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# Indigenous Land Claims and Reconciliation: The Importance of Land and Relationship Between Indigenous Nations and the Government of Canada

Joy S. Spear Chief-Morris, *The University of Western Ontario*

Supervisor: Quinn, Joanna, *The University of Western Ontario*

A thesis submitted in partial fulfillment of the requirements for the Master of Arts degree in Political Science

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## **Abstract**

This thesis discusses whether Indigenous land claims settlements signal reconciliation between Indigenous nations and the Government of Canada. Using Indigenous methodologies, anti-oppressional and intersectional lenses, and historical institutionalism, it argues that land claim settlements do not signal reconciliation of the Indigenous-Canadian relationship. This is because the modern land claims settlement process exists as a reiteration of the colonial policies and institutions that preceded it. It examines the historical treaty process, case law on Aboriginal rights and title, existing documents, and statutes that protect and promote Indigenous sovereignty and nationhood. Lastly, it examines the 2015 Canadian Truth and Reconciliation Commission as a transitional justice mechanism for reconciliation, and its limitations in resolving land claims in the spirit of meaningful reconciliation within Canada. It concludes that there is a need for incorporating international legal frameworks into the land claim settlement process between Indigenous nations and the Government of Canada.

## **Keywords**

Indigenous land claims, Indigenous rights, Aboriginal title, Indigenous sovereignty, historical treaties, modern treaties, reconciliation, Canadian Truth and Reconciliation Commission, transitional justice, nation-to-nation.

## **Summary for Lay Audience**

This thesis looks at the Indigenous land claims settlement process in Canada and its implications for reconciliation between Indigenous nations and the Government of Canada. It incorporates Indigenous methodologies and Western research models to argue that land claim settlements do not indicate reconciliation of the Indigenous-Canadian relationship. The land claim settlement process, also known as the modern treaty process is a new iteration of past colonial policies and institutions. By examining the history of the colonial relationship between Indigenous nations and the Government of Canada, including looking at historical and modern documents and legal studies, it looks at the importance of Aboriginal rights and title as well as Indigenous sovereignty and nationhood in the land claims process. It looks at the 2015 Canadian Truth and Reconciliation Commission (TRC) as a means of promoting reconciliation, as well as the ways in which the TRC did not manage to offer recommendations for resolving land claims in the spirit of meaningful reconciliation within Canada. This thesis concludes that there is a need for an international system to settle land claim between Indigenous nations and the Government of Canada.

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what it means to be a strong Blackfoot woman.

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# Chapter One

## 1 Introduction

*Oki, ni ta nik'ko Soopaki. Nimp'oah toot do Sikooh'ko tokii.* My name is Joy SpearChief-Morris, my Blackfoot name is *Soopaki*, which means “Windy Woman,” and was given to me by my grandmother when I was born on a windy day. I am from Lethbridge, Alberta. I am a member of the Kainai Blood Tribe, a part of the Tall People Clan, in southern Alberta, Canada, who are members of the Blackfoot Confederacy. We are the *Niitsitapi*, “The People.” I am an Indigenous woman, an African American woman, and a Canadian. I have been taught that it is important to properly introduce myself as a matter of protocol and formality when entering a new place and meeting new people; you begin by positioning yourself, introducing who you are, and where you come from. This is how I connect myself to not only the land from which I come from, but to the land that I am on now. I am a guest in the traditional territories of the Anishnaabek, Haudenosaunee, Lūnaapéewak, and Attwandaron people.

This type of protocol could be called a land acknowledgement, a part of Indigenous knowledge, and the larger Indigenous protocols for nation-to-nation acknowledgements and relationships.<sup>1</sup> What a land acknowledgement shows is that land matters, and the relationship one has to that land matters. It is thus incredibly important that I begin this thesis with this protocol, or form of acknowledgement, to let the reader know who I am, where I come from, my relationship to this place, this land, and my purpose for this thesis.

Land is the reason for how the development of Canada as a nation was established. Yet, this came at the cost of the sovereignty and rights of the Indigenous people whose nations lived on

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<sup>1</sup> See Betty Bastien, *Blackfoot Ways of Knowing: The Worldview of the Siksikaitapi* (Calgary: University of Calgary Press, 2004), 39; and Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009), 110.

these lands long before the arrival of Europeans. The issue of land in settler-colonial states, such as Canada therefore carries greater implications of nationhood, sovereignty, and human rights. Since the arrival of Europeans on Indigenous lands, Euro-Canadians and Indigenous people have been joined in a relationship through their connections to the land and each other. The establishment of protocols between these entities, such as treaties, tied these nations together until “the Sun ceases to shine, and the rivers have flown away dry, and the grass no longer grows.”<sup>2</sup>

In the modern era, the implications of these treaties and the lands upon which they were signed come into conflict over the claims of land which are disputed on between Indigenous nations and the Government of Canada. These land claims have larger implications for the socioeconomic condition of Indigenous people as well as, but not only, Indigenous political, legal and cultural rights, and the rights of the Canadian Government to these lands. How to resolve these long-standing conflicts and pains that exist between Indigenous people and the Canadian government have arisen in what has now become the question of reconciliation.

