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Indigenous Blockades and the Power to Speak the Law: From Settler Colonialism to Indigenous Resurgence

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INDIGENOUS BLOCKADES AND THE POWER TO SPEAK THE LAW:
FROM SETTLER COLONIALISM TO INDIGENOUS RESURGENCE

CHRISTOPHER ALBINATI

A THESIS SUBMITTED TO
THE FACULTY OF GRADUATE STUDIES
IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
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Abstract

This thesis traces tensions between pluralism, elimination and resistance in the centuries-old narrative underlying the uncertain legal foundations of Crown sovereignty in the territory now known as Canada. The first half of the work applies the emerging literature of settler colonialism to a close reading of a selection of leading scholarship on Aboriginal rights jurisprudence to identify whether the Canadian courts are reproducing elements of settler colonialism in their decisions. This review raises serious doubts about the legitimacy of Canadian courts to impartially and fairly resolve disputes involving Indigenous peoples. It also narrows the legal issue in such cases to assessing the legitimacy of competing claims to jurisdiction between the settler colonial state and Indigenous peoples. The second half of this work then draws on the literature of Indigenous resurgence, blockades, jurisdiction and the rule of law to construct a framework for examining juridical sites where conflicting assertions of Indigenous and settler colonial authority are a dispositive factual and/or legal issue. This framework is used to analyze a selection of leading Indigenous blockades cases as a way of further understanding the challenges that courts and Indigenous peoples face in seeking to decolonize law and restore a pluralistic legal order.

This thesis is dedicated to Arthur Manuel, Secwepemc leader, author, activist, legal warrior, friend and mentor, whose stories inspired me to go to law school, whose conversations helped to keep me from leaving law school, whose famous big breakfast made sure I crossed the stage for my law degree on a full belly, and whose many words of wisdom and guidance over the years since have filled my mind and heart as I pursue this work and learn more about living and practicing “solidarity in the struggle.”

Acknowledgements

I picked up the kernel of this thesis almost ten years ago while working as a news producer at CKUT 90.3 FM in Montréal. It was an energizing time of organizing against the 2010 Olympics and G8/20 meetings. I was inspired then by stories about Arthur Manuel and Defenders of the Land, about the resistance of the Secwepemc and the Algonquins of Barriere Lake and about the connection between blockades and Indigenous law. These stories awoke in me questions, lessons, personal reflections and obligations that have led me to pursue a commitment to solidarity in the struggle that has taken me to many places, to meet many people and to hear many more stories about resistance, all of which have shaped the kernel of my work as it continues to grow.

First and foremost, I acknowledge the Secwepemc, Musqueam, Squamish, Tsleil-Waututh, Anishinaabeg and Haudenosaunee, on whose respective territories that I and my young family have lived while developing this thesis. I am grateful to Dayna Scott and Andrée Boisselle, my supervisors, for their patience, insight, feedback and encouragement throughout the writing process. I am excited to have their guidance as I follow the next phase of this work into the PhD. I also thank Sonia Lawrence, my program director and defense committee chair, for her guidance, support and insightful questions and comments during my defense process. I thank Ravi de Costa, the external member, for challenging me with tough and informed questions during my defense.

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Much of the thinking underlying this thesis has been influenced, challenged and shaped by numerous conversations and encounters with scholars whom I aspire each day in this work to call my contemporaries, key among them are: Glen Coulthard, Kent McNeil, Shiri Pasternak, Russ Diabo, Aaron Mills, Emma Feltes, John Borrows, Brian Noble, Leanne Simpson, Val Napoleon, Irina Ceric and Sharon Mascher. I thank Dave Nahwegahbow, Dianne Corbiere, Scott Robertson and all my coworkers at Nahwegahbow Corbiere for their ongoing support and encouragement in my graduate work. I also thank the Law Foundation of British Columbia for supporting this work through a Graduate Fellowship.

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Finally, it is impossible to capture in words the unpayable debt of gratitude that I have for my family whose support, inspiration and sacrifice throughout this work has made this thesis possible: To my Lola, thank you for making me realize that one is never too old to awaken to the struggle of your people, for sharing your stories, culture and language of the Isinay and for setting me on a lifelong journey to reclaim that part of my identity. Thank you to my parents and my siblings for all of the ways that you have sharpened the skills that have made me who I am.

And lastly, to my partner and best friend Carolyn, and our beautiful kids Theo, Uma and [TBD ☺]. Thank you for all the big and little things, notes, drawings, inspirations, smiles, interruptions, sacrifices, breaks, hugs and kisses every single day. You are my world.

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Introduction: From Settler Colonialism to Indigenous Resurgence

For almost four decades graduate students in law¹ and legal scholars have turned their minds towards Canada's uncertain legal foundations and its destructive impact on the existing relationships that Indigenous peoples have with their land.² This impressive span of study makes the problem seem relatively nascent when we include the commissions of inquiry from the last three centuries³ which shows that this problem predates Confederation under the July 1, 1867

¹ Of the select theses and dissertations that I have reviewed which deal mainly with the question of Canada's claim to sovereignty through discovery, see: Brian Slattery, *The Land Rights of Indigenous Canadian Peoples, As Affected by the Crown's Acquisition of their Territories* (D. Phil Thesis, Oxford University, 1979), [Slattery, PhD]; John Borrows, *Traditional Use, Treaties and Land Title Settlements: A Legal History of the Anishnabe of Manitoulin Island* (PhD Dissertation, Osgoode Hall Law School, 1994), [Borrows, PhD]; Mei Lin NG, *Convenient Illusions: A Consideration of Sovereignty and the Aboriginal Right of Self-Government* (LLM Thesis, Osgoode Hall Law School, 1994).

² By relationships with land I mean more than just legal rights and obligations. To cite just a select few from leading and emerging scholars, see e.g.: Brian Slattery, "The Hidden Constitution: Aboriginal Rights in Canada" (1984) 32:2 Am J Comp L 361, [Slattery, Hidden]; ---, "Understanding Aboriginal Rights" (1987) 66 Can Bar Rev 727, [Slattery, Understanding]; ---, "The Organic Constitution: Aboriginal Peoples and the Evolution of Canada" (1996) 34 Osgoode Hall LJ 101; John Borrows, "(Ab)Originalism and Canada's Constitution" (2012) 58 SCLR (2d) 351, [Borrows, (Ab)Originalism]; ---, *Freedom & Indigenous Constitutionalism* (Toronto: UTP, 2016), [Borrows, Freedom]; ---, *Canada's Indigenous Constitution* (Toronto: UTP, 2010), [Borrows, Constitution]; ---, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: UTP, 2002), [Borrows, Recovering]; ---, "The Durability of Terra Nullius: *Tsilhqot'in Nation v British Columbia*" (2015) UBC L Rev 701, [Borrows, Tsilhqot'in]; ---, "Sovereignty's Alchemy: An Analysis of *Delgamuukw v British Columbia*" (1999) 37:3 Osgoode Hall LJ 537, [Borrows, Alchemy]; ---, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 UBC L Rev 1; Kent McNeil, "Sovereignty and Indigenous Peoples in North America" (2016) 22:2 UC Davis J Intl L & Pol'y 82, [McNeil, Sovereignty]; ---, "The Decolonization of Canada: Moving Toward Recognition of Aboriginal Governments" (1994) 7:1 Western Legal History 113, [McNeil, Decolonization]; ---, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation, and Judicial Discretion" (2001-2002) 33 Ottawa L Rev 301, [McNeil, Extinguishment]; Hamar Foster, "Forgotten Arguments: Aboriginal Title and Sovereignty" (1991) 1 Manitoba LJ 343, [Foster]; Mark D. Walters, "Brightening the Covenant Chain: Aboriginal Treaty Meanings in Law and History After Marshall" (2001) 24 Dalhousie LJ 75, [Walters, Covenant Chain]; ---, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill LJ 711, [Walters, Golden Thread]; Felix Hoehn, *Reconciling Sovereignties: Aboriginal Nations and Canada* (Saskatoon: Native Law Centre, 2012), [Hoehn]; Patrick Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill LJ 382; Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 CJLS 145. [Pasternak, Jurisdiction]; and Janna Promislow, "Treaties in History and Law" (2014) 47:3 UBC Law Rev 1085, [Promislow].

³ For a concise summary of the earlier commissions in RCAP, see: Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, vol 2 Restructuring the Relationship* (Ottawa: Supply and Services, 1996) at 246-249, [RCAP]; Province of Canada, Legislative Assembly, "Report on the Affairs of the Indians in Canada, Part I: Commission from Sir Charles Bagot to Rawson William Rawson et al, 10 October 1842" in *Sessional Papers*, Appendix EEE (1844-45), Appendix EEE, [Bagot Report]; Province of Canada, Legislative Assembly, "Report on the Affairs of the Indians of Canada, laid before the Legislative Assembly, 20th March 1845" in *Sessional Papers*, Appendix T (1847); Province of Canada, Legislative Assembly, "Report of the Special Commissioners appointed on the 8th of September, 1856 to Investigate Indian Affairs in Canada" in

enactment of the *British North America Act*⁴ that marks Canada's official birthday. While the landscape of this problem has been and continues to be well charted, the problem effectively remains unchanged: Canada's legal and political systems are built on, and maintained by, deeply racist ideas and this directly results in the perpetual impoverishment of Indigenous peoples.

While there are many Indigenous voices, academic and activist alike, that routinely expose Canada's colonial project and the deep structural harm it is causing Indigenous peoples; for me, Arthur Manuel, a Secwepemc author, activist and political leader, is one voice that stands out for his ability to simplify what is a very complex problem.⁵ In a recent essay titled "Are You A Canadian?" Manuel addressed the upcoming celebration of Canada's 150th birthday writing "it is time for us to decide if we want to continue to be colonized peoples or if we want to seek self-determination. We have to face the fact that Canada is a settler state that was created by Great Britain to take over our Indigenous territories for use and benefit of Canada."⁶ Manuel's work (inherited from his father Grand Chief George Manuel⁷) locally and at the international level provides a jarring juxtaposition to the sense of pride that most Canadians have in themselves⁸ and

Sessional Papers, No. 21 (1858).). See also: Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada* (Ottawa: TRC, 2015), [TRC, Summary].

⁴ *British North America Act, 1867*, RSC 1985, app II, no 5.

⁵ Arthur Manuel & Grand Chief Ronald M. Derrickson, *Unsettling Canada: A National Wake-up Call* (Toronto: Between the Lines, 2015), [Manuel, Unsettling]

⁶ Arthur Manuel, "Are You A Canadian?", (August-December 2016) *First Nations Strategic Bulletin* at 1-4, online: <http://www.mediacoop.ca/sites/mediacoop.ca/files2/mc/fnsb_aug_dec_16.pdf>, [Manuel, Are you a Canadian].

⁷ George Manuel and Michael Posluns, *The Fourth World: An Indian Reality*, (New York: The Free Press, 1974) [Manuel and Posluns]. (Grand Chief George Manuel's work not only resulted in the inclusion of Aboriginal and Treaty rights into s. 35(1) of the *Constitution Act, 1982*, but also formed the groundwork for the World Council of Indigenous Peoples, an international community that would eventually result in the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 (Annex), UNGAOR, 61st Sess, Supp No 49, UN Doc A/61/49 (2008) 15. [UNDRIP]. See: Peter McFarlane, *Brotherhood to Nationhood: George Manuel and the Making of the Modern Indian Movement* (Toronto: Between the Lines, 1993), [McFarlane]).

⁸ Maire Sinha, *Canadian Identity, 2013* (Ottawa: Statistics Canada, 2013), online: <<http://www.statcan.gc.ca/pub/89-652-x/89-652-x2015005-eng.htm>>.

the broader global perception of Canada as a welcoming multicultural society.⁹ What Manuel captures in his essay is an aspect of what it means to be “a Canadian” when we take an honest look in the mirror and are faced with an unsettling reflection of our colonized reality that is all too often obscured from our normative frame of view. Perhaps because of this, Manuel defines colonization in a straightforward way, writing:

Colonization is a complex relationship but simple to understand if you know that dispossession, dependency and oppression are the consequences that it is designed to produce between the colonizer and the colonized. ...the moment you dispossess someone of their land and make him or her dependent upon the colonizer, you create a person willing to fight to be free and independent again. In this way, colonialism is against world peace.¹⁰

By distilling colonization to what it reproduces, Manuel’s direct connection between the assertion of colonial authority to steal Indigenous lands and the inevitable resistance which results, frames the central problematic of this thesis and the pattern it sets out to identify.

Broadly this thesis situates the literatures of settler colonialism, decolonization and Indigenous resurgence within an analysis of the role of the courts in adjudicating cases involving the rights of Indigenous peoples. The specific question I ask is whether the courts are reproducing the settler colonial logic of elimination when resolving disputes involving Indigenous blockades. The purpose for analyzing blockades cases is that they provide a unique and momentary record of the ongoing struggle between Indigenous peoples and the settler colonial state over sovereignty and jurisdiction. I find these records are unique for how the voices of both the settler colonial state and the Indigenous peoples are represented in them. Thus, on the one hand, they are exclusively written by judges exercising their power to speak the law on behalf of a settler colonial state which has unilaterally assumed the exclusive authority to control, own and govern lands within the

⁹ Daniel Schwartz, “How Canada is perceived around the world” *CBC News* (1 July 2015), online: <<http://www.cbc.ca/news/canada/how-canada-is-perceived-around-the-world-1.3132343>>.

¹⁰ *Ibid.*

territorial boundaries of the state of Canada. On the other hand, the voice of Indigenous peoples in these decisions are directly contesting the colonial state's assumption of authority and control over their lands and resources. This presents an immediate conflict for a judge tasked with upholding both the authority of the settler colonial state and the rule of law. By analyzing the judicial decision through a rule of law lens, I suggest that we can reach some conclusions about the limitations of the courts as legitimate adjudicators over the claims to authority made by Indigenous peoples. Further to this, by selecting blockades cases which were peripheral to leading Aboriginal title and rights cases, we uncover an underlying demand by Indigenous peoples for sovereignty and jurisdiction in those cases. In doing so, we bring to light a clearer picture of how the logic of settler colonialism is being reproduced in Aboriginal jurisprudence. This deepens the problematic of reconciling sovereignties that has become the leading topic for legal scholars. However, this also reveals the necessary role that Indigenous resurgence, and the direct assertion and exercising of Indigenous law on the ground, must play in decolonizing law.

In Chapter 1, I begin by defining settler colonialism. In Chapter 2, I examine a selection of Canada's earlier commissions and the literature on Aboriginal rights jurisprudence. In Chapter 3, I construct a frame of analysis using jurisdiction, rule of law and the literature on Indigenous resurgence and blockades. In Chapter 4, I set out to determine whether the pattern of settler colonialism is being reproduced in a selection of the leading Indigenous blockades cases. In my conclusion, I discuss my findings and raise a key question that I believe will require community-based fieldwork to answer. I suggest that seeking to answer this question through the blockades context will contribute to the emergent discussions currently taking place in the research into the resurgence of Indigenous law and authority grounded in relationships with the land, as opposed to a racist assumption of sovereignty and entitlement transplanted centuries ago.

Chapter 1: Settler Colonialism: An Emerging Pathology of Violence

From the outset, it is useful to make clear that the study of settler colonialism is much newer than the legal scholarship on Aboriginal rights jurisprudence. It was relatively recently in 2010 that Lorenzo Veracini traced the theoretical emergence of the field in which he pointed to Patrick Wolfe's 1998 book, *Settler Colonialism and the Transformation of Anthropology* as providing its "extrication" moment from colonial studies and in turn giving rise to the need for "the development of a dedicated interpretive field."¹¹ Thus, in the context of Canadian scholarship, while it is described as an emerging, but "dedicated field of inquiry"¹², there is a growing body of scholarship that incorporates settler colonialism to analyze many of the techniques that Canada is deploying to address its fundamental problem.¹³ Based on my research to date I have not yet uncovered any dedicated legal scholarship that directly employs the lens of settler colonialism to an analysis of Aboriginal rights jurisprudence¹⁴ and in particular the decisions of judges in dealing with Indigenous blockades. This is what I intend to do in this thesis.

¹¹ Lorenzo Veracini, *Settler Colonialism: A Theoretical Overview* (New York: Palgrave Macmillan, 2010) at 9, [Veracini]. (In marking the sudden passing of Patrick Wolfe in 2016, Veracini writes in the obituary that Wolfe's seminal 1998 work in defining settler colonialism was something of an unforeseen bonus that emerged from focusing on the history of Australian anthropology. This provides an anecdotal lesson in the approaches required to uncover and expose the multitude of ways in which these patterns of violence and oppression can remain hidden. See: Lorenzo Veracini, "Obituary: Patrick Wolfe (1949-2016)" (2016) 6:3 *Settler Colonial Studies* 189-90, [Veracini, Obit].)

¹² Shiri Pasternak, *Jurisdiction and Settler Colonialism: The Algonquins of Barriere Lake Against the Federal Land Claims Policy* (PhD Thesis, University of Toronto Department of Geography, 2013) at 5, [Pasternak, PhD].

¹³ Of the select works that I have reviewed closely and have informed the shape of this work, see e.g.: Pasternak, PhD, *ibid*; Glen Coulthard, *Red Skin White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), [Coulthard]; and, Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham and London: Duke University Press, 2014), [A. Simpson].

¹⁴ A possible exception to this is the political theorist Michael McCrossan's analysis of "the discursive relations between members of the judiciary and legal counsel representing Indigenous peoples" in the Aboriginal title case of *Delgamuukw v British Columbia*, [1997] 3 SCR 1110, [Delgamuukw]. McCrossan also suggests that there is a similar gap in the legal scholarship on Aboriginal jurisprudence that has yet to explain the problematic of Crown sovereignty as Canada's legal foundation. See: Michael McCrossan, "Contaminating and Collapsing Indigenous Space: Judicial Narratives of Canadian Territoriality" (2015) 5:1 *Settler Colonial Studies* 20-39, [McCrossan].

I. What is Settler Colonialism?

According to Lorenzo Veracini, settler colonialism as a distinct form of colonialism has been discussed by scholars going back as far as the work of Darwin, Marx and Engels in the nineteenth century.¹⁵ In tracing the emergence of settler colonialism as a “subset category within colonialism” to being “understood as an antitype category,” Veracini acknowledges Patrick Wolfe’s history of anthropology in Australia for providing the critical turn.¹⁶

Wolfe’s work sets out three key elements that define settler colonialism: structure or structural characteristic, land or territoriality (access to land), and a logic of elimination which informs a range of practices.¹⁷ The first two elements serve to explain replacement as settler colonialism’s primary drive, as Wolfe puts it “The determination 'settler-colonial state' is Australian society's *primary structural characteristic* rather than merely a statement about its origins. The primary object of settler-colonization is the land itself...a winner-take-all project whose dominant feature is not exploitation but replacement.”¹⁸ In his later work defining what he calls the “logic of elimination” I see the separate notions of “land itself” and the “winner-take all project” collapsing into the irreducible element of “access to territory” or “territoriality”, as Wolfe puts it “to get in the way of settler colonization, all the native has to do is stay at home. Whatever settlers may say—and they generally have a lot to say—the primary motive for elimination is not race (or religion, ethnicity, grade of civilization, etc.) but access to territory. Territoriality is settler colonialism’s specific, irreducible element.”¹⁹ Wolfe’s distinction between territoriality and race

¹⁵ Veracini, *supra* note 11 at 1-2.

¹⁶ *Ibid* at 9.

¹⁷ Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London & New York: Cassell, 1999) at 163, [Wolfe, Settler Colonialism]; ---, “Settler-Colonialism and the Elimination of the Native” (2006) 8:4 J Genocide Research 387 at 388, [Wolfe, Elimination].

¹⁸ Wolfe, Settler Colonialism, *ibid*.

¹⁹ Wolfe, Elimination, at 388. (Citing: Deborah Bird Rose, *Hidden Histories: Black Stories from Victoria River Downs, Humbert River and Wave Hill Stations* (Canberra: Aboriginal Studies Press 1991) at 46.).

as driving the logic of elimination raises profound questions for me from a legal perspective, for it disturbs a prevailing view that the colonial state's fundamental characteristic is racism, which is widely adopted in regards to colonialism's fundamental legal doctrines of discovery and *terra nullius*.²⁰ As I read it, Wolfe's distinction does not remove racism as a feature of colonialism, or render it irrelevant. Rather, it suggests that racism is a rationalization that develops when elimination and access to territory are made the primary objective. To understand this better, Wolfe describes the logic of settler colonialism as "a sustained institutional tendency to eliminate the Indigenous population [which] informs a range of historical practices that might otherwise appear distinct—invasion is a structure not an event."²¹ By describing the logic of elimination as the source of practices that a settler or settler colonial state deploys, I think it makes sense to see racism as a practice of elimination not as the driving logic or justification behind settler colonialism. This distinction is clearer in the negative/positive dimensions and examples of practices that Wolfe describes:

[S]ettler colonialism has both negative and positive dimensions. Negatively, it strives for the dissolution of native societies. Positively, it erects a new colonial society on the expropriated land base... The positive outcomes of the logic of elimination can include officially encouraged miscegenation, the breaking-down of native title into alienable individual freeholds, native citizenship, child abduction, religious conversion, resocialization in total institutions such as missions or boarding schools, and a whole range of cognate biocultural assimilations. All these

²⁰ See e.g.: Lindsay Robertson, *Conquest by Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (Oxford: OUP, 2005); Robert J. Miller, Jacinta Ruru, Larissa Behrendt and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies*, (Oxford/New York: Oxford University Press, 2012); Robert J. Miller, "The Future of International Law in Indigenous Affairs: The Doctrine of Discovery, the United Nations, and the Organization of American States" (2011) 15 *Lewis & Clark L Rev* 847; and Tonya Gonnella Frichner, Special Rapporteur Permanent Forum on Indigenous Issues, *Impact on Indigenous Peoples of the International Legal construct known as the Doctrine of Discovery, which has served as the Foundation of the Violation of their Human Rights*, Preliminary Study, UNECOSOCOR, 2010, UN Doc E/C19/2010/13), online: <www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.12%20EN.pdf>.

²¹ Wolfe, *Settler Colonialism*, *supra* note 17 at 163.

strategies, including frontier homicide, are characteristic of settler colonialism. ...
Settler colonialism destroys to replace.²²

Thus, while it is possible to say that racism is a prominent characteristic of each of these practices or strategies if they were looked at separately, when looked at together there is more coherence, I can see how they could be viewed as practices of an overall logic of elimination and territoriality.

Other scholars have since defined settler colonialism in ways that I think have expanded on Wolfe's initial three elements. One of these is Dene scholar and political theorist Glen Coulthard who frames settler colonialism as a relationship "characterized by a particular form of *domination*... where power—in this case, interrelated discursive and nondiscursive facets of economic, gendered, racial, and state power—has been structured into a relatively secure or sedimented set of hierarchical social relations that continue to facilitate the *dispossession* of Indigenous peoples of their lands and self-determining authority."²³ Notably, each of Wolfe's three elements are contained in here, but what Coulthard provides us with is an expanded understanding of the structure as a power dynamic, as he puts it "the subjective and *structural composition* of settler-colonial power."²⁴ Another prominent expansion on this power dynamic of settler colonial relations comes from Eve Tuck and K. Wayne Yang who give settler colonialism a suitable shorthand; violence, and one that operates on multiple layers, as they write "the disruption of Indigenous relationships to land represents a profound epistemic, ontological, cosmological violence. This violence is not temporally contained in the arrival of the settler but is reasserted each day of occupation."²⁵

²² Wolfe, Elimination, *supra* note 17 at 388. (Citing: Raphaël Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress* (New York: Carnegie Endowment for International Peace, 1944) at 79).

²³ Coulthard, *supra* note 13 at 6-7. (Emphasis in the original).

²⁴ Coulthard, *ibid* at 24. (Emphasis added).

²⁵ Eve Tuck and K. Wayne Yang, "Decolonization is not a metaphor" (2012) 1:1 Decolonization: Indigeneity, Education & Society 1 at 5-6, [Tuck & Yang].

The importance of incorporating Coulthard, Tuck and Yang into defining the concept of settler colonialism for the purposes of this thesis is two-fold: First, I struggle with a limitation that I perceive in Wolfe’s use of the word “project” to characterize settler colonialism. Such a characterization seems to contradict the permanence and absence of temporality captured by the word “structure”. Further, it does not suggest the relational power dynamic of violence. This expanded definition, in my view, more accurately captures what is actually involved in putting settler colonialism into practice and eliminating Indigenous peoples from their land.

Second, this expanded definition provides us with a framework that can be applied to an analysis of social and legal practices and effects at any point in time, whether that is a historical period, or present day. This allows us to identify, by comparison over time, both the elements of the structure and the internal logic as they develop and evolve to reproduce the primary goal of elimination and replacement. When this is done, it is possible to start capturing what emerges as an element of settler innovation that is required to sustain the kind of decades and centuries long campaign against both the inevitable resistance by Indigenous peoples, as well as the introduction of new ideologies, or political and legal theories that could undermine or shut down altogether the project of settler colonialism. Thus, I see innovation as an expansion of the element of the logic of elimination that Wolfe described as a “*sustained* institutional tendency” which “*informs* a range” of practices.²⁶ This aspect of innovation helps to explain the complex array of practices that have been mapped out by the different studies reviewed below, but it also alerts us to be attentive to the fact that the settler colonial state may be engaging in new practices.

Together, these two points emphasize that settler colonialism does not merely start as a paint-by-numbers invasion and then advance steadily forward. Nor should its continuation be seen

²⁶ Wolfe, *Settler Colonialism*, *supra* note 17 at 163. (Emphasis added).

as simply an accident or by-product of the momentum of history. If settler colonialism exists today, then somebody is deliberately keeping it going through practices that should be identifiable based on their reproduction of settler colonial violence.

This is where the power dynamics and violence of settler colonialism becomes truly apparent. As Frantz Fanon writes “colonialism is not a thinking machine, nor a body endowed with reasoning faculties. It is violence in its natural state and it will only yield when confronted with greater violence.”²⁷ Fanon further connects this natural state with its articulation, as he writes “We have seen how the government’s agent uses a language of pure violence. The agent does not alleviate oppression or mask domination. He displays and demonstrates them with the clear conscience of the law enforcer, and brings violence into the homes and minds of the colonized subject.”²⁸ In reading these together, there is a tendency to ask whether there is an inconsistency in Fanon’s view that on the one hand equates colonialism with a lack of reasoning faculties, while on the other describes the colonizer as conscious and clear in their violence and makes no attempt to hide it. In reflecting on this, I find the inconsistency is removed if we read Fanon as stating that the settler is aware of his violence, but is not open to negotiating if or how he will stop. This is where the logic of elimination becomes immovable and irrational for while it has the capacity to innovate and transform, it will only use that capacity to produce and reproduce violence. Violence *is* settler colonialism and the latter does not exist without the other.

I find these aspects of logic, reasoning, consciousness, clarity and boldness are all interesting sites of discussion in the study of settler colonialism. Focusing for the moment on the

²⁷ Frantz Fanon, *Wretched of the Earth*, translated by Constance Farrington (New York: Grove Press Inc, 1963) at 61. (Note: This quote is from the original 1963 translation. The 2004 translation, which is the edition I will rely on from here on out, reads “colonialism is not a machine capable of thinking, a body endowed with reason. It is naked violence and only gives in when confronted with greater violence.” See: Frantz Fanon, *Wretched of the Earth*, translated by Richard Philcox (New York: Grove Press Inc, 1963) at 23, [Fanon, *Wretched*].).

²⁸ Fanon, *Wretched*, *ibid* at 4.

last one, the clear conscience and boldness in Fanon's description, I find that it comes up against aspects of settler guilt, obscuring and hiding that have been noted by others. For instance, in explaining why "settler colonialism as a specific formation has not yet been the subject of dedicated systematic analysis", Veracini suggested that part of the nature of settler colonialism itself is found in seeing that "the actual operation of settler colonial practices is concealed behind other occurrences."²⁹ As he puts it "the settler hides behind" many things: the sovereign coloniser, or "his labour and hardship"; and from this concealed position the settler argues that "he is not responsible for colonialism;" and that he "does not dispossess anyone;" but rather "enters a 'new, empty land to start a new life', indigenous people naturally and inevitably 'vanish'; it is not settlers that displace them... Settler colonialism obscures its own production."³⁰ The settler characteristic of hiding fits with what Tuck and Yang describe as "settler moves to innocence" which they define as "strategies or positionings that attempt to relieve the settler of feelings of guilt or responsibility without giving up land or power or privilege, without having to change much at all."³¹

Now, if we look at this point of possible contention closely, what at first appears to be a clash is, when looked at as an example of settler innovation, actually an overlap around the confirmation of the conscience of the settler and their awareness of their complicity in perpetuating violence against Indigenous peoples. Thus, where once the settler colonial state could confidently and openly act out their hate, racism and bloodlust, times have changed and the state must now find a way to pursue the same primary objective of elimination, but using a different language. In other words, I think it is worth considering that the difference between the boldness that Fanon describes in 1963 and the hiding and moves to innocence that Veracini and Tuck and Yang describe

²⁹ Veracini, *supra* note 11 at 14.

³⁰ *Ibid.*

³¹ Tuck & Yang, *supra* note 25 at 10.

50 years later, might be explained if we see the change as a product of settler innovation over time in the face of new ideologies and perspectives that have resulted in increased political and social pressures which challenge settler colonialism's logic of elimination. From this point we can posit that while the settler colonial state may be capable of reasoning and appearing to be open to negotiations, when we examine these appearances closer we may find that their primary objective of elimination remains completely intact. In other words, when we investigate and examine the practices that have sustained settler colonialism, we need to be aware that settler colonial violence is not just the stereotypical frontier homicide of Hollywood westerns, manifest destiny and Indian wars, but that it is also a language, an epistemology, an education, a religious conversion, a citizenship, an alienable freehold title, and even new legal principles.

To summarize, for the purposes of this thesis, I see settler colonialism as being defined by the following four elements: a structure of power and domination, a primary objective of territoriality or access to land, a logic of elimination that drives an innovation to develop a range of practices, technologies or rationalizations, and a violence that disrupts relationships on multiple levels. In the next section I expand on these elements by reviewing a selection of studies that investigate the range of settler practices or techniques that have been used to produce and reproduce the same effects that the theory of settler colonialism predicts.

II. Past and Present: Transforming Violence into Law, Jurisdiction and Sovereignty

For the purposes of this thesis, the studies selected for this review illustrate the ways in which violence has been transformed into settler colonial law, jurisdiction and sovereignty. I separate this selection into two groups: The first group are the studies of nineteenth century settler colonialism by Lisa Ford and Cole Harris. I selected and grouped these studies together because they emerge from different disciplines—legal history and critical geography—and they predate Lorenzo

Veracini's overview. Thus, to an extent I see them as examples of the approach that Wolfe used in 1998 to first arrive at the concept,³² which focused on the techniques used by the settlers to produce the effects we now identify as settler colonialism. This group, therefore, provides examples of identifying settler colonialism through more of an empirical approach that focuses on the technique and effects of practices from a certain period in time.

The second group are the studies of Shiri Pasternak and Glen Coulthard which have defined Canada as a settler colonial state. What distinguishes this group from the first is that they build off the explanatory power of Patrick Wolfe's defining concept and combine it with other theories and tools to analyze an existing technique or practice that is currently being used by the Canadian state. Thus, I read their studies as trying to understand and verify that the current techniques they are investigating are in fact reproducing settler colonialism *today*.

Read together, I see the temporal shift between these two groups as providing confirmation of the fundamental characterization of settler colonialism as an enduring structure of power based on, and maintained by, a logic of elimination. Further, the studies also offer a strong understanding of the tension between the contradictory objectives of settler colonialism and legal pluralism. This understanding is so strong that I would argue they confirm the two cannot coexist. Beyond this, the studies provide an array of analytical tools that allow us to identify, both in the past and the present, how settlers, and settler colonial states, reproduce violence and transform it into settler sovereignty, jurisdiction and law.

A. The Past: Settler Sovereignty and Jurisdiction on the Edge of Empire

Lisa Ford's comparative case study of early nineteenth century criminal cases in the American

³² Veracini explains this in Wolfe's obituary writing "As far as he was concerned, when he had written it, settler colonialism as a mode of domination was not the main focus. And yet, to explain the evolution of anthropology Patrick defined settler colonialism as distinct from colonialism. No one had theorised it before and in a systematic way." See: Veracini, Obit, *supra* note 11 at 189.

state of Georgia and the Australian colony of New South Wales, investigates the practices of jurisdiction and legal discourses used by the settler courts to perfect settler sovereignty and territoriality.³³ The study focuses on a historical period “suspended between empire and statehood, between local and global. It is about defining sovereignty as the order of indigenous peoples in space; a project undertaken by Anglophone settler polities around the globe between 1822 and 1847.”³⁴ Ford’s study is situated within a core tension between the older imperial order of legal pluralism and political negotiations with Indigenous peoples, and the rapacious appetite for complete and perfect territoriality demanded for by settler colonialism, as Ford writes “After 1800, plural legal practices came under pressure. Evolving global discourses of sovereignty combined with new technologies of governance brought new people and new ideas to settler peripheries. In just two decades, settler and indigenous violence became crucibles of sovereignty talk, as the idea of perfect territorial sovereignty clashed with tenacious pluralities.”³⁵

In order to deal with this tension between legal pluralism and settler sovereignty, Ford explains that the “settler courts in the 1820s and 1830s, then, did something quite radical.”³⁶ Specifically, the practices of the courts is summed up in “exercising criminal jurisdiction over violence between indigenous people,” and that by doing this “settler courts asserted that sovereignty was a territorial measure of authority to be performed through the trial and punishment of every person who transgressed settler law in settler territory.”³⁷ Notably, Ford credits the courts practices as “both innovative and uniquely destructive of indigenous rights. After 1820, courts in North America and Australasia redefined indigenous theft and violence as crime, and in the

³³ Lisa Ford, *Settler Sovereignty* (Cambridge and London: Harvard University Press, 2010), [Ford].

