests of evidence. Meaning is metaphorically captured in a nuanced vernacular that is unfamiliar in courts of law. Not premised on notions of lineality, oral histories are not necessarily coded as chronological narratives, thus making traditional tests of time difficult. Oral histories, of course, are understood in the context of their telling and in the manner of speech of the narrator, the latter of which may also be misunderstood by the court. Moreover, not only are oral histories at risk of being construed as hearsay, they are tested against the "truth" of written histories and ethnographies. Thus McEachern professed a faith in the written words of the last century, which of course cannot be subjected to the same scrutiny regarding accuracy and contrary positions since no other records existed from that era, while expressing disbelief in the evidence deriving from oral history, which is readily evaluated against contrary positions. The records he unquestioningly accepted — journals and reports from the Hudsons' Bay Company — reflect a strong male bias, are written by individuals little concerned with routine domestic life, and by the very fact of being written reify a particular view of a moment in history.¹⁶ Taken to the courts as social practice, this slice of time may emerge as law. The impossibility of any written record accurately capturing the social context and social relations that gave rise to and made meaningful customary practice is overlooked in the determination of rights, which are now to be rendered sensible in transformed social conditions. Context and relationships give meaning to law just as law gives meaning to context and

¹⁵ This is not a new argument. For a discussion of other deficiencies of the court with respect to aboriginal claims see Eric Colvin, "Legal Process and the Resolution of Indian Claims" (Saskatoon: University of Saskatchewan Law Centre, 1981).

¹⁶ McEachern's rejection of oral history generated intense, critical responses from academics. See, for example, Michael Asch, "Errors in *Delgamuukw*: An Anthropological Perspective," *Aboriginal Title in British Columbia: Delgamuukw v. The Queen*, F. Cassidy, ed. (Lantzville: Oolichan Books and the Institute for Research on Public Policy, 1992); Geoff Sherratt, "The Court's Evidence," *Saskatchewan Law Review*, 56,2 (1992): 441-50.

social practice. Given the proclivity of the court to rely on written authority and on the expert witnesses who interpret it, we may find aboriginal women silenced and overruled in their assertions of customary law.

Second, as Nahanee cogently argues, the state has favoured men of the First Nations at the expense of women. She rightly argues that "cultural sensitivity" in the British Columbia courts does not necessarily protect women. On the contrary, it can oppress them when men advance "cultural defences" as explanations of and excuses for domestic violence and sexual crimes. Nor are women protected by parallel justice systems wherein customary laws and punishments fail either to curb male sexual violence or to offer women physical protection. In fact, she points out, cultural sensitivity of the British Columbia criminal justice system is now known to be detrimental to women, and particularly to victims of sexual violence.¹⁷

Courts are bound to the supreme law of Canada, the Canadian Charter of Rights and Freedoms. "Grand Law," as aboriginal peoples sometimes refer to their own legal orders, is subordinate to provisions of the Charter, the implications of which are unclear and hotly contested by First Nations leaders. Are collective rights threatened by individual rights? Are the collective rights asserted by women perceived to be individual rights by male politicians and within Canadian jurisprudence? Is it meaningful to assert that treaty and aboriginal rights apply equally to women and men if First Nations leadership perceives it to be otherwise? Stated otherwise, do First Nations have a customary right to gender inequality? These and other tensions divide First Nations women and men, and render judicial powers particularly problematic.¹⁸

The quest of First Nations women for secure and peaceful lives in gender-harmonious communities is not easily accommodated in the dominant legal order. Issues of gender inequality are subtle and often coded in discourses committed to women's well-being.¹⁹ Paternalistic premises shape advocacy discourses within the dominant legal order

¹⁷ Teresa Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter," *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues*, Royal Commission on Aboriginal Peoples, (Ottawa: Minister of Supply and Services, 1993): 360-62. Nahanee, a lawyer and member of the Squamish Indian Nation, cites several bodies of documents filed with the provincial and federal Ministers of Justice on Native Justice Projects and case law from Northwest Territories where Pauktuutit (Inuit Women's Association) is seeking a court challenge against Her Majesty for lenient sentencing of Inuit sex offenders.

¹⁸ Teresa Nahanee, "Dancing with a Gorilla."

¹⁹ The following is derived from six interviews, two with provincial court judges, three with lawyers, one with a member of the Attorney-General's office.

and reflect perceptions that First Nations women need protection from First Nations men, but will not achieve it unless judicial and other mandated powers disallow sexist posturing or power imbalances. The everyday judicial discourse appropriates power in the same manner as decisions of the bench; judges, not aboriginal women, determine the sphere of safety and equity. It is the external authority that assumes the right to disallow all male representation in a sentencing circle "if the case should include women."