## **1.1 The Research Question**

This thesis discusses this issue of land, nationhood, sovereignty, and relationship. In this thesis. I answer the question of whether land claim settlements signal reconciliation between Indigenous nations and the Government of Canada. In order to answer this question, I examine several components. The first is the importance of land and why it matters in relation to land claim disputes. This looks at the spiritual and cultural importance of land, as well as the political and socioeconomic importance. The second includes establishing the meaning and importance of Indigenous rights, including Aboriginal rights, Aboriginal title, self-determination, and Indigenous

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<sup>2</sup> Adolf Hungry Wolf, *The Blood People: A Division of the Blackfoot Confederacy, an Illustrated Interpretation of the Old Ways* (New York: Harper and Row, Publishers, 1977), 230. Spoken by George First Rider of Treaty Seven.

inherent sovereignty. The third involves the original relationship between Indigenous nations and early European settlers. The establishment of this relationship relates to the intent of the original historical treaties between these entities. The fourth is the formation of the modern treaty process, also known as the Specific and Comprehensive Claims Policies. These are the current land claims processes that settle land claims disputes between Indigenous nations and the Canadian government as a result of a dispute in the treaty record over lands, or the lack of an existing historical treaty. The fifth component looks at transitional justice and reconciliation. This includes examining truth commissions as a mechanism for reconciliation in settler-colonial states. It also involves looking at the various definitions and understandings of reconciliation within transitional justice scholarship and Indigenous scholarship and ways of knowing. The sixth and final component looks directly at the 2015 Canadian Truth and Reconciliation Commission and its implications to land claims and reconciling the Indigenous-Canadian relationship.

In my analysis of these components I conclude that land claim settlements do not signal reconciliation between Indigenous nations and the Government of Canada. This is because the current land claims settlement process is a reiteration of previous colonial policies regarding Indigenous lands within the existing settler-colonial courts system. This policy diminishes Indigenous sovereignty, nationhood, and claims to Aboriginal title in favour of Crown sovereignty and Crown title to lands.

## **1.2 Chapters at a Glance**

Each chapter of this thesis is dedicated to addressing one or more of these components involved in the overall research question. Chapters Two and Three establish the context of how this thesis was written. Chapter Two is a literature review of the existing Indigenous-Canadian relationship,

including the literature on treaties, land claims, and reconciliation, that already exist within the current scholarship. This chapter looks most closely at the establishment of the historical treaty making process, which is central to understanding the model in which the modern land claims process is built upon. Chapter Three addresses the methodology of thesis, which establishes Indigenous methodologies as well western-style methodologies. It also discusses the importance of using Indigenous knowledge in addressing questions of colonialism and relations to and with land.

The next two chapters serve as foundational chapters for the main argument of this thesis. Chapter Four addresses the importance of land, which in itself is one of the main components of the research question. It also addresses the components of Indigenous rights, including Aboriginal title and self-determination. Chapter Five examines modern treaties and land claims, looking at the current land claims settlement process that is being addressed in the research question. This chapter also addresses the components of Indigenous sovereignty and nation-to-nation agreements, which are essential to the main argument.

Chapters Six and Seven discuss reconciliation of the Indigenous-Canadian relationship within the context of land and land claims. These chapters are the focus of the argument of this thesis. Chapter Six addresses transitional justice and truth commissions as mechanisms for the establishment of reconciliation in settler-colonial states and looks at the 2015 Canadian Truth and Reconciliation Commission. This chapter addresses the reconciliation component on land claims, central to understanding if they signal reconciliation. Chapter Seven addresses the short comings of the Canadian TRC in addressing the current land claims process and offers insights into reconciling the Indigenous-Canadian relationship by addressing land claims as issues of international law between sovereign nations.

Lastly, Chapter Eight examines questions for further analysis regarding land claims and reconciliation of the Indigenous-Canadian relationship in the future. This includes a deeper look at the implications of Indigenous activism, grass roots movements, and traditional governments in the land claims process. It also looks at the incorporation of Indigenous legal systems in an international framework for settling land claim disputes.

## Chapter Two

### 2 Literature Review

Reconciliation between Indigenous people and the people and Government of Canada cannot be accomplished by pursuing one or a number of things within a narrow scope. Accordingly, this literature review covers material related to land, treaty and the Indigenous-Canadian relationship. This includes Indigenous treaties signed in Canada; Canadian laws, policies, and commissions for settling treaty and land disputes, including court literature; theory on reconciliation from transitional justice and post-conflict reconstruction scholarship; and Indigenous and non-Indigenous pedagogy on reconciling the Indigenous-Canadian relationship, in particular how it relates to land and treaty.

#### 2.1 Indigenous Knowledge and Land

In discussing the literature on treaties, land claims disputes, and reconciliation, it is important to begin with the importance of land and its relationship to reconciliation. John Borrows describes reconciliation between Indigenous people and the Crown as requiring “our collective reconciliation with the earth.”<sup>1</sup> Indigenous knowledge and worldviews are centered on our human and spiritual relationship to the land. Borrows argues that the idea of surrender which is found in the written language of most treaties through what might generically be described as “cede, surrender, and release,” is inconsistent with an Indigenous worldview, which, along with Indigenous languages and economies are rooted in traditional lands. Treaties do not “extinguish

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<sup>1</sup> John Borrows, “Earth-Bound: Indigenous Resurgence and Environmental Reconciliation,” in *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings*, ed. Michael Asch, John Borrows and James Tully (Toronto: University of Toronto Press, 2018), 49.

the idea that we will always draw our life from the sun, waters, and plants that shine, flow, and grow on our traditional territories.”<sup>2</sup> Andrew Woolford emphasizes that Indigenous connection to land is more than a surface level “closeness” but is an “embodied inscription,” of Indigenous identity.<sup>3</sup> Leroy Little Bear argues that acceptance of Indigenous traditional knowledge is growing in the Canadian intellectual community through a recent reference by the Supreme Court.<sup>4</sup> The value of Indigenous knowledge as a means of evidence in Aboriginal rights cases was first affirmed in the *R. v. Van der Peet* (1996) ruling that Indigenous knowledge could not be undervalued in respect to Western standards of knowledge and evidence.<sup>5</sup> This was further confirmed in *R. v. Marshall* (1999) and *R. v. Bernard* (2005).