³⁴ *Ibid* at 1.

³⁵ *Ibid* at 3.

³⁶ *Ibid* at 2.

³⁷ *Ibid*.

process, they pitted settler sovereignty against the rights of indigenous peoples.”³⁸ The fundamental elimination of Indigenous jurisdiction and law is captured in how Ford defines settler sovereignty writing “the legal obliteration of indigenous customary law became the litmus test of settler statehood.”³⁹ Exercising jurisdiction over indigenous peoples to eliminate them is not a simple project, but one that requires violence and manipulation to carry it out, as Ford writes:

Settler violence, then, was clothed in law—a law which, in important respects, settlers constituted and controlled. Recent comparative legal histories have emphasized how settler communities and their legislatures manipulated laws of property and civil law better to fit the project of indigenous dispossession and of property development. Some very recent frontier histories have suggested that lawlessness in late eighteenth and early nineteenth-century North America contained within it a meta-narrative about indigenous sovereignty. As Cumfer and Dowd have shown, when they systematically ignored indigenous rights and murdered indigenous people, Tennessee and Pennsylvania frontiersmen contributed to the discourse and practice of settler sovereignty over indigenous people and their land.⁴⁰

As we see here, settler manipulation of law and violence are prominently intertwined and Ford’s study provides insight into how the two are wrapped up in the logic of elimination that is relied upon by the settler courts, as she explains “This new judicial discourse of perfect settler sovereignty left precious little space for first peoples. Even as settler communities in North America and the Antipodes started to romanticize the slow disappearance of their noble savages, common-law courts condemned them to juridical death.”⁴¹

For me, the key thing that emerges from Ford’s work is the role of the settler courts in transforming settler colonial violence through logic and legal reasoning into something resembling law, jurisdiction and territoriality, as Ford summarizes in her conclusion:

³⁸ *Ibid.*

³⁹ *Ibid* at 2.

⁴⁰ *Ibid* at 85-86. (Citing: G.E. Dowd, *War under Heaven: Pontiac, the Indian Nations, and the British Empire* (Baltimore: Johns Hopkins University Press, 2002); C. Cumfer, *Separate Peoples, One Land: The Minds of Cherokees, Blacks, and Whites on the Tennessee Frontier* (Chapel Hill: University of North Carolina Press, 2007).).

⁴¹ *Ibid* at 187.

They redefined settler sovereignty as a territorial measure of authority that left little or no space for indigenous rights to property, to sovereignty, or to jurisdiction. They recrafted plural settler polities into modern nation-states whose legitimacy was predicated on the subordination of indigenous rights. The many acts of dissolution, oppression, and marginalization that followed were all performances of sovereignty. State legislation displaced Aborigines from their country to missions—a systematic attempt to erase indigeneity through spatial, social, and legal domination.⁴²

The critical relevance of Ford's investigation is that it reminds us, particularly in the North American context, that we have been down the road of legal pluralism and negotiations around jurisdiction; that in fact this was the norm throughout the seventeenth and eighteenth centuries,⁴³ but in the end settler colonialism was not satisfied with that. It will not stop until it has perfected territoriality and Indigenous peoples are in the way of that primary objective. Although Ford's study looks at history, she makes it perfectly clear that her conclusions are not just historical facts:

The exercise of jurisdiction over indigenous crime performs the myth of settler sovereignty over and over. Sovereignty as territorial jurisdiction defines the parameters of indigenous rights to this day.

...

Settler sovereignty has a history—a history that is more recent, more local, and more contingent than many have supposed. It is one of the most brutal iterations of nineteenth-century territoriality. It was made and challenged on the farthest peripheries of empire, in the context of global discourse and global networks of trade. Finally, however, it was defined as the exercise of jurisdiction over indigenous crime. The most powerful legal myth in common-law settler polities, then, cannot be purged of its plural origins. Settler sovereignty starts and ends with indigenous people.⁴⁴

What is frightening about this conclusion, for me at least, with its acknowledgement of global discourse and trade juxtaposed with the assertion of jurisdiction over Indigenous peoples in order to criminalize them, is that it could be just as applicable to any number of conflict zones in the twenty-first century as it was to the settler colonies of Georgia and New South Wales in the

⁴² *Ibid* at 206.

⁴³ *Ibid* at 19.

⁴⁴ *Ibid* at 208-210.

nineteenth century.

Cole Harris provides us with an understanding of how this same project of elimination was implemented in British Columbia during the nineteenth century through a careful study of the powers underlying the imposition of the Indian Reserve system.⁴⁵ Of particular note is the emphasis that Harris places on looking at the structure of power relations and their effects to also simplify the complexity of this colonial project, writing “Comprehensive and intricate, it quickly dispossessed one set of people and established another. But to emphasize the complexity of colonial power, as the postcolonial literature tends to do, is not in itself particularly helpful. The challenge, rather, is to look inside the complex to establish how particular powers operated and to what particular effect.”⁴⁶ By focusing on the effects, Harris exposes how state sanctioned violence lies at the root of the settler colonial state’s structure of power in writing about how the “initial ability to dispossess rested primarily on physical power and the supporting infrastructure of the state. Once the power of violence had been demonstrated, the threat of it was often sufficient. The colonial state sought and, backed by the British military, was often able to impose, a monopoly on violence. It introduced the governmental framework of the modern state, within which colonization proceeded.”⁴⁷

Like Ford’s study, Harris’s study also uncovers the process by which settler colonial violence is transformed into settler law and territoriality. The contrast is that this process is not an innovation of the courts, but of the legislature. Notably, these practices were deliberately informed and rationalized by a logic that was prominently racist, but was above all things, rooted in the

⁴⁵ Cole Harris, “How Did Colonialism Dispossess? Comments from an Edge of Empire” (2004) 94:1 *Annals of the Association of American Geographers* 165–182, [Harris].

⁴⁶ *Ibid* at 179.

⁴⁷ *Ibid*.

elimination of Indigenous peoples, as Harris writes “The legitimation of and moral justification for dispossession lay in a cultural discourse that located civilization and savagery and extolled the advantages for all concerned of replacing the latter with the former.”⁴⁸

While state-sanctioned violence and racism are central findings in Harris’ study, where it is most compelling is in his identification of the specific and primary role that law played in orchestrating the dispossession of Indigenous peoples for the exclusive benefit and enrichment of White settlers, as he writes “All these disciplinary technologies were necessary, but law provided a far more comprehensive framework than did the others for recalibrating land and life on the colonizers’ terms and without reference to indigenous antecedents.”⁴⁹

B. The Present: Jurisdiction and the Colonial Politics of Recognition

The thing that stands out most in a comparison of the techniques of nineteenth century settler colonialism, when the modern state was being born, and the techniques of the modern state today, is a striking similarity in the fundamental tensions at work between the settler colonial state’s discourse of territoriality and an emerging, or *re-emerging*, discourse of pluralism.

Shiri Pasternak’s dissertation examines the struggle over jurisdiction by the Algonquins of Barriere Lake and how, in particular, they contest the settler colonial state of Canada’s claims to sovereignty over their territory.⁵⁰ Pasternak explains that her dissertation “turns our attention to the practices of settler colonial sovereignty in Canada, and especially to the role Indigenous law plays in resisting dispossession of their lands.”⁵¹ Pasternak’s study offers a good comparative to Ford and Harris’ because it is situated within the same tensions of settler colonialism and pluralism

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ Pasternak, PhD, *supra* note 12.

⁵¹ *Ibid* at 2.

represented by two different policy mechanisms for resolving land claims. First, the pluralism mechanism is represented by “a resource co-management agreement signed in 1991 between the Algonquins, Canada, and Quebec” which “illustrates the best and the worst of what can happen when Indigenous and settler laws meet.”⁵² Notably, this “Trilateral Agreement” was an initiative of the Algonquins and it was rooted in the legal pluralism that characterized the order of things before the emergence of the modern settler colonial state, as Pasternak writes “From the Algonquins’ perspective, the Agreement was based on their historic 3-figure wampum belt that ensured the community would always exercise leadership over their territory in partnership with the French and British nations.”⁵³

The story that unfolds from this unique example of cooperation in more modern times, is a confirmation of the enduring elements of elimination and territoriality, as Pasternak explains “through a multiplicity of legislative, bureaucratic, economic, and repressive security tactics, the federal and provincial governments withdrew their commitments to share jurisdiction.”⁵⁴ The underlying explanation that Pasternak provides for these tactics of withdrawal is that ultimately the Federal government was concerned that sharing jurisdiction with Indigenous peoples “would undermine the government’s preferred policy for settling unresolved land claims through the Comprehensive Land Claims policy.”⁵⁵ Notably, this policy stands in direct contrast to the jurisdiction sharing model of the Trilateral Agreement, as Pasternak explains it “operates as a technique of settler colonial jurisdiction-making on Indigenous lands, transforming unceded Indigenous territory into fee simple lands, disclosing new possibilities for economic exploitation

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

⁵⁵ *Ibid* at 3.

and land alienation, and by reconfiguring Indigenous lands under provincial rather than federal powers.”⁵⁶ Thus, when we look at this study comparatively in the context of Ford and Harris’ findings, we can find that the effects of the Comprehensive Land Claims policy allow us to see that it is a practice of the settler colonial state that performs the same elimination of Indigenous rights and jurisdiction by transforming them into forms that are contained within specific geographical areas that do not disturb settler sovereignty.

In reviewing the technique of jurisdiction further, Pasternak identifies part of the logic that underlies its use, writing “In Canada, the state’s claims to jurisdiction over Indigenous lands assumes the authority to inaugurate law where law already existed, and presumes the new forms that law will take. These presumptions preclude asking pertinent questions about which laws should apply on these lands.”⁵⁷ The reach of this logic is not limited to policy making, but is reproduced in the form of a problematic that the courts are faced with (a problem of their own making, although they don’t acknowledge it as such), as Pasternak explains “it is incumbent on the courts to shield the details of colonial acquisition from themselves to persist in their reasoning against Indigenous assertions of jurisdiction over their lands. Challenges to state sovereignty are considered beyond the jurisdiction of the court, eliding the crucial period of inauguration.”⁵⁸

When looked at in comparison to Ford and Harris’s studies, what becomes apparent is that this fundamental assumption of authority and jurisdiction is one that emerged primarily through a deliberate and conscious practice and performance of law and policy through both the settler courts and the settler legislative powers in the nineteenth century. The point to take away from

⁵⁶ *Ibid.*

⁵⁷ *Ibid* at 9-10.

⁵⁸ *Ibid* at 13. (Citing: Peter Fitzpatrick, “‘No Higher Duty’: Mabo and the Failure of Legal Foundation” (2002) *Law and Critique* 13.).

Pasternak's analysis is that the logic of elimination remains unchanged, although it has found new forms through which it is expressed.

Glen Coulthard's study looks at the shifts in political discourse around the struggles of Indigenous peoples in Canada for self-determination.⁵⁹ Drawing primarily on the works of Marx and Fanon, Coulthard lays out a clear argument for undermining the settler colonial politics of recognition and the limitations of the liberal paradigm, and then supports this argument through a comprehensive empirical study of the Dene peoples' struggle for recognition.⁶⁰ In particular, he focuses on how this struggle has "increasingly been cast in the language of 'recognition'" and traces the evolution of this technique, its effects—prominently the "recognition" of Aboriginal rights under s. 35(1) of the *Constitution Act, 1982*⁶¹—as well as the "flurry of intellectual activity that has sought to unpack the complex ethical, political, and legal questions that these types of claims raise."⁶²

Similar to Ford and Pasternak's study, Coulthard's work is also situated in a tension between the settler colonial state and a pluralistic vision that he describes "is couched in the vernacular of 'mutual recognition.'"⁶³ Coulthard argues against this writing "the politics of recognition in its contemporary liberal form promises to reproduce the very configurations of colonialist, racist, patriarchal state power that Indigenous peoples' demands for recognition have historically sought to transcend."⁶⁴ Broadly, Coulthard's study demonstrates how detrimental this reproduction has been, as he writes "much of our efforts over the last four decades to attain settler-

⁵⁹ Coulthard, *supra* note 13.

⁶⁰ *Ibid.*

⁶¹ *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 s 35.

⁶² Coulthard, *supra* note 13 at 1-3.

⁶³ *Ibid.*

⁶⁴ *Ibid.*

state recognition of our rights to land and self-government have in fact encouraged the opposite—the continued dispossession of our homelands and the ongoing usurpation of our self-determining authority.”⁶⁵

Like the others, Coulthard analyses specific practices of the settler colonial state. One in particular, that draws a comparative with Harris’ work, is how Coulthard draws a strong connection between the racist civilization discourse that underpinned the imposition of the Indian Reserve system and how that discourse is being reproduced to the same effect within urban centres, writing “we are seeing a similar logic govern the gentrification and subsequent displacement of Indigenous peoples from Native spaces within the city. ... gentrifiers often defend their development projects as a form of ‘improvement,’ where previously ‘wasted’ land or property ... are made more socially and economically productive.”⁶⁶ When this logic is viewed “through a colonial lens, [it is viewed] as yet another ‘frontier’ of dispossession central to the accumulation of capital. Through gentrification, Native spaces in the city are now being treated as *urbs nullius*—urban space void of Indigenous sovereign presence.”⁶⁷

Where Coulthard’s study stands apart from the others is that it critically analyses some of the practices that Indigenous peoples have developed to obtain “recognition” within the settler colonial structure of power. One prominent example involves the resource sharing agreements that are often entered into with industry which Coulthard engages with as follows:

A similar problem informs self-determination efforts that seek to ameliorate our poverty and economic dependency through resource revenue sharing, more comprehensive impact benefit agreements, and affirmative action employment strategies negotiated through the state and with industries currently tearing up Indigenous territories. Even though the capital generated by such an approach could, in theory, be spent subsidizing the revitalization of certain cultural traditions

⁶⁵ *Ibid* at 24.

⁶⁶ *Ibid* at 175.

⁶⁷ *Ibid* at 176.

and practices, in the end they would still remain dependent on a predatory economy that is entirely at odds with the deep reciprocity that forms the cultural core of many Indigenous peoples' relationships with land.⁶⁸

In the end, while Coulthard acknowledges “that over the last forty years Indigenous peoples have become incredibly skilled at participating in the Canadian legal and political practices” his findings lead him to conclude “that our efforts to engage these discursive and institutional spaces to secure recognition of our rights have not only failed, but have instead served to subtly reproduce the forms of racist, sexist, economic, and political configurations of power that we initially sought, through our engagements and negotiations with the state, to challenge.”⁶⁹

For me, the strength of Coulthard's analysis comes through in demonstrating how the logic of elimination is ultimately encoded within the types of agreements that are being produced by the current discourse of “recognition.” Further, Coulthard's argument demonstrates a consistent theme throughout the studies above, which is that settler colonialism and legal pluralism are incompatible.

III. Conclusion

Although the study of settler colonialism may still be considered as emerging, we should realize that its lessons and concepts are readily identifiable in the long history of colonialism itself if we only look for them. Settler colonialism is about more than just history repeating itself. It is about the most violent acts of history being reproduced, over and over, to the point of being normalized so that they can be repeated today in ways that are increasingly harder to detect. For anyone who believes in peace, through whatever lens, I think it is incumbent on that belief to identify the ideologies and practices that work against it.

⁶⁸ *Ibid* at 171.

⁶⁹ *Ibid* at 179.

One of those ideologies is settler colonialism. When we draw all of the above together we are provided with a clear definition of its core elements: a violence that disrupts relationships on multiple levels, a relational structure of power and domination, a primary objective of territoriality or access to land, and a logic of elimination that drives an innovation to develop a range of practices, technologies and rationalizations. The review of empirical studies above, from different disciplines ranging from geography to history to politics and comparing the past to the present, demonstrates and confirms these elements by investigating the specific practices that the settler colonial state uses to reproduce violence in its insatiable program to eliminate and replace.

The studies selected above have been chosen because they demonstrate how the logic of elimination has been used in North America, and Canada in particular, to inaugurate settler law, jurisdiction and sovereignty in the nineteenth century, and how that same logic is being reproduced within the existing legal and political practices and discourses today for the same effect. What reviewing these studies in comparison demonstrates is that this logic of elimination contains an element of innovation that allows it to be obscured, hidden and even presented as emancipatory.

As mentioned in the opening of this chapter, I have yet to uncover any legal scholarship that directly applies this particularly theory of settler colonialism to the jurisprudence on Aboriginal rights. However, there is a wide range of scholarship on that jurisprudence. Thus, in the next chapter, I begin to pursue this course of investigation by reviewing a selection of the commissions and literature for evidence of some of the elements that define settler colonialism. As I will explain, this allows us to narrow the legal problematic to the issue of jurisdiction and points us in the direction of looking more closely at Indigenous blockades cases.

Chapter 2: Whose Land is Canada Built On?

A country cannot be built on a living lie. We know now, if the original settlers did not, that this country was not *terra nullius* at the time of contact and that the newcomers did not ‘discover’ it in any meaningful sense. We know also that the peoples who lived here had their own systems of law and governance, their own customs, languages and cultures.⁷⁰

— Royal Commission on Aboriginal Peoples (RCAP)
Report of the Royal Commission on Aboriginal Peoples, 1996

The official legal story of Canada—its sovereignty, territorial authority, system of politics and laws which serve as the bedrock for the jurisdiction of every judge and all the rights, privileges and material entitlements that Canadians (including myself) enjoy and ostensibly take for granted every day—is that it was founded upon the concept of *terra nullius*, which assumed that all of North America was “empty, essentially barren and uninhabited land”⁷¹ and the doctrine of discovery.⁷² For over three centuries, the European imperial powers repeatedly acted out these ideas “by making grandiose territorial claims... as though the continent was juridically vacant and the Indigenous peoples living there did not have sovereignty.”⁷³

As we know from Lisa Ford’s study above, these sweeping legal claims were deliberately taken up by the settler colonial courts in the nineteenth century to shape the discourse of territoriality into settler sovereignty, jurisdiction and law. This was an exercise of pure legal innovation with no basis in fact, as Kent McNeil writes “To the extent that these claims extended beyond the areas controlled by Europeans at the time—which was almost invariably the case—they cannot have been based on factual possession or the actual exercise of jurisdiction.”⁷⁴

⁷⁰ RCAP, vol 2, *supra* note 3 at 1.

⁷¹ RCAP, vol 1, *supra* note 3 at 47.

⁷² For a concise summary of the application of the doctrine of discovery in Canada, see: TRC, *supra* note 3 at 50-54.

⁷³ McNeil, Sovereignty, *supra* note 2 at 82.

⁷⁴ *Ibid.*

Notably, this discourse of territoriality was repeated in Canada in the form of the royal commissions in the nineteenth century, two of which I will review here. These provide a clear record of how the logic of elimination was being applied by Canada as rationalizations for its racist policies. The first is the Report of the Bagot Commission of 1845/47 which made clear findings of the active and ongoing dispossession and destruction of Indigenous lands by European squatters and industrialists in clear contravention of British Imperial law at the time under the *Royal Proclamation of 1763*⁷⁵ while also acknowledging that “The protection which the Government intended to throw over the Indians was not and could not be sufficiently maintained.”⁷⁶ In other words, white settlers were breaking the law, the government was doing nothing about it, and this was apparent to everyone, particularly Indigenous peoples whose communities and ways of life were being destroyed by the settler invasion and whose clear and detailed petitions to the Crown in response were numerous.⁷⁷ What makes the Bagot Report exemplary of the logic of elimination during this time is in how this dispossession and destruction is rationalized, first by asserting that Europeans were lawfully entitled to take “land of which the Savages stood in no particular need”, and then bolstering that settler entitlement by repeatedly asserting the “ignorance” of Indigenous peoples, “their remarkable fondness for spirits” and how their “inability also to compete with their white brethren debarred them, in a great measure, from the enjoyment of civil rights.”⁷⁸

While this rationale is visibly racist, what exposes the logic of elimination embedded within these statements is comparing them with the Indigenous perspective. In writing about the geopolitical contexts that influenced the Proclamation, Anishinaabeg scholar John Borrows writes

⁷⁵ *Royal Proclamation of 1763*, RSC 1985, Appendix II, No 1, Geo III, UK. October 7, 1763, [The Proclamation].

⁷⁶ Bagot Report, *supra* note 3 at A-C.

⁷⁷ Bagot Report, *ibid*; RCAP, vol 1, *supra* note 3 at 136 & 198.

⁷⁸ Bagot Report, *ibid*.

that from the Indigenous perspective, the royal order of King George III was a promise “that the British would respect existing political and territorial jurisdiction by incorporating First Nations understandings of this relationship in the document.”⁷⁹ As Borrows notes, the Proclamation failed to fulfill this promise because “its wording recognized Aboriginal rights to land by outlining a policy that was designed to extinguish these rights.”⁸⁰ The fundamental contradiction inherent in recognizing a legal interest so that it could be legally erased was not lost on Indigenous peoples. In order to address this failure, the Treaty of Niagara was made in 1764 which, in contrast to the unilaterally drafted and declared Proclamation, directly incorporated Indigenous perspectives and practices of diplomacy and law making to produce “a multination alliance in which no member gave up their sovereignty”.⁸¹

What is significant about analysing the rationale of the settler colonial power from the Indigenous perspective is that we can see this tension between legal pluralism and settler colonialism. In this way, the Indigenous perspective provides a contrast which sharpens our ability to identify the logic of elimination and whether it is being relied upon. Thus, we can see how the Bagot Report relies on this logic by distorting the facts and law that are relevant to a proper determination of whether dispossessing Indigenous peoples of their land is lawful. This eliminated the sovereignty and jurisdiction of Indigenous peoples by failing to acknowledge their existing legal recognition under the Proclamation, as well as distorting their equal entitlement to the protection of the law, not just individually as subjects of the Crown, but as allies, partners, brothers, hosts and Treaty nations.

⁷⁹ John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, Michael Asch ed. (Vancouver: UBC Press, 1997) at 159.

⁸⁰ *Ibid* at 160.

⁸¹ *Ibid* at 161.

The same logic can be seen being reproduced in the Report of the Pennefather Commission of 1858 which relied on it to set out in greater detail how the Crown could expedite its predetermined objective which it described as “gradual civilization”⁸² or rather the assimilation of Indigenous peoples. Fundamentally, this program was not about civilization or assimilation in any morally supportable sense, but about perfecting settler sovereignty by completing the dispossession of Indigenous peoples from their lands and discontinuing the annuities that were an integral part of the treaty and land sharing relationship.⁸³ The intention to liquidate Indigenous lands in order to open them up for white settlers was explicitly put in the outset of the Pennefather Report which stated that it “endeavoured to define the actual limits of the Indian Territory, with a view to ascertain what may be convertible into funds to aid in the support of the Aborigines when the Imperial aid shall be withdrawn, and which may be available to meet the demands of the white population for land after reserving so much as may be necessary for the Indians themselves.”⁸⁴

Notably, the racist discourse of Indigenous inferiority used to rationalize the Bagot Report is now embedded in this mandate. But what brings it out as a product of the logic of elimination is how it is used to rationalize the predetermined objective that Indigenous peoples must be dispossessed of their lands for the primary benefit of the expansion of the white settler society, with just a pecuniary and temporary benefit to be left for Indigenous peoples to support them when the Imperial Crown ceased the practice of payments or gifts in exchange for the friendship of Indigenous nations; a practice that had long been fundamental to the relationship between the Crown and Indigenous peoples and was required by the Treaty of Niagara and subsequent

⁸² Pennefather Report, *supra* note 3 at PART I.

⁸³ RCAP, vol 1, *supra* note 3 at 248-49.

⁸⁴ Pennefather Report, *supra* note 3 at PART I.

treaties.⁸⁵ By unilaterally ending a treaty requirement grounded specifically in Indigenous legal perspectives about sharing, and replacing it with an entitlement drawn from a strictly white settler perspective, one can see how the logic of elimination is trying to find a way of reconciling the fundamental legal contradiction created by the assertion of Crown sovereignty through the Proclamation by eliminating Indigenous sovereignty.

This discourse of territoriality and the logic of elimination was reproduced throughout Canada's policies towards Indigenous peoples⁸⁶ and the early Aboriginal rights jurisprudence cases in the nineteenth and early twentieth centuries which relied explicitly on the doctrines of discovery and *terra nullius* as the clear legal basis upon which the Crown's sovereignty and title had crystallized. A review of those decisions is not necessary, because what matters most for our purposes is that the Supreme Court of Canada (SCC) in the landmark decision in *Guerin* affirmed that Canada's legal claim to sovereignty and ownership are founded on this discourse and logic holding that "The principle of discovery which justified these claims gave the ultimate title in the land in a particular area to the nation which had discovered and claimed it."⁸⁷ This affirmation of discovery as the foundation of Crown sovereignty and title allowed the SCC to do two key things which have set the trajectory of jurisprudence regarding the constitutional rights of Aboriginal peoples recognized under s. 35(1) of the *Constitution Act, 1982*.

The first is that the SCC confirmed Aboriginal title as a legal interest to land which exists as a "burden on the radical or final title of the Sovereign."⁸⁸ The second, based on the confirmation of Aboriginal title, was to define the relationship between the Crown and Indigenous peoples as

⁸⁵ Borrows, PhD, *supra* note 1 at 51-52. (As Borrows notes, from the Indigenous perspective accepting gifts was necessary for the sharing of one's land, and the cessation of gifts was an underlying cause of Pontiac's War.)

⁸⁶ See: RCAP, vol 1, *supra* note 3.

⁸⁷ *R v Guerin*, [1984] 2 SCR 335 at 378, [*Guerin*].

⁸⁸ *Guerin*, *supra* note 87 at 349 & 380. (Citing: *St. Catherine's Milling and Lumber Co v The Queen* (1888), 14 App Cas 46 at 408).

one that makes Indigenous peoples fundamentally dependent on the Crown and thus requiring the application of fiduciary principles to any dealings or actions taken by the Crown in regards to the legal interests of Aboriginal peoples.⁸⁹ This framing of the relationship has been repeated throughout the development of Aboriginal rights jurisprudence which has steadily reshaped itself around the doctrines of reconciliation and the honour of the Crown through major decisions in *Van der Peet*,⁹⁰ *Delgamuukw*,⁹¹ *Haida Nation*⁹² and *Tsilhqot'in Nation*.⁹³

The literature on Aboriginal rights has consistently problematized Canada's official legal story and how it has shaped legal doctrine. The first contribution I wish to make in this thesis is that when we conceptualize the problem through the concept of settler colonialism, immediately we can see that the SCC is transforming a power relationship of domination into law by eliminating the underlying title of Indigenous peoples and replacing it with that of the Crown's. Trying to understand how this is done is where the explanatory power of the logic of elimination reveals that the analysis of legal and political scholars examining the role of the courts have been identifying in some detail how the elements of settler colonialism are being reproduced in law.

The benefit of this contribution, I argue, is that it brings the Aboriginal rights jurisprudence into a different light. This exposes a potential limitation in this literature which I view as overlooking how deeply embedded the logic of elimination is within this jurisprudence. On this same point, I think a possibility that must be considered is whether this same logic is being unwittingly reproduced in this scholarship through conclusions that implicitly rely on what I will refer to as an "aspirational assumption" that the settler colonial systems of law, politics and even

⁸⁹ *Guerin*, *ibid* at 376.

⁹⁰ *R v Van der Peet*, [1996] 2 SCR 507, [*Van der Peet*].

⁹¹ *Delgamuukw v British Columbia*, [1997] 3 SCR 1110, [*Delgamuukw*].

⁹² *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [*Haida Nation*].

⁹³ *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44, [*Tsilhqot'in Nation*].

reason will eventually work to bring about justice for Indigenous peoples. In a sense, this reflects the same prevailing view about “mutual recognition” that Coulthard is arguing against in the political discourse. Whether a similar argument in the legal discourse should be made for a rejection of Aboriginal rights jurisprudence as emancipatory is part of the underlying inquiry in this thesis which my examination of blockades cases below hopes to expand.

To be clear, my identification and critique of this “aspirational assumption” is one that emerged naturally from my close reading of some of these leading works in the literature and was not one that I was looking to identify in particular. It is only recently that I have become aware of an emergent body of scholarship that is starting to identify what Eve Tuck and Marcia McKenzie describe as “the ways in which social sciences, when not cognizant of settler colonial structures, can replicate some of the epistemic violences of settler colonialism and exhibit some of the tendencies of that structure to accumulate at all costs.”⁹⁴ I have not fully reviewed this area of scholarship, but to the extent that my identification of the “aspirational assumption” fits any of the patterns being identified by others, then I would suggest that this provides legal and political scholars with incentive to be further reflective and attentive to the assumptions they rely upon.

To demonstrate how the elements of settler colonialism are being identified and then overlooked by the assumption in the literature, I look at three forms of analysis in this chapter that: 1) problematize the creative role of the courts; 2) identify inconsistencies in the logic of the courts; and, 3) honestly examines the legal and political realities underlying the courts’ reliance on the assumption of territoriality and the prospects of negotiations with the state.

⁹⁴ Eve Tuck and Marcia McKenzie, *Place in Research: Theory, Methodology, and Methods* (New York & London: Routledge, 2015) at xvi. (Citing: E. Tuck & M. Guishard, “Uncollapsing ethics: Racialized sciencism, settler coloniality, and an ethical framework of decolonial participatory action research” in T.M. Kress, C.S. Malott & B.J. Portfilio eds., *Challenging Status Quo Retrenchment: New Directions in Critical Qualitative Research* (Charlotte: Information Age Publishing, 2013).

I. Creativity of the Courts: Inventing New Ways to Eliminate Indigenous Sovereignty

Judges can be a creative bunch, particularly when it comes to uprooting unfounded and discriminatory ideas that are deeply entrenched in the prevailing views of law and society. A prominent example in Canadian law is the “living tree doctrine” a bedrock rule of interpretation that was invented by the Privy Council to deal with the task of explaining why the SCC was wrong to conclude unanimously that women were not “persons” under Canada’s founding constitutional statute, the *British North America Act*.⁹⁵ What is striking about the Privy Council’s decision is that, in 1929, it calls the “exclusion of women from all public offices...a relic of days more barbarous than ours,” but then sets out the continuous line of authority and rationalizations for that exclusion reaching back two millennia, even directly quoting the tribal laws written down in the *Germania*.⁹⁶ The SCC had correctly relied on this authority, but the problem, as the Privy Council put it, was that “Customs are apt to develop into traditions which *are stronger than law* and remain unchallenged *long after the reason for them has disappeared*.”⁹⁷

By creatively describing Canada’s constitution as a “living tree” which required “a large and liberal interpretation”⁹⁸ the Privy Council was able to give the law the strength it needed to break free from a deeply structural form of discrimination, no matter how traditional, and usher in an important moment for women’s rights and gender equality. The living tree has been used many times over to give courts the power to recognize “the existence and importance of unwritten constitutional principles”⁹⁹ so that they may interpret Canada’s constitution in a way that

⁹⁵ *Edwards v Attorney-General for Canada*, [1929] UKPC 86, [1930] AC 124 (PC), [the *Persons Case*]; *British North America Act, 1867*, RSC 1985, app II, no 5, s 24.

⁹⁶ *Ibid* at 2-3.

⁹⁷ *Ibid* at 7. (Emphasis added).

⁹⁸ *Ibid* at 9.

⁹⁹ *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385 at para 52.

“accommodates and addresses the realities of modern life”¹⁰⁰ further allowing the law and the society it rules to redefine itself free from other long held discriminatory and baseless traditions.

The overarching recommendations of RCAP and the TRC are to assert the “that Aboriginal peoples must have room to exercise their autonomy and structure their own solutions.”¹⁰¹ One would think that the living tree gives the courts the power needed to implement this. Yet, for reasons unknown or unstated, Indigenous peoples are excluded, and, ironically given the *Persons Case*, Indigenous women who are statistically the most vulnerable group in Canadian society are particularly excluded.¹⁰²

The clear effect of this exclusion erases Indigenous jurisdiction, as John Borrows writes “Interpreting Aboriginal and treaty rights through the same lens as other constitutional provisions would allow Indigenous peoples to exercise jurisdiction in relation to violence against women. [But they] are not interpreted in the same way as other constitutional provisions: Aboriginal peoples can only possess constitutional rights *if they are rooted in the past*.”¹⁰³ The contradiction with the *Persons Case*, which is about breaking from the past, is striking. Yet the reason for this is elusive, as Borrows writes “While constitutional rights of all stripes find their genesis in some historic moment, only Aboriginal peoples’ constitutional rights are limited by such moments.”¹⁰⁴ The exclusion impacts more than just Indigenous jurisdiction, since the living tree “invites democratic participation because... Canadian constitutional law is an open-ended, ongoing activity.”¹⁰⁵ Thus, the courts are not only eliminating Indigenous jurisdiction, they are also

¹⁰⁰ *Reference re Same-Sex Marriage*, 2004 SCC 79 at para 22.