The flow of judicial power is replicated in other levels of legal process; a federal or provincial government agency, in its own eyes at least, is mandated to operate according to preconceived notions of gender equity, leading officials to speak of "allowing" or even "requiring" women to participate on public boards and other executive bodies imposed upon First Nations by external governments. Mandated voices of authority and hierarchical processes of decision-making emulate the state, a masculinist site of power. As Catherine MacKinnon cogently asserts, "The law sees and treats women the way men see and treat women." The discourses of masculinity and law are inextricably linked, the ideals of rationality and reason are held to be the essence of both; law is masculine, and the masculine are the natural interpreters of law. As such, law is "produced under conditions of patriarchy" and reproduces the power of the patriarchal state. The socially masculine powers of the state have defined women's position to men in terms of domination, dependence, discipline, and protection — that is, within the parameters of all female subordination.²⁰

Institutional safeguards proposed by external authority in the name of custom may undermine or even obliterate existing sources of female power and protection. Intradiscursive practices of courts and ministries of corrections and attorneys-general result in reification of traditional laws as they understand them, which in turn leads to reliance on institutional authority. In the contemporary world, institutional authority is implicitly, if not explicitly, hierarchical. Assurances that women will "be represented" on public consultation panels, in sentencing circles, and on executive boards presumes that these are the legitimate venues of power and decision-making. The mere presence of bodies thus legitimated, however, may well undermine, if not eradicate, traditional, diffuse sites of power in which women gained security and authority. Centralized powers favoured by the govern-

²⁰ Catherine MacKinnon, cited by Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989): 80; Wendy Brown, "Finding the Man in the State," *Feminist Studies* 18, 1 (1992): 7-34; Jo-Anne Fiske, "Child of the State Mother of the Nation."

ment, and often legitimated by male-dominated elected band councils, usurp the authority women once held in matrilineal long houses, isolated extended families, and in the potlatch/clan system, wherein power was dispersed through a range of positions of authority based on kinship, rank, and age.²¹ Institutionalized dispute resolution undermines the flexibility inherent in oral legal codes and replaces the context and conditions of compensation (the primary principle of customary law) with the context and conditions of contestation. What results is a struggle between paternal power and female empowerment.²²

Encoded in the implications of the Canadian Charter of Rights and Freedoms is an assumed government mandate to protect certain classes of people, including women and youth. Protection reinvents paternalism; it does not, indeed many would argue cannot, envision female autonomy and authority. By reading the Casimel decision as one in which the dominant legal order is obliged to interpret customary law, external voices of authority usurp the power of women to determine what is best for themselves and for their children. This need not have been the outcome; surely the principle of co-existing legal order implicates concepts of supreme law. If indeed the dominant legal order recognizes the authority of customary law, it should resist deforming the principles inherent in it. Ministerial obligations collide with affirmations of treaty and aboriginal rights and the recognition of First Nations government. Protective paternalism fails to interrogate patriarchal powers that defined the status of aboriginal women in the Indian Act and that mandated state-emulating power prerogatives to aboriginal men. Euro-Canadian paternalism ignores the lived reality of social practice. Women were disempowered in the patriarchy of colonialism. In their struggle to regain what was lost, they are dismissed as being tainted by "foreign feminism," resented if not simply ignored by internal hierarchies.²³ In the process, women's appeals for equity and recognition of their collective rights are appropriated to the meaning of ministerial obligations.

²¹ For examples of such power systems in Northwestern British Columbia see Jo-Anne Fiske, "Carrier Women and the Politics of Mothering," "Colonization and the Decline of Status: The Tsimshian Case," *Feminist Studies*, 17,3 (1991): 509-36. For a case where such powers are now asserted see Winona Diabo and Joyce King Mitchell, "Court of Kahnawake," *Aboriginal Peoples and the Justice System*. Royal Commission on Aboriginal Peoples (Ottawa: Minister of Supply and Services, 1993).

²² Teresa Nahanee presents similar arguments in "Dancing with a Gorilla."

²³ Krosenbrink-Gelissen, *Sexual Equality as an Aboriginal Right*, 132. This theme came up repeatedly in interviews with lawyers who cautioned me against imposing my own feminism "where it didn't belong." As one stated, "The ministry has to apply the constitution and that doesn't mean we have to make them [aboriginal women] feminists. It's not in their culture."

CONCLUSION

Law has the power to define and disqualify.²⁴ Law not only presents itself as a solution, it defines how we think about cultural prerogatives and who can define and judge the impact of them. Because law is a discourse that refutes and defeats alternative discourses, there are no guarantees that the positive rights eventually confirmed upon the Casimels (both of whom passed away in a senior citizens' care facility before financial compensation was possible) will be enjoyed by other plaintiffs. The resort to courts is problematic. It demands discursive transformation of customary principles of obligations and harmony into the language, methods, and procedures of the dominant legal order. Legal process demands that value judgements be placed upon custom that are extraneous to the custom and the context in which it operates. In this way, the powers of law today replicate the powers and posturing of the colonial authorities of the past. In stating that customary law must be considered in relationship to "the workings of the general law of B.C.," the chief justice exhumed a nineteenth century colonial ghost, Indian Agent J. Vowell, who stated in 1881,

With regard to [the] question as to whether Indian law or custom prevails. . . , I have to state that this department, so far, has not attempted to interfere with alleged Indian regulations or customs. . . . It must be apparent however that the moment they conflict with the laws of the Province or Dominion these customs or assumed rights cannot continue or have approval, and Indians must submit to other, and it is hoped, superior arrangements for their well being instead.²⁵

²⁴ Carol Smart, *Feminism and the Power of Law*, 164.

²⁵ J. Vowell, Indian Superintendent to Reverend R. H. Smith, 19 April 1881, BCARS, ADD MSS 2644, V.7