## 2.2 Treaties

My understanding of reconciliation goes much deeper than many of the understandings in the transitional justice literature.<sup>6</sup> Reconciliation must be based on the promises and relationships formed through treaties between Indigenous groups and the British Crown, now the Government

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<sup>2</sup> Ibid., 59. For more on Indigenous knowledge and worldviews see, Kathleen E. Absolon (Minogizhigokwe), *Kaandossiwin: How We Come to Know* (Halifax: Fernwood Publishing, 2011); Kathy Absolon and Cam Willett, “Aboriginal Research: Berry Picking and Hunting in the 21<sup>st</sup> Century,” *First Peoples Child and Family Review* 1, no. 1 (2004): 5-17; Jo-Ann (Q’um Q’um Xiiem) Archibald, *Indigenous Storywork: Educating the Heart, Mind, Body, and Spirit* (Vancouver: UBC Press, 2008); Betty Bastien, *Blackfoot Ways of Knowing: The Worldview of the Siksikaitsitapi* (Calgary: University of Calgary Press, 2004); Adolf Hungry Wolf, *The Blood People: A Division of the Blackfoot Confederacy, an Illustrated Interpretation of the Old Ways* (New York: Harper and Row, Publishers, 1977); and Shawn Wilson, *Research is Ceremony: Indigenous Research Methodologies* (Halifax: Fernwood Publishing, 2008).

<sup>3</sup> Andrew Woolford, “Ontological Destruction: Genocide and Canadian Aboriginal Peoples,” *Genocide Studies and Prevention* 4, no. 1 (2009): 89.

<sup>4</sup> Leroy Little Bear, “Traditional Knowledge and Humanities: A Perspective by a Blackfoot,” *Journal of Chinese Philosophy* 39, no. 4 (2012): 519-520.

<sup>5</sup> Ibid., 525. For more cases including Indigenous knowledge as evidence see *R. v. Marshall* (1999) and *R. v. Bernard* (2005) decisions in John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Material and Commentary*, 5<sup>th</sup> ed. (Toronto: LexisNexis Canada Publishing, 2018).

<sup>6</sup> See Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009): 321-367 or Rosemary Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission,” *The International Journal of Transitional Justice* 7, (2012): 52-73 for competing arguments on reconciliation and transitional justice.

of Canada, since the signing of Confederation in 1867. The Government of Canada creates two main categories: historical treaties and modern treaties. Historical treaties can be divided into five sub-categories: treaties of peace and neutrality (1701-1760), treaties of peace and friendship (1725-1770), the Upper Canada Land Surrenders (1764-1862) and William Treaties (1923), the Robinson Treaties and Douglas Treaties (1850-1854), and the Numbered Treaties (1871-1923). The Government of Canada recognizes seventy historic treaties covering 364 Indigenous nations and representing over 600 000 Indigenous people over the time span from 1701 to 1923.<sup>7</sup> Modern treaty agreements are considered to be those agreed upon between 1975 to the present.<sup>8</sup>

The Government of Canada notes that the first recorded historical treaty is the 1701 Albany Deed (also known as the Nafan Treaty) between the First Nations of the Great Lakes and the British Crown in which the Indigenous people “agreed to sell lands of the Great Lakes to the British in exchange for their protection and the continued right to hunt and fish.”<sup>9</sup> It is interesting to note that the Government of Canada begins its history of “peace and neutrality” treaties with what it considers to have been a land transfer. It does not acknowledge *Guswenta*, also and more commonly referred to as the Two Row Wampum Treaty, which dates to 1613, between the Haudenosaunee Nations and the Dutch, and represents a living treaty between the Covenant Chain and European partners.<sup>10</sup> For many Indigenous people, *Guswenta* is considered to have been the first treaty, still in existence. Representatives of the Haudenosaunee describe *Guswenta* as following:

It is on a bed of white wampum, which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of our ancestors; those two rows

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<sup>7</sup> Canada, “Treaties and Agreements,” Crown-Indigenous Relations and Northern Affairs Canada, modified September 11, 2018, <https://www.rcaanc-cimnac.gc.ca/eng/1100100028574/1529354437231>.

<sup>8</sup> Ibid.

<sup>9</sup> Canada, “Treaties of Peace and Neutrality (1701-1760),” Crown-Indigenous Relations and Northern Affairs Canada, modified June 4, 2013, <https://www.rcaanc-cimnac.gc.ca/eng/1360866174787/1544619566736>.