¹⁰¹ RCAP, vol 2, *supra* note 3 at 259.

¹⁰² John Borrows, “Aboriginal and Treaty Rights and Violence Against Women” (2013) 50 Osgoode Hall LJ 699.

¹⁰³ *Ibid* at 730. (Emphasis added).

¹⁰⁴ *Ibid* at 731.

¹⁰⁵ Borrows, *Freedom*, *supra* note 2 at 134.

disenfranchising Indigenous peoples from the constitutional dialogue as founding nations.

It is in the effective exclusion and elimination of Indigenous nationhood and jurisdiction that I see Borrows has identified the elements of settler colonialism. Yet, I find this definition is overlooked in his conclusion because it rests on an aspirational assumption that the courts will eventually work and that applying the living tree equally will mean “Canada’s constitution would be more unified and less discriminatory. Aboriginal peoples’ rights would be considered in a broader light, and Canada would be strengthened.”¹⁰⁶

While the courts have excluded Indigenous peoples from the benefit of their creative powers, they have not held back in using those powers to deny them justice. Kent McNeil demonstrates this in his critical review of the interlocutory and appeal decisions in the *Chippewas of Sarnia* case that dealt with Aboriginal title land that was unlawfully surrendered in the 19th century.¹⁰⁷ From the outset, McNeil argues that because of Canada’s flawed foundations “In virtually all of Canada, Crown assertions of sovereignty therefore need to be re-evaluated by examining both the legal and the factual basis for the Crown’s claims.”¹⁰⁸ In analyzing the interlocutory decision of Campbell J., McNeil identifies the judge’s “invention of a 60-year equitable limitation period” calling it a “remarkable departure from legal principle and precedent.”¹⁰⁹ McNeil saves his sharpest criticism for the Ontario Court of Appeal which upheld that invention, calling the use of judicial discretion to extinguish Aboriginal title “disturbing” and one that “raises serious questions about the role of the courts in adjudicating Aboriginal claims,

¹⁰⁶ *Ibid* at 151.

¹⁰⁷ McNeil, Extinguishment, *supra* note 2. (For the cases, see: *Chippewas of Sarnia Band v Canada (Attorney General)*, [1999] OJ 1406; 40 RPR (3d) 49; 88 ACWS (3d), [Ont Sup Ct]; and *Chippewas of Sarnia Band v Canada (Attorney General)*, [2000] 51 OR (3d) 641, 2000 CanLII 16991 (ONCA).).

¹⁰⁸ *Ibid* at 318. (Emphasis added).

¹⁰⁹ *Ibid* at 331. (Emphasis added).

and the impact on the law generally of decisions involving Aboriginal rights.”¹¹⁰

By demonstrating how the courts have eliminated Indigenous legal interests in order to protect settler interests, I find that McNeil clearly identifies how the logic of settler colonialism is being reproduced by the courts. In his conclusion, McNeil relies on the aspirational assumption by pointing out that the same tools used to create the problem can be used to solve it, writing “judicial creativity should be directed towards finding solutions that achieve an appropriate balance and at the same time abide by fundamental principles. Unfortunately, the creativity shown by the Court of Appeal in this instance failed to achieve either of these objectives.”¹¹¹ While I don’t disagree with this conclusion as a matter of legal analysis, if viewed through the lens of settler colonialism I think one needs to question whether the logic of elimination and the innovation of the settler courts will not just reproduce the same result of judicially eliminating Aboriginal title, but in a form that is harder to detect or appears more acceptable to legal scholars.

While McNeil’s analysis focuses on Aboriginal title, Janna Promislow articulates similar doubts about the role that courts can play in the interpretation of treaties by situating their role within the broader forces at work, as Promislow writes “With the coercive force of the state behind it and the role of courts as public authorities, the narrative that emanates from courts has a controlling impact on the public history of treaties. When law, history, and political theory collide through the law, *the legitimacy and character of the national narrative is at stake.*”¹¹² For me, these connections speak not only to the legitimacy of the courts, but to the power dynamic of their role in examining, as McNeil says we must, the factual and legal bases of Canada’s claim to sovereignty.

¹¹⁰ *Ibid* at 345.

¹¹¹ *Ibid* at 345-46.

¹¹² Promislow, *supra* note 2 at 1087. (Emphasis added).

A good example of how narratives and discourses can be used to reproduce the power dynamics of settler colonialism in law is found in the early analysis of the entrenchment of Aboriginal rights into Canada's constitution by Brian Slattery. Slattery sets out his analysis by drawing connections between law and national narratives writing "All national myths involve a certain amount of distortion. But some at least have the virtue of broad historical accuracy, roughly depicting the major forces at work. The myth that underlies much legal thinking about the history of Canada lacks that redeeming feature."¹¹³ Again, Slattery identifies not only that Canada's story is baseless, but emphasizes an absence of any virtue to strive for accuracy that is exceptional by comparison. In his conclusion Slattery predicts that Aboriginal rights would "provide solutions to a number of longstanding problems and grievances" because s. 35(1) officially confirmed that "the original rights of native American peoples are held to have survived the Crown's acquisition of sovereignty, except insofar as these were incompatible with the Crown's ultimate title".¹¹⁴

In this I find Slattery's optimism about Aboriginal rights moving forward is based on an aspirational assumption. Notably, that optimism is clearly burdened by a precondition that what the Crown has gained through its myth and discourse of its territoriality remains untouchable. The immediate problem that I have with the optimism and the precondition is that they both reproduce the settler colonial state's territoriality in implicit and explicit ways. In a subsequent article, Slattery draws attention to the fact that this precondition is lacking justification as he writes:

Canadian law treats the question of when and how the Crown gained sovereignty over Canadian territories in a somewhat artificial and self-serving manner. To state a complex matter simply, the courts *apparently feel bound* to defer to official territorial claims advanced by the Crown, *without inquiring into the facts supporting them or their validity in international law*.¹¹⁵

¹¹³ Slattery, Hidden, *supra* note 2 at 361.

¹¹⁴ Slattery, Hidden, *ibid* at 387.

¹¹⁵ Slattery, Understanding, *supra* note 2 at 735. (Emphasis added).

What is significant about Slattery's analysis is that it goes beyond identifying this element of territoriality and points out that it is being reproduced by the courts in a way that is exceptional by international law standards. What this suggests is that the settler colonial myth that Canada continues to assert as normative, is actually drifting further away from acceptable standards. Reading both pieces together, I see Slattery pointing out that this lack of a redeeming quality is not just a problem for the national myth, but also one for the courts.

The legal historian Hamar Foster identified these same concerns in questioning "How the act of discovery or mere words on paper can be transformed into rights and jurisdiction over Aboriginal nations remains a mystery."¹¹⁶ Despite an absence of justification, the resiliency of the precondition can be seen as Foster concedes that "even if one is obliged to accept the elevation of that mystery into a legal doctrine, a corollary is that what went before remains until specifically abrogated."¹¹⁷ By pointing out the mystery, but conceding that either it won't be solved or solving it is not necessary, I see Foster identifying how the courts are reproducing settler colonialism here. This problem is reiterated in his conclusion, as he writes:

So it may not matter that the courts have hitherto *set their faces against tribal sovereignty. It can be revived* and can qualify as an 'existing' Aboriginal right under s. 35(1) because *it has always been there, had we only the wit to see it.* As an impartial observer might say: if we are going to have mysteries, *let us be certain that they work both ways.*¹¹⁸

Again, the aspirational assumption is relied upon here, but Foster arguably gives it some support by separating the mysterious work of law from the more visible role of the courts and hoping that the strength of the former will prevail over the stubbornness of the latter.

The scholarship on the absence of justification for Crown sovereignty is much broader than

¹¹⁶ Foster, *Forgotten Arguments*, *supra* note 2 at 385.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid* at 385-86. (Emphasis added).

this, but from this selective review we can see there is some consistency in both the identification of the reproduction of settler colonialism and a reliance on an aspirational assumption in the conclusions. The problem I have with the aspirational assumption is that, even without applying the concept of settler colonialism, it paradoxically goes against the analysis which continues to cast serious, and increasingly irredeemable doubt on the role that law and the courts can play in adjudicating issues involving Indigenous peoples. There is a significant discomfort for me in the absence of a clear justification for relying on this aspirational assumption for the simple reason that if we only continue to confirm instances when courts are not *impartial* decision makers, and that mysteries do not work *both ways*, it only makes sense to me that our doubts about the reliability of that assumption should grow. Yet, the resilience of this assumption throughout the literature suggests to me that it either holds out the possibility of a truth that reason alone cannot express or reveal, or perhaps more practically, that the assumption is necessary for analyzing Canadian law. In either case, if this aspirational assumption must remain a key part of the legal scholarship, then I would argue, given the growing evidence eroding this assumption, that our analysis must start including evidence and arguments that justify our reliance on this assumption because without it I think the risk that this scholarship is unconsciously reproducing the logic of elimination grows.

II. “Because it does not make sense”: The Logic of Elimination in Judicial Decisions

If we can identify that the courts are reproducing elements of settler colonialism, then we should be able to identify some of the ways that the courts are doing this. There are many examples of this in the literature, but I limit my review here to three prominent and distinct examples that identify gaps or problems in the courts’ reasoning which I view as good examples of how the courts are reproducing the logic of elimination in their decisions.

The first example comes from the precedent setting Aboriginal rights case of *Van der Peet*

where the SCC was faced with finding a way to recognize Aboriginal rights as a possible legal entitlement without disturbing the settler interests that claim the same space and resource. First, Lamer CJC acknowledged “the doctrine of aboriginal rights exists, and is recognized and affirmed by s. 35(1), because of one simple fact: when Europeans arrived in North America, aboriginal peoples were already here, living in communities on the land, and participating in distinctive cultures, as they had done for centuries.”¹¹⁹ Next, he juxtaposed this with the assumption of territoriality and defines the overarching mandate of s. 35(1) around the discourse of reconciliation, writing “the aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”¹²⁰

In his review of *Van der Peet*, Mark D. Walters writes that to this point, Lamer CJC’s “analysis is consistent with imperial common law principles.”¹²¹ In this there is still some hope that the mysterious powers of the law, in articulating what it called “reconciliation” could work both ways. However, the hope captured in this principle is overshadowed by a fatal “conceptual leap that (arguably) detaches *Van der Peet* from the common law” when Lamer CJC tries to put reconciliation into practice by setting out the “integral to a distinctive culture test.”¹²² In breaking down Lamer CJC’s logic, Walters writes the “reasoning seems to be this: (a) Aboriginal rights arise from prior occupation of territory by distinctive Aboriginal societies having their own customary laws; therefore, (b) Aboriginal rights are limited to customs that made their societies distinctive.”¹²³ Walters then points out the conceptual leap writing “The cases he cites support (a) but do not support (b). Furthermore, (b) does not follow inexorably from (a). Although the cases

¹¹⁹ *Van der Peet*, *supra* note 90 at para 30. (Underlined emphasis in the original).

¹²⁰ *Ibid* at para 31.

¹²¹ Walters, *Golden Thread*, *supra* note 2 at 741.

¹²² *Ibid*.

¹²³ *Ibid*.

mention that Aboriginal peoples were ‘distinct’, there is no suggestion that the distinctiveness of their cultures was the reason for the recognition of their rights.”¹²⁴

As I read it, Walters’ analysis of the SCC’s logic identifies its reliance on the logic of elimination in more detail by demonstrating that the assumption of territoriality is so deeply embedded within the logic of Canadian law that judges are capable of articulating it as if it is perfectly true and reasonable. While this casts serious doubt on the role of the courts, I find that Walters’ analysis provides support for relying on the aspirational assumption by demonstrating that the logic of elimination can be identified by pointing out where its assumptions create contradictions and inconsistencies. Further underscoring this point is Walters’ conclusion that the SCC’s logic not only contradicts the common law, but that it violates the rule of law “by introducing a confusing and (from the local perspective) arbitrary rule that deprived culturally non-integral parts of the legal system of any force.”¹²⁵ Like Foster, this separates the role of the courts from the rule of law in a way that supports the latter as a standard by which we can determine whether the courts are undermining the legitimacy of their role.

This problem with the logic of Canadian law was reproduced more dramatically in *Delgamuukw*, the first s. 35(1) Aboriginal Title case to reach the SCC released the year after *Van der Peet* and 13 years after the landmark case in *Guerin*. In trying to explain Aboriginal title as a legal interest in land without disturbing the assumption of territoriality, Lamer CJC for the majority writes “Aboriginal title is a burden on the Crown’s underlying title. However, the Crown did not gain this title until it asserted sovereignty over the land in question. *Because it does not make sense to speak of a burden on the underlying title before that title existed, aboriginal title crystallized at*

¹²⁴ *Ibid* at 741-42.

¹²⁵ *Ibid* at 742. (Emphasis in the original)

the time sovereignty was asserted.”¹²⁶ Notably, the reasoning here in *Delgamuukw* is expanding on how Aboriginal title was defined in *Guerin*. It is tempting to see this as a response to the criticisms of Slattery and Foster that there is a lack of justification and motivation in the courts’ reasoning to strive for accuracy and explain its mysteries. However, the durability of the territoriality discourse and the courts’ incapacity to deal with it is, in my view, captured in Lamer CJC’s now infamous closing words “Let us face it, we are all here to stay.”¹²⁷

In his review of the decision, John Borrows takes direct aim at what it is that really “does not make sense” when courts attempt to reconcile the assumption of territoriality with the fact that Indigenous peoples have a pre-existing legal and sovereign interest to the land, writing:

It does not make sense that one could secure a legal entitlement to land over another merely through raw assertion... It is even less of a ‘morally and politically defensible’ position when this assertion has not been a neutral and noble statement, but has benefited the Crown to the detriment of the land’s original inhabitants. As such, ‘it does not make sense’ to speak of Aboriginal title as being a ‘burden’ on the Crown’s underlying title. As ‘it does not make sense to speak of a burden on the underlying title before the title existed,’ Aboriginal peoples wonder how it ‘makes sense’ that Crown title ‘crystallized at the time sovereignty was asserted.’¹²⁸

By identifying what is an obvious failure of the Court to justify its continued reliance on the assumption of territoriality, Borrows clearly identifies the elements of settler colonialism being reproduced: the elimination of Indigenous sovereignty in order to affirm settler sovereignty.

That this is put so clearly is significant, but where Borrows’ analysis goes deeper is in how he deconstructs the logic of elimination embedded in the courts reasoning by tracing how it has been reproduced throughout history, writing “The key words that unlock sovereignty’s power are of ancient origin. Practitioners of its craft can summon a tradition that reaches deep into the past.

¹²⁶ *Delgamuukw*, *supra* note 91 at para 145, [*Delgamuukw*]. (Emphasis added).

¹²⁷ *Ibid* at para 186.

¹²⁸ Borrows, *Alchemy*, *supra* note 2 at 562-63.

It flows from classical times through the Renaissance. Political and legal ascendancy are conveyed to those *who can conjure fictions that vindicate their claims of authority.*¹²⁹ In this, Borrows not only makes a strong connection between the logic of elimination and a power relationship of domination, but he provides it with a deep genealogy that predates the genesis of colonization in Canada.¹³⁰ As the *Persons Case* demonstrated, the courts have the power to break from deeply rooted discriminatory traditions. Yet somehow the failure of the court to do so when it comes to Indigenous peoples makes this racism exceptional. This is felt in Borrows' conclusion as he writes "While the Court's encouragement of negotiated settlements is promising... its observation that 'we are all here to stay' does not tell us where 'here' is. It is clear that if 'here' is principally defined in relation to a reconciliation with magical assertions of Crown sovereignty, 'here' will never be a place where Aboriginal peoples will feel at home."¹³¹

It goes without saying that there is little hint of the aspirational assumption in the conclusion here. Further, if we consider Pasternak and Coulthard's studies which are published 15 years after this conclusion, we find that whatever looked promising in these "negotiated settlements" has simply not borne any fruit. In fact, what is most striking in Borrows' conclusion is that it identifies the irreducible element of settler colonialism, territoriality, which ultimately makes it impossible for the settler sovereignty and Indigenous sovereignty to peacefully coexist.

While the first Aboriginal title decision demonstrated how the SCC will use the logic of

¹²⁹ *Ibid* at 558-59.

¹³⁰ Awareness of this correlation in the DNA of the common law is nothing new. In fact, the prominent English jurist William Blackstone, writing in the eighteenth century about the fundamental legal fiction transplanted by the Norman conquest, stated "Our ancestors, therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from the crown, as the basis of a military discipline, with reason looked upon these deductions as *grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth.*" (Sir William Blackstone, *Commentaries on the Laws of England* (Philadelphia: J.B. Lippincott Co., 1893) at 432. [Emphasis added].).

¹³¹ Borrows, *Alchemy*, *supra* note 2 at 596.

elimination to reproduce the assumption of territoriality, the most recent Aboriginal title decision has demonstrated that the same powers of logic and legal reasoning cannot be used to undo the most racist tenets of that assumption. This seems to be what the SCC attempted to do in *Tsilhqot'in Nation* by stating, matter-of-factly, that "The doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada."¹³²

Again, John Borrows precisely sums up the fallacy of this statement by pointing out the obvious contradiction in the *same paragraph* of the Court's decision, writing:

If only this declaration were deeply true. Canadian law still has *terra nullius* written all over it. The same paragraph that purportedly denied *terra nullius* contains the following statement: "At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province." If that land was owned by Indigenous peoples prior to the assertion of European sovereignty, one wonders how the Crown acquired title in the same land by merely asserting sovereignty, without a version of *terra nullius* being deployed. The Crown's claim to underlying title on this basis "does not make sense." Some kind of legal vacuum must be imagined in order to create the Crown's radical title. The emptiness at the heart of the Court's decision is disturbing.¹³³

The significance of this to further understanding how deeply embedded the logic of elimination is in the legal reasoning of the SCC is troubling for it suggests that the aspirational assumption, long reflected in the literature, about the SCC's ability to use its creative and mysterious powers *both ways*, if only it were willing to do so, may be wrong.

In his conclusion, Borrows writes "So-called underlying Crown title is a fiction... This comment has pointed out areas that need greater attention from the Supreme Court of Canada in order to extend its rejection of *terra nullius*... Until that day occurs, Canada remains a deeply

¹³² *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 69 [*Tsilhqot'in Nation*].

¹³³ Borrows, *Tsilhqot'in*, *supra* note 2 at 702-703. (Borrows citing: Patrick Macklem, *Indigenous Difference and the Constitution of Canada* (Toronto: UTP, 2001) at 113-31, [Macklem, Difference]; Mariana Valverde, "The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty" (2012) 21:1 Soc & Leg Stud 3, [Valverde, Crown]; and Pasternak, *Jurisdiction*, *supra* note 2.).

colonial state built on the vilest of discriminatory tenets.”¹³⁴ Again, this aspirational assumption continues to be maintained paradoxically alongside evidence that directly undermines its reliability, and further with nothing to justify it, but the word “until.” By comparison, Andrée Boisselle makes a similar closing comment in her analysis of the same decision, as she writes:

Until that standard is properly applied to Indigenous claimant groups, the Canadian state perpetuates the racist vision that prevented the recognition of Indigenous nations as the equivalent of nation states in the eyes of the European powers colonizing North America, and produced the infamous proposition that the continent was *terra nullius* until European powers asserted jurisdiction over it.¹³⁵

Like Borrows, the weight of the aspirational assumption is felt in that one word; *until*. As stated above, if we are to rely on this assumption, then we should provide more of an argument to support it than *until*. At least for me, Boisselle’s analysis of the “seemingly innocuous clarification” by the SCC to the Aboriginal title test serves as a good example of the type of evidence that is needed to support our reliance on the aspirational assumption. As Boisselle explains “the Court merely clarified that the standard of occupation that must be met to ground possessory title at common law has to do with the intention and capacity to control the land, rather than with the manner and use of the land in question.”¹³⁶ I agree with Boisselle that this change, which is slight but creative, is important and holds out all the potential she describes as she writes:

Indeed, affirming that the title test rests on the proof of control puts the issue of Indigenous territories’ boundaries, and therefore of Indigenous nations’ recognition of each other’s authority and jurisdiction over their respective territories, at the forefront of the legal inquiry. It effectively places Indigenous normativity—treaties between neighbouring Indigenous nations, permissions granted, denied or skirted to enter a group’s territory—at the heart of Canadian law.¹³⁷

¹³⁴ *Ibid* at 742. (Citing: Nicholas Blomley, “Disentangling Law: The Practice of Bracketing” (2014) 10 Annual Rev L & Social Science 133 at 138 who Borrows quotes as writing “[l]egal fictions such as the doctrine of discovery or Crown radical title entail a parsing of history and geography”) (Emphasis added).

¹³⁵ Andrée Boisselle, “To Dignity Through the Back Door: Tsilhqot’in and the Aboriginal Title Test” (2015) 71 SCLR (2d) 27 at 42.

¹³⁶ *Ibid*.

¹³⁷ *Ibid* at 43.

In reading both papers together, I see that Boisselle’s conclusions are perhaps trying to fill the “emptiness at the heart of the decision” that Borrows sees. But, the limitation to this potential, which is not only consistent throughout the literature and central to Boisselle’s analysis as reflected in the earlier quote, is that all of this great potential for justice is left encapsulated in that one word; *until*. Until the law works *equally*; until mysteries work *both ways*; until the fruits of the *living tree* can be used to nourish the truth that Indigenous peoples have kept alive at great cost and have been struggling to assert for centuries in the face of genocide and settler colonial violence; until then, the aspirational assumption that the courts may produce justice arrives stillborn with the long-awaited, hard fought for, and groundbreaking recognition of Aboriginal title.

I must admit that the tension between the tones of optimism and frustration in the analysis of this groundbreaking judicial decision, the first to issue a long awaited declaration of Aboriginal title, resonates deeply with me. The problem of “No Justice on Stolen Native Land!” is one that I started learning more about over years spent working as a community journalist and activist in Montréal. It was a driving factor for why I decided to go to law school, particularly choosing to go to Thompson Rivers University in Secwepemcul’ecw, the territory of the Secwepemc and homeland of inspiring Indigenous leaders, thinker and activists like Grand Chief George Manuel, William “Wolverine” Ignace Jones, Irene Billy, Arthur Manuel and Janice Billy and the decades of grassroots struggles over land that they were engaged in.¹³⁸ Entering law school charged up, I was quickly disillusioned when I was briefly introduced to the doctrine of discovery in my first year property law class.¹³⁹ As the grind of law school took its toll, this disillusion gave way to emptiness; an irony that I probably should have anticipated given the literal meaning of *terra*

¹³⁸ For the story behind the struggles of these Secwepemc leaders connected to the political and legal Canadian context, see: Manuel, Unsettling, *supra* note 5.

¹³⁹ This was so even though I was fortunate enough to have been taught first year property law by the excellent, critical (and patient) Professor Sharon Mascher.

nullius. A bigger irony is that my determination to address that emptiness by directly engaging with the problem helped me to survive law school, become a lawyer working exclusively in Aboriginal law, connect me with my own Indigenous roots—revealed to me by my grandmother who had kept them unspoken most of her life, and all of mine, for many reasons (stories for another time and place)—and eventually pointed me towards this thesis. Throughout all of this work I have repeatedly traced the development of the Aboriginal jurisprudence from *Guerin* to *Delgamuukw* to *Tsilhqot'in Nation* and their corresponding analysis and literature. To me, seeing an endemic pattern of optimism and potential concurrent with frustration left me feeling puzzled and empty.

If I am being honest, seeing this pattern discouraged me each time I turned my mind to how and what my own efforts might possibly have to contribute. I was at a loss to come up with a way to analyze blockades decisions without repeating this frustrating pattern. It was only when I read Borrows' article again for evidence of how the courts are reproducing the settler colonial logic of elimination that I began to see how this casts the problem in a different light, as he writes "Canadian law *still* has *terra nullius* written all over it... Some kind of legal vacuum *must be imagined*."¹⁴⁰ Viewed this way, I suddenly saw how Borrows' concluding remarks illuminated the logic of elimination in the SCC's reasoning as he writes:

The Court's *assumption* of a legal vacuum... *implies* that legal vacuums exist wherever Indigenous rights exist... These *propositions* are the echo and remnants of *terra nullius*. Crown power can be directly traced to discriminatory *assumptions* rooted in European sovereign assertions when the Crown 'discovered' Canada. These *assumptions are repeated* and applied in the *Tsilhqot'in Nation* case."¹⁴¹

Assumptions, implications, propositions: When viewed through the lens of settler colonialism it became clear to me that the logic of elimination is being reproduced in each of these unexplained

¹⁴⁰ Borrows, *Tsilhqot'in*, *supra* note 2 at 702-703.

¹⁴¹ *Ibid* at 740-41. (Emphasis added).

mysteries, logical leaps and contradictions. This logic has always been there, it has been identified over and over, yet for some reason the legal scholarship has not called it out for what it reproduces: The transformation of violence into settler law, jurisdiction and sovereignty.

III. **Assumption of Territoriality: Is the Colonial Court a Thinking Machine?**

James Tully argues effectively that western political theories can be used to delegitimize colonization writing “Political theorists can employ the language of western political thought critically to test these dubious justifications, to delegitimize them and to test the claims of indigenous peoples for and of freedom.”¹⁴² I find Tully’s political argument compatible with McNeil’s legal argument that the legitimacy of Crown sovereignty can and must be re-examined.

While I believe that Glen Coulthard’s argument for rejecting the colonial politics of recognition provides a full counter argument to Tully’s position, as noted above, underlying this thesis is an inquiry into whether the same argument can be made in law. The reason for this is because, as the discussion above has considered, there remains an aspirational assumption in the literature that, from time to time, finds some evidence and reasoning to support it by separating the rule of law from the role of the courts. The question is whether this separation is significant enough to undermine the assumption of territoriality and root out the logic of elimination that reproduces it. Put another way, to borrow Fanon’s phrasing: Is the colonial court a thinking machine? Or is it predetermined to transform violence into law; to use its creativity and the logic of elimination to find new ways of articulating the same objective of territoriality?

To get at this question further we must look squarely at how the SCC has embedded the assumption of territoriality in the doctrines of reconciliation and the honour of the Crown. These

¹⁴² James Tully, “The Struggles of Indigenous Peoples for and of Freedom,” in Duncan Ivison et al. eds, *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2001) at 50, [Tully, Struggles].

have been central to a perceived transformation of Aboriginal rights jurisprudence that began with the SCC's decision in *Haida Nation*.¹⁴³ Brian Slattery described this decision as portraying “the fundamental law governing Aboriginal rights as more *dynamic* than *static*.”¹⁴⁴ As Slattery explains, this resulted in a paradigmatic shift specifically with regards to how the SCC described “the Crown’s *assertion* of sovereignty, as opposed to its *acquisition* of sovereignty.”¹⁴⁵ Most significantly, this shift opened up the “potential for evolution”.¹⁴⁶ As we have now come to expect, this potential is limited, something Felix Hoehn points out in his close study of this paradigmatic shift, writing that “Reconciling sovereignties is a political task, and so it can only be negotiated; reconciliation cannot be imposed by a court. However, this does not exclude other important roles that courts can and should play in relation to claims of sovereignty... Sovereign Aboriginal nations can exist within Canada, and they can look to courts for recognition of that sovereignty.”¹⁴⁷

To me, Hoehn’s conclusion is somewhat paradoxical in the sense that, on the one hand he acknowledges that the strictly political nature of *reconciling* sovereignties identifies the limitation of the courts ability to fix the problem. Yet on the other hand, he suggests that courts *do* have the power needed to recognize Indigenous sovereignty. This paradigmatic shift, burdened by the necessity of a political task, left me suspicious as to what exactly distinguishes *reconciling* sovereignties from *recognizing* them. It also left me further doubtful about the role of law in addressing this problem. If politics is ultimately where the potential for a resolution exists, then in my view Coulthard’s argument has largely *settled* this debate—unfortunate pun intended.

¹⁴³ *Haida Nation*, *supra* note 92 at para 20.

¹⁴⁴ Brian Slattery, “Aboriginal Rights and the Honour of the Crown” (2005) 29 SCLR (2d) 433 at 434. (Emphasis in the original).

¹⁴⁵ *Ibid* at 437. (Emphasis in the original).

¹⁴⁶ *Ibid* at 443.

¹⁴⁷ Hoehn, *supra* note 2 at 78-79. (Citing: Macklem, *Difference*, *supra* note 133 at 111).

In seeking to expand my inquiry into the political realities of the assumption of territoriality, I turned to the separate works of anthropologist Michael Asch and sociolegal scholar Mariana Valverde. In his book, *On Being Here to Stay*, Asch takes the SCC's definition of reconciliation to task, first by pointing out the flawed proposition it contains, writing "what at first blush reads as an open-ended process *becomes one based on this singular pre-condition*: the agreement on the part of Indigenous peoples that the scope of their political rights, and in particular their right to self-determination, is circumscribed by the fact that, at the end of the day, whatever rights they may have *are subordinate to the legislative authority of the Canadian state*."¹⁴⁸ By this point, it is clear that this singular precondition is the assumption of territoriality. In contrast to how legal scholars have questioned the absence of a justification for this assumption, what makes Asch's challenge stand out is the straightforward way he flips the SCC's definition around, writing "this logically ought not to be the case, if for no other reason than that the political rights of Indigenous peoples already existed at the time that Crown sovereignty was asserted and, therefore, *it is the question of how the Crown gained sovereignty that requires reconciliation with the pre-existence of Indigenous societies* and not the other way around."¹⁴⁹ In this move I find that Asch exposes the logic of elimination embedded within the assumption that SCC has relied upon.

Asch's description of the precondition as *singular* strikes a devastating blow to the potential of *reconciling* sovereignties through a paradigmatic shift, because it exposes that the process of reconciliation is the same predetermined path that the Crown has set out for Indigenous peoples since the Proclamation. In fact, perhaps it is necessary to go further and propose that as long as this precondition continues to be relied upon by the courts, there can be no reason to rely

¹⁴⁸ Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada*, (Toronto: UTP, 2014) at 11, [Asch]. (Emphasis added).

¹⁴⁹ *Ibid.* (Emphasis added).

on the aspirational assumption that continues to be reproduced by the legal literature. Support for this position is found in seeing that the only conclusion discussed above which did not rely on this aspirational assumption was the one that also clearly identified the assumption of territoriality inherent in the SCC's definition of reconciliation. Again, that conclusion came from John Borrows who writes "if 'here' is principally defined in relation to a reconciliation with magical assertions of Crown sovereignty, 'here' will never be a place where Aboriginal peoples will feel at home."¹⁵⁰

In contrast to how Asch exposes the logic of elimination by inverting the SCC's reasoning, I believe Mariana Valverde demonstrates the existence of this logic in her book *Chronotopes of Law*¹⁵¹ by pointing out how elimination is being reproduced in both the jurisprudence and the political space where reconciliation is meant to be implemented. Valverde uses a multidisciplinary sociolegal framework that updates her previous studies of the honour of the Crown doctrine.¹⁵² In examining "the internal dynamics of the mystical entity named in the doctrine" Valverde writes "As a matter of legal fact, it is the *doctrine* that obliges the government to take some measures to fix the tear in the national fabric. But when the words 'the doctrine of' are deleted by judges, and the words 'honour of the Crown' are treated as both the grammatical subject of a sentence and the motor force of law, a miraculous act, for which the word 'performative' is inadequate, is achieved."¹⁵³ Here, Valverde's analytical approach transcends the identification of logical contradictions by focusing on how judges concoct different meanings in the words and principles they use or create.

This view begins to demystify the courts powers, but where Valverde's analysis is

¹⁵⁰ Borrows, *Alchemy*, *supra* note 2 at 596.

¹⁵¹ Mariana Valverde, *Chronotopes of Law: Jurisdiction, Scale and Governance* (New York: Routledge, 2015) [Valverde, *Chronotopes*].

¹⁵² See: Valverde, *Crown*, *supra* note 133; and, Mariana Valverde, "The Honour of the Crown is at Stake": Aboriginal Land Claims Litigation and the Epistemology of Sovereignty" (2011) 1 UC Irvine L Rev 955.