<sup>10</sup> Oneida Nation, “Two Row Wampum – Guswenta,” Oneida Nation, modified 2018, <https://www.onondaganation.org/culture/wampum/two-row-wampum-belt-guswenta/>.



never come together in that belt, and it is easy to see what that means. It means that we have two different paths, two different people. The agreement was made that your road will have your vessel, your people, your politics, your government, your way of life, your religion, your beliefs — they are all in there. The same goes for ours... They said there will be three beads of wampum separating the two, and they will symbolize peace, friendship, and respect.<sup>11</sup>

*Guswenta* has become an emblem of original intent: living treaties meant to show two nations living in equal respect alongside one another.<sup>12</sup> This is quite unlike the Government of Canada's characterization of the initial relationships between Indigenous nations as commercial partnerships and military alliances, that promised freedom from the molestation, as well as friendship and trade in exchange for supporting the efforts of disputing European nations.<sup>13</sup>

The second phase of treaties, beginning after the Treaty of Utrecht between Britain and France, is characterized by a similar pattern of re-establishing “peace and commercial relations,” and not surrenders of land, resources, or rights.<sup>14</sup> Treaties of this period carry significance in Indigenous rights claims in modern times, such as assertion of the treaty right to hunt and fish to maintain a moderate livelihood.<sup>15</sup> This is important because claims of Aboriginal treaty rights pertain parallel significance to the assertion of Aboriginal rights to land in modern land claims.

The third phase of treaties includes what the Government of Canada refers to as the “Upper Canada Land Surrender” and Williams’ Treaties, which were responsible for settling most of the

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<sup>11</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back* (Ottawa: Canada Communications Group – Publishing, 1996), 97.

<sup>12</sup> See also George First Rider's excerpt on treaties as living agreements in Adolf Hungry Wolf, *The Blood People*, 229-230.

<sup>13</sup> Canada, “Treaties of Peace and Neutrality (1701-1760).”

<sup>14</sup> Canada, “Peace and Friendship Treaties (1725-1779),” Crown-Indigenous Relations and Northern Affairs Canada, modified June 4, 2013, <https://www.rcaanc-cirnac.gc.ca/eng/1360937048903/1544619681681>.

<sup>15</sup> *Ibid.* For example the “Truck House” clause of two treaties between the British and the Mi'kmaq, Maliseet and Passamaquoddy, became prevalent in *R. v. Simon* (1985) and *R. v. Marshall* (1999). Gregory Younging further defines a “treaty right” as “a right held by Indigenous Peoples collectively, and by individual Indigenous people, because of treaties Indigenous Peoples negotiated with Canada's government. Examples of Treaty Rights in Canada include provision of reserves, provision of education, and provision of health care (health care was originally negotiated under Treaty Six and later extended to all First Nations covered by treaty).” See Gregory Younging, *Elements of Indigenous Style: A Guide for Writing by and About Indigenous Peoples* (Brush Education Inc., 2018), 69.

province of Ontario.<sup>16</sup> These treaties follow the October 7, 1763 *Royal Proclamation*, the original document that outlines the process for which the British Crown was supposed to purchase the cession of land from Indigenous nations through treaty in what is now Canada.<sup>17</sup> The Upper Canada Land Surrenders were enacted as a means to deal with an influx of British Loyalists fleeing from the War of Independence and then again after the War of 1812.<sup>18</sup> The Williams Treaties were negotiated to deal with land outstanding from the Upper Canada Land Surrenders that had not been “fully surrendered to the Crown.”<sup>19</sup> Both the Upper Canada Land Surrenders and Williams’ Treaties established many commonalities typical to treaties with Indigenous people, such as civilization policies to force Indigenous people into more European and sedentary lifestyles.<sup>20</sup>

The Robinson Treaties of the fourth phase of treaty making expanded British settlement into the rest of Ontario around Lake Huron and Lake Superior in the 1850s, “bundling” certain rights for Indigenous people in a way that had not previously been done before, including setting aside reserve land and promising to make annuity payments.<sup>21</sup> The Douglas Treaties were signed simultaneously on Vancouver Island by the Hudson Bay Company and Fort Victoria to deal with the establishment of land for the new British Crown Colony as well as the Hudson’s Bay Company.<sup>22</sup> Fourteen almost identical treaties were negotiated between 1850 and 1854 with a number of different Indigenous nations, which were considered land purchases, at Fort Victoria,

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<sup>16</sup> Canada, “Upper Canada Land Surrenders and the Williams Treaties (1764-1862/1923),” Crown-Indigenous Relations and Northern Affairs Canada, modified February 15, 2013, <https://www.rcaanc-cirnac.gc.ca/eng/1360941656761/1544619778887#uc>.

<sup>17</sup> King George III, *Royal Proclamation 1763*, (London: Mark Baskett, Printer to the King’s most Excellent Majesty and by Assigns of Robert Baskett, 1763) in “250<sup>th</sup> Anniversary of the Royal Proclamation of 1763,” Indigenous and Northern Affairs Canada, modified March 8, 2016, <https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a1>

<sup>18</sup> Canada, “Upper Canada Land Surrenders and the Williams Treaties (1764-1862/1923).”

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Canada, “Robinson Treaties and Douglas Treaties (1850-1854),” Crown-Indigenous Relations and Northern Affairs Canada, modified February 15, 2013, <https://www.rcaanc-cirnac.gc.ca/eng/1360945974712/1544619909155#rt>.

<sup>22</sup> Ibid.

Fort Rupert, and Nanaimo.<sup>23</sup> These remain the only treaties to have been negotiated on Vancouver Island.<sup>24</sup>

The fifth and final phase of historic treaty making, the Numbered Treaties, were negotiated as a means to settle the western plains in the annexation of Rupert's Land from the Hudson's Bay Company to Canada following Confederation.<sup>25</sup> These eleven treaties, following the form established by the Robinson Treaties, covered the area "between the Lake of the Woods to the Rocky Mountains to the Beaufort Sea," promising reserve lands, annuities, hunting and fishing rights, schools and education (which ultimately became the Residential Schools system), and agricultural implementations, either farm tools or livestock, in exchange for the European claim of cession of Aboriginal Title.<sup>26</sup> The Numbered Treaties, while similar, are not identical and carry varying individual agreements between specific nations and the British Crown.<sup>27</sup> These treaties are responsible for Canadian federal control over Indigenous people as wards and the creation of various "Indian policies" including the *Indian Act*.

Despite the large-scale land cession that was accomplished through the historic treaties across Canada, there remain large tracts of unceded land where Indigenous people have not signed any treaties with any European or Canadian government. Modern treaties, as comprehensive land claim agreements, are the result of outstanding land disputes where no historic treaties were ever formally signed.<sup>28</sup> Following *Calder v. British Columbia* (1973), which led to the formal

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<sup>23</sup> Ibid. The Douglas Treaties included provisions for reserve land and hunting and fishing rights.

<sup>24</sup> Ibid.

<sup>25</sup> Canada, "The Numbered Treaties (1871-1921)," Crown-Indigenous Relations and Northern Affairs Canada, modified June 4, 2013, <https://www.rcaanc-cirnac.gc.ca/eng/1360948213124/1544620003549>.

<sup>26</sup> Ibid. Note that cession of land to the Crown was not the context of the treaties understood by Indigenous People. See George First Riders explanation of the signing of Treaty No. 7 in See also George First Rider's excerpt on treaties as living agreements in Adolf Hungry Wolf, *The Blood People*, 229-230.

<sup>27</sup> Canada, "The Numbered Treaties (1871-1921)."

<sup>28</sup> Canada, "Treaties and Agreements." Aboriginal Rights formally include Aboriginal Title, land and resource use, self-government rights, and social and cultural rights. Gregory Younging defines an Indigenous (interchangeable here) right as "an inherent and original right possessed collectively by Indigenous Peoples, and, in some cases, by individual

recognition of Aboriginal rights, the Specific Claims Policy was created to deal with “claims relating to the nonfulfillment of ‘lawful obligations’ flowing from the *Indian Act* or treaties,” and the Comprehensive Land Claims policy was created to deal with the negotiation of modern treaties.<sup>29</sup> The first modern treaty, the James Bay and Northern Quebec Agreement, was signed in 1975.<sup>30</sup>

The Comprehensive Claims policy has been modified several times, most recently under the Harper administration, to deal with the increasing scope of issues related to land transfers and Title rights.<sup>31</sup> Since 1975, there have been 26 comprehensive claims agreements, or modern treaties, negotiated across Northern Quebec, the Northwest Territories, Yukon and British Columbia.<sup>32</sup> The Specific Claims Policy was updated several times in the 1980s and 1990s, including the creation of the Specific Claims Commission more specifically to address and review Indian Affairs decisions and recommendations.<sup>33</sup> The vast amount of unceded land in British Columbia resulted in the specific creation of the 1992 British Columbia Treaty Commission.<sup>34</sup> In response to Indigenous calls for autonomy and recognition of self-government, the Inherent Right

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Indigenous people. Some Indigenous Rights have legal recognition in Canada, and some do not. So, the term can assert a moral and ethical imperative.” See Gregory Younging, *Elements of Indigenous Style*, 65.

<sup>29</sup> Canada, “Treaties and Agreements;” and Canada, “A History of Treaty Making in Canada,” Crown-Indigenous Relations and Northern Affairs Canada, modified September 2, 2011, <https://www.rcaanc-cirnac.gc.ca/eng/1314977704533/1544620451420>. For more on how the Comprehensive Claims Policy affects Aboriginal Title rights see Michael Asch and Norman Zlotkin, “Affirming Aboriginal Title: A New Basis for Comprehensive Claims,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, edited by Michael Asch (Vancouver: UBC Press, 1997), 208- 229.

<sup>30</sup> Canada, “Treaties and Agreements.” For more information on case law related to the treaties and land claim decisions see *R. v. Syliboy* (1929), *Paulette v. Registrar Titles (No. 2)* (1973), *R. v. White and Bob* (1964), *R. v. Simon* (1985), *R. v. Sioui* (1990), *R. v. Badger* (1996), *R. v. Marshall* (1999), *R. v. Bernard* (2005), *Grassy Narrows First Nation v. Ontario (Natural Resources)* (2014), *Quebec (Attorney General) v. Moses* (2010), *First Nation of Nacho Nyak Dun v. Yukon* (2017) decisions in John Borrows and Leonard Rotman, *Aboriginal Legal Issues*.

<sup>31</sup> Canada, “A History of Treaty Making in Canada.”

<sup>32</sup> Canada, “Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights,” Crown-Indigenous Relations and Northern Affairs Canada, modified June 18, 2018, <https://www.rcaanc-cirnac.gc.ca/eng/1408631807053/1544123449934>.

<sup>33</sup> Canada, “A History of Treaty Making in Canada.”

<sup>34</sup> Canada, “Treaties and Agreements.”

to Self-Government Policy was created in 1995 to “negotiate practical arrangements with First Nations to make a return to self-government a reality,” in which seventeen agreements have been signed as part of larger Comprehensive Claims agreements.<sup>35</sup> While 1975 marked a change in the treaty making process, it does not necessarily mark a shift towards reconciliation between Indigenous nations and the Canadian state. This is because the Specific and Comprehensive Claims policies still operate within the same colonial system that the historical treaties were enacted in. For instance, comprehensive land claim agreements may still require the full cession of Aboriginal Title to land.<sup>36</sup>

### **2.3 Transitional Justice Literature on Reconciliation**

It is important to acknowledge that there is no general consensus on what the best path towards reconciliation should be, particularly as it relates to the Indigenous-Canadian relationship in a settler-colonial society. Achieving reconciliation between conflicting parties in transitional justice literature can be separated into two main competing bodies of literature.