¹⁵³ Valverde, *Chronotopes*, *supra* note 151 at 147.

particularly insightful is in how it debunks the “miracle” by projecting the practical effects of the Court’s magic onto the temporal and spatial fields of jurisdiction and social discourse, writing:

[W]hile the doctrine has worked to recognize aboriginal peoples’ dignity and land rights to some extent, the fact that it does so through the legal technology of ‘the honour of the Crown’ bars the kind of open-ended heteroglossic dialogue that a postcolonial society would need... aboriginal nations are barred from exercising not only sovereignty but even jurisdiction unless such jurisdiction is benevolently granted to them by governments... There is, in other words, *a game of jurisdiction going on*, as well as disputes about resources and control; and all of those asymmetrical engagements have *as a precondition the ‘assertion’ of colonial sovereignty*. That specific forms of spatiotemporality *facilitate certain jurisdictional moves and foreclose others*... is fully demonstrated here.¹⁵⁴

Here the logic of elimination is identified by demonstrating how the specific moves of the court in their reasoning reproduces territoriality and eliminates Indigenous claims to sovereignty and jurisdiction. What makes Valverde’s identification of this logic slightly different from Asch’s is that, in addition to pointing out the lack of any justification or reason for the assumption of territoriality, Valverde demonstrates that its effects are barring Indigenous peoples from having a proper role in the constitutional dialogue needed for transitioning into a postcolonial era. Recall, that these are the same prevailing effects that legal scholars have been identifying for decades, yet lacking an explanation as to why. What the non-legal perspectives of Valverde and Asch point out is that there simply is no reasonable explanation to be found. In part, what helps them to reach this conclusion is that they do not seem to give the courts the benefit of the aspirational assumption. They simply point to the logical contradictions and the violence that it reproduces.

Valverde sums up the contradiction in a way that is similar to Borrows, writing “it is precisely the incantatory repetition of the phrase ‘honour of the Crown’ that makes it seem as if the doctrine which is in fact being elaborated in contemporary judges’ words is an ancient legal fact—though the lack of citations to standard common law sources or legal treatises suggests

¹⁵⁴ *Ibid* at 147. (Emphasis added).

otherwise.”¹⁵⁵ Emptying out the SCC’s latest and boldest attempt to usher in a paradigmatic shift for addressing the problem strikes a devastating blow to the aspirational assumption that there is any potential to be found in the capacity of the courts to correct the problem. When read alongside Borrows’ more recent analysis of the SCC’s attempt to erase *terra nullius*, these conclusions draw our attention back towards the question of whether colonial courts, when all the dusts of mystery and constructed meaning settles, are simply programmed to reproduce violence.

This question evokes Frantz Fanon’s powerful line that “colonialism is not a thinking machine, nor a body endowed with reasoning faculties. It is violence in its natural state and it will only yield when confronted with greater violence.”¹⁵⁶ There is a tendency, at least for western theorists I think, to dismiss this latter part of Fanon’s point. Although Tully isn’t responding directly to Fanon, I think he captures this tendency in part when he writes “it is impractical to struggle for freedom in deed by direct confrontation, it is possible to struggle in words by confronting and seeking to invalidate the two legitimating hinge propositions.”¹⁵⁷ I read this as saying, instead of greater violence we need greater *reason*. However, even if we do see it this way, this argument again implies the same aspirational assumption without a way to validate it.

Whether in legal or political theory, throughout this review we have seen that this assumption is becoming less reliable as the doubts and contradictions inherent in the courts’ reasoning continue to pile up. As Coulthard persuasively demonstrates, four decades of confronting those contradictions, as Tully suggests we do, has not moved Indigenous peoples any closer to the kind of freedom that they have spent centuries struggling for, but has “in fact

¹⁵⁵ *Ibid* at 151.

¹⁵⁶ Fanon, *Wretched*, *supra* note 27.

¹⁵⁷ Tully, *Struggles*, *supra* note 142 at 51.

encouraged the opposite".¹⁵⁸ Such a conclusion leads us to accept Fanon's conclusion, that the colonial court is not a thinking machine and that our aspirational assumption is nothing more than a mirage on the horizon; scholars so thirsty for any sign of justice in the jurisprudence of a settler colonial legal system that they construct an oasis in each new landmark decision from the SCC.

But is this really the end of the inquiry? Recall that there is still some evidence to support the alternative, that the courts *are* aware of their leaps and contradictions. Perhaps if we think about the people who populate courts, the judges, we might find some evidence of an awareness and an ability to turn things around. Thus, before we can discard the potential for law entirely, one last question should be asked: *Who* are we trying to reason with? Throughout our review of the legal literature, the assumed answer to this question has been the courts as an institution. But what about the judge? While we cannot truly know the mind of a judge, political theory allows us to consider people as political actors and in this Michael Asch's work is insightful. As I read it, Asch's concluding thoughts suggest unlocking the potential of the aspirational assumption will require more than logical arguments from outside, but self-reflective honesty from within:

[W]hen it comes to reconciliation with Indigenous peoples, *the presumption that 'might makes right' is not good enough*. Rather, it suggests that we begin by asking ourselves what the shape of a relationship with Indigenous peoples would be were we to replace the de facto 'assertion of Crown sovereignty' with an approach that asks how that would look were we to base reconciliation on the de jure principle that, in our way of understanding, it is simply wrong to move onto lands we know belong to others without permission.¹⁵⁹

In contrast to Hoehn's 'political task', Asch's view here pushes the task of reconciling sovereignties even further into the political sphere and turns it inwards on the individual settler. I think this is a necessary turn, albeit one that comes into direct conflict with the present habits of

¹⁵⁸ Coulthard, *supra* note 13 at 24. (Emphasis added).

¹⁵⁹ Asch, *On Being Here to Stay*, *supra* note 148 at 33. (Emphasis added).

the settler to “hide” and “obscure” the reproduction of settler colonial violence. In terms of Asch’s analysis, I see a problematic in how he maintains a reliance on the role of law (a reconciliation based on settler legal principles) and by extension the role of the courts to ultimately frame and referee that exercise. The discussion above has illustrated how this reliance has to this point only reproduced violence. Therefore, what justifies our reliance on settler law and the colonial courts?

The answer is less than satisfying, but at length Asch’s work suggests it is important to not abandon our hope in law altogether because, after he dispenses with numerous other fallacies in the political arguments against fully implementing the self-determination of Indigenous peoples, he then virtually erodes any hope in a political solution as he reaches the conclusion that:

The self-determination argument puts Settlers in a no-win position. We may be convinced by reasoned argument that Indigenous peoples have the same right to self-determination as do other colonized peoples, and the consequence may well be a recognition on our part that *we have no right to stay*. Yet, as Lamer aptly summarized, we are here to stay. Therefore, even though the argument may be compelling, *we are likely to reject it*. To ask us to accept that Indigenous peoples have this right, then, is to virtually *ensure that we will ‘choose against it*.¹⁶⁰

Asch’s brutal honesty reveals that there *is* some political truth in the presumption that ‘might makes right’ which is acutely captured in the colonial context by Fanon’s equation of colonialism with violence. Further, it seems that Asch is perhaps suggesting that it is this presumption which Lamer CJC is truly articulating through his oft-cited closing words in *Delgamuukw*: “Let us face it. We are all here to stay.”¹⁶¹ If this is so, then it leads inevitably to the conclusion that a structure of power built on the logic of elimination may be incapable of redefining itself because whatever principles that law, as the institution tasked with social and political oversight, tries to develop, they are ultimately at the mercy of the interpretation of the settler colonial government, and the

¹⁶⁰ *Ibid* at 72.

¹⁶¹ *Delgamuukw*, *supra* note 126 at para 186.

majority of settlers themselves, who are likely to reject it to the extent that it compromises their territoriality. Does this mean that settlers are programmed to reproduce settler colonialism?

Again, it is here where we see how reconciliation facilitates the reproduction of settler colonial violence, as Tuck and Yang write “Reconciliation is about rescuing settler normalcy, about rescuing a settler future. Reconciliation is concerned with questions of *what will decolonization look like? ... What will be the consequences of decolonization for the settler?*”¹⁶² It is clear that Asch is engaging these questions through his honesty and careful examination of the potential of treaty relations to, as he puts it “offer us the means to reconcile the fact that we are ‘here to stay’ with the fact that there were people already here when we first arrived.”¹⁶³ While there is much in Asch’s approach that I agree with, as always, the potential in that approach is held up by another *until* moment: *until* there is honesty from settlers, courts and governments above all.

So again, the potential is based on an assumption that settler courts and governments should at least be capable of honesty. Unfortunately, when we examine the narrative of reconciliation being crafted by Canada for evidence to support this assumption, we do not find honesty. Instead, we find the logic of elimination being reproduced through examples of unilateral moves which “ultimately represent settler fantasies of easier paths to reconciliation.”¹⁶⁴ There are many such moves being made in this day and age, but I will limit this to the following two examples.

The first one comes from a 2013 speech titled “Defining Moments: The Canadian Constitution” in which Chief Justice Beverley McLachlin stated “Reconciliation *recognizes the reality* that Canada is made up of people of First Nations descent *but also* people who are descended, not just from European forbears, but from people from all parts of the globe. *Whatever*

¹⁶² Tuck & Yang, *supra* note 25 at 35. (Emphasis added).

¹⁶³ Asch, On Being Here to Stay, *supra* note 148 at 152.

¹⁶⁴ Tuck and Yang, *supra* note 25 at 4.

our views about that, it is a reality and we must accept it.”¹⁶⁵ The second comes from what should have been a historic speech by the Minister of Indigenous and Northern Affairs, the Honourable Carolyn Bennett, officially pledging to the world that Canada intended “nothing less than to adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* in accordance with the Canadian Constitution” and stating “I firmly believe that once you know the truth, you cannot unknow the truth. *We now know the truth. We know the reality of our shared reality* with Indigenous people in Canada. We now need all Canadians to embark on the journey of reconciliation.”¹⁶⁶ This remark is striking in the context of our review above. But, like Borrows’ inquiry into what Lamer CJC meant by “here” in *Delgamuukw*, if we look closely, we are left wondering what do these two very powerful women, and representatives of the Crown’s political and judicial personas really mean when they say “reality” and “truth”?

First, what is clearly missing in these statements is any hint of the honest questions that reconciliation requires settlers to ask of themselves. The lack of honesty in Minister Bennett’s statement on behalf of the Liberal federal government came rushing quickly to the forefront as Canada immediately began backpedalling on its commitment to implement UNDRIP through official statements that it was “unworkable”¹⁶⁷ even while sharply denying that it was going back

¹⁶⁵ Rt Hon Beverley McLachlin, “Defining Moments: The Canadian Constitution” (Speech delivered at the Canadian Club of Ottawa, 5 February 2013) online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-02-05-eng.aspx>>, [McLachlin]. (Emphasis added).

¹⁶⁶ See: Indigenous and Northern Affairs Canada, News Release, “Canada Becomes a Full Supporter of the United Nations Declaration on the Rights of Indigenous Peoples” (10 May 2016) online: <<http://news.gc.ca/web/article-en.do?nid=1063339&tp=1>>; Indigenous and Northern Affairs Canada, Speech, “Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10.” (11 May 2016), (emphasis added), online: <<http://news.gc.ca/web/article-en.do?crtr.sj1D=&crtr.mnthndVl=6&mthd=advSrhc&crtr.dpt1D=6680&nid=1064009&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2016&crtr.kw=&crtr.dyStrtVl=1&crtr.aud1D=&crtr.mnthStrtVl=5&crtr.page=1&crtr.yrndVl=2016&crtr.dyndVl=1>>.

¹⁶⁷ The official statements have come directly from the Honourable Jody Wilson-Raybould, who also happens to be the first Indigenous person to hold the office of the Attorney General of Canada. See: “Justice Minister Jody Wilson-Raybould says adopting UNDRIP into Canadian law ‘unworkable’” *APTN National News* (12 July, 2016), online: <<http://aptn.ca/news/2016/07/12/justice-minister-jody-wilson-raybould-says-adopting-undrip-into-canadian-law-unworkable/>>; and, “The UNDRIP, drip, drip of Liberal native rights policy”, Editorial, *The Globe and Mail* (11

on its words.¹⁶⁸ With that honesty absent, it becomes clear that this rhetoric of reconciliation is again unilaterally asserting that the “truth” and “shared reality” which Canadians *and* Indigenous peoples alike “must accept” is fundamentally based on the assumption of territoriality which still lacks a legal, factual and moral basis, or even any attempt at a reasonable explanation for why it is remotely justified. What is further astonishing about these unilateral moves is the clear foreclosure of dialogue captured by statements like “Whatever our views about that, it is a reality and we must accept it.”¹⁶⁹ Thus, reconciliation is a story to be told by settlers and Indigenous peoples alike, on the precondition that its concluding chapter is already written entirely by settlers in a way that guarantees the perfection of settler sovereignty.

By unilaterally imposing the *settler* reality and truth on Indigenous peoples in this way, these political statements from high ranking representatives of the Crown, are just forms of settler colonial violence disguised as progressive calls to action because they again eliminate Indigenous peoples’ perspectives and voices from the type of honest postcolonial dialogue that Asch’s settler Indigenous relations approach requires. In doing this they further obscure the *actual* reality and truth of the violence that Indigenous peoples continue to demand Canadians acknowledge and account for. Michi Saagig Nishnaabeg scholar Leanne Simpson vividly captures this:

If Canadians do not fully understand and embody the idea of reconciliation, is this a step forward? It reminds me of an abusive relationship where one person is being abused physically, emotionally, spiritually and mentally. She wants out of the relationship, but instead of supporting her, we are all gathered around the abuser, because he wants to “reconcile.” But he doesn’t want to take responsibility. He doesn’t want to change. In fact, all through the process he continues to physically, emotionally, spiritually and mentally abuse his partner. He just wants to say sorry so he can feel less guilty about his behaviour. He just wants to adjust the ways he

September, 2016), online: < <http://www.theglobeandmail.com/opinion/editorials/the-undrip-drip-drip-of-liberal-native-rights-policy/article31807191/>>.

¹⁶⁸ Kristy Kirkup, “Government supports Indigenous declaration without reservation: Wilson-Raybould” *CBC News* (20 July, 2016), online: < <http://www.cbc.ca/news/indigenous/government-supports-undrip-without-reservation-1.3687315>>.

¹⁶⁹ McLachlin, *supra* note 165.

is abusing; he doesn't want to stop the abuse. Collectively, what are the implications of participating in reconciliation processes when there is an overwhelming body of evidence that in action, the Canadian state does not want to take responsibility and stop the abuse? What are the consequences for Indigenous Peoples of participating in a process that attempts to absolve Canada of past wrong doings, while they continue to engage with our nations in a less than honourable way?¹⁷⁰

There is no denying *this* reality and truth. If an assumption is to be made at this juncture about the reasoning faculties of colonial courts and governments on the issue of the Crown's claim to sovereignty, then it is here that I would argue a critical component of the kind of settler honesty demonstrated and demanded by Asch's treaty relations approach requires, in my view, making the assumption that Fanon is right to equate colonialism with violence and incapacity for reason.

There are many compelling reasons to assume that the settler colonial state of Canada is not a thinking machine. And while this conclusion may be made about the state as a *structure*, I find that extending this conclusion to the *people* who work every day to maintain that structure would understate things and let them off the hook too easily. Chief Justice McLachlin and Minister Bennett are very intelligent and accomplished women who are quite capable of thinking. The problem is that they, and their predecessors and contemporaries, have exercised their thinking capacity in ways that have maintained a power relationship of dominance marked by violence that deliberately puts Indigenous lives in harm's way in order to protect the status quo of settlers.

Because Indigenous lives are at stake *every day*, because settler colonial violence is being reproduced in *every action*, what we cannot assume any longer is that Canadian courts, as *structures*, are going to always, or eventually, use their power in a manner that is inconsistent with the elimination of Indigenous peoples. However, whether individual judges, as *people* are capable of rejecting this logic and reasoning impartially, is a question that must remain open.

¹⁷⁰ Leanne Simpson, *Dancing on Our Turtle's Back* (Winnipeg: Arbieter Ring Press, 2011) at 21, [Simpson, Dancing].

Thus, in our analysis of the decisions of a judge, we need to place on them the burden to demonstrate their impartiality. For analytical purposes, this means that when the courts explicitly or implicitly rely on the assumption of territoriality in their reasoning, and fail to provide a reason for doing so in their decisions involving Indigenous peoples, particularly those cases where colonial sovereignty is directly challenged, that such a move is equated with the reproduction of settler colonial violence. In other words, the colonial court may not be a thinking machine, but we should leave open the possibility that the *human* judge sitting on the bench is.

IV. Conclusion

In 2017, Canada is celebrating 150 years of transforming violence into law, jurisdiction and sovereignty. As Arthur Manuel explains in his latest essay, when this celebration is viewed for what it is “Indigenous Peoples need to be careful NOT to honour the 150 years of colonization because this will validate the racism that is implicit in Canadian colonialism. Instead,” continues Manuel “Indigenous Peoples and Canadians who believe in human rights need look at Canada’s 150th Birthday Party as [a] period to undertake a commitment to decolonize Canada and recognize the right of Indigenous Peoples to self-determination.”¹⁷¹

Throughout this chapter we have reviewed plenty of evidence to support Manuel’s claim that Canada is a settler colonial state and that this structural characteristic “is deeply engrained in the entire constitutional and legal fabric of Canada.”¹⁷² We have traced this logic of elimination from the blatantly racist justifications in the Bagot Report of 1845-47 and the Pennefather Report of 1858, we have seen it embedded within the hard-fought struggle for “recognition” and the entrenchment of Aboriginal and Treaty rights into the Constitution, we have traced this logic’s

¹⁷¹ Manuel, Are you a Canadian, *supra* note 6.

¹⁷² *Ibid.*

evolution through the development of the Aboriginal rights jurisprudence, and we have now seen it contained within the long-awaited declaration of Aboriginal title and even the formal adoption of *UNDRIP*. While the language has changed, and new progressive sounding principles and discourses have emerged, what matters is that substantively Canada has not shifted one iota from the primary objective of territoriality it asserted in 1763. In fact, what this retrospective of the reasoning and the dozens of different scholarly writings have demonstrated is that the logic of elimination has driven both courts and governments alike to be as creative as possible in maintaining the project of settler colonialism, even to the point of declaring, absurdly, that *terra nullius* never applied in Canada and that they know the “shared reality” of settler colonization.

This kind of record leaves little room for the aspirational assumption to be relied upon in politics or law. When looked at in light of settler colonial studies and the empirical work of Ford, Harris, Pasternak and Coulthard, this record raises serious questions about the potential that the latest paradigm shift in Aboriginal rights jurisprudence has for ushering in a true era of legal pluralism and mutual recognition that respects an uncompromised right to self-determination for Indigenous peoples as called for by *UNDRIP*.

At length, we need to accept, as Arthur Manuel has stated we must, that Canada is a settler colonial state and that its institutions are presently committed to protecting its exclusive claim to territoriality by reproducing the logic of elimination in their policies and decisions. However, we must also remain open to the possibility that separate from institutions, that the people living under a settler colonial regime, if they undertake an honest examination of themselves and their obligations, are capable of rejecting this logic and using their creativity and innovation to construct new and more positive discourses and relations that respect and protect the existence of Indigenous peoples, their laws and their authority. I view this as a major theme and call to action reflected

throughout Manuel's book, *Unsettling Canada: A National Wake-Up Call* in which he writes:

The land retains its power and its beauty. All we have to do is rethink our place on it. Simply by removing the shadow of the doctrine of discovery, you find a rich tapestry of peoples who need to sit down to speak to each other as equals and build a new mechanism to co-operate with each other, to satisfy each other's needs and aspirations in the modern world. There is room on this land for all of us and there must also be, after centuries of struggle, room for justice for Indigenous peoples. That is all that we ask. And we will settle for nothing less.¹⁷³

Significantly, this message of co-existence, justice, peace and equality is one that was prominently put by his father, Grand Chief George Manuel, forty years earlier in his book *The Fourth World: An Indian Reality* in which he writes:

The greatest barrier to recognition of aboriginal rights does not lie with the courts, the law, or even the present administration. Such recognition necessitates the re-evaluation of assumptions, both about Canada and its history and about Indian people and our culture – assumptions with which people have lived for centuries. Real recognition of our presence and humanity would require a genuine reconsideration of so many people's role in North American society that it would amount to a genuine leap of imagination. The greatest preservative for racial myths is the difficulty of developing a new language in which the truth can be spoken easily, quietly, and comfortably.¹⁷⁴

Again, this same message is one that can be traced back to the *Memorial to Prime Minister Sir Wilfrid Laurier* written by the Chiefs of the Secwépemc, Nlaka'pamux, and Syilx Nations in 1910 who, in accordance with their laws and desires for peace, initially responded to the invasion of settlers with good will stating "These people wish to be partners with us in our country. We must, therefore, be the same as brothers to them, and live as one family. We will share equally in everything half and half in land, water and timber, etc. What is ours will be theirs, and what is theirs will be ours. We will help each other to be great and good."¹⁷⁵ Unfortunately, this vision of

¹⁷³ Manuel, *Unsettling*, *supra* note 5 at 11-12.

¹⁷⁴ Manuel and Posluns, *Fourth World*, *supra* note 7 at 224.

¹⁷⁵ From the *Memorial to Sir Wilfrid Laurier, Prime Minister of Canada*, (1910), online: <http://shuswapnation.org/wordpress/wp-content/uploads/2012/09/137543_ShuswapNation_Bro.pdf>. (Emphasis added).

mutual recognition and coexistence was ignored by violence and the unilateral imposition of a settler colonial legal and political order and the Chiefs responded by declaring:

So long as what *we* consider justice is withheld from *us*, so long will dissatisfaction and *unrest* exist among us, and we will continue to struggle to better ourselves. For the accomplishment of this end we and other Indian tribes of this country are now uniting and we ask the help of yourself and government in this fight for our rights. *We believe* it is not the desire nor policy of your government that these conditions should exist.¹⁷⁶

Grand Chief George Manuel described the catastrophic effect of this on the Secwépemc, writing “Within my own lifetime I have seen my people, the Shuswap nation, fall from a proud state of independence... to a condition of degeneration, servitude, and dependence as shameful as any people have ever known.”¹⁷⁷ But, continues Grand Chief George Manuel “I have also seen my people make the beginning of the long, hard struggle back to the plateau that is our proper place in the world.”¹⁷⁸ In making that struggle to reclaim the inherent right to self-determination his life’s work, Arthur Manuel writes in the closing of his book “This is where we are now heading. We invite all Canadians to join us to help move the final obstacles together. We can accomplish this as friends and partners as we have at times in the past. Or we can do it as adversaries, in anguish. Our path toward decolonization is clear. It is up to Canadians to choose theirs.”¹⁷⁹

This is the kind of message that Canadians *could* be celebrating today and into the future. But what stands in the way of a pluralistic and mutually respectful society in these lands, is Canada itself. As a settler colonial state it is the opposite of the multicultural, inclusive and diverse country that it repeatedly tells itself and the world that it is. While the door to decolonization remains open for Canadians to be honest with themselves and to reject settler colonialism in all of its forms, it is

¹⁷⁶ *Ibid.*

¹⁷⁷ Manuel and Posluns, *Fourth World*, *supra* note 7 at 2.

¹⁷⁸ *Ibid.*

¹⁷⁹ Manuel, *Unsettling*, *supra* note 5 at 227.

most critical to acknowledge that Indigenous peoples have kept that door open through their tireless resistance from the first moment of colonization. For this reason, it is to these voices and the theory and practice of Indigenous resurgence that we turn to explore in the next chapter as we continue to develop our discussion ahead of an analysis of the role of the courts in resolving disputes involving Indigenous blockades.

Chapter 3: Indigenous Resurgence and the Rule of Law

These models put the hens in charge of the hen house and the fox under interrogation. If it is truly time to talk “reconciliation,” then how we reconcile is critically important. I can see no evidence whatsoever that there exists a political will on the part of the state to do anything other than neutralize Indigenous resistance, so as not to impinge upon the convenience of settler-Canadians. The only way to not be co-opted is to use our own legal and political processes to bring about justice...

Our liberatory and inherent theories of resurgence also do not tell us to persistently search through the web of colonial traps for settler political recognition and to gleefully accept white paper liberalism designed to redistribute resources and rights, placating the guilt of settler Canadians and neutralizing Indigenous resistance. Our inherent theories of resurgence are transformative and revolutionary. They are meant to propel and maintain social, cultural and political transformative movement through the worst forms of political genocide; and I think it is important to understand them as such.¹⁸⁰

— Leanne Betasamosake Simpson,
Dancing on Our Turtle’s Back, 2011

As discussed in the first chapter, the history of Indigenous resistance is one that is often found when we read between the lines of the one-sided versions of history recorded by the colonizers who define Indigenous peoples as “Savages”, whose “ignorance” and “remarkable fondness for spirits” justifies their dehumanization and dispossession of land.¹⁸¹ We know these rationalizations are more than just racist stereotypes, but that they are driven by a logic of elimination that seeks to perfect settler sovereignty and territoriality. As touched upon in the last chapter, we also know that by acknowledging and listening to the Indigenous perspective we can begin to see more sharply how this logic is deeply embedded in Canada’s official legal story and the decades of legal reasoning that has shaped the jurisprudence on Aboriginal rights. When we take a closer look at that official story we see that Indigenous resistance has been, and is still a part of the national narrative.

¹⁸⁰ Simpson, *Dancing*, *supra* note 170 at 24.

¹⁸¹ Bagot report, *supra* note 3.

We see that the flawed promise of “Protection” under the Proclamation in 1763 was significantly influenced by Indigenous resistance through the uprising known as Pontiac’s War.¹⁸² We see that when the promise of “Protection” was never kept, Indigenous resistance took the form of petition after petition to stop the destruction of their lands and that settlers responded with a policy of “gradual civilization.”¹⁸³ We see that when the policy proved to be inefficient for the settlers and they introduced the “Potlach Law”¹⁸⁴ that Indigenous resistance took their criminalized practices and ceremonies underground, as Leanne Simpson writes:

My ancestors resisted by simply surviving and being alive. They resisted by holding onto their stories They resisted by taking the seeds of our culture and political systems and packing them away, so that one day another generation of Michi Saagiig Nishnaabeg might be able to plant them. I am sure of their resistance, because I am here today, living as a contemporary Michi Saagiig Nishnaabeg woman. I am the evidence. Michi Saagiig Nishnaabeg people are the evidence. Now, nearly two hundred years after surviving an attempted political and cultural genocide, it is the responsibility of my generation to plant and nurture those seeds and to make our Ancestors proud.¹⁸⁵

Since inaction, assimilation and criminalization had all failed to eliminate Indigenous peoples, the settler colonial state started to set up a system of “recognition”, which, as Grand Chief George Manuel writes, was a “process of granting recognition with one hand and taking it away with the other... a policy that led to a complete denial of Indian title.”¹⁸⁶ When many Indigenous Nations refused to be fooled by this colonial trap, they resisted by hiring lawyers to bring claims for Aboriginal title, and again Canada reacted by making it an offence “to raise funds for the purpose of pressing any Indian claim.”¹⁸⁷ Eventually, criminalization was repealed in 1951, but, as George

¹⁸² Slattery, PhD, *supra* note 1 at 198; Borrows, PhD, *supra* note 1 at 52.

¹⁸³ RCAP, vol 1, *supra* note 3 at 248-49.

¹⁸⁴ Manuel and Posluns, *supra* note 7 at 73.

¹⁸⁵ Simpson, Dancing, *supra* note 170 at 15.

¹⁸⁶ *Ibid* at 80.

¹⁸⁷ *Ibid* at 94.

Manuel writes, the reasons for the repeal “did not lie in convincing the Parliament of Canada of our humanity. It lay in the fact that the tradition of the potlach never died. The organizing and coming together of people to work for our common goals never stopped.”¹⁸⁸

Indigenous resistance is, and always has been, how the door for peace and respect for humanity stays open. It has never been about convincing the settler colonial state to provide accommodations for or to “recognize” Indigenous peoples. The last two chapters have attempted to make it clear that studying, and practicing Aboriginal rights jurisprudence is broadly about learning the latest in settler colonial state technology and innovation for transforming violence into sovereignty, jurisdiction and law. The turning point in the broader argument of this thesis is this: I believe that if legal scholars want to begin to understand law as a pathway to peace and respect in the context of the settler colonial state, then we need to start by studying law through the praxis of Indigenous resurgence, why it supports the necessity of direct action and how its practices create sites of jurisdictional conflict that offer us an opportunity to expose how the courts are reproducing the logic of elimination in their judgements.

I. What is Indigenous Resurgence?

Like the study of settler colonialism, Indigenous resurgence is also an emerging field of intellectual, scholarly and grassroots activity. Of those writing in this field, I consider the works of Mohawk scholar Taiaiake Alfred¹⁸⁹ and Michi Saagig Nishnaabeg scholar Leanne Simpson¹⁹⁰ provide the foundational theorization, while the works of Dene scholar Glen Coulthard,¹⁹¹

¹⁸⁸ *Ibid* at 97-98.

¹⁸⁹ Taiaiake Alfred, *Peace Power Righteousness: An Indigenous Manifesto* (Don Mills: Oxford University Press, 1999); ---, *Wasáse: Indigenous Pathways of Action and Freedom* (Peterborough: Broadview Press, 2005), [Alfred].

¹⁹⁰ Simpson, *Dancing*, *supra* note 170.

¹⁹¹ Coulthard, *supra* note 13.

Mohawk scholar Audra Simpson¹⁹² and Secwepemc authors and scholars Janice Billy¹⁹³ and Arthur Manuel¹⁹⁴ provide us with greater detail into the specific practices and forms that Indigenous resurgence can and should take on the ground. In this section, I will focus on sketching out the theory of Indigenous resurgence before turning to some of the specific forms and practices that it takes.

Indigenous resurgence is a theory and practice of decolonization “on our own terms, without the sanction, permission or engagement of the state, western theory or the opinions of Canadians.”¹⁹⁵ It more than just a rejection of the settler colonial traps of liberal recognition, rather, as Leanne Simpson writes, it moves “beyond resistance and survival to flourishing and *mino bimaadiziwin*.”¹⁹⁶ Taiaiake Alfred also makes this point, writing “The challenge for those of us seeking to move beyond mere survival, to engender social and political movements taking us to a place beyond colonialism, is to convince Onkwehonwe to draw on our inherent and internal resources of strength and to channel them into forms of energy that are capable of engaging the forces that keep us tied to colonial mentality and reality.”¹⁹⁷ For Alfred, both the attitudes and actions of Indigenous resurgence are “actions of a certain type, actions that restore the selflessness and unity of being that are at the heart of indigenous cultural life, that reject individualistic and materialist definitions of freedom and happiness, and that create community by embedding

¹⁹² A. Simpson, *supra* note 13.

¹⁹³ Janice Billy, *Back from the Brink: Decolonization through the Restoration of Secwepemc Language, Culture and Identity*, (PhD Thesis, Simon Fraser University, 2009) [unpublished].

¹⁹⁴ Manuel, *Unsettling*, *supra* note 5.

¹⁹⁵ Simpson, *Dancing*, *supra* note 170 at 17.

¹⁹⁶ *Ibid.* (Simpson explains in the footnote that “*Mino bimaadiziwin* is a phrase that is used to denote ‘living the good life’ or ‘the art of living the good life.’ Winona LaDuke translates the term as ‘continuous rebirth,’ (Winona LaDuke, *Our Relations: Struggles for Land and Life* (Cambridge: South End Press, 1994), so it means living life in a way that promotes rebirth, renewal, reciprocity and respect.”).

¹⁹⁷ Alfred, *supra* note 189 at 179.

individual lives in the shared identities and experiences of collective existences.”¹⁹⁸

Finding the energy and strength within is both the objective and the first action to be taken, as Simpson writes “If this approach does nothing else to shift the current state of affairs—and I believe it will—it will ground our peoples in their own cultures and teaching that provide the ultimate antidote to colonialism... Transforming ourselves, our communities and our nation is ultimately the first step in transforming our relationship with the state.”¹⁹⁹ Importantly, there is a self-awareness of how the energy and strength of the individual is invested, as Simpson writes “I have spent enough time taking down the master’s house, and now I want most of my energy to go into visioning and building our new house.”²⁰⁰ In this sense, it is critical to see Indigenous resurgence as a theory of decolonization that is distinct from the study of settler colonialism for it is not strictly defined by confirming the existence of settler colonial violence and identifying its many evolving practices.

In the same sense, it is important to distinguish Indigenous resurgence from decolonization as understood by Frantz Fanon who describes it as “clearly an agenda for total disorder” that “can only find its significance and become self coherent insofar as we can discern the history-making movement which gives it form and substance. Decolonization is the encounter between two congenitally antagonistic forces that in fact owe their singularity to the kind of reification secreted and nurtured by the colonial situation.”²⁰¹ While Fanon is correct in saying that the existence and necessity of Indigenous resistance is inextricably wrapped up historically with the invasion and continued occupation of settler colonialism; it is important to see that Indigenous resurgence as a

¹⁹⁸ *Ibid* at 187.

¹⁹⁹ Simpson, *Dancing*, *supra* note 170 at 17.

²⁰⁰ *Ibid* at 32.