The traditional transitional justice perspective views reconciliation as more politically and legally based, seeing the reconciliation of land claim settlements as a form of restitution.<sup>37</sup> Paige

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<sup>35</sup> Canada, “A History of Treaty Making in Canada.”

<sup>36</sup> According to “Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights,” the Government of Canada recognizes that Aboriginal Title falls under Section 35 of the *Canadian Constitution Act, 1982*, protecting Aboriginal rights. In this respect determining “certainty over lands and resources is central to the purpose of treaty negotiations, which provides a respectful framework for reconciliation.” This involves a “legal reconciliation technique” that involves a clear process that reconciles Aboriginal Title with the Canadian Government’s objectives for a treaty and which “cannot be used to undermine the agreement of the parties.” See Canada, “Renewing the Comprehensive Land Claims Policy.”

<sup>37</sup> See Paige Arthur, “How ‘Transitions’ Reshaped Human Rights”; Alexandra Barahona de Brito, “Introduction,” in *Human Rights and Democratization in Latin America: Uruguay and Chile* (New York: Oxford University Press, 1997); Niel J. Kritz, “The Dilemmas of Transitional Justice,” in *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, ed. by Niel J. Kritz (Washington D.C.: United States Institute of Peace, 1995), xix-xxx; and Lawrence Whitehead, “International Aspects of Democratization,” in *Transitions from Authoritarian Rule: Comparative Perspectives*, ed. by Guillermo O’Donnell, Philippe C. Schmitter, and Lawrence Whitehead (Baltimore: Johns Hopkins University Press, 1986), 3-46.

Arthur defines transitional justice as “an international web of individuals/institutions whose internal coherence is held together by common concepts, practical aims and distinctive claims for legitimacy began to emerge as a response to these new practical dilemmas and as an attempt to systematize knowledge deemed useful to resolving them.”<sup>38</sup> Arthur’s idea of reconciliation looks only at states that have undergone a transition from conflict to peace, or from authoritarian rule to democracy. It appears that Arthur, unlike others, never contemplated the need for transitional justice within already democratic settler-colonial liberal states.<sup>39</sup> She outlines that the key components of reconciliation include truth-telling, restitution, and reform of state institutions.<sup>40</sup>

There is a second body of literature that more deeply considers the idea of transitional justice within settler-colonial societies.<sup>41</sup> These scholars consider reconciliation as the embrace of Indigenous self-determination as a means of decolonizing settler states. Rosemary Nagy sees

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<sup>38</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights,” 324.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid. Zinaida Miller argues that truth commissions have a tendency to ignore issues regarding economic development, resource distribution and equality of wealth and power. See Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2, no. 3 (2008): 268. For more on truth commissions, see Kim Pamela Stanton, “Truth Commissions and Public Inquiries: Addressing Historical Injustices in Establishing Democracies,” (PhD Dissertation, The University of Toronto, 2010); Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (New York: Routledge, 2010); Martha Minow, “The Hope for Healing: What Can Truth Commissions Do?” in *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000); Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2002); Pablo de Greiff, “Truth Telling and the Rule of Law,” in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, edited by Tristan Anne Borer (Notre Dame, Indiana: University of Notre Dame Press, 2006); and Siri Gloppen, “Roads to Reconciliation: A Conceptual Framework,” in *Roads to Reconciliation*, edited by Elin Skaar, Siri Gloppen, and Astri Suhrke (Lanham, Maryland: Lexington Books, 2005).

<sup>41</sup> See Jennifer Balint, Julie Evans, and Nesam McMillan, “Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,” *International Journal of Transitional Justice* 8, no. 2 (2014): 194-216; Jeff Corntassel and Cindy Holder, “Who’s Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru,” *Human Rights Review*, no. 9 (2008): 465-489; Rosemary Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission”; Ronald Niezen, *Truth and Indignation: Canada’s Truth and Reconciliation Commission on Indian Residential Schools* (Toronto: University of Toronto Press, 2013); Brian Rice and Anna Snyder, “Reconciliation in the Context of a Settler Society: Healing the Legacy of Colonialism in Canada,” in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, ed. by Marlene Brant-Castellano, Linda Archibald, and Mike DeGagné (Ottawa: Aboriginal Healing Foundation, 2008), 45-61; and Siri Gloppen, “Roads to Reconciliation.”

reconciliation and decolonization in the form of restoration of an egalitarian relationship.<sup>42</sup> Her vision of reconciliation involves recognition of a “settler problem,” as coined by Paulette Regan, and argues that reconciliation must address the implications and models of ongoing structural violence.<sup>43</sup> Jennifer Balint, Julie Evans, and Nesam McMillan see the need for transitional justice theory to be more flexible to address historical and colonial harms, focusing on the structural violence experienced most predominantly by Indigenous people in settler-colonial states.<sup>44</sup>

However, both sets of existing literatures on reconciliation in the transitional justice literature fall short in finding a path towards a true and meaningful reconciliation of the Indigenous-Canadian states because they fail to address the question of land.<sup>45</sup> As a colonial-state, it is necessary to acknowledge that Canada exists as a liberal democracy through the law of reception. According to Peter W. Hogg, the law of reception, either by colonial settlement, conquest, or cession, allowed for the English common law of the United Kingdom to become the law of the land in what is now Canada.<sup>46</sup> In relation to the Indigenous people of these lands, the law of reception states that “a colony acquired by cession... was treated as acquired by conquest.”<sup>47</sup> Since Indigenous treaties were viewed in the eyes of the British Crown as a form of cession, the British Crown viewed Indigenous lands as acquired into the systems of British common law through colonial settlement. Yet, the law of reception states that in lands acquired by conquest, the

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<sup>42</sup> Rosemary Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission,” 52-73.