²⁰¹ Fanon, *Wretched*, *supra* note 27 at 2.

theory and practice of regenerating “traditional values” is not similarly framed as a mere response to the violence of settler colonialism, as Coulthard writes “the resurgence paradigm defended by Alfred and Simpson does not require us to dialectically transcend Indigenous practices of the past once the affirmation of the practices has served to reestablish us as historical protagonists in the present.”²⁰² Distinguishing Indigenous resurgence in this way is also important to separate its practices from being generalized as representing the “greater violence” that Fanon theorizes is the confrontational force required to overthrow colonialism. There can be no doubt that settler colonialism is violence in many forms, but Indigenous resurgence is substantively greater than violence, as Coulthard puts it “Indigenous resurgence is at its core a *prefigurative* politics—the methods of decolonization prefigure its aims.”²⁰³

From this theoretical basis emerges a number of methods and practices of Indigenous resurgence emerge, but for the purposes of this thesis, we turn now to focus specifically on the form of direct action typically referred to as a “blockade” and seek in particular to understand the argument made for the necessity of this action to the broader resurgence of Indigenous peoples.

II. The Necessity of Direct Action

As discussed above, the narrative of Indigenous resistance is the obscured half of Canada’s official legal story. As Kiera L. Ladner writes, this narrative is being told through many forms of Indigenous resistance ranging “from legal actions to public marches or demonstrations on the lawns of government buildings, and from Métis armed insurrections to protesting uranium exploration. Such struggles have even presented themselves as suicides.”²⁰⁴ In this way, the form

²⁰² Coulthard, *supra* note 13 at 154.

²⁰³ *Ibid* at 159.

²⁰⁴ Kiera L. Ladner & Leanne Simpson, “This is an Honour Song” in Leanne Simpson & Kiera L. Ladner, eds, *This is an Honour Song: Twenty Years since the Blockades* (Winnipeg: Arbeiter Ring Publishing, 2010) at 2-3, [Ladner & Simpson].

that resistance takes ranges from individual to collective, as Ladner writes “[e]very single Indigenous nation in Canada has a long history of resistance.”²⁰⁵ In this it must be assumed that every nation has their own ways of resisting that are germane to their culture and history.

By the same measure, no form of resistance is more important than another, but they can be distinguished and this is where the necessity of blockades as a form of resistance resides. As Ladner explains, the Kanien’kehaka resistance at Kanehsatà:ke and Kahnawà:ke in the summer of 1990 (the Oka Crisis) “was different” from other forms of resistance because of the impact it had through the “powerful images every night on the news for months—images that became a defining moment for many of us. Images that generated unprecedented Indigenous response in the form of solidarity blockades across Turtle Island.”²⁰⁶ There are many factors beyond the media coverage for why the Oka Crisis stands out as such a significant expression of Indigenous resistance. These range from the historical and geopolitical significance of that place as one of the first expressions of coexisting settler colonialism (the French Crown and Jesuit missionaries) and military alliance with Indigenous peoples²⁰⁷ to the surreal deployment of the Canadian military against their former Haudenosaunee military allies 270 years later—who, it must be remembered, without them the British would not have conquered the French in 1760 and Canada would not have defended itself against the Americans in 1812; and, in a word, Canada would not *exist*—all to protect the possible addition of 9 holes to a golf course.²⁰⁸

While the Oka Crisis epitomizes the elimination of Indigenous peoples for the purpose of protecting the most trivial of settler interests, what stands out the most about the Oka Crisis is that

²⁰⁵ *Ibid* at 4.

²⁰⁶ *Ibid* at 3.

²⁰⁷ See generally: Richard Bartlett, *Indian Reserves in Quebec* (Saskatoon: Native Law Centre, 1984); and, ---, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (Saskatoon: Native Law Centre, 1990).

²⁰⁸ Manuel, Unsettling, *supra* note 5 at 80.

its impact reached far beyond its immediate spatial and temporal limitations, both in the form of solidarity blockades across the continent, as well as through the ongoing consequences which include the commission that produced RCAP.²⁰⁹ In all of these factors and effects, the Oka Crisis is an event where the many complexities of settler colonialism, across Turtle Island, were suddenly made visible to Canadians and Indigenous peoples alike. It shocked a part of their moral consciousness that the logic of elimination is intended to leave confused and disoriented.

This is part of the power inherent in the blockade as a form of resistance. It not only disrupts the settler colonial state on many levels—economic, social, political and legal—but can in some cases reverse its momentum by prompting an honest self-reflective turn. The inherent power of the blockade also makes it a lightning rod of controversy, particularly in discourses of Indigenous resistance, as Glen Coulthard explains “With respect to those approaches deemed ‘legitimate’ in defending our rights, emphasis is usually placed on formal ‘negotiations’—usually carried out between ‘official’ Aboriginal leadership and representatives of the state—and if need be coupled with largely symbolic acts of peaceful, nondisruptive protest that abide by Canada’s ‘rule of law.’”²¹⁰ The result of this, continues Coulthard, is that “forms of ‘direct action’ that seek to influence power through less mediated and sometimes more disruptive and confrontational measures” are “increasingly deemed ‘illegitimate’” and worse, despite “their diversity and specificity... tend to get branded in the media as the typical Native ‘blockade.’ Militant, threatening, disruptive, and violent.”²¹¹

Engaging this debate directly, Coulthard identifies and responds to three arguments that are typically used to delegitimize forms of direct action. The first argument is that “negotiations

²⁰⁹ Coulthard, *supra* note 13 at 21.

²¹⁰ *Ibid* at 166.

²¹¹ *Ibid*.

are, objectively speaking, simply more effective in securing the rights and advancing the interests of Indigenous communities.”²¹² In response, Coulthard writes “This is simply false. Historically, I would venture to suggest that all negotiations over the scope and content of Aboriginal peoples’ rights in the last forty years have piggybacked off the assertive direct actions—including the escalated use of blockades—spearheaded by Indigenous women and other grassroots elements of our communities.”²¹³ The second argument follows a line of reasoning that holds “these tactics disrupt the lives of perhaps well-intentioned but equally uninformed non-Indigenous peoples, First Nations will increasingly find themselves alienated and our causes unsupported by average, working-class Canadians.”²¹⁴ In response, Coulthard makes two points: First, that “getting this reaction from the dominant society is unavoidable... Power and authority have been unjustly appropriated, and much of it will have to be reinstated. This will inevitably be very upsetting to some; it will be incredibly inconvenient to others.”²¹⁵ Second, continues Coulthard “this criticism or concern smells of a double standard. I suspect that equally ‘disruptive’ actions undertaken by various sectors of, for example, the mainstream labor movement, including job actions ranging from the withdrawal of teaching, transit, and healthcare services to full-blown strike activity does not undergo the same criticism and scrutiny”.²¹⁶

The third argument relates particularly to blockades, which Coulthard frames as follows “On the surface, blockades in particular appear to be the epitome of *reaction* insofar as they clearly embody a resounding ‘no’ but fail to offer a more *affirmative* gesture or alternative built into the practice itself. The risk here is that, in doing so, these *ressentiment*-laded modalities of Indigenous

²¹² *Ibid* at 167.

²¹³ *Ibid* at 167.

²¹⁴ *Ibid* at 168.

²¹⁵ *Ibid*.

²¹⁶ *Ibid*.

resistance reify the very structures or social relationships we find so abhorrent.”²¹⁷ It is important to note that this argument lines up with the theoretical tensions that distinguish Indigenous resurgence from other decolonization practices. Coulthard’s response to this argument begins from this distinction and is critical to understanding blockades as a practice of Indigenous resurgence:

This concern, I claim, is premised on a fundamental misunderstanding of what these forms of direct action are all about... Forms of Indigenous resistance, such as blockading and other explicitly disruptive oppositional practices, are indeed *reactive* in the ways that some have critiqued, but they are also very important. Through these actions we physically say “no” to the degradation of our communities and to exploitation of the lands on which we depend. But they also have ingrained within in them a resounding “yes”: they are the affirmative *enactment* of another modality of being, a different way of relating to and with the world. ... They embody through praxis our ancestral obligations to protect the lands that are to who we are as Indigenous peoples.²¹⁸

As I read it, Coulthard’s broader thesis situates direct action, including the diverse range of tactics that are branded as “blockades”, as a practice that is necessary to Indigenous resurgence. In the context of the discussion so far, this places Indigenous resurgence, and blockades, in direct tension with the discourse around what forms and approaches should be considered “legitimate” and consistent with what Canadian law considers to be the “rule of law.”

To my view, in the “no” and “yes” aspects of the blockade as Coulthard describes, there is a mirrored reflection of Patrick Wolfe’s description of the negative and positive dimensions of settler colonialism: Negatively they reject or seek dissolution of an old structure; positively they seek to construct and affirm a new structure and society. When viewed as a practice, it is possible then to compare and Indigenous blockades and the role of the settler colonial courts along the lines of their respective claims to be inaugurating authority, jurisdiction, law and obligations.

In seeking to engage this question of what forms of inaugurating jurisdiction and law

²¹⁷ *Ibid* at 169. (Emphasis in the original).

²¹⁸ *Ibid*. (Emphasis in the original).

should be deemed “legitimate” and consistent with the “rule of law,” we need to first examine in greater detail the particular claim that Indigenous blockades embody an assertion of Indigenous authority, jurisdiction, law and control over territory. From there we can set out the basic framework of jurisdiction and the rule of law itself which will set up the discussion for our final chapter which engages in a case-review of some of the leading blockades decisions in Canadian jurisprudence.

III. Indigenous Blockades

As Coulthard explains, the “blockade” as a general term is a product of media branding which can now immediately trigger negative connotations and images of militancy, threats and violence. From the outset it must therefore be noted that the “blockade” takes many forms and attempts to generalize them should be avoided, a caution which is frequently repeated in the literature.²¹⁹

Despite this caution, if one generalization should be made based on the literature, it is that blockades involve an expression of Indigenous relationships to *their land* and can be properly understood, first and foremost, as expressions of Indigenous authority, control and Indigenous law. Support for this assertion is found in three characteristics of almost every blockade I have witnessed or reviewed in the scholarship: 1) The long history of their use against outsiders; 2) Their physical occupation and control of land and resources; and 3) Their complex *underbelly* encompassing all the social and political variables and costs of resistance and struggle.

In his comprehensive historical and contemporary review of blockades for the Ipperwash Inquiry, John Borrows notes that their use predates the arrival of Europeans and was based in well-

²¹⁹ Nicholas Blomley, “Shut the Province Down: First Nations Blockades in British Columbia, 1984-1995” (1996) 3 BC Studies 5 at 29, [Blomley, Blockades]. (Blomley describes the blockade “as a political phenomenon” and states that “generalization is difficult” and that “they can take a variety of forms.”) See also: Bruce W. Hodgins, Ute Lischke & David T. McNab, eds, *Blockades and Resistance: Studies in Actions of Peace and the Temagami Blockades of 1988-89* (Waterloo: Wilfrid Laurier University Press, 2003), [Hodgins, Blockades].

developed systems as part of an array of legal, political and diplomatic mechanisms “that Aboriginal peoples employed to secure their resources.”²²⁰ After the arrival of Europeans, blockades were used strategically and creatively in the relationship between Indigenous peoples and the European powers during the eighteenth century as a way of reminding the Europeans of their tenuous position and dependence on the military strength of Indigenous peoples in the geopolitical struggles for control of Turtle Island.²²¹ In specific cases, blockades were used to continue reasserting independence as colonial surveyors divided up lands for settlement.²²² Thus, long before and long after the arrival of Europeans, blockades have consistently been a primary way that Indigenous peoples continue to assert and exercise control and authority over resources and relationships in connection with a physical space: *their land*. There is nothing to indicate that blockades have ever been removed or disconnected from existing Indigenous legal and political orders. In fact, the literature shows the opposite; Indigenous blockades continue to be clear expressions of Indigenous law and territorial authority.

In almost every inventory or review that I have looked at, blockades are described as a physical occupation of land.²²³ This generic description is partly why generalizations should be avoided, because it simply does not capture the complexity of the authority and relationships at work; both in the geography of the blockade,²²⁴ but in the political and social narratives behind

²²⁰ John Borrows, “Crown and Aboriginal Occupations of Land: A History & Comparison” (Research Paper Commissioned by the Ipperwash Inquiry, 15 October 2005) [Borrows, Occupations] at 5.

²²¹ *Ibid* at 9-10. See also: *R v Sioui*, [1990] 1 SCR 1025 at 1052-54, [*Sioui*]. (The Court in *Sioui* acknowledges in detail the military and diplomatic strength of the Indian Nations and the pivotal role they played in shaping the outcome of the Seven Years War between France and Great Britain.)

²²² Borrows, PhD, *supra* note 1 at 167.

²²³ Borrows, Occupations, *supra* note 220 at 22; Peter H. Russell, “Oka to Ipperwash: The Necessity of Flashpoint Events” in Leanne Simpson & Kiera L. Ladner, eds, *This is an Honour Song: Twenty Years since the Blockades* (Winnipeg: Arbeiter Ring Publishing, 2010) at 29. [Russell, Flashpoint]; Hodgins, Blockades, *supra* note 219.

²²⁴ Blomley, Blockades, *supra* note 219.

it.²²⁵ Nicholas Blomley's review of blockades in BC over a 15-year period situates blockades within a contemporary geographical frame of resistance through control of land describing "a blockade as an attempt to interfere with the flow of people and/or commodities through the placement of an obstruction, either partial or complete."²²⁶ Filling in the intricate textures of culture, politics, kinship relations, meaning, autonomy, law and responsibility Blomley writes:

For the decision to blockade is further sustained and justified with reference to a complex set of cultural understandings inherent to Native peoples. If a blockade serves to deny logging trucks access to a disputed area, in other words, that action may be justified not only in terms of the protection of a disputed economic resource, narrowly defined, but *also in terms of the innate right of a people to manage its own affairs and a non-negotiable mandate from the Creator to protect lands that it holds in trust.*²²⁷

This point extends to the use of blockades as part of a number of efforts engaged in the community's ongoing struggle, not only to assert their authority, but to uphold their obligations under Indigenous law. Significant to Blomley's review of dozens of blockades is that he situates it within the decision-making structures of the community, writing "while renegade blockades do occur, they seem to be the exception. Generally, it seems, blockades are established after wide deliberations within a band and, on occasion, with neighbouring bands or a full Council."²²⁸ Again, this emphasizes the *legitimacy* of the blockade within the legal and political orders of the Indigenous community that is engaging in the form of direction action.

Another point that is clear in the literature is that today blockades are the ongoing affirmation of an organized Indigenous resistance to the invasion of settler colonialism. This visible form of resistance is seen in the fact that nearly every blockade in the last fifty years has

²²⁵ Val Napoleon, "Behind the Blockades" (2010) 9 Indigenous LJ 1, [Napoleon, Blockades].

²²⁶ Blomley, *supra* note 219 at 11.

²²⁷ *Ibid* at 16.

²²⁸ *Ibid* at 15.

been deeply connected to acts of dispossession and destruction of Indigenous lands, resources and economies through the use of force that is routinely sanctioned by the legal system.²²⁹ Despite this singularity throughout history, as Fanon might view it, it is critical to note that the literature on blockades also supports Coulthard's claim that blockades are about more than just a *reaction* to settler colonialism, but that they represent a positive affirmation of Indigenous resurgence.

John Borrows captures this in his most recent work writing “the continued eruption of civil (dis)obedience demonstrates that Indigenous peoples will not retreat from taking a direct role *in trying to construct their place* in the world.”²³⁰ The constructive role that blockades play is a response to what Borrows, in earlier work, described as a “major flashpoint” that arises from “the lack of recognition and acknowledgement of Aboriginal perspectives and historical rights to land and resources.”²³¹ In a closer review of these flashpoints, Peter H. Russell expanded on their nature and underlying causes, writing “The flashpoint event occurs when members of the Aboriginal community see that the government, without settling the long-standing dispute, is permitting activities to take place that ignore Aboriginal interests in the area and, in effect, deny Aboriginal or treaty rights.”²³² These same causes are reflected in findings from two-years of hearings by the Ipperwash Inquiry in which Commissioner Linden concluded that blockades are clear evidence of the failure of the Crown to deal with the systemic problems that cause them, stating “The frequency of occupations and protests in Ontario and Canada is a symptom, if not the result, of our collective and continuing inability to resolve these tensions consistently.”²³³ Without taking away from the

²²⁹ Borrows, Occupations, *supra* note 220 at 3.

²³⁰ Borrows, Freedom, *supra* note 2 at 102.

²³¹ *Ibid* at 24.

²³² Russell, Flashpoint, *supra* note 223 at 29.

²³³ Honourable Sidney B. Linden, Commissioner, *Report of the Ipperwash Inquiry*, vol 4 (Toronto: Attorney General of Ontario, 2007) at 79, online: <<http://www.attorneygeneral.jus.gov.on.ca/inquiries/ipperwash/index.html>>. [Ipperwash Report].

important findings of the Ipperwash Inquiry, it must be noted that it should not take a multi-million dollar Royal Commission to reach this conclusion, given that Nicholas Blomley reached the same conclusion 11 years earlier, writing that blockades “speak to a systemic and enduring failure on the part of the dominant society to accommodate the legitimate demands of colonized peoples.”²³⁴

While there are many affirmative points to be made about blockades, it is necessary to understand that in the discourse around the “legitimacy” of these diverse forms of direct action, that this discussion properly takes place within respective Indigenous communities and therefore, as Kiera L. Ladner writes “it is important to understand that resistance often has an underbelly—stories of a community divided and stories which serve to divide a community. It is important to acknowledge that underbelly.”²³⁵ Val Napoleon captures what largely goes unseen to outside viewers through a series of stirring and heart-breaking vignettes about the figures and people behind the blockades that she has personally known, writing:

At their best, these blockades and direct political actions enabled narratives wherein despair and anger was channeled into resistance and meaningful demands for justice... After and beyond the blockades, the many acts of violence and self-destruction in the stories can also be characterized as continued forms of resistance against the erasure of meaning-making. But *we must consider who is bearing the cost of these acts of resistance.*²³⁶

What Napoleon reveals through her stories is that blockades are not simply acts of resistance, but that they can harbour a space where settler colonial violence can be reproduced that is kept internal, to the individuals and communities involved. As Napoleon puts it “Blockades and other direct political actions include the myriad human experiences, good and bad, positive and negative, that form the stories we hold.”²³⁷ The significance of acknowledging the blockade in its entirety,

²³⁴ Blomley, *supra* note 219 at 30.

²³⁵ Ladner & Simpson, *supra* note 204 at 3.

²³⁶ Napoleon, Blockades, *supra* note 225 at 10.

²³⁷ *Ibid* at 11.

particularly in the context of a discussion around “legitimacy”, is that it reminds us that these actions are never taken lightly or easily. They are acting out sacred and legal obligations under Indigenous law that take into consideration the variety of costs and consequences for the individual or community involved that can ripple outwards for generations.

In spite of the costs, blockades continue to be a course taken in increasing frequency. In examining this dynamic, what emerges is another argument for their necessity which Russell situates in a basic lack of any political and legal alternative path to justice, as he puts it “They do not deliver full justice, but they do put a stop to furthering an injustice. ... so long as political negotiations and litigation fail to stop injustices or provide timely and adequate resolution of disputes about the rights of Aboriginal Peoples and the treaty obligations of governments, flashpoint events, despite their adverse aspects, will be necessary.”²³⁸ In this, the necessity of the blockade to Indigenous resurgence provides us with a strong direction to study them in contrast with the parallel development of Aboriginal rights jurisprudence.

In setting up this contrast, the first point to note is that in almost every leading decision in Aboriginal rights jurisprudence there is a presumptive unlawfulness applied to the physical actions that Indigenous peoples perform. As Shin Imai puts it, most of the leading cases “began as relatively minor prosecutions for breaches of regulatory statutes. In *R v Sparrow* the fishing net was too long; in *R v Badger* the First Nation hunters were on private land; in *R v Van der Peet* ten salmon were sold without a licence...”²³⁹ This fact already aligns with what Lisa Ford identifies as the principle practice of the settler colonial courts in constructing settler sovereignty “the exercise of jurisdiction over indigenous crime performs the myth of settler sovereignty over and over.

²³⁸ Russell, Flashpoint, *supra* note 223 at 45.

²³⁹ Shin Imai, “The Adjudication of Historical Evidence: A Comment and an Elaboration on a Proposal by Justice LeBel” (2006) 60 UNB LJ 146 at 146. (Case citations omitted).

Sovereignty as territorial jurisdiction defines the parameters of indigenous rights to this day”²⁴⁰
By this fact alone, Aboriginal jurisprudence is already a space where the long standing tradition of criminalizing and oppressing Indigenous resistance, law and authority for the sole purpose of maintaining the settler colonial state is kept alive and well.

While these cases are not exceptional through the lens of settler colonialism, what makes them exceptional for Canadian jurisprudence is that “It is rare, outside of the Aboriginal context, for offences such as these to be considered by the Supreme Court of Canada. Convictions usually result in relatively light non-penal penalties and most cases are settled through plea bargains before they go to trial.”²⁴¹ Now, within that already exceptional group of cases in Canadian law, what sets blockades decisions apart from all of the other physical actions that Indigenous peoples take in their struggle to have their rights recognized is that the physical action that is being presumptively criminalized is not trying to feed yourself, or build a shelter, or generate a little bit of a local economy; it is the irreducible act of physically occupying space and embodying a relationship with the land that the settler colonial state has not eliminated. It is a claim to authority over land that rejects the assumption of territoriality that has been constructed and relied upon by the settler colonial courts in order to reproduce the myth of settler sovereignty. It is, to apply Coulthard’s framing, a simple “No” to the existence of settler sovereignty, and a “Yes” to the existence of Indigenous peoples. Through the blockade, Indigenous peoples have taken the fundamental act of continuing to affirm their existence and have used it to express an incredible range of complex aspects that are fundamental to who they are as Indigenous peoples. The action of a blockade not only expresses these things in the present, but it transcends the fundamental barriers of time itself

²⁴⁰ Ford, *supra* note 33 at 208.

²⁴¹ *Ibid.*

by projecting the past and the likely future of generations to come if a resolution to the pathology of settler colonialism is not found. As Leanne Simpson writes “Something must be done now—before another twenty years pass... Our hope is that something is done. This is not what we want for future generations.”²⁴²

IV. Jurisdiction and the Rule of Law

The blockade itself is a unique site where the past, present and future claims of Indigenous peoples to exist comes into direct conflict with the existence of the settler colonial state. Each time the blockade enters a court of law, the judge or judges presiding over the dispute are inevitably tasked with an existential crisis of authority. In these moments, the legitimacy of the rule of law and the legitimacy of the settler colonial state are juxtaposed as the jurisdictional question is put under the microscope. Examining how judges deal with this moment is the central inquiry to be undertaken as we examine some of the leading blockades cases. In this section I set out the framework by which the jurisdictional issue can be identified in judicial decisions and how the legitimacy of the rule of law in each case can be examined.

As the discussion above has set out, a legal analysis of blockades begins with the conceptualization of these juridical sites as a struggle over jurisdiction, as Shiri Pasternak writes “at the heart of this encounter, is a conflict over the inauguration of law—or the authority to have authority—and the specific forms of struggle that arise when competing forms of law are asserted over a common space.”²⁴³ Similarly, Wapshkaa Ma’iingan (Aaron Mills) projects the problem as one “about sharply different legal orders imposing differing (and often conflicting) sets of

²⁴² Ladner & Simpson, *supra* note 204 at 7.

²⁴³ Pasternak, Jurisdiction, *supra* note 2 at 146.

obligations on the same group of people.”²⁴⁴ What we see in comparing these descriptions is that the jurisdictional lens allows us to see how the blockade expresses both the spatial and relational aspects of law at the point where it is being claimed to exist.

The key here is that we are focused on the point where law is exercised. This gives our framework for legal analysis a primary question, as Shaunnagh Dorsett and Shaun McVeigh explain “to exercise jurisdiction is to bring law into existence... We can, therefore, consider jurisdiction as the first question of law, because it asks whether law exists at all, and thus determines what can properly be considered law.”²⁴⁵ When put this way, the analytical lens of jurisdiction allows us to untangle the competing claims of Indigenous peoples and Canada by focusing on the inaugural and singular point of law—where it is exercised. This is the point where law comes into existence. Starting with this point allows us to identify analytical sites where we can examine the legitimacy of the competing claims of authority through the primary question: Does law exist?

There are two main sites of analysis that jurisdiction enables us to identify in the context of a blockade: The first is the blockade itself, the physical presence on land, where Indigenous peoples claim jurisdiction over that space by exercising it on the ground. The second is where the settler colonial state claims jurisdiction through its executive, legislative and judicial branches carrying out a variety of practices, including the granting, or enforcing, of legal interests to land through leases, injunction orders, the arrest of Indigenous peoples and ultimately the destruction of the blockade. Now, while jurisdiction allows us to identify these two sites for analysis and gives us a primary question to ask, it does not give us the tools necessary to evaluate the legitimacy of

²⁴⁴ Wapshkaa Ma'iingan/Aaron Mills, “Aki, Anishinaabek, kaye tahsh Crown” (2010) 9:1 Indigenous LJ 107 at 114. [Ma'iingan].

²⁴⁵ Shaunnagh Dorsett & Shaun McVeigh, *Jurisdiction* (New York: Routledge, 2012) at 4-5, [Dorsett & McVeigh].

the competing claims. Those tools can only come from the particular rules that govern the existence and legitimacy of the law being asserted.

Of these two sites, the claim we are focused on in this thesis is that of the settler colonial state which is asserted through the judge who in presiding over the blockade assumes the jurisdiction to do so based on an obligation to uphold the rule of law. The reason for this is twofold: First, the literature on blockades is sufficient to support the generalization that Indigenous law exists at the site of the blockade. Further, as the discussion above has pointed out, in order to investigate the legitimacy of the blockade and whether Indigenous law was properly inaugurated, we would need to gather knowledge relevant to the Indigenous Nation whose laws are being asserted through the blockade. This task is not only outside the scope of the existing literature, but also this project. Second, absent the assurance that Indigenous law exists on the blockade, the problematic identified throughout this thesis is whether the courts are reproducing settler colonial violence in blockades cases by relying on the logic of elimination in a way that effectively causes the disappearance of Indigenous peoples, in law, in order to affirm the assumption of territoriality.

Therefore, the issue of legitimacy we are asking in each case is whether the judge or judges presiding over a blockades case have exercised their judicial authority in a way that is consistent with the rules that govern the use of that authority. The lens of jurisdiction allows us to answer this question, because it “gives us the form and shape of law and the idiom of law... This is the ‘diction’ part of the term ‘jurisdiction’. When we think about an idiom we are thinking about the language and style of talking about law.”²⁴⁶ Thus, to inaugurate law and exercise it, there must be a performance of it. Because jurisdiction has technical meanings²⁴⁷ I find it helpful to also refer to

²⁴⁶ *Ibid* at 5.

²⁴⁷ *Ibid* at 6.

it in its literal translation as “the power to speak the law.”²⁴⁸ In doing so I seek to emphasize that the irreducible element of jurisdiction that we are analyzing here is its performance.

We know that in form the authority of a judge is performed through spoken or written reasons. Thus, in analyzing the judge’s power to speak the law, we are looking at the judicial decision. Broadly, I take the set of principles and rules which govern the legitimacy of this performance of jurisdiction to be the rule of law. There are many views about the rule of law.²⁴⁹ In the context of analyzing judicial decisions from a rule of law standpoint, a useful starting point is the distinction that David Dyzenhaus has articulated between rule *of* law and rule *by* law in the context of the judge’s role in a “wicked legal regime” effectively meaning, in this context, a political and legal order that is aptly characterized by settler colonialism.²⁵⁰ Essentially, in Dyzenhaus’ case-study of judicial decisions under apartheid South Africa, the notion of rule *by* law is characterized when a segment of society is oppressed and excluded from the benefit or participation in the traditions of a liberal democracy.²⁵¹ An example of this under apartheid was the subjection of blacks to laws passed by a legislature whose members were elected by a system that blacks could not vote in.²⁵²

The negative effect of rule *by* law is that it undermines the legitimacy of the political sphere and the justification for the independent judicial sphere to be partially, or wholly deferential to the political and democratic powers of governance.²⁵³ While there are near identical parallels between

²⁴⁸ Pasternak, Jurisdiction, *supra* note 2 at 148.

²⁴⁹ See e.g.: Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) at 91; and, David Dyzenhaus, “Recrafting the Rule of Law” in *Recrafting the Rule of Law: The Limits of Legal Order*, David Dyzenhaus ed. (Oxford: Hart Publishing, 1999) at 2.

²⁵⁰ David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality*, 2nd ed (Oxford: OUP, 2010) [Dyzenhaus, *Hard Cases*]; David Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Oxford: Hart Publishing, 1998).

²⁵¹ Dyzenhaus, *Hard Cases*, *ibid* at 224.

²⁵² *Ibid.*

²⁵³ *Ibid.*

the settler colonial states of apartheid South Africa and Canada an analogy is not necessary to apply Dyzenhaus' distinction when we recall that there is a deliberate exclusion of Indigenous peoples from the benefit of the living tree doctrine, the creation of barriers to their engaging in the constitutional dialogue and an entire jurisprudence on Aboriginal rights that is, without question, wholly deferential to the political powers. Furthermore, the rule *by law* also explains many of the aspects of Canada as a settler colonial state which have been identified above. Thus, we can see that there is clearly a case to be made that the rule *by law* concept applies to Canada. But what of the aspirational assumption?

If there is support for an aspirational assumption to be found in legal theory, it exists in the concept of the rule *of law*, which Dyzenhaus explains holds out a “bare promise” for those who are struggling against oppression “to achieve full rights of political participation” through “extraparliamentary politics.”²⁵⁴ Thus, even in a situation as democratically insufficient as apartheid South Africa, Dyzenhaus' case-study tells us that it is still possible to identify places where the rule *of law* is being kept alive by looking for it in the decisions of judges, as he writes “it mattered a great deal both that there was a legal order and that judges were committed to upholding the rule *of law*. Even the commitment of plain fact judges mattered in this regard, as their willingness to uphold rule *by law* helped to maintain the possibility for the rule *of law* to be realized by judges who adopted the common law approach.”²⁵⁵ Notably, in applying the distinction here, Dyzenhaus associates the rule *of law* with judges who take the common law approach, and the rule *by law* with judges who are more positivist or highly deferential to the political powers.

The twist for analyzing the problem of Canada as a settler colonial state through the rule

²⁵⁴ *Ibid* at 292-293.

²⁵⁵ *Ibid* at 293. (Emphasis added).

of/by law frame provided by Dyzenhaus is that the Aboriginal rights jurisprudence is a primary example of Canadian courts applying the common law approach. Yet, they have chosen to use their creative common law powers to usher in an age of equality for some members of society, while forcing *only* Indigenous peoples—who are already the most vulnerable polity—to negotiate their place in society. Therefore, while Dyzenhaus’ frame provides us with a sliver of support for holding on to the aspirational assumption, *if* we can identify that the rule *of* law is being upheld in a judicial decision, we cannot answer the question of legitimacy with this frame alone because what appears to be the rule *of* law could in fact be a rule *by* law.

As a result, we need to expand the definition of the rule *of* law within this distinction. In the context of the judge’s role, I take the rule of law to be fundamentally about safeguarding against arbitrariness by requiring both a fair process and sufficient reasons whenever power is exercised.²⁵⁶ The necessity of reasons, in this context, is particularly critical to the legitimacy of the form in which the judge’s power to speak the law is exercised, because as Dorsett and McVeigh explain, reasoning is “concerned with persuasion between equals, force is concerned with domination. Authority gives people reasons to submit.”²⁵⁷ This distinction between reasons/equality with force/domination in analyzing the form that power over others is asserted, fits nicely with Dyzenhaus frame to give us a distinction we can apply when approaching the question of legitimacy. Thus, rule *of* law is characterized by reasons and equality, while rule *by* law is characterized by force and domination.

We know from the discussion above that settler colonialism is characterized by violence (force), a power relationship of domination and a practice of racism (inequality). Thus, the settler

²⁵⁶ See generally: Neil Brooks, “The Judge and the Adversary System” in A. Linden, ed, *The Canadian Judiciary* (Toronto: Osgoode Hall Law School, 1976) at 90-116.

²⁵⁷ Dorsett & McVeigh, *supra* note 245 at 10. (Citing: Hannah Arendt, *Between Past and Future: Six Essays in Political Thought* (New York: The Viking Press, 1961)).

colonial state, for the most part, falls into the rule *by law* category. But what of the existence of reasons as evidence that the rule *of law* is being upheld? This is the site where our discussion about the logic of elimination and the aspirational assumption come into direct conflict with each other. In analyzing the reasons of a judge, if the logic of elimination is identified, then we can say that the rule *by law* description applies and that there is no evidence to support the aspirational assumption that the rule *of law*, and its “bare promise”, is being upheld.

V. Conclusion

The blockade case represents a site where the “frontier homicide” of settler colonialism continues to live on through the exercise of jurisdiction and presumptive criminalization of Indigenous peoples who continue to stand up, assert and exercise their jurisdiction over their lands. At the centre of the blockade is a direct conflict over jurisdiction, or rather, *who* rightly holds the power to speak the law over the contested space.

From this point of tension, the central questions of this thesis emerge at last: What happens when the blockade enters the courtroom? How does the judge deal with the existential crisis before them that threatens to undermine the settler colonial state’s assumption of territoriality? Does the judge perform the power to speak the law in a way that is consistent with the rule *of law*? Or does the judge rely upon the logic of elimination in a way that reproduces settler colonial violence against Indigenous peoples?