<sup>43</sup> Ibid.

<sup>44</sup> Jennifer Balint, Julie Evans, and Nesam McMillan, “Rethinking Transitional Justice, Redressing Indigenous Harm,” 194-216.

<sup>45</sup> For more literature on the shortcoming of the transitional justice in settler-colonial contexts and the need to frame transitions as a shift to transformative justice see Paul Gready and Simon Robins, *From Transition to Transformative Justice* (Cambridge: Cambridge University Press, 2019); Wendy Lamborne, “Transitional Justice and Peacebuilding after Mass Violence.” *The International Journal of Transitional Justice* 3, (2009): 28–48; and Dustin Sharp, “What Would Satisfy Us? Taking Stock of Critical Approaches to Transitional Justice,” *International Journal of Transitional Justice*, (2009): 1-20.

<sup>46</sup> Peter W. Hogg, *Constitutional Law of Canada: 2011 Student Edition* (Toronto: Carswell, Thomas Reuters Canada Limited, 2011), 2.1-2.3.

<sup>47</sup> Ibid., 2.2.

existing laws of the conquered people “continued in force, except to the extent necessary to establish and operate the governmental institutions of British colonial rule.”<sup>48</sup> Indigenous legal traditions, however, were ignored in this extent, as Hoggs notes that the law of reception was applied “in disregard of the existence of the aboriginal peoples, who were in possession of much of British North America before the arrival of Europeans... It is clear that all aboriginal customary law did not disappear at the time of European settlement, as the rule of reception for a settled British colony might imply.”<sup>49</sup> Thus, Indigenous legal traditions survive today and are necessary to reconciliation in Canada. The existence of Indigenous legal traditions is consequentially problematic to traditional theories of transitional justice.

The sets of transitional justice literature mentioned focus on the assumption that all societies strive to achieve liberal democracy; this strengthens the position of colonial governments in settler-colonial liberal states over Indigenous assertions of sovereignty within these states.<sup>50</sup> Jeff Corntassel and Cindy Holder argue that “state-dominated reconciliation mechanisms are inherently problematic for indigenous communities.”<sup>51</sup> They claim that truth commissions and apologies are not sufficient to address ongoing colonial injustices committed against Indigenous people and that it is necessary to transform colonial states’ relationships with Indigenous people through the mechanisms of decolonization and restitution. These mechanisms “must begin by

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> See Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 23 and 26-27; Robert I. Rotberg, “Truth Commissions and the Provision of Truth, Justice, and Reconciliation,” 8; and the mandate of the 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* (Winnipeg: Library and Archives Canada Cataloguing in Publication, 2015), 343.

<sup>51</sup> Jeff Corntassel and Cindy Holder, “Who’s Sorry Now?” 465.



acknowledging indigenous peoples' inherent powers of self-determination," but also allow for lasting foundations of self-determination for Indigenous nations.<sup>52</sup>

## 2.4 Indigenous Pedagogy on Reconciliation

Greg Poelzer and Ken Coates argue that "There is no single Aboriginal perspective on the future of Indigenous-non-Indigenous relations, nor will there ever be one."<sup>53</sup> Like the transitional justice literature, Indigenous scholarship on reconciliation and the Indigenous-Canadian relationship can be separated into several bodies of literature.

Like the scope of traditional transitional justice, some Indigenous scholars see the potential for reconciliation through political and legal relationships.<sup>54</sup> Glen Coulthard, for example, focuses on reconciliation of the political relationships between Indigenous nations and the Canadian state. Coulthard speaks of the "politics of recognition," which involves decolonizing and re-delegating "land, capital and political power from the state to Indigenous communities through land claims, economic development initiatives, and self-government processes."<sup>55</sup> Taiaiake Alfred sees reconciliation as a restructuring of the Canadian political landscape. For Alfred, this requires a

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<sup>52</sup> Ibid., 467 and 471. For more on the inability of truth commissions to possess the power to implement real change see Siri Gloppen, "Roads to Reconciliation," 27; and Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 15.

<sup>53</sup> Greg Poelzer and Ken Coates, *From Treaty Peoples to Treaty Nation: A Road Map for All Canadians* (Vancouver: UBC Press, 2015), 33. For more on the difficulty of defining reconciliation in Canada, see Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back* (Ottawa: Canada Communications Group – Publishing, 1996), 12.

<sup>54</sup> See Glen Coulthard, "Subjects of Empire: Indigenous Peoples and 'Politics of Recognition' in Canada." *Contemporary Political Theory* 6, (2007): 437-460; Taiaiake Alfred in Jeff Corntassel and Cindy Holder, "Who's Sorry Now?," 470; Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (Toronto: University of Toronto Press, 2014); Matthew Glass, "Canada's Duty to Consult: Communicative Equality and the Norms of Legal Discourse," (Master's thesis, The University of Western Ontario, 2015); Carole Blackburn, "Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada," *The Journal of the Royal Anthropological Institute* 13, no. 3 (2007): 621-628; and Jennifer Dalton, "Constitutional Reconciliation and Land Negotiations: Improving the Relationship between Aboriginal People and the Government of Ontario," *Journal of Parliamentary & Political Law* 2 (2009): 277-323.