Relying on all of the discussion to this point, these are the questions that we will attempt to answer as we turn now to an analysis of many of the leading blockades cases in Canadian law.

Chapter 4: Indigenous Blockades and the Power to Speak the Law

This chapter analyzes a selection of leading blockades cases in Canadian law. The choice to analyze blockades cases has been discussed at length above, but in brief, blockades cases represent a juridical site where the primary dispute is a conflict between competing jurisdictional claims to the same territory by Indigenous peoples and the settler colonial state. The question to be focused on in a legal analysis of these cases is whether the judge, or judges, exercise the power to speak the law in a way that is consistent with the rule of law, or whether the logic of settler colonialism is relied upon to affirm settler sovereignty and expand the state's territoriality by eliminating and/or criminalizing the expression of Indigenous jurisdiction through the blockade.

Some points have already been made above that inform the selection of the cases, but in brief, all of these cases (except one) are situated in unceded territory, meaning they are in places where no treaty has been signed between the Crown and the Indigenous Nation. The significance of this factor, central to what distinguishes the exceptional case, is that the settler colonial state's assumption of territoriality is *truly* an assumption, while the pre-existence of the jurisdiction and ownership of the respective Indigenous nation, prior to "discovery", is a historical fact. Beyond this factor, these cases have been chosen based on either their status as precedent (that is they have not been overturned and have been adopted by other courts in other jurisdictions) and/or their specific relationship to the leading cases in Aboriginal rights jurisprudence. On this point, as discussed above, the heralded decisions of *Delgamuukw*, *Haida Nation* and *Tsilhqot'in Nation* are regularly discussed and analyzed for their impact on Aboriginal rights and title jurisprudence. While the doctrines attract much attention and generate much intellectual activity in the worlds of lawyers, corporations, scholars and governments alike; what I have found throughout this project is that the struggle that was responsible for bringing the cases forward in the first place is often left

behind as just a part of the context, if it gets mentioned at all. I see this as a serious disconnect that the literatures on settler colonialism and Indigenous resurgence reveals. Thus, while these blockades cases offer us sites for a unique comparative analysis to the momentous decisions in Aboriginal law, I wish to state that in selecting them as a focal point of analysis is my way of acknowledging that they contain a central part of the legal story underlying these major decisions that often gets lost, or eliminated, as the jurisprudence, and the corresponding analysis, develops. In light of the discussion above around the uniqueness of each community's struggle and complex underbelly, I want to point out that in researching and providing context for these cases I have drawn from the published accounts available, and within those accounts have chosen to prioritize the voices of those who were on the ground, experiencing the struggle first hand.

In terms of order, I begin with the precedent setting case of *R v Manuel*²⁵⁸ which takes place in Skwelkwek'welt, a sacred mountain space in Secwepemùl'ecw, the unceded territory of the Secwepemc Nation. This case is useful for seeing the jurisdictional conflict amidst a variety of complicated factors and power dynamics at play which are explained by Arthur Manuel who was Chief of the Neskonlith Indian Band during the blockade. The second case takes place in unceded Gitksan and Wet'suwet'en territory and was peripheral to the Aboriginal title case in *Delgamuukw*. This case highlights the explicit awareness of the judges to the fundamental conflict between jurisdictional claims and examines how they engaged, or failed to engage, the question in an impartial way. The third case takes place on the unceded island of Haida Gwaii and was peripheral to the paradigm shifting case in *Haida Nation*. The reasoning of the judge in this case offers us an important comparative through which we can analyze the value in the paradigm shift that took the Haida Nation 20 years to achieve. The fourth case is the only case that is not in British Columbia.

²⁵⁸ *R v Manuel*, 2008 BCCA 143. [*R v Manuel*].

It takes place in unceded Algonquin territory and was precedent setting for its impact in ushering in significant statutory changes to Ontario’s mining regime. The fifth case takes place in unceded Tsilhqot’in territory and is a peripheral case to the landmark declaration of Aboriginal title in *Tsilhqot’in Nation*. This case stands out as good comparative to the other cases because of how the judge chose to deal with the “uncertainty” of the legal status of Aboriginal title.

The sixth and last case is the SCC’s decision in *Behn*.²⁵⁹ This case stands apart from the others for two important reasons: First, it takes place in Treaty 8 territory, on the traditional lands of the Fort Nelson First Nation (FNFN). This distinction means that the assumption of territoriality is less uncertain, depending on the interpretation of the Treaty and its legitimacy. However, what must also be kept in mind is that this increased level of certainty exists because of Treaty 8 and should not be extended to jurisprudence that deals with unceded lands, particularly if it is done for the benefit of the settler colonial state. Second, this case is unique because, at the time of this project, it is the only Indigenous blockades case to be heard by the SCC.²⁶⁰ In this respect, it is an important site of analysis because, while the case has now become a leading authority on Indigenous blockades, it has largely flown under the radar in terms of its impact on Aboriginal jurisprudence. My review of the commentary of the *Behn* decision has not revealed any substantial analysis of this potential impact. The most significant comment I found was by John Borrows in a footnote of his recent work where he described *Behn* as a “prominent example of the Supreme Court’s failure to recognize individual exercises of Indigenous law.”²⁶¹ From what we know about

²⁵⁹ *Behn v Moulton Contracting Ltd*, 2013 SCC 26, [*Behn*], aff’g *Moulton Contracting Ltd v British Columbia*, 2011 BCCA 311, [*Moulton*, BCCA], aff’g *Moulton Contracting Ltd v British Columbia*, 2010 BCSC 506, [*Moulton*, BCSC].

²⁶⁰ While the events of Clayoquot Sound reached the SCC, they were civil disobedience cases, not Indigenous blockades cases brought by non-Indigenous NGOs and/or largely non-Indigenous protestors. Aboriginal rights was not a factor in that case, see: *MacMillan Bloedel Ltd v Simpson*, [1996] 2 SCR 1048.

²⁶¹ Borrows, Freedom, *supra* note 2 at 88n239.

blockades, this is a clear conclusion to be made, but what we are still missing is an explanation for that failure and analysis into whether the decision in *Behn* could impact Aboriginal rights jurisprudence beyond the blockades context.

I. Skwelkwek'welt: Seeing the Violence in the Jurisdictional Conflict

In order to visualize the jurisdictional conflict in the context of a blockade and how it creates the space for transforming settler colonial violence into law through the logic of elimination, it is necessary to get a sense of what is actually playing out from the ground to the courtroom.

In his book *Unsettling Canada*, Arthur Manuel describes the events that took place while he was the Chief of the Neskonlith Indian Band that were related to the Skwelkwek'welt Protection Centre in the mountainous interior of so-called British Columbia. This was a peaceful blockade that was set up to assert Aboriginal title and protect a pristine area of Secwepemc territory that Manuel describes as “one of the last places in our territory where we can still hunt for food, gather medicines, and continue to practice other Secwepemc cultural traditions.”²⁶² In the late 1990s and early 2000s, the area was threatened by the proposed development of “an all-season mega-resort, an instant city of condos, hotels, and restaurants” called Sun Peaks.²⁶³ Explaining the extensive impacts of the project, Manuel writes “The pressure of tens of thousands of tourists descending on a mountain ecosystem would be immense; the water, sewage, and garbage needs of the resort would all take their toll, forever changing the plant and animal habitats of these pristine mountain ecologies.”²⁶⁴ A novel aspect of this project, from a jurisdictional perspective which serves to reinforce the immense scale of the development, was that the government of British Columbia actually “invented a new administrative structure they called a ‘mountain resort municipality.’

²⁶² Manuel, *Unsettling*, *supra* note 5 at 138.

²⁶³ *Ibid.*

²⁶⁴ *Ibid* at 139.

This designation gave Sun Peaks municipal powers, even though it did not have enough permanent residents to justify them.”²⁶⁵ After several unsuccessful attempts to deal with the Province and Nippon Cable, the Japanese company behind the development, Secwepemc Elders and youth put up a small protest camp in the fall of 2000.²⁶⁶ The BC government responded in June of the following year by issuing “a lease to Sun Peaks for the land our camp was located on.”²⁶⁷ Shortly after Sun Peaks sought an injunction and, in July “the police moved in.”²⁶⁸ Four people were arrested, including two Elders; all were charged with criminal contempt for “refusing to leave the camp.”²⁶⁹ As the conflict escalated, so too did the expressions of racism-fueled violence, and with those expressions came fear, as Manuel explains:

[W]hen twenty members of the Native Youth Movement walked through the village signing traditional Native songs and calling for a moratorium on the development, several young white guys on a bar terrace began shouting racial slurs at them. One of the men strode off the terrace and approached the Native youth shouting, “Fucking Indians, get off our land!” and “You want war? Come on!” He swung several punches in the direction of one of the young men, then directed his attention to my daughter, Niki, shouting at her and, finally, hitting her in the face.

The police moved in and arrested not the man who had committed the assault, but my daughter. Later, a cabin in the woods that the protestors were living in was burned down, and our people began to receive threats of violence if we entered nearby towns. After fanning this local anger, the resort began leading a call for mass arrests of the protestors and went back to the courts to get another round of injunctions against us. Once again, Elders and youth were arrested. It was infuriating for our people to see eighty-three-year-old Irene Billy led away in handcuffs for the crime of occupying her own family trapline.

...

By this time, the tensions were not only with the white community, but also within our own. In Neskonlith, and even more so in other Secwepemc communities, people began to have a genuine fear of white backlash and government reprisals. This last fear was felt most acutely by the chiefs. They were in the business of delivering

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid* at 140.

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

government programs and services, and it is at moments like this that our dependency becomes most evidence. Some understand that the only way out is to break that dependency once and for all, to assert our right to our lands and begin to build true Indigenous economies on our territories. Many others test the wind and, if it is blowing too strong, flee back to their subsistence benefactor at Indian Affairs, which pays their salaries as well as the community program funding.²⁷⁰

As the conflict ensued, over 50 members of the Secwepemc Nation would be arrested for occupying their own land leading to charges and convictions, and five Secwepemc homes and structures built as part of the Skwelkwek'welt Protection Centre “were bulldozed or burned down by the resort or by persons unknown. None of these acts were investigated by the police.”²⁷¹

For Manuel, the wide net of criminalization captured many people in his family, including his daughter who was jailed for 60 days and “was separated from her four-month-old baby boy” who was left in Manuel’s care.²⁷² The experience of having to make weekly trips to and from the jail so that his grandson could continue drinking his mother’s milk had a deep emotional impact on Manuel, as he writes:

I remember feeling not so much anger as shame for the whole system that had produced this situation. This is not just how whites treat Indians, I thought, it is how they treat each other. If I needed any inspiration to continue to try to get back our people’s birthright, our land and our independence, taking my grandchild to the Burnaby jail for those brief visits with my daughter was more than enough.²⁷³

The Skwelkwek'welt Protection Centre offers up many issues and problems that can be identified at several points in time throughout the course of this blockade through a variety of legal, political and sociolegal approaches. The immediate problem that faces an analysis of this event is that it can be quickly overwhelmed by a variety of factors which are all likely to be relevant to the question being asked. However, no matter how many factors there are, in cases like this the

²⁷⁰ *Ibid* at 142-44.

²⁷¹ *Ibid* at 141.

²⁷² *Ibid* at 146.

²⁷³ *Ibid*.

singularity that binds settler colonialism and Indigenous resistance as antagonizing forces emerges so strongly that there is very little room to see how a true compromise between these competing claims could ever be achieved through any form of “negotiations”.

This is where the argument for the necessity of direct action finds full purchase. It is also where the rule of law, if it is upheld, is critically important for avoiding a literal “war” over claims to territory, as the white racist bar patron so readily threatened. Unfortunately, the use and formation of power in this context falls into the category of rule by law for how it repeatedly demonstrated its capacity to perpetuate settler colonial violence by creating legal spaces for it to take place. This not only took place through police inaction in relation to assaults and arsons committed against Secwepemc people doing nothing more than existing on their lands. It also occurred through the convenient lease of unceded and blockaded lands granted by the BC government to Sun Peaks. This was followed quickly by an injunction order from the court, which in turn lead swiftly to the arrests and criminalization of dozens of Secwepemc people, including many Elders and youth. Finally, escalating spin-off violence and threats from the white/settler community sparked fear and political divisions within the Secwepemc communities themselves.

Several years later, the British Columbia Court of Appeal (BCCA) heard an appeal on the criminal convictions stemming from the blockade in the case *R v Manuel*.²⁷⁴ There are multiple ironies in the case, beginning with the fact that because of the formality of the criminal justice system, the two Secwepemc women, mother and daughter whose home had been one of those which had been burned to the ground, could only argue the defence of colour of right. This required proving that they were honestly mistaken in their belief that they were standing on unceded

²⁷⁴ *R v Manuel*, 2008 BCCA 143.

Secwepemc territory and acting in accordance with valid Secwepemc law.²⁷⁵

As the BCCA summarized, the trial judge “found that the appellants’ belief in the law of the Creator was not a belief in law but in a moral right (at para. 27) and their belief in title to the land was a belief about what should be or ought to be (at para. 32).”²⁷⁶ In upholding the trial judge’s decision, the BCCA relied on the uncertainty of Canadian law in formally recognizing Aboriginal title over that area, stating:

The issue in this case was whether the appellants’ beliefs that title to the land gave rise to a legal right to block Sun Peaks Road were honest, in light of their knowledge that the legal rights claimed by them were unadjudicated and unconfirmed in law (taking into account all of Canadian law, including the aboriginal perspective, aboriginal legal systems, and Canadian common law and criminal law), and conflicted with established common law property rights. It was not a matter of choosing one system of law over another, or of rejecting the appellants’ beliefs because aboriginal title had not been established. The question was whether there was any reasonable doubt that the appellants’ honestly believed they had the legal right to block Sun Peaks Road in light of the uncertainty and conflict of legal rights.²⁷⁷

In analyzing the court’s reasoning here, a problem should first be identified with the very formulation of the colour of right defense as the only one available to the accused in their circumstances. Here it can be seen that this form of defense already implies a presumption of guilt based on the court taking as established facts that the land the accused were standing on and the laws they were abiding by, were *not* and could not be recognized in law as Secwepemc. In this way, this very formulation of the defense meets Lisa Ford’s litmus test for settler statehood: “the legal obliteration of indigenous customary law.”²⁷⁸ In terms of the logic of elimination, the formulation of this defense represents how the assumption of territoriality is conveniently

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid* at para 52.

²⁷⁷ *Ibid* at para 58.

²⁷⁸ Ford, *supra* note 33 at 2.

embedded within some of the very forms of criminal law.

There is also in this passage, and its broader context, an effective illustration of what the legal theorist Robert Cover described as the violence of legal interpretation, writing:

Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. Interpretations in law also constitute justifications for violence which has already occurred or which is about to occur. When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.²⁷⁹

Reading Cover's theory in the context of the logic of elimination, what we identify with better clarity is one of the practices—judicial interpretation—that a judge might use to transform violence into law for the purposes of eliminating Indigenous peoples.

In looking at the court's reasoning, the violence is performed in this case by interpreting the words "uncertainty and conflict of legal rights" to literally mean *certainty* of the territoriality of the settler colonial state and the elimination of any Secwepemc legal rights, thus removing altogether the question of whether there is "a conflict" between legal rights. Notably, this same practice performs the replacement element of settler colonialism by affirming the *certainty* of the common law property rights of a newly created municipal resort authority which were convenient recent creations of the settler colonial state to expedite land development and eliminate Indigenous resistance. In the end, the BCCA transforms violence into law by making a ruling that relies on the non-existence of Secwepemc authority and law, and the effective elimination, in Canadian law, of what the court explicitly acknowledged was the *possibility* of a legal right to Aboriginal title.

²⁷⁹ Robert M. Cover, "Violence and the Word" (1985-86) 95 Yale LJ 1601.

II. The Gitksan and Wet'suwet'en Nations: Competing Claims to Jurisdiction

As Val Napoleon explains, the precedent setting Aboriginal title case in *Delgamuukw* was deeply rooted in the coordinated resistance of Indigenous peoples from across Canada who were strategizing on how to continue advancing their claims in the wake of the *Calder* decision.²⁸⁰ Perceiving that they were being excluded from negotiations, in 1977 the Gitksan and Wet'suwet'en issued the *Gitksan-Carrier Declaration* which asserted “ownership and jurisdiction over 25,000 square miles of Gitksan and Wet'suwet'en Territory.”²⁸¹ In contrast to this external expression of authority, Napoleon explains that internally “there was a deliberate, and partially successful, effort to shift local political authority away from the band council system to the Gitksan kinship system of matrilineal House groups with hereditary chiefs as legal holders of the House territories according to Gitksan law.”²⁸² This is the *underbelly* of the struggle.

In 1984, the legal action that would become *Delgamuukw* was filed and it would be three years before the 374 day trial would begin.²⁸³ Significantly, while this “massive and extremely costly”²⁸⁴ trial was underway, the Gitksan and Wet'suwet'en nations were still having to set up blockades to try and stop logging companies from continuing to clear cut swaths of timber over what they hoped would eventually be recognized by the courts as *their* land.²⁸⁵ Typically, the on the ground conflicts captured by these blockades are quickly made subject to injunction orders through an expedient process before a motions judge. We will analyze some of these motions decisions in later contexts. But in looking at the Gitksan and Wet'suwet'en struggle we look

²⁸⁰ Napoleon, Blockades, *supra* note 225 at 3-4; *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313.

²⁸¹ *Ibid* at 3.

²⁸² *Ibid*.

²⁸³ *Ibid* at 4.

²⁸⁴ *Ibid*.

²⁸⁵ *Westar Timber Ltd v Gitksan Wet'suwet'en Tribal Council*, 1989 CanLII 2764 (BCCA). [*Westar*].

specifically at the BCCA’s decision in *Westar* to see that the courts were well aware that underlying both the peripheral blockade case and the central title case were the competing claims to jurisdiction by both the settler colonial state and the Indigenous Nations.

In the *Westar* appeal, the three judges on the panel each issued separate reasons and varying dispositions, but they were all clear that the central issue in the case was the jurisdictional question. Justice Carrothers writes “The Gitksan claim constitutes a direct challenge to the sovereignty of the Crown and the validity of its laws.”²⁸⁶ Justice Esson expands on this by acknowledging that the jurisdictional issue is dispositive of the outcome of the case, writing “to grant an injunction in the circumstances of this case is tantamount to finding that the Gitksan are entitled now to act as though such rights have been established.”²⁸⁷ Lastly, Locke J.A. not only frames the problem in line with the other two, but also disposes of the issue without engaging it, stating “there is in the case at bar a direct collision between the right of ownership of the Crown, *solemnly confirmed by the law*, and the claim of the Gitksan to own the same land. The extent of the collision will have to be adjudicated upon by the Supreme Court. The plaintiffs ask very specifically for all the rights of sovereignty including control of the natural resources.”²⁸⁸

In analyzing these statements, what must be identified first is that each of the three judges have consciously acknowledged that there is a real legal conflict between the competing claims to jurisdiction. First, they acknowledge that there is an assertion to Indigenous sovereignty, jurisdiction, laws and authority. Second, they acknowledge the *possibility* that this assertion could be found to be *true* by the SCC. Third, they acknowledge that if such an assertion were true, that it would directly conflict, or displace, the Crown’s own assertion to the same. And finally, they

²⁸⁶ *Ibid* at para 14.

²⁸⁷ *Ibid* at para 38

²⁸⁸ *Ibid* at para 89. (Emphasis added).

acknowledge that they don't have jurisdiction to decide this legal conflict.

Identifying these factors brings to light how the logic of elimination was then relied upon to eliminate what had just been acknowledged and perform jurisdiction, contrary to their admission that they did not rightfully have or were not willing to exercise, to resolve the conflict. This was done through the words “solemnly confirmed by law” which specifically results in a finding of fact that Indigenous sovereignty does not exist and Crown sovereignty does. This speaks directly to the disposition of the case at bar and upholds the Crown's exclusive access to territory and unilateral control over the natural resources.

By acknowledging on the one hand that they were avoiding the jurisdictional question, while effectively answering the question in order to resolve the case in the Crown's favour, the BCCA undermined both their legitimacy as impartial adjudicators and the rule of law. When looked at in comparison to the eventual *Delgamuukw* decision, we can start to see how this avoidance is ultimately underwritten into the problematic that Borrows identifies in his analysis of that decision. The SCC was, or ought to have been, well aware that the jurisdictional issue was being fundamentally raised by the Gitksan and Wet'suwet'en Nations and that it needed to be resolved by an impartial adjudicator. Yet, in setting out the doctrine of Aboriginal title, it “*conjures fictions*”²⁸⁹ which not only avoids the issue, but actually embeds it within the doctrine unresolved.

The effect of this is not limited to just embedding the logic of elimination within the doctrine of Aboriginal title, but it problematizes the legal fiduciary remedies and the exclusively political remedies of negotiation, consultation and reconciliation that the doctrine provides a basis for. It is here where the “bare promise” that the rule of law in Canada is deeply problematized, if it can be said to meaningfully exist in the jurisprudence on Aboriginal rights.

²⁸⁹ Borrows, *Alchemy*, *supra* note 2 at 558-59.

However, when we take the longer view, we see that almost 40 years since the *Gitksan-Carrier Declaration* there still hasn't been a legal or external recognition of the Gitksan and Wet'suwet'en title and jurisdiction. We also see that 20 years since the *Delgamuukw* decision that the internal struggle over the authority to engage in the political remedies continues to be impacted by this,²⁹⁰ as Val Napoleon writes "Years later, tensions between the imposed *Indian Act* band council system and the Gitksan kinship system continue and remain unresolved and conflicted."²⁹¹

The internal struggle of leadership and representation is a problem that must be acknowledged by this analysis from the outside, even though it cannot be solved from the outside. The reason for this is because it further problematizes the political remedies by raising greater uncertainty about *who* is the proper authority to represent the collective rights and title of Indigenous nations. This is an important question, but again, as I explain in the conclusion, it cannot, and likely should not, be answered through legal analysis because the answer can only come from the community itself defining and applying their own laws.

III. **The Haida Nation: From Haida Jurisdiction to the Duty to Consult**

Following *Delgamuukw*, the *Haida Nation* case is well known for establishing reconciliation, the honour of the Crown and the duty to consult and accommodate as primary doctrines of Aboriginal jurisprudence. However, like Grand Chief George Manuel's assessment of the repeal of criminalization, this perceived paradigmatic shift is not a result of convincing the Court of the humanity of Indigenous peoples, but of the relentless struggle and direct actions of the Haida

²⁹⁰ Trevor Jang, "Deal with B.C. government is 'bribery more or less,' says prominent B.C. chief who accepted public money in exchange for pipeline approval" *Discourse Media* (7 February 2017), online: <<http://discoursemedia.org/toward-reconciliation/deal-b-c-government-bribery-less-says-prominent-b-c-chief-accepted-public-money-exchange-pipeline-approval>>.

²⁹¹ Napoleon, Blockades, *supra* note 225 at 3-4. These internal disputes over authority have arisen in a number of litigations now over. See: *Gwininitxw v British Columbia (Attorney General)*, 2013 BCSC 1972; *Gitksan Treaty Society*, 2012 BCSC 452; *Gitksan Treaty Society*, 2013 BCSC 974.

Nation as evidenced by the critical blockades of Moresby and Lyell Islands during the 1980s against logging companies.²⁹² The short oral decision of McEachern C.J. (the same trial judge who presided over the *Delgamuukw* case) in *Skidegate*²⁹³ allows us to contrast the legal doctrine the Haida Nation is known for and what the Haida Nation have been fighting for. This allows us to consider whether the Haida Nation's jurisdiction was supplanted by the Crown's duty to consult.

In *Skidegate*, McEachern C.J. was faced with the situation that the Haida people had peacefully and deliberately ignored an injunction order to take down the blockade granted to the logging company Western Forest Products. Similar to the *Westar* case, McEachern C.J. simultaneously acknowledges and refuses to answer the central jurisdictional question that was being raised by the blockade, as he states:

Mr. Justice McKay made it clear beyond any doubt that he was not pronouncing on the question of ownership of or title to Lyell Island or to aboriginal rights, but he advised those appearing before him that as matters now stand Lyell Island, and indeed all of the Queen Charlotte Islands, are a part of British Columbia and subject to its laws. He did not purport to deal with the question of ownership, nor do I.²⁹⁴

Here McEachern C.J. explicitly relies on the assumption of territoriality in order to eliminate any substantive legal interest the Haida Nation have to sovereignty and ownership, as well as any procedural right they might have to challenge the Crown's claim to the same. Again, the violent effect of this performance of law is the disappearance of the Haida Nation's jurisdiction, in order to affirm that of the Crown's.

In this, McEachern C.J.'s reasoning falls within a rule *by law* description which, as the rest

²⁹² See: Haida Nation, "Athlii Gwaii: 25 Years Down the Road" *Haida Laas* (November 2010), online: <http://www.haidanation.ca/Pages/haida_laas/pdfs/journals/jl_nov.10.pdf>. Notably, these blockades took place concurrently alongside many blockades, including the Lil'wat, the Lubicon Cree, and of course on the West Coast, the famous Clayoquot Sound protests involving the declaration of a Tribal Park on Meares Island in 1984 that would lead to a decade of direct action which would attract international attention and a number of Supreme Court of Canada decisions, see: *Borrows, Occupations*, *supra* note 220 at 25-50; and *Blomley, Blockades*, *supra* note 219.

²⁹³ *Western Forest Products v Skidegate Indian Band*, [1985] BCJ 349 [QL] (BCSC), [*Skidegate*].

²⁹⁴ *Ibid* at para 5.

of the decision unfolds, becomes conflated with his reference to the rule *of* law. This first occurs, in how he frames the actions of the Haida people by stating “if the Haida people can disobey the law then presumably others can also disobey the law, and that would be *the end of a social order and civilization as we know it.*”²⁹⁵ Here we see elimination being performed through the clear assertion that the settler colonial state is the *only* normative social order. From this assertion, McEachern C.J. is then able to exercise jurisdiction over the Haida people by declaring the *presumptive* unlawfulness of their actions (the blockade). Informing this jurisdictional move is the bald assertion of their normativity captured by reference to the rule of law, as McEachern C.J. states “Everyone who thinks about these matters will have no difficulty concluding, as I do, that the rule of law which protects us all and which provides the solution to all disputes is infinitely more precious than the rights or claims of any group or individual.”²⁹⁶ Notably, this is another example of the practice of judicial interpretation that we saw being used in *R v Manuel*, except in this case, McEachern C.J. is drawing on his normative conclusions to interpret the “rule of law” in a way that eliminates any space in law for the existence of the substantive and procedural rights of the Haida Nation to assert or exercise their laws. In McEachern C.J.’s reasoning, neither the Haida people nor their jurisdictional dispute is included in the definition of “all.” They are simultaneously eliminated as a people while being subjected to the settler colonial legal order. This is rule *by* law.

To this point, McEachern C.J.’s reasoning follows the logic of elimination to its conclusion: the settler colonial state’s assumption of territoriality is affirmed as *true*, while the existence of the Haida Nation’s sovereignty and authority, and even the *possibility* of proving its existence, are eliminated.

²⁹⁵ *Ibid* at paras 7-8. (Emphasis added).

²⁹⁶ *Ibid.*

When we situate this decision within a longer view of the Haida Nation’s struggle, we find the beginnings of a troubling refusal of the court to justify its legitimacy as safeguarding the rule of law, and those who appeal to it from the unilateral and unequal powers of the political sphere. This tension emerges in McEachern C.J.’s conclusion which explicitly leaves all of the problems raised in his court to be dealt with exclusively by the political forum, as he states “They have challenged the rule of law directly, and they cannot expect that this challenge can go unanswered.... They have achieved maximum results from confrontation, for the Attorney General has indicated a willingness to meet with them when disobedience ceases.”²⁹⁷ Again, there is a strange dissonance between McEachern C.J.’s “rule of law” and what is generally regarded as the rule of law in how he acknowledges a challenge to the rule of law that he is tasked with upholding, yet refuses to meet that challenge and leaves it to be dealt with through negotiations.

In hindsight we know that those negotiations failed to meet the Haida Nation’s challenge to the rule of law and so they ended up back in court where they argued that the ongoing destruction of their lands will render their existence as Haida people “irretrievably despoiled” by the time they prove their Aboriginal title claim.²⁹⁸ On the other side, the government of BC argued that the Haida people had no legal rights.²⁹⁹ In resolving the dispute by elevating the primacy of the duty to consult to one that applies to *prima facie* claims to Aboriginal title and rights, the SCC also remodeled the doctrines of the honour of the Crown and of reconciliation. Where, 20 years ago the Haida people had to engage in a blockade in order to secure negotiations with the Crown, now, the SCC held that the “honour of the Crown requires negotiations” and that the agreements (or “Treaties”) which result from these negotiations “serve to reconcile pre-existing Aboriginal

²⁹⁷ *Ibid* at para 10.

²⁹⁸ *Haida Nation*, *supra* note 92 at para 7.

²⁹⁹ *Ibid* at para 8.

sovereignty with assumed Crown sovereignty”.³⁰⁰ Before setting out its discussion of the new duty to consult, the SCC closes with a clear statement of what these paradigm shifting doctrines recognize and the linear, predetermined process they secure:

Put simply, Canada’s Aboriginal peoples were here when Europeans came, and were never conquered. Many bands reconciled their claims with the sovereignty of the Crown through negotiated treaties. Others, notably in British Columbia, have yet to do so. The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.³⁰¹

What must be noted is that when the changes in the normative language of the courts is stripped away, the fundamental *legal* existence of Crown sovereignty and the current non-existence of Indigenous sovereignty has not—despite explicit acknowledgements of its *pre*-existence. All that has been gained in 20 years of struggle is that the necessity of exercising Haida jurisdiction through a blockade to secure negotiations with the Crown, has now been supplanted by the duty to consult.

While I know that it may be controversial to say, I would argue that this transformation performs the same act of settler colonial violence through a novel application of the logic of elimination. By refashioning the legal duty to consult into a practical tool for governments and industry to use when seeking access to Indigenous territories, the SCC greatly expanded the settler colonial state’s territoriality by creating a clear division between Indigenous jurisdiction over territory and settler jurisdiction over territory. The result of this is that the approach of negotiations is now deemed to be the “honourable” or “legitimate” approach, while the former approach of blockades is cast out, and becomes an “illegitimate” approach.

³⁰⁰ *Ibid* at para 20.

³⁰¹ *Ibid* at para 25.

This argument suggests that the legitimacy of the settler colonial state, which the Haida Nation directly challenged through their resistance on the blockades, is being maintained by a logic of elimination embedded in the doctrines of reconciliation, the honour of the Crown and the duty to consult. What is more troubling, as we will now discuss, is how these doctrines have been relied upon by courts, government and industry alike to justify the expansion of settler colonial territoriality while reinforcing the assertion that an exercise of Indigenous jurisdiction through a blockade is presumptively unlawful.

IV. Robert Lovelace and the KI 6: The Presumptive Criminalization of Indigenous Law

The blockades at the centre of the precedent setting Ontario Court of Appeal (ONCA) companion decisions in *Frontenac Ventures*³⁰² and *Platinex*³⁰³ are excellent examples of Indigenous law being exercised through blockades. The decisions of the motions court judges are revealing of how the logic of elimination can crudely masquerade as the “rule of law” and perform the myth of settler sovereignty by explicitly criminalizing expressions of Indigenous law. Despite the precedent set

³⁰² *Frontenac Ventures Corp v Ardoch Algonquin First Nation*, 2008 ONCA 534, [*Frontenac*]. For a detailed review of the facts leading up to the Sharbot Lake blockade from one of the lawyers involved in case, see: Graham Mayeda, “Access to Justice: The Impact of Injunctions, Contempt of Court Proceedings, and Costs Awards on Environmental Protestors and First Nations” (2010) 6 McGill JSDLP 143-176 at 143. As to its precedent, the holding in *Frontenac* has been applied many times in sentencing under criminal law, but has particularly been applied to several blockades cases in various jurisdictions since, see: *Canadian Forest Products Inc v Sam*, 2011 BCSC 676; *Taseko*, *supra* note 323; *Brantford (City) v Montour*, 2010 ONSC 6253; and *Moulton*, BCSC, *supra* note 259. Additionally, the holding in *Frontenac* had impacts beyond the jurisprudence resulting in significant legislative amendments in Ontario in the *Mining Act*, RSO 1990, c M.14; and the *Far North Act, 2010*, RSO 2010, c 18, which were designed to embed consultation within the statutory frameworks. However, the amendments have been heavily criticized by both Aboriginal rights scholars and the natural resource development industry, suggesting that reconciliation and the duty to consult are not quite so easily implemented, see: Holly L. Gardner, Stephen R. J. Tsuji, Daniel D. McCarthy, Graham S. Whitelaw & Leonard J.S. Tsuji, “The Far North Act (2010) Consultative Process: A New Beginning or the Reinforcement of an Unacceptable Relationship in Northern Ontario, Canada?” (2012) 3:2 The International Indigenous Policy Journal at article 7; Shawn H.T. Denstedt & Ryan V. Rodier, “What Happens When Developers Can’t Develop: Can and Should Resource Developers Be Compensated When They Can’t Develop Their Assets?” (2010) 48 Alta L Rev 331-362.

³⁰³ *Platinex Inc v Kitchenuhmaykoosib Inninuwug First Nation*, 2008 ONCA 620, [*Platinex*]. For a detailed review of the community and blockade at issue in *Platinex v KI* from the perspective of the community of KI, see: Rachel Ariss and John Cutfeet, *Keeping the Land: Kitchenuhmaykoosib Inninuwug, Reconciliation and Canadian Law* (Winnipeg: Fernwood Publishing, 2012). [Ariss & Cutfeet].

by the ONCA in overturning and rebuking the motions judges, an analysis of the ONCA's reasoning reveals that the same logic of elimination is still being reproduced in a way that is carefully encoded in the progressive language of reconciliation and negotiation.

In *Frontenac*, the Ardoch Algonquin First Nation (AAFN) had exercised Algonquin law by issuing a moratorium on uranium mining and then set up a blockade to enforce it. Injunction orders were issued by the court and deliberately ignored leading to a charge of civil contempt of court which resulted in punitive fines and jail time. At the sentencing hearing, Robert Lovelace, former Chief of the AAFN, explained the authority for the moratorium and the blockade as follows:

The authority for this particular moratorium lies both with the AAFN Algonquin First Nation -- Mr. Perry was our representative Elder who after hearing consensus within the community and at the Family Heads Council -- and it also comes from the authority of William Commanda who is the principal Elder of all of the Algonquin people, and after he considered it, after he talked with the people that are important to him and the Algonquins that he feels are -- are representative of the Algonquin voice, then he also gave his hand to signing that moratorium.³⁰⁴

What is important to acknowledge in this statement is the lengths to which Chief Lovelace goes to explain and trace out the legitimacy of the moratorium as an expression of Algonquin law. However, this effort was ostensibly wasted in the mind of the motions judge Cunningham J. who reacted to the suggestion that Algonquin law has any legitimacy, by writing in his decision:

Mr. Lovelace says that while he respects the rule of law, he cannot comply because his Algonquin law is supreme. He says he finds himself in a dilemma. Sadly, it is a dilemma of his own making. His apparent frustration with the Ontario government is no excuse for breaking the law. There can only be one law, and that is the law of Canada, expressed through this court.³⁰⁵

Here, settler sovereignty is explicitly performed, not only through the elimination of Algonquin law, but through a declaration that it is contradictory to the "rule of law" as Cunningham J. defines.

³⁰⁴ *Frontenac*, *supra* note 302 at para 27. (The court reading this part of Lovelace's testimony into the decision.)

³⁰⁵ *Ibid* at 40. (The reasons of the motions judge Cunningham J. were given orally and were not reported. The ONCA reproduces this excerpt from the transcript in its decision).

Notably, this exchange, between blockader and judge, was deliberately reproduced by the ONCA in its decision and was directly related to its reasons for overturning Cunningham J. on the basis that he “did not address *the other dimensions of the rule of law* referred to in *Henco*.”³⁰⁶ What are these “other dimensions of the rule of law” and is it possible that they include a space for Indigenous law? Sadly, the answer is no. To briefly see this, *Henco* was a decision before the ONCA released two years earlier that involved a blockade set up by the Haudenosaunee Six Nations in opposition to the development of claimed lands.³⁰⁷ Much has been written about this blockade, particularly the disturbing notions of the “rule of law” held by the settler community expressed through their strong reaction to the blockade.³⁰⁸ This notion was effectively captured by the motions judge Marshall J. who opened his decision by stating that he was “reading this judgment in open court because it is a matter of such importance to the communities and to this court. Ladies and gentleman we speak of the rule of law.”³⁰⁹ Having seized the opportunity, Marshall J. then waxed at length (without reference to authority or precedent) about his own perspectives on the “rule of law” before applying them to strongly rebuke, first the governments for engaging the Six Nations in negotiations as a result of the blockade, then the police agencies

³⁰⁶ *Ibid* at para 42. (Emphasis added). (The ONCA citing: *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council* (2006), 82 OR (3d) 721 [ONCA], [*Henco*]).

³⁰⁷ For a detailed summary and chronology of the facts and the ongoing nature of the dispute see: CBC News, “In Depth: Caledonia Land Claim” *CBC News* (1 November 2006), online: <<http://www.cbc.ca/news2/background/caledonia-landclaim/>>; Aboriginal Affairs and Northern Development Canada, *Chronology of Events at Caledonia*, (Ottawa: Canada, 2009); and Teviah Moro, “Native claims on Caledonia housing land heat up” *Hamilton Spectator* (13 January 2016), online: <<http://www.thespec.com/news-story/6230665-native-claims-on-caledonia-housing-land-heat-up/>>.

³⁰⁸ For an understanding of the perspective of “non-native” Caledonia residents on the events and their “view” of principles like the “rule of law” and “equality”, see: Amanda Vyce, *Protesting the "Protest": Understanding "Non-Native" Reactions and Responses To The Six Nations Land "Occupation And Protest" in Caledonia, Ontario* (MA Thesis, McMaster University, 2010). National Post columnist Christie Blatchford wrote a book titled, “Helpless” describing the non-native members of Caledonia and vilifying the government and police forces. For a short book review see: Suanne Kelman, “In Caledonia, all wrongs and no rights” *The Globe and Mail* (12 November 2010) online: <<http://www.theglobeandmail.com/arts/books-and-media/helpless-by-christie-blatchford/article1314720/>>.

³⁰⁹ *Henco Industries Ltd v Haudenosaunee Six Nations Confederacy Council* (2006), 82 OR (3d) 347 (ONSC) at paras 1-2.

for not enforcing his injunction order by immediately arresting the blockaders.³¹⁰

Now, in situating what the “other dimensions of the rule of law” would come to represent when the ONCA defines them in *Henco*, it is critical to compare this with the precedent that we saw taking place in the *Skidegate* case, then affirmed by *Delgamuukw* and *Haida Nation*, that positioned negotiations and consultation as the only “legitimate” remedies available to Indigenous peoples when dealing with settler governments and industry that want to access their territories. Here, Marshall J.’s “rule of law” is so narrow, that he has cast those remedies as contradictory to the rule of law. Not only does this stray from precedent, but if we do the math, this leaves precisely *zero* remedies. In this way, Marshall J.’s “rule of law” is likely more realistic for at least it is slightly more honest about the fact that Canada is a settler colonial state.

This is where the ONCA steps in and effectively turns our attention away from that fact.

On appeal, Laskin J.A. attempts to correct these perceptions stating in his conclusion:

Throughout his reasons the motions judge emphasized both the importance of the rule of law and his view that “the rule of law is not functioning in Caledonia” and “the law has not been enforced”. As we said in our reasons on the stay motion, no one can deny the importance of the rule of law in Canada... But the rule of law has many dimensions... These other dimensions include respect for minority rights, *reconciliation of Aboriginal and non-Aboriginal interests through negotiations*, ... It seems to me that in focusing on vindicating the court's authority through the use of the contempt power, the motions judge did not adequately consider these other important dimensions of the rule of law.³¹¹

The rebuke of the motions judge is clear, but problematically we see that the strictly political remedies of reconciliation and negotiations are now being used to justify this new multidimensional, or even pluralistic, definition of the “rule of law” in blockades contexts. The problem is, that for all of its pretense about the inclusivity of Indigenous peoples, this expanded

³¹⁰ *Ibid.*

³¹¹ *Ibid* at paras 135-142. (Emphasis added).

definition of the “rule of law” is still no different from the “rule of law” in *Skidegate*.

Turning back to *Frontenac*, the ONCA would further clarify its holding in *Henco*. First, MacPherson J.A. links the blockades directly with Aboriginal law tracing the “the clear line of Supreme Court jurisprudence, from *Sparrow* to *Mikisew*,” before stating:

I think it is important to give judicial guidance on the role to be played by the nuanced rule of law described in *Henco* when courts are asked to grant injunctions, the violation of which will result in aboriginal *protestors* facing civil or criminal contempt proceedings.

Where a requested injunction is intended to create “a protest-free zone” for contentious private activity that affects asserted aboriginal or treaty rights, the court must be very careful to ensure that, in the context of the dispute before it, the Crown has fully and faithfully discharged its duty to consult with the affected First Nations. The court must further be satisfied that every effort has been exhausted to obtain a negotiated or legislated solution to the dispute before it. Good faith on both sides is required in this process.³¹²

Here, the ONCA effectively performs the same move as McEachern C.J. in *Skidegate* only now it is cast in the new and improved *Haida Nation* language of reconciliation and honourable negotiations. But all of it amounts to the same thing: reinforcing settler sovereignty, expanding its territoriality while eliminating Indigenous jurisdiction by (mis)characterizing its expression through the blockade as “protest” and contradictory to the requirement of good faith.

Is this move deliberate? It’s impossible to know the mind of a judge, but one possible answer to this question can be found in considering that the ONCA did reproduce the excerpts of Robert Lovelace’s testimony asserting the existence and application of Algonquin law, and then contrasted this with the reasons of the motions judge. From this we could infer that the ONCA was aware that they were mischaracterizing Indigenous law as protest. However, whether it was deliberate or not, the consequence is the same. This conclusion is made clearer when we look at

³¹² *Frontenac*, *supra* note 302 at para 43-48. (References omitted, emphasis added).

the companion decision in *Platinex* which adopted the reasoning in *Frontenac*.³¹³

In the motions decision in *Platinex*, Smith J. also rejected any suggestion that Indigenous law and authority existed by stating more explicitly “If two systems of law are allowed to exist – one for the aboriginals and one for the non-aboriginals, *the rule of law will disappear and be replaced by chaos*. The public will lose respect for, and confidence in, our courts and judicial system.”³¹⁴ Here, settler sovereignty is again performed through the bald assertion that allowing Indigenous law to *coexist* (again the existence of Canadian law is implicit) would eliminate the “rule of law” as understood by “the public” (by which is meant the settler colonial state) would cease to exist.

Rachel Ariss, writing with John Cutfeet who was one of the KI 6 involved in the *Platinex* case, engage critically with the flaws in the legal reasoning in their book *Keeping the Land* by discussing the many factors leading up to and surrounding the blockade and the judicial process.³¹⁵ In reviewing their conclusions, I find they reinforce many of the conclusions here, as they find that in *Frontenac* “Algonquin law is seen, which is a start, but it is not fully recognized. The Court does not know how to value Algonquin law, or any Indigenous law, alongside Canadian law.”³¹⁶ Their work as a whole reinforces the fact made consistently throughout the literature on blockades that they are Indigenous actions and forms which are deeply embedded in the political, legal and spiritual orders of Indigenous peoples. Their analysis demonstrates that when we analyze blockades cases from this perspective, it is possible to identify the logic of elimination being reproduced through the judicial statements of Smith J., as they write:

³¹³ *Platinex*, *supra* note 303.

³¹⁴ *Platinex Inc v Kitchenuhmaykoosib Inninuwug et al*, 2008 CanLII 11049 (ONSC) at para 44. (Emphasis added).

³¹⁵ Ariss & Cutfeet, KI, *supra* note 303.

³¹⁶ *Ibid* at 118.

What Justice Smith has forgotten here is that the Canadian criminal law already shapes two legal systems—one for Aboriginal and one for non-Aboriginal people... Here, the possibility of sentencing for contempt in a way that recognized the particular role of defending Aboriginal rights in that contempt, is set up as so contradictory to the rule of law that disrespect and chaos must result.³¹⁷

This echoes the jurisdictional nature of the problematic at the heart of blockades cases, as Ma'iingan puts it above, the problem is “about sharply different legal orders imposing differing (and often conflicting) sets of obligations on the same group of people.”³¹⁸ Although this conflict is repeatedly *seen* by the courts in blockades cases, we have seen how it is just as quickly covered up by the courts who distort their interpretation of the “rule of law” to eliminate Indigenous law and jurisdiction by criminalizing it. In doing so the courts are severely undermining their legitimacy as institutions tasked with the obligation to uphold the rule of law. For all that the ONCA *might* be implying about seeing Indigenous law, it has continued to effectively deny its existence in the same way that McEachern C.J. did 20 years earlier, only now it is couched in the discourse of reconciliation, honourable negotiations and the Crown’s duty to consult.

V. The Tsilhqot’in Nation: Seeing Unproven Aboriginal title

As discussed above, the *Tsilhqot’in Nation* case has been marked as both a historic and empty victory for Indigenous peoples. While an explanation for that emptiness is still elusive, I believe we can start to unpack it by acknowledging the underlying story of their struggle on the ground. The Tsilhqot’in Nation’s struggle is deeply rooted in a unique history of resistance, which for them dates back to their first contact with Europeans in the 19th century, violent conflicts with goldminers in the wars of 1858 and 1864,³¹⁹ and a declaration of sovereignty, jurisdiction and

³¹⁷ *Ibid* at 115.

³¹⁸ Ma'iingan, *supra* note 244 at 114.

³¹⁹ Daniel Patrick Marshall, *Claiming the Land: Indians, Goldseekers, and the Rush to British Columbia* (PhD Dissertation, University of British Columbia, 2000) [unpublished]; Edward Sleigh Hewlett, “The Chilcotin Uprising of 1864” (1973) 19 BC Studies 50.

ownership over their territory and their people in 1983.³²⁰ Similar to the Gitksan and Wet'suwet'en during the *Delgamuukw* trial, blockades were a constant necessity for the Tsilhqot'in Nation on the ground before, during and after the *Tsilhqot'in Nation* trial as the case was making its way through the appeal process. The blockades cases from 1999-2004³²¹ that were peripheral to the title action are interesting sites of analysis that share much with the struggles analyzed above. But the blockade case that I will focus on here is the solo action of Marilyn Baptiste, who was Chief of the Xeni Gwet'in at the time. The reason for focusing on this case, as mentioned, is because it provides us with a good comparative with the cases above in how the judge interprets the "uncertainty" of the Tsilhqot'in Nation's Aboriginal title as a legal interest.

The story in this case is that Taseko Mines was determined to continue exploratory drilling that would threaten or destroy important lakes in Tsilhqot'in territory and Chief Marilyn Baptiste, on her own, blocked the road.³²² In describing the actions of Chief Baptiste that day, Grauer J. stated that Chief Baptiste refused "to recognize [Taseko Mines] authority to proceed into what she described as Tsilhqot'in territory. In a blockade that appeared to me to be more moral than physical, but was nonetheless effective, she declined to let Taseko's convoy of trucks and equipment pass."³²³ Significantly, this is the only factual description of the blockade in the decision. The next time it is mentioned is at the end of the decision when Grauer J. twice describes the actions of

³²⁰ "1983 General Assembly of the Chilcotin Nation: A Declaration of Sovereignty", *Tsilhqot'in National Government* (website), online: <<http://www.tsilhqotin.ca/about.htm>>.

³²¹ See e.g.: *Carrier Lumber Ltd v British Columbia*, 1999 CanLII 6979 (BCSC); *Tsilhqot'in Nation v Canada*, 2002 BCCA 122; *Xeni Gwet'in First Nations v British Columbia*, 2002 BCCA 434; *Xeni Gwet'in First Nations v British Columbia*, 2004 BCCA 106.

³²² For her actions, Chief Marilyn Baptiste would later be awarded the prestigious Goldman Prize "one of the world's largest international awards for grassroots environmental activism," that comes with a \$175,000 USD award. See: Daybreak Kamloops, "Marilyn Baptiste receives prestigious \$175K Goldman Prize" *CBC News* (20 April 2015), online: <<http://www.cbc.ca/news/canada/british-columbia/marilyn-baptiste-receives-prestigious-175k-goldman-prize-1.3040916>>.

³²³ *Taseko Mines Ltd v Phillips*, 2011 BCSC 1675 at para 11.

Chief Baptiste as “unlawful”.³²⁴ In the whole context of the decision, this is asserted as both a fact and conclusion. This is yet another example of how the judge performs settler sovereignty by presumptively criminalizing Indigenous jurisdiction.

However, unlike the other cases where this move is made, in this case this is not decisive of the outcome as the Tsilhqot’in Nation were successful in securing an injunction order and Taseko was denied theirs.³²⁵ The key reason why the blockade trumped the exploratory program of Taseko Mines was summarized by Grauer J. in weighing the balance of convenience, stating “The geology will always be there. The ore bed is not going anywhere. The same cannot be said of the habitat that is presently left to the petitioners. Once disturbed, it is lost. Once lost, the exercise of aboriginal rights is further diminished.”³²⁶

What is significant about this case, in comparison with *R v Manuel* and *Westar*, is that the still unproven Aboriginal rights of the Tsilhqot’in Nation were actually given *some weight* to merit the implication that protecting Aboriginal rights and extracting resources are directly opposing interests in a zero-sum balancing exercise. Unfortunately, there is nothing further that explains why Grauer J. gave as yet unrecognized Aboriginal rights any weight in his decision. Whatever the explanation, what is significant is that in recognizing the as yet unproven and unrecognized Aboriginal title and rights of the Tsilhqot’in Nation, Grauer J. provides us with a unique example of the ability of a judge to offer the “bare promise” contained in the rule of law. It is only a glimmer, but—at least for those legal scholars who continue to search for evidence to support the aspirational assumption—it is literally better than nothing at all. As I interpret it, this result at least helps to confirm the necessity of blockades as a step towards decolonizing the rule of law.

³²⁴ *Ibid* at paras 72 & 77.

³²⁵ *Ibid*.

³²⁶ *Ibid* at para 66.

At length, the positive evidence in this case is still severely limited by Grauer J.’s assertion of the blockade as unlawful, for while it provides some “recognition” of a legal interest in Aboriginal title that is still subject to settler sovereignty, it simultaneously performs the elimination of Indigenous jurisdiction.

VI. **George Behn and the Fort Nelson First Nation: Who is the Proper Authority?**

The blockade of the 82-year-old George Behn from the Fort Nelson First Nation (FNFN) in Treaty 8 territory started in October of 2006 and continued for several months.³²⁷ It was entirely peaceful and there was no damage done to any machinery or work sites; it was a pure act of physically occupying space and asserting authority over land.³²⁸ Like the others, it was also deeply rooted in a long history of unfair and unilateral decisions made by the Crown that were significantly impacting the territory.³²⁹ Unlike the other blockade cases, this one was not subject to an injunction order. Instead, Moulton Contracting (Moulton) gave up trying to access the territory to cut timber and instead filed a civil action seeking damages from the Behns and the Crown.³³⁰ In their statement of defense, the Behns sought to argue that there was inadequate consultation; that the Crown had breached its duty to consult and accommodate when it approved and sold the timber licences to Moulton.³³¹ Both Moulton and the Crown filed an application to strike out the Behns defence on the basis that the Behns did not have the authority to argue it.³³²

Before we can get to analyzing the SCC’s reasoning, a brief review and analysis of the procedural history in the case is necessary to understand how the framing of the jurisdictional issue

³²⁷ For the complete story, including the factual findings made when the trial decision was finally released following the SCC decision, see: *Moulton Contracting Ltd v British Columbia*, 2013 BCSC 2348. [*Moulton*, 2013].

³²⁸ *Ibid* at para 154.

³²⁹ *Ibid* at paras 37-116.

³³⁰ *Ibid*.

³³¹ *Moulton*, BCSC, *supra* note 259.

³³² *Ibid*.

as one of standing in this case ultimately influenced the disposition when it reached the SCC. For our purposes, the jurisdictional question is effectively: *Who* is the *proper* authority in relation to the territory at issue? It is important to understand that the conflict in this question is slightly different from the blockades cases above. Here, the jurisdictional question was whether George Behn, in his own right and on behalf of his family, had the power to speak the law on *his family's* territory and in relation to *his family's* Treaty Rights.³³³ Or, if the FNFN, as the “Indian Band” should be *presumed* to be the proper authority. What makes this question distinct is that it effectively pits two Indigenous authorities against each other. However, what makes it similar is that on one side the source of authority is grounded in Indigenous law and jurisdiction, while on the other side, the source of authority is found in the settler colonial state’s racist *Indian Act* and its problematic jurisprudence on Aboriginal and Treaty rights. Thus, from the lens of settler colonialism, this is still a conflict between Indigenous jurisdiction and settler colonial jurisdiction.

The significance of analyzing how the courts dealt with this jurisdictional issue is that uncertainty over *who* is the proper authority to represent collectively held Aboriginal title and Treaty rights deeply problematizes the legitimacy of the political remedies of negotiation, consultation and reconciliation. As deeply flawed as these remedies already are for the reasons discussed above, they are based, fundamentally, on an assumption that the Crown or the industry proponents are dealing with a body or individual with legitimate agency to represent and make decisions that are impacting *all* of the holders of those collective rights. When we look broadly at the jurisprudence on Aboriginal and Treaty rights, this assumption about the proper authority is

³³³ Throughout the consultation record, George Behn repeatedly affirmed that he was the proper authority, not the FNFN, to be consulted with regarding his “family territory.” *Moulton*, 2013, *supra* note 327 at para 107.

largely untested.³³⁴ Yet it is inevitably situated at the heart of Aboriginal jurisprudence and significantly, the political machinery of the discourse of “recognition”³³⁵ and the comprehensive claims process that is extinguishing Aboriginal title one final agreement at a time.³³⁶ As the context of the Gitksan and Wet’suwet’en demonstrate, there may be significant reasons for undermining this blanket assumption that courts, governments and industry are applying in different communities with very different struggles.

In *Behn*, this fundamental assumption is being challenged by the blockade and George Behn’s assertion of authority over his land. As with almost all cases involving Indigenous peoples, as the blockade and Behn’s assertion of authority enters the court, it is immediately disadvantaged by framing it as a very narrow question of whether Behn has standing to argue that the Crown breached its duty to consult.³³⁷ Now, the act of framing the jurisdictional question as a question of standing could arguably be seen as presumptively decisive of the matter in much the same way that the formulation of the colour of right defence was in *R v Manuel* or the defective pleadings was in *Delgamuukw*. However, the real risk is that it forces the *underbelly* of the struggle to be exposed to the court. As we will see, the SCC arguably takes advantage of this vulnerability and strikes a very damaging blow that is sure to have a critical impact on the future of Aboriginal jurisprudence and the struggle of Indigenous peoples.

A. Procedural History: *Moulton Contracting Ltd v British Columbia, BCSC & BCCA*

As stated, the question in the case is: *Who* is the *proper* authority in relation to the territory at

³³⁴ Kent McNeil, “Aboriginal Title and Indigenous Governance: Identifying the Holders of Rights and Authority” (2016) Osgoode Digital Commons Working Paper No 264, online: <http://digitalcommons.osgoode.yorku.ca/all_papers/264>.

³³⁵ See: Coulthard, *supra* note 13.

³³⁶ For an extensive review of the problems underlying the comprehensive claims process through the lens of settler colonialism, see: Pasternak, PhD, *supra* note 12; and, Manuel, Unsettling, *supra* note 5.

³³⁷ *Moulton*, BCSC, *supra* note 259.

issue? The Crown argued that the FNFN is the proper authority.³³⁸ By contrast, the Behns' assert that *they* are the proper authority based on Indigenous law which they articulated by saying that the FNFN "traditionally ordered themselves so that the rights to hunt and trap set out in Treaty 8 were exercised in tracts of land associated with different extended families."³³⁹ The Crown in response argued that the Behns "did not go so far as to assert that *their family* was charged with the responsibility and authority to deal with the Crown in relation to those rights."³⁴⁰

Notably, the Crown's argument here asserts that there is, or must be, *another* authority that is above the Behns. The immediate effect of this argument is to persuade the court to ignore the Indigenous law that the Behns have just asserted which, for them, definitively answers the factual and legal question of *who* is the proper authority in FNFN territory. Again, this effect can be seen as a direct result of how the jurisdictional issue is framed from the outset.

In response to the Crown the Behns' argued "that it would be odd to accept that George Behn is a holder of a hunting right but then find that he cannot assert that right if he is sued in relation to the manner in which he exercised his right."³⁴¹ Justice Hinkson rejects this argument stating "It is not George Behn's hunting rights that he is relying on. Granted he and his family have pled that their hunting rights have been infringed, but the action against him, and the defence to it, is not with respect to any exercise of his hunting rights; rather, *it is with respect to his blockade*, along with others, of the access of Moulton to areas 'taken up' by the Crown and licensed to Moulton."³⁴² What is immediately apparent here, in light of the review of cases above, is that we have another problem with how blockades as assertions of Indigenous jurisdiction over land are

³³⁸ *Ibid* at paras 56-58.

³³⁹ *Ibid* at para 56.

³⁴⁰ *Ibid*. (Emphasis added).

³⁴¹ *Ibid* at para 60.

³⁴² *Ibid*. (Emphasis added).

being characterized as illegitimate by the courts to presumptively defeat them. Here, the blockade of George Behn is reworked so that it is juxtaposed with interfering with the Crown's exclusive and presumptive authority under the controversial "taking up" Treaty 8 clause to grant Moulton access and license to take timber out of the Behns family territory. Again, the effect of this move is to eliminate Indigenous jurisdiction in order to reinforce settler sovereignty.

While the statement of Hinkson J. reproduces the same problem identified in the blockades cases above, there is an added twist due to the different nature of the jurisdictional question. Thus, like the others, it relies on the presumptive unlawfulness of the blockade, but the twist here is that Hinkson J. reframes the Behns assertion of authority over their family territory, as one of an assertion of authority over collectively held Treaty rights of which the FNFN, not the Behns, are *presumed* to be the proper authority. This reframing and the presumption allows Hinkson J. to conclude that "the Behn defendants do not have standing" because, as he puts it "The Behn defendants *have not demonstrated that their family has been charged with the authority to deal with the Crown in relation to those rights*, and, in this case, the leadership of the Fort Nelson First Nation is a separate party to the proceedings, advancing a position on behalf of their First Nation."³⁴³

Notably, the effect of Hinkson J.'s reasoning is to ignore, or rather eliminate, the Indigenous law that the Behns' have explained regarding how FNFN lands are managed internally by different families. From the lens of settler colonialism, this is another example of how the logic of elimination can be applied. However, from a strictly doctrinal perspective there is another significant problem here in how Hinkson J.'s reasoning contradicts the rule from *Delgamuukw* which he paraphrases or restates, writing "While aboriginal and treaty rights are exercised by

³⁴³ *Ibid* at para 62. (Emphasis added).

individuals, such rights are collective rights and are neither possessed by nor reside with individuals.”³⁴⁴ The immediate problem with Hinkson J.’s restatement of the rule in *Delgamuukw* here is that it does not support the proposition that the Fort Nelson First Nation is the proper authority. In fact, it is very likely that *Delgamuukw* not only contradicts Hinkson J.’s restatement as a correct principle of law, but that it contradicts the notion that judges, as opposed to the collective Treaty holders themselves, even have the power to be making such an assumption.

While a full analysis of *Delgamuukw*—particularly the preliminary issues related to the initial pleadings and a review of the internal struggle that Val Napoleon described above³⁴⁵—produces many reasons why this is; for our purposes, we need only look as far as the paragraph in *Delgamuukw* that is cited by Hinkson J. which reads in full:

A further dimension of Aboriginal title is the fact that it is held communally. Aboriginal title *cannot be held by individual* Aboriginal persons; it is a collective right to land *held by all members* of an Aboriginal nation. *Decisions with respect to that land are also made by that community.* This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.³⁴⁶

As a matter of doctrine, the actual statement of the rule in *Delgamuukw* is markedly different from Hinkson J.’s restatement. When read in its entirety it is clear that this holding sets out a clear distinction between the individual and community holdings of Aboriginal title (not specific Treaty rights to hunting) with the central aspect of this holding being what Kent McNeil describes as recognizing a “decision-making authority over their land.”³⁴⁷ Brian Slattery articulates this authority inherent in Aboriginal title through an external/internal dichotomy, writing “Viewed externally, aboriginal title is a generic right which possesses certain distinctive features, such as

³⁴⁴ *Ibid* at para 32.

³⁴⁵ Napoleon, Blockades, *supra* note 225.

³⁴⁶ *Delgamuukw*, *supra* note 91 at para 115. (Emphasis added).

³⁴⁷ Kent McNeil, “Exclusive Occupation and Joint Aboriginal Title” (2015) 48 UBC L Rev. 821 at 859. [McNeil, Joint Aboriginal Title].

inalienability, that do not change from one Indigenous group to another. Viewed internally, aboriginal title allows each Indigenous group to use its lands in its own fashion, within certain broad limits.”³⁴⁸ Slattery has expanded on this in later analysis showing how “Aboriginal title has a complex internal structure. It is like a clockwork egg, its smooth surface concealing an intricate world within – a world as diverse as its Aboriginal title-holders.”³⁴⁹

We know that the scholarship analysing *Delgamuukw* and Aboriginal rights and title on this particular rule is extensive and more could be reviewed. But the point to be made is that there is *nothing* in the actual statement of the rule in *Delgamuukw* that Hinkson J. relies upon, and even less when the circumstances of the decision as a whole are considered, that remotely supports his proposition that the FNFN, not the Behns are the proper authority. By getting the law in *Delgamuukw* wrong, Justice Hinkson’s conclusion is doctrinally flawed. However, the bigger problem, in my view, is that from the lens of settler colonialism, Hinkson J. extends his jurisdiction into the *internal* dimensions of the FNFN decision-making authority in a way that deliberately overrides, and by effect eliminates, the *clear* and *direct* assertions of Indigenous law that were provided to the court which give us just a small glimpse into the “intricate world” of how the FNFN community makes decisions with respect to *who* is the proper authority.

The doctrinal error should have been one that the BCCA would be expected to notice and correct. But instead, the court’s review of the trial decision becomes a disturbing example of the courts ability to not only miss an error of law, but to see it and make it far worse. Justice Saunders first states the holding at issue, writing Hinkson J. “concluded that individual members of the Fort Nelson First Nation do not have standing to advance the legal positions set out in those paragraphs

³⁴⁸ Brian Slattery, “The Metamorphosis of Aboriginal Title” (2006) 85 Can Bar Rev 255 at 279.

³⁴⁹ Brian Slattery, “The Constitutional Dimensions of Aboriginal Title” (2015) 71 SCLR (2d) 45 at 46.

because the rights asserted in those paragraphs are collective rights of the Aboriginal community.”³⁵⁰ Justice Saunders then frames the jurisdictional issue as one concerned with “the right of individual defendants to challenge instruments they, but not the collective, say are invalid because they violate collective rights.”³⁵¹ Notably, by framing the issue this way, Saunders J.A. reinforces the flawed proposition that the FNFN is presumed to be the proper authority.

From here, Saunders J.A. then performs the now familiar move of characterizing the blockade as “*self-help behaviour* by some or all of the appellants in response to proposed logging”.³⁵² Again, there is nothing in this decision to indicate why Saunders J.A. decides to characterize the blockade in this way.

After a lengthy discussion, which includes reviewing the full excerpt of paragraph 115 in *Delgamuukw*³⁵³ but does not notice that Hinkson J.’s reasoning clearly contradicts that holding, Saunders J.A. reaches the conclusion that Hinkson J. was correct.³⁵⁴ Again, the failure to recognize an error of law is a doctrinal problem. But the biggest problem, by far, in the decision is the lengths that Saunders J.A. goes to *mischaracterize* the blockade as “self-help” in order to repeatedly reinforce the flawed proposition that the FNFN are presumed to be the proper authority.

Justice Saunders does this in framing the issue, stating “To reach the point of success on these defences, the Behns must clear the hurdle of invalidating Moulton's rights to log and use the road. Yet the rights they assert in order to denigrate Moulton's claim *are communal rights of the Fort Nelson First Nation, and the Behns are not authorized to speak on behalf of the Fort Nelson*

³⁵⁰ *Moulton*, BCCA, *supra* note 259 at para 3.

³⁵¹ *Ibid* at para 4.

³⁵² *Ibid*. (Emphasis added).

³⁵³ *Ibid* at para 35.

³⁵⁴ *Ibid* at para 40.

*First Nation.*³⁵⁵ This proposition is again reinforced through more aggressive language, as Saunders J.A. states “The proposition that it does not lie in the mouth of individual members of the Fort Nelson First Nation to attack these Crown granted instruments, whether as an offensive move by starting a claim or as a defensive move in response to a claim, *leaves to the Fort Nelson First Nation the responsibility of speaking on behalf of the collective through its authorized representatives.*³⁵⁶

The disturbing move here is that this statement effectively conflates the flawed proposition with the rule in *Delgamuukw*. Thus, it does more than just misstate the rule in *Delgamuukw*; it effectively redefines the rule by reading the flawed proposition into it. In doing so, Saunders J.A. has not only eliminated the Indigenous law in this case by replacing it with what the court thinks should be the laws that govern the internal dynamics of the FNFN decision-making power; she has now transformed this violent imposition of settler colonial jurisdiction into precedent of Aboriginal rights jurisprudence within the jurisdiction of British Columbia.

Justice Saunders then uses her remodeled version of the internal dynamics of the FNFN’s authority to complete the logical connection between her mischaracterization of the blockade and the flawed proposition to decide the issue of standing, as she writes:

It is, further and in my view, to expose the respectful resolution of issues between the provincial (or federal) government and the First Nation to the risk of an end-run, *whereby individuals may engage in self-help rather than using available legal channels and, when challenged by court process, then litigate individually these communal rights.* In this sense, *allowing individuals to assert a position on a collective right may have unexpected consequences and, simply, lacks order.*³⁵⁷

While Saunders J.A. does not baldly cite the “rule of law” like the other blockades decisions, she

³⁵⁵ *Ibid* at para 31.

³⁵⁶ *Ibid* at para 32.

³⁵⁷ *Ibid* at para 34.

has in every sense fully reincarnated the disturbing reasoning of McEachern C.J. in dealing with the Haida Nation: blockades are presumptive unlawful, Indigenous law and jurisdiction is illegitimate and to allow them any legitimacy leads inevitably to disorder.

This reasoning is only reinforced throughout as Saunders J.A. continues to mischaracterize the blockade as illegal and completely contradictory to Aboriginal rights, describing it as “an attack on a non-Aboriginal party's rights, on the basis of treaty or constitutional propositions.”³⁵⁸ The connection between this mischaracterization of the blockade and the flawed proposition is further reinforced in reaching the conclusion as, Saunders J.A emphasizes “the high importance of *recognizing the Fort Nelson First Nation as the sole authority* for managing the advancement of treaty and constitutional First Nations rights...Absent a challenge by the Fort Nelson First Nation, the instruments in issue may not be attacked by individual members of the Fort Nelson First Nation on the basis of inadequate consultation or on any other basis engaging constitutional or treaty rights.”³⁵⁹ The reasoning of Saunders J.A. reveals a deeply disturbing move by the court to eliminate Indigenous law and jurisdiction by mischaracterizing blockades and imposing the court’s own opinion of *who* the proper authority is.

B. *Behn v Moulton Contracting Ltd*, 2013 SCC 26

Justice LeBel, writing for a unanimous decision of the SCC, frames the situation as one “of relations between members of an Aboriginal community, a logging company, and a provincial government... The courts below held that the individual members of the Aboriginal community (the “Behns”) did not have standing to assert collective rights in their defence; *only the community could raise such rights.*”³⁶⁰ Here, before we have even reached paragraph 3, whatever authority

³⁵⁸ *Ibid* at para 39.

³⁵⁹ *Ibid* at paras 40-41.

³⁶⁰ *Behn*, *supra* note 259 at paras 1-2. (Emphasis added).

the Behns’ might possibly be seen to hold, or trying to assert, has just been eliminated by carefully framing the jurisdictional issue in a way that positions the authority of the FNFN as the “Aboriginal community” against the Behns.

In turning to deal with the issue of standing, LeBel J. summarizes the established jurisprudence on the duty to consult and reconciliation before stating “The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature.”³⁶¹ As discussed above, this general rule is based in *Delgamuukw* which does *not* support the flawed proposition that the Indian Band is *presumed* to be the proper authority in the sense that it is being used here. Perhaps because of this, LeBel J. does not actually cite *Delgamuukw* here, but instead cites *Beckman* at paragraph 35 which requires some unpacking to see how this actually reinforces the flawed proposition.

The holding from *Beckman* reads “the entitlement of the trapper Johnny Sam *was a derivative benefit based on the collective interest of the First Nation of which he was a member*. I agree with the Court of Appeal that he was not, as an individual, a necessary party to the consultation.”³⁶² Notably, this holding relies on the proposition that the Little Salmon/Carmacks First Nation (LSCFN) is the proper authority. This proposition is not entirely flawed, but is based on the kind of creative leap that Walters identifies in *Van der Peet*. The proposition is not flawed in *Beckman* because the LSCFN is *not* an Indian Band, but is a completely new legal entity created by the LSCFN Treaty.³⁶³ In other words, the LSCFN Treaty terminated the predecessor Band under the *Indian Act* and reincarnated it as the LSCFN. In doing so, all of the powers and assets of the

³⁶¹ *Ibid* at para 30.

³⁶² *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53 at para 35, [*Beckman*]. (Emphasis added).

³⁶³ *The Little Salmon/Carmacks First Nation Self-Government Agreement*, 21 July 1996, online: <<https://www.aadnc-aandc.gc.ca/eng/1100100030728/1100100030730>>, [LSCFN Treaty]

Indian Band were “reconciled” with the Canada and Yukon governments by extinguishing them.

The relevance of this distinction in *Beckman* is that “Trapline #143” the interest registered to Johnny Sam, is actually “in a category administered by the Yukon government, not the First Nation.”³⁶⁴ Thus, the pre-existing Indigenous authority over land has already been eliminated and replaced by the settler colonial authority through the LSCFN Treaty. The awkward result produced from this is that the trapline and the “derivative benefit based on the collective interest” are somehow two different legal interests. In order to “reconcile” this, the Court in *Beckman* has to make a leap. The leap they make is that as a member of the LSCFN, Johnny Sam’s entitlement to the trapline which is an interest under the jurisdiction of the Yukon, is not enforceable as an individual right, but is seen as a “derivative benefit” that is based on the LSCFN as the proper holder of that right as per the terms of the LSCFN treaty.

Now, it is critical to keep in mind that all of this unique context is specific to the proposition that the LSCFN, *not* an Indian Band, is the proper authority. What is problematic about citing *Beckman* as authority for a much more general proposition about s. 35 Aboriginal rights is that there is simply no discussion by LeBel J. about the unique facts in *Beckman* which are uniquely relevant to supporting the specific proposition in that case. The effect of this is that LeBel J. completely disconnects the important context in *Beckman*, and in doing so, distorts his own statement of the general rule in order to reinforce the flawed proposition that the Indian Band is the proper authority. This move is completed in the next statement as LeBel J. cites *Beckman* to stand for the rule that “an Aboriginal group *can authorize an individual or an organization to represent it* for the purpose of asserting its s. 35 rights.”³⁶⁵

³⁶⁴ *Beckman*, *supra* note 362 at para 21.

³⁶⁵ *Behn*, *supra* note 259 at para 30. (Emphasis added).

The problem here is that a very specific legal interpretation from the terms of the LSCFN treaty, which extinguishes Aboriginal title and rights by converting them into fee-simple interests and “derivative benefits” under settler colonial jurisdiction, has now been read into what has just become a completely new and binding legal principle by virtue of the SCC’s supreme power that is now applicable to *all* of the s.35 jurisprudence.

To be sure, there is no mistaking LeBel J.’s intention to promote the flawed proposition as established law for it is deliberately reinforced throughout his reasoning as he upholds the conclusions of the courts below stating “it does not appear from the pleadings that the FNFN authorized George Behn or any other person to represent it... given the absence of an allegation of an authorization from the FNFN, in the circumstances of this case, the Behns cannot assert a breach of the duty to consult on their own, *as that duty is owed to the Aboriginal community, the FNFN.*”³⁶⁶ What is astonishing is how LeBel J. demonstrates his awareness that this new legal principle could possibly be flawed by writing “Even *if it were assumed that such a claim by individuals is possible*, the allegations in the pleadings provide no basis for one in the context of this appeal.”³⁶⁷ Here, the irony of this holding is deeply disturbing. In this statement, the cumulative effect of repeatedly mischaracterizing, reframing and narrowing the Behns blockade and assertion of authority over their land comes home to roost. By faulting the Behns for not framing their pleadings in a certain way, LeBel J. is completely disregarding the several ways (discussed above) in which the courts below have deliberately reframed the Behns’ assertions to reinforce the flawed proposition they want to rely on.

Instead of letting the possibility that the proposition is flawed raise awareness of the need

³⁶⁶ *Ibid* at para 31. (Emphasis added).

³⁶⁷ *Ibid*. (Emphasis added).

for caution, LeBel J. serves to obscure that possibility further by reinforcing the proposition in his discussion of whether there was a breach of Aboriginal and Treaty rights. Interestingly, LeBel J. starts the discussion by rejecting the Crown's argument "that claims in relation to treaty rights must be brought by, or on behalf of, the Aboriginal community."³⁶⁸ Justice LeBel states simply that "This general proposition is too narrow."³⁶⁹ In explaining why LeBel J. begins by stating "It is true that Aboriginal and treaty rights are collective in nature."³⁷⁰ Although the authorities cited for this proposition are standard, they now include an interesting outlier in *Beckman*—which, as discussed, is unique because it is a modern land claim agreement that extinguishes pre-existing legal interests and Indigenous authorities; it is not like a historic treaty or an Aboriginal rights or title case. Because it is so critical to understand why conflating *Beckman* with the other s. 35 precedents is wrong, the uniqueness of *Beckman* discussed above is made sharper when contrasted against a brief review of those precedents developed over decades of Aboriginal jurisprudence.

First, the cited passage from *Sparrow* sets out the guiding caution for the characterization of Aboriginal rights as *sui generis*, by stating:

Fishing rights are not traditional property rights. They are rights held by a collective and *are in keeping with the culture and existence of that group*. Courts must be careful, then, to avoid the application of traditional common law concepts of property as they develop their understanding of what the reasons for judgment in *Guerin*, referred to as the "sui generis" nature of aboriginal rights.³⁷¹

As discussed, the passage from *Delgamuukw* that sets out the internal/external dimensions of Aboriginal title is consistent with this caution as the SCC respectively shaped the nature of Aboriginal title.

³⁶⁸ *Ibid* at para 33.

³⁶⁹ *Ibid*.

³⁷⁰ *Ibid*. (Citing: *R v Sparrow*, [1990] 1 SCR 1075 at 1112; *Delgamuukw*, *supra* note 126 at para 115; *R v Sundown*, [1999] 1 SCR 393 at para 36, [*Sundown*]; *R v Marshall*, [1999] 3 SCR 533 at paras 17 & 37, [*Marshall #2*]; *R v Sappier*, 2006 SCC 54 at para 31, [*Sappier*]; and *Beckman*, *supra* note 362 at para 35).

³⁷¹ *Sparrow*, *ibid* at 1112.

Next is *Sundown* where the SCC was dealing with the question of whether the harvesting of wood by an individual to build a hunting cabin could be characterized as an Aboriginal right that was “reasonably incidental” to the collectively held Treaty right.³⁷² Because the Aboriginal right involved allowing an individual to make use of another individual’s property by building a dwelling, the issue was further problematized by finding a way to articulate how such a right fit within the province’s prevailing property law framework. In dealing with this complex question, the SCC not only rejected defining Treaty rights in a way that accords with the common law concepts of title and use, as per *Delgamuukw*, but emphasized the importance of characterizing rights “specific to each Aboriginal community”³⁷³ and “the complexities of aboriginal history, society and rights [that] must be defined in the specific factual context of each case.”³⁷⁴ The specific and unique context that is emphasized throughout *Sundown* is significant to the paragraph that is cited which reads:

Any interest in the hunting cabin is a collective right that is derived from the treaty and the traditional expeditionary method of hunting. *It belongs to the Band as a whole and not to Mr. Sundown or any individual member of the Joseph Bighead First Nation.* It would not be possible, for example, for Mr. Sundown to exclude other members of this First Nation who have the same treaty right to hunt in Meadow Lake Provincial Park.³⁷⁵

Critically, if this passage is read in isolation from its unique context in *Sundown*, then it appears to stand for the proposition that an individual member of an Aboriginal community cannot depend on treaty rights in a legal action because they are collective in nature. However, that proposition makes absolutely no sense in the full context of *Sundown* which is fundamentally about an individual depending on collectively held treaty rights in a legal action to serve as a full defense.

³⁷² *Sundown*, *ibid* at para 1.

³⁷³ *Sundown*, *ibid* at para 25. (Citing: *Van der Peet*, *supra* note 119 at para 69.)

³⁷⁴ *Ibid*. (Citing: *Sparrow*, *supra* note 370.)

³⁷⁵ *Ibid* at para 36.

Even in the distorted way that the courts have framed the Behns assertions, this is the very thing that the Behns are trying to do in their defense to the civil action brought by Moulton. The only difference is that the action in *Sundown* was building a physical structure, whereas the Behns are simply physically occupying land. Thus, it must be understood that it is the blockade—in all of its distorted mischaracterizations—and nothing else, that explains why the Behns are excluded from the benefit of the precedent set in *Sundown*.

From *Sparrow*, to *Delgamuukw*, to *Sundown*, the consistent principle is caution and attention towards the specificity and uniqueness of each community’s history, cultures and traditions as they relate to their Aboriginal and Treaty rights. The same principle remains true in the passages cited from *Marshall*, in which the Court stated “treaty rights do not belong to the individual, but are exercised *by authority of the local community* to which the accused belongs,”³⁷⁶ and then applied this principle by emphasizing the importance of the Indigenous perspective in framing “regulations that... define the Mi’kmaq treaty right in terms that can be... understood by the Mi’kmaq community that holds the treaty rights.”³⁷⁷ Similarly, the Court in *Sappier* reinforced this understanding and the importance of examining the facts, finding in that case that the “evidence detailing the many uses to which wood was put by the Mi’kmaq as a whole is important given the communal nature of aboriginal rights.”³⁷⁸

At last we come to the outlier, *Beckman*, which as discussed is a duty to consult case in the context of a Modern Treaty. Of all of these leading precedents, even *Beckman* does not directly support the flawed proposition that the Indian Band is *presumed* to be the proper authority. *Beckman* only supports this proposition when it is stripped of the unique context that validates the

³⁷⁶ *Marshall*, *supra* note 370 at para 17

³⁷⁷ *Ibid* at para 37.

³⁷⁸ *Sappier*, *supra* note 370 at para 31.

proposition in that case, which is precisely what LeBel J. did earlier in the decision. By including *Beckman* in with the others, LeBel J. imports this distorted proposition into that long line of established jurisprudence in order to read the flawed proposition into the general rule.

This move allows him to dismiss the evidence tendered by the Behns' to support their assertion that they, not the FNFN, are the proper authority. That LeBel J. was acutely aware that this evidence is before him, is reflected in his summary of it:

On the basis of an allegation of a connection between their rights to hunt and trap and a specific geographic location within the FNFN territory, the Behns assert that they have a greater interest in the protection of hunting and trapping rights on their traditional family territory than do other members of the FNFN. *It might be argued that this connection gives them a certain standing to raise the violation of their particular rights as a defence to Moulton's tort claim.*³⁷⁹

Again, the irony in this statement is palpable. Yes, it *might* be argued and there *might* be a defence, if that argument and defence hadn't been repeatedly reframed by the courts below in order to eliminate Indigenous jurisdiction. What is truly perplexing throughout this analysis is that LeBel J. continues to demonstrate his awareness that he might be applying a flawed proposition by acknowledging that the Behns original argument, which he is rejecting without considering it, could possibly succeed.

All of this is troubling, but the most troubling aspect of this case is found in how LeBel J. ultimately disposes of the decision by applying the doctrine of abuse of process. As LeBel J. makes clear, the doctrine of abuse of process is a broad and flexible tool through which the SCC can exercise its power to speak the law.³⁸⁰ Justice LeBel demonstrates that power by finding that "the Behns' *acts* amount to an abuse of process."³⁸¹ There is no question that the "acts" being referred

³⁷⁹ *Behn*, *supra* note 259 at para 36. (Emphasis added).

³⁸⁰ *Ibid* at paras 39-41.

³⁸¹ *Ibid* at para 42.

to are the peaceful and non-violent acts of physically occupying space and asserting Indigenous jurisdiction over their land. Significantly, in reaching this holding about the “acts” of the Behns, LeBel J. applies Saunders J.A.’s connection between the mischaracterization of blockades and the issue of standing to make a finding based on the factual record, stating:

On the face of the record, whereas they now claim to have standing to raise these issues, the Behns did not seek to resolve the issue of standing, nor did they contest the validity of the Authorizations *by legal means* when they were issued... Instead, *without any warning*, they set up a camp that blocked access to the logging sites assigned to Moulton. By doing so, the Behns put Moulton in the position of having either to go to court or to forgo harvesting timber pursuant to the Authorizations it had received after having incurred substantial costs to start its operations.³⁸²

Everything stated here is a complete mischaracterization of several materially relevant facts. First, as was evident in the consultation record, George Behn gave repeated warnings, in writing, in person and over the telephone, about his opposition and his intention to blockade should the Province decide to unilaterally impose their authority by granting permits to cut timber on his territory.³⁸³ Not only that, there were boilerplate provisions in the application for timber licences and the licences themselves that indemnified the Province in the event of a blockade or other dispute related to Aboriginal and Treaty rights.³⁸⁴ The very fact these clauses exist as *boilerplate* demonstrates how realistic the possible invalidity of tenure and occurrences of blockades is in the BC logging industry. In other words, the risk of violating Aboriginal rights and being shut-down by blockades is just part of the anticipated costs of doing business. But LeBel J. ignores this.

Second, the Behns did not “put” Moulton in any kind of either/or position. Not only do the exemption clauses demonstrate that Moulton was, or ought to have been, fully aware of the possibility that their activity could be invalidated as a result of conflict over Aboriginal and Treaty

³⁸² *Ibid.* (Emphasis added).

³⁸³ *Moulton*, 2013, *supra* note 327 at paras 67, 95 & 107.

³⁸⁴ *Ibid* at paras 78-81.

rights, including being subject to blockades; there is plenty of evidence throughout the factual record to show that Moulton had other options, that even before the blockade went up, the Province was asking Moulton to pause their activity while they tried to resolve the dispute with George Behn before it escalated.³⁸⁵

Third, the suggestion that they “now claim to have standing” is completely inconsistent with the fact that they were claiming all along to have standing, beginning in the trial decision which Hinkson J. rejected, Saunders J.A. upheld, and LeBel J. himself just affirmed only a dozen paragraphs earlier in this same decision.

Finally, it is clear throughout the record that the Behns have been contesting the legal and constitutional validity of the licences from the beginning. The disconnect on this point is that LeBel J. does not consider as “legal means” the many attempts of George Behn in contacting the Province to tell them he is opposed to the logging as they are proposing it and when the Province ignores him, his act of physically occupying space and exercising Indigenous jurisdiction in accordance with the Indigenous law as he explained.

All of these complete distortions of fact and law, from the beginning of the decision to the end, amount to the same thing: That the actions of George Behn in physically occupying space and exercising his authority were *presumptively* illegal. By repeatedly embedding and connecting the flawed proposition and mischaracterizations throughout his reasoning, LeBel J. is able to take Saunders J.A.’s mischaracterization of blockades to another level, by declaring that blockades are contradictory to the doctrines of reconciliation and the duty to consult, as he states in closing:

To allow the Behns to raise their defence based on treaty rights and on a breach of the duty to consult at this point *would be tantamount to condoning self-help remedies and would bring the administration of justice into disrepute*. It would

³⁸⁵ *Ibid* at paras 115-16.

also amount to a repudiation of the duty of mutual good faith that animates the discharge of the Crown's constitutional duty to consult First Nations.³⁸⁶

And with that, another deeply disturbing precedent in the jurisprudence on Aboriginal rights is shaped by the settler colonial court and put on the book as binding law.

The significance of the decisive holding in the *Behn* case is that it has come full circle to where we were with McEachern C.J. back in the 1980s. Only now, asserting Indigenous law and jurisdiction on the ground has been categorically held to be contradictory to the legal doctrines that were won only because there was a struggle and blockades in the first place.

VII. Conclusion

Analyzing the blockades cases that were peripheral to the leading cases in Aboriginal law has revealed that the settler colonial courts have been keeping the narrative of Indigenous resistance separate from the Aboriginal jurisprudence in order to avoid dealing directly with the fundamental jurisdictional question of the legitimacy of settler sovereignty. This move is ultimately being done to maintain and expand the assumption of territoriality. The dangerous precedents set by the *Behn* decision is already impacting Aboriginal jurisprudence in every jurisdiction in the country, particularly on cases involving natural resource development, the Crown's duties to consult and accommodate, the assertion of a veto and the issue of proper authority.³⁸⁷ This illustrates how quickly the logic of elimination can spread through the jurisprudence and how seemingly

³⁸⁶ *Ibid* at para 42.

³⁸⁷ The *Behn* decision has impacted hundreds of decisions, and dozens of Aboriginal decisions. Of those, these cases have particularly reinforced the flawed precedents in *Behn* through application, see: *Tla'Amin Elders Against Treaty v British Columbia Treaty Commission*, 2013 BCSC 965; *Mohawks of the Bay of Quinte v Canada (Indian Affairs and Northern Development)*, 2013 FC 669; *Red Chris Development Company Ltd v Quock*, 2014 BCSC 2399; *NunatuKavut Community Council Inc. v Nalcor Energy*, 2014 NLCA 46; *Ogichidaakwe v Ontario (Energy)*, 2014 ONSC 5492; *Huron-Wendat Nation of Wendake v Canada*, 2014 FC 1154; *Saik'uz First Nation and Stelat'en First Nation v Rio Tinto Alcan Inc*, 2015 BCCA 154; *Ominayak v Penn West Petroleum Ltd*, 2015 ABQB 342; *Petahtegoose et al v Eacom Timber et al*, 2016 ONSC 2481; *Jackman v Giesbrecht*, 2016 BCSC 229; and *Martin v Province of New Brunswick and Chaleur Terminals Inc*, 2016 NBQB 138.

irreversible the violence can become once the court imposes its jurisdiction on an Indigenous Nation in order to supplant the *legally* recognized Indigenous authority and jurisdiction that the Indigenous Nation already has over their *internal* affairs.

Given the robustness of this problem, this begs the question as to whether there are any actions that courts could take in legitimately upholding the rule of law? Generally, it is clear from the analysis above that courts should not reframe issues, mischaracterize actions so as to cast them as presumptively illegitimate, and create and rely on flawed propositions to eliminate Indigenous jurisdiction. In the *Behn* case, from the trial to the SCC, it is clear that based on the scholarship and historical precedent demonstrating a clear connection between blockades and Indigenous law, that the courts should have simply accepted and respected George Behn's assertion of Indigenous law and jurisdiction. If not that, then upholding the rule of law at the very least required them to turn their minds fairly and impartially towards the underlying jurisdictional question and the factual determination that needed to be made. In doing this, they could have looked at the evidence available to them that might have supported George Behn's assertion. Had they done this they may have found, as the eventual trial decision of *Behn* did when it was released after the SCC decision in 2013, that there was plenty of documented evidence, *in the Crown's possession*, that clearly sets out how the FNFN had been applying *their* laws to answer the question of authority at the time.

They would have found that on October 1, 2006, George Behn notified the Chief of the FNFN that he would be setting up a blockade and that in response the Chief asked him to meet with the FNFN Council, which Behn agreed to do "because it was traditional to seek the blessing of the community leadership for what he was about to undertake [and] that it was his 'policy' to do so."³⁸⁸ They would have found that George Behn met with the Chief and Council of the FNFN

³⁸⁸ Moulton, 2013, *supra* note 327 at para 118.

the next day and that this was the first of several meetings, exchanges and correspondences between George Behn, the FNFN, the Province and Moulton over the next several weeks.³⁸⁹ They would have found that Chief Logan of the FNFN had told the Province in a letter dated November 30, 2006 “I have always made it clear to the province that the question of whether the Behn’s camp stays in place or if any cutting can occur on the trapline if the camp is taken down is entirely up to George Behn. If the FNFN were to take a position on this matter, it would not be respectful of George Behn’s personal connection to his family trapline.”³⁹⁰

All of these findings at trial were drawn from documentary evidence that would have been before the court at all stages of the interlocutory matter in the *Behn* case. If the court at any stage was adhering to the standards set by the rule of law they likely could have concluded from this evidence that George Behn was the proper authority. But instead of adhering to the rule of law, instead of impartially framing the question and looking at the facts and trying to determine the truth; the courts at each level, including the SCC, went to extreme lengths to fabricate a cascading complexity of mischaracterizations and flawed propositions in order to maintain and expand the jurisdiction and territoriality of the settler colonial structure of power that was determined to destroy the last pristine area of the Behn family’s territory.

All of these moves fundamentally undermine the legitimacy of the court based on the basic tenets of the rule of law. Although it is difficult to determine for certain what the courts’ *true* motivation for doing this in *Behn* were, we can say that the consequences of how they performed

³⁸⁹ *Ibid* at para 122. (Note: the SCC makes no mention of this meeting or any of these meetings. However, the Factum of the Appellant makes specific reference to the fact that shortly after October 2, 2006, “correspondence was exchanged and various meetings occurred between Moulton, the Province, members of the Behn family and representatives of the Band Council.” The same meetings are mentioned by the Province in their Factum, but Moulton is silent on this part of the story. This shows that the evidence was before the SCC as they made their decision, but they *chose* to overlook it. See: *Behn*, *supra* note 259, Factum of the Appellant at para 22; and Factum of the Respondent, BC at para 23.).

³⁹⁰ *Moulton*, 2013, *supra* note 327 at para 145. (Note: There is no mention of this correspondence in the interlocutory decisions.).

their power to speak the law not only eliminated the jurisdictional claim that George Behn had been making from the beginning, but presumptively criminalized it as well. At length, this review of blockades cases demonstrates that the blockade is still an active site where the “frontier homicide” is alive and well, and the settler colonial courts are still actively transforming violence into law.

CONCLUSION

Towards a Theory of Authority Grounded in Indigenous Legal Orders

The myth of settler sovereignty continues to be performed over and over by Canada in an endless pursuit to perfect it. In this thesis we have traced examples of this performance since its inception in the *Royal Proclamation of 1763*, to the imposition of the *Gradual Civilization Act* and the *Indian Act* in the nineteenth century, to the era of criminalization under the Potlach Law in the early twentieth century, into the decades long struggle for constitutional recognition and now the present discourse of reconciliation and negotiations. Each violent performance has been met in lock-step by the resistance of Indigenous peoples that has, for centuries now, guarded and protected the vision of a society where Indigenous and non-Indigenous peoples can live, side-by-side, in peace and mutual respect and recognition of each other's inherent human rights to self-determination.

Canada's project of perfect settler sovereignty has yet to be accomplished. Despite the fact that this project is fundamentally genocidal and violent, and in complete contradiction to the goal of world peace as Arthur Manuel puts it; Canada continues to pursue this project with innovation by developing increasingly new practices, techniques and rationalizations. As others have demonstrated, some of these include the Federal government's comprehensive land claims policy, resource sharing and impact benefit agreements, and the colonial politics of recognition.

Broadly this thesis has sought to examine whether the courts are manufacturing similar practices and tools to effect the elimination of Indigenous peoples; whether they, like their nineteenth century predecessors, were also transforming settler colonial violence into sovereignty, jurisdiction and law. It approached this by first identifying glimpses of an underlying trend in the jurisprudence on Aboriginal rights that suggested the courts were relying on a logic of elimination to dissolve Indigenous jurisdiction in order to affirm the sovereignty and expand the territoriality

of the settler colonial state. The analysis of the blockades cases exposed how this underlying trend has been fomenting in the shadows of each of the major Aboriginal title and rights decisions.

When I first set out to engage in this analysis, admittedly I expected to see the courts reproducing traits of settler colonialism in the blockades decisions. However, I was surprised to uncover the complexity of practices that the courts have developed for criminalizing and eliminating expressions of Indigenous jurisdiction. I was even more surprised by the extent to which this was done in the *Behn* case, from the trial decision, all the way up to a unanimous decision of the highest court in the country. Altogether, this analysis presents deeply troubling evidence that the courts are not just impotent against the project of settler colonialism, but that they are complicit in it to a degree that borders on being predatory. When we impose a burden on the judges to demonstrate their impartiality and legitimize the jurisdiction they exercise, their reasons simply do not live up to the standards that the generally accepted definition of the rule of law has set. By failing in this way judges have broken the trust that society and Indigenous peoples place in them each time they seek their help as impartial adjudicators in resolving disputes.

However, we cannot conclude from this that *all* judges are predetermined to perpetuate the violence of settler colonialism against Indigenous peoples through their power to speak the law. In as much as this thesis has been searching the reasons of judges for evidence of violence, it has also been searching for evidence to support the hope being reflected in the aspirational assumption of the legal scholarship. If evidence of hope can be found to exist by the slimmest of margins, then we still have reason to hope. The smallest bit of evidence for hope was found in the reasons of Grauer J. who, despite his awareness that the Aboriginal title of the Tsilhqot'in Nation had yet to be proven as a legal interest, gave it enough weight to put a stop to the efforts of Taseko Mines.

Of course, the role that Grauer J. played in exercising his jurisdiction to stop the mining of

Tsilhqot'in territory was miniature in comparison to the courageous efforts of Chief Marilyn Baptiste who single-handedly stopped the trucks by exercising Indigenous jurisdiction that was firmly grounded in the territory over which it was asserted. The findings here suggest that we must see that Indigenous resurgence premised on direct actions, including blockades, will continue to play a necessary role in decolonizing law in Canada.

Taking this direction, however, is not without questions that will need to be answered. This thesis has identified one in particular which I believe will need to be answered by further studying Indigenous law in the context of Indigenous resurgence.

As the analysis shows, the issue of proper authority in relation to Indigenous laws and Aboriginal rights and title are deeply problematized by the *underbelly* of the struggle. In *Unsettling Canada*, Arthur Manuel captured the danger of this complexity and its capacity to undermine the struggle for Indigenous resurgence by pointing out specific examples, writing:

One of the ironies of the name “Idle No More” is that most of the key activists behind it have not been idle at all. Indian resistance has not stopped in Canada, but it had, for several decades, been cut off from the leadership. In fact, activists, many of whom would be more comfortable in describing themselves as *sovereignists*, were disowned by our leadership to the point where we recently learned that the Assembly of First Nations was secretly working with the RCMP to contain protests at the community level.³⁹¹

Manuel's words suggest that the prediction of his father, Grand Chief George Manuel, is potentially coming to fruition, as he wrote back in 1974:

For colonialism to be fully effective it is necessary that the leaders who propagate the myths about those whom they have conquered must not only convince themselves of what they say—it need hardly be said that they must convince their followers down to the humblest peasant and foot soldier—they must also convince the conquered. The conquered will only submit to the theft of everything they hold when they can be convinced that it has been done for their own good. Conquest

³⁹¹ Manuel, *Unsettling*, *supra* note 5 at 209. (Emphasis in the original).

only becomes colonialism when the conquerors try to convince the conquered that the rape of his mother was committed for the sake of some higher good.³⁹²

The efforts of judges to maintain the settler colonial structure in their decisions is reflective of George Manuel's prescient words. However, it is simply a disturbing and *unsettling* sign that this prediction is starting to come true when evidence that the present day leadership of the Assembly of First Nations—which is the successor to the National Indian Brotherhood that Grand Chief George Manuel started in order to organize Indigenous peoples against the clear determination of the Canadian government to assimilate them and terminate their constitutional rights to land—is secretly working with the settler colonial structure of power exercised through the RCMP in order to undermine the grassroots struggle; the heart of Indigenous resurgence.

The *Behn* case revealed that judges are directly interfering with the internal dynamics and struggle of Indigenous peoples. When the underbelly of the struggle was exposed, the courts in *Behn* sharpened their swords and violently imposed their own determination of *who* was the proper authority by ignoring and eliminating the authority that was being asserted and claimed by Indigenous peoples on the ground. This is a problem that must be stopped. But, again, that does not mean the courts should refrain from taking any action whatsoever.

While each of the blockades cases are disturbing when looked at in isolation; what we see in examining the reasons of the judges is that they are relying on the violent logic of settler colonialism to eliminate Indigenous jurisdiction. However, critically this analysis has demonstrated that this is not a predetermined outcome. It is fundamentally the logic, not the people relying on it that is the problem.

If the rule *of* law—and by this I mean specifically judges recognizing and enforcing Indigenous law and jurisdiction as they should and must do (because to do anything contrary would

³⁹² Manuel & Posluns, *supra* note 7 at 59.

be to repeat the objective of elimination)—is to have any role in reversing this endemic violence, the findings in this thesis have suggested that we will need to determine, in all cases, the question of *who* is properly authorized to define the relevant Indigenous laws in a given case.

While there is a role for law to play in decolonization, there is simply no way to *reconcile* settler colonialism with legal pluralism. They are opposing forces in the sense that one is predicated on the elimination of Indigenous peoples and the other, if it is to be accepted by Indigenous peoples, will have to fully protect and respect their inherent right to self-determination. As a result, judges must choose which force they are going to express and uphold through their power to speak the law. If they choose to reinforce settler colonialism, they are choosing to reproduce colonial violence and subjugation by force. But if they choose to uphold the right of Indigenous peoples to exist and to exercise their jurisdiction, then they are choosing to play a role in the resurgence of Indigenous peoples.

At length, the rule of law requires that we make deliberate moves to tear down the settler colonial structure of power and rebuild a system of laws, politics and relationships that are based on concepts like Glen Coulthard’s notion of grounded normativity which is “deeply informed by what the land as a system of reciprocal relations and obligations can teach us about living our lives in relation to one another” and is defined as “the modalities of Indigenous land-connected practices and longstanding experiential knowledge that inform and structure our ethical engagements with the world and our relationships with human and nonhuman others over time.”³⁹³ We need to move towards a theory of authority that is *grounded* in the legal orders that were developed over millennia by Indigenous peoples, living on and respectfully with the land. *Because it does not make sense* to consider how or why a foreign legal order that was mythically transplanted through

³⁹³ Coulthard, *supra* note 13 at 13.

violence and deception, and is still being maintained through the same means, has any place in governing these sacred and important relationships.

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