<sup>55</sup> Glen Coulthard, "Subjects of Empire," 437-438.

drastic power shift over land and economic resources. Control of these must be placed into the hands of Indigenous nations as the only means to reconcile past colonial injustices and prevent future injustice.<sup>56</sup> Carole Blackburn looks at the legal record of modern Indigenous treaty agreements, notably the Nisga'a Treaty, and sees two meanings of reconciliation: first, the correcting of past wrongs by colonial states creating a new relationship, and second, reconciling constitutionally protected Indigenous rights within Canadian sovereign society.<sup>57</sup> Blackburn rightfully notes that modern treaties like Nisga'a do not offer the form of reconciliation most desired by Indigenous people, which would involve the denial of colonial, non-Indigenous forms of government and political autonomy for Indigenous nations.<sup>58</sup>

Finally, there is a body of literature that sees reconciliation as the return to a more holistic, or egalitarian relationship between Indigenous people, Canadians, and the land.<sup>59</sup> John Borrows and James Tully argue for a form of reconciliation that is transformative of the Indigenous-Canadian relationship. They offer a rejection of the language of reconciliation, which they say perpetuates “unjust relationships of dispossession, domination, exploration, and patriarchy,” ultimately reconciling Indigenous people within a colonial status quo.<sup>60</sup> Instead, they argue for practices of Indigenous resurgence that have “the potential to transform these unjust relationships... Robust resurgence infuses reciprocal practices of reconciliation in self-

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<sup>56</sup> Jeff Cornthassel and Cindy Holder, “Who’s Sorry Now?” 470.

<sup>57</sup> Carole Blackburn, “Producing Legitimacy,” 621.

<sup>58</sup> *Ibid.*, 622. See also Matthew Glass argument on the revisal of Canada’s Duty to Consult in reconciling Indigenous political and legal relationships with Canada in Matthew Glass, “Canada’s Duty to Consult,” ii, 1, and 5; and Jennifer Dalton on reconciliation through political decolonization through a truer recognition of Indigenous treaty and Aboriginal Title rights as affirmed in Section 35 of the Canadian *Constitution Act* in Jennifer Dalton, “Constitutional Reconciliation and Land Negotiations,” 277 and 279.

<sup>59</sup> See Rosemary Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission.”; John Borrows, “Earth-Bound: Indigenous Resurgence and Environmental Reconciliation.”; and John Borrows and James Tully, “Introduction,” in *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings*, ed. Michael Asch, John Borrows and James Tully (Toronto: University of Toronto Press, 2018).

<sup>60</sup> John Borrows and James Tully, “Introduction,” 5.

determining, self-sustaining, and inter-generational ways.”<sup>61</sup> The final report of the 1996 Royal Commission on Aboriginal Peoples also recommended a form of transformative and restorative reconciliation through a return to the original intent of the relationship between Indigenous people and what is now the Canadian state.<sup>62</sup>

However, it is fair to argue that this may be a utopian ideal, as it implies that the relationship between Indigenous nations and European nations at the time of the signing of historical treaties was one of equal power. Yet these agreements themselves show that there were in fact unfair power imbalances at play. Robyn Green critiques holistic forms of decolonization and transformative justice, arguing that they have always been used to financialize Indigenous claims to self-determination in favor of the settler-state.<sup>63</sup> Reconciliation cannot necessarily be a return to egalitarian principles—which may never have existed—but rather a transformative version of justice that looks to build this relationship in the spirit of egalitarianism.

## 2.5 Case Law and Statutes

Along with this scholarly literature material, this thesis, by nature of the focus on land claim disputes, settlements, and treaty agreements, must also draw from and look more in depth at primary source material. This includes court case law which inform the Specific Claims and the Comprehensive Claims policies. Case law that looks at the assertion and protection of Aboriginal and treaty rights includes, *R v. St. Catherine’s Milling and Lumber Co.* (1888), *Calder v. British Columbia* (1973), *R. v. Sioui* (1990), *R. v. Sparrow* (1990), *R. v. Van der Peet* (1996), and *R. v. Marshall* (1999). There is also case law that deals particularly with the assertion of Aboriginal

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<sup>61</sup> Ibid.

<sup>62</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Volume 1*, 12.

<sup>63</sup> Robyn Green, “The Economics of Reconciliation: Tracing Investments in Indigenous-Settler Relations.” *Journal of Genocide Research* 17, no. 4 (2015): 474.

title, such as *Delgamuukw v. British Columbia* (1997) and *Tsilhqot'in Nation v. British Columbia* (2014). Lastly there is the case law that deal with the Crown's fiduciary duties, such as *Haida Nation v. British Columbia* (2004).<sup>64</sup>

This thesis also draws on archival documents relevant to treaties and the duty of the Crown, all relevant to the current land claims settlement process. These include treaty transcripts, such as the treaty Commissioner Alexander Morris' *The treaties of Canada with the Indians of Manitoba and the North-West Territories: Including the Negotiations on Which They Were Based, and Other Information Relating Thereto*, an original account of the Numbered Treaties' negotiations.<sup>65</sup> As well, oral histories and testimonies such as those collected through case law, as well as official commissions such as the 1996 Royal Commission on Aboriginal Peoples and the 2015 Truth and Reconciliation Commission's executive final report, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*.

Historical and modern proclamations and statutes all have precedent on land claim settlements as means of evidence as well as detailing the Crown's fiduciary duty to Indigenous peoples, particularly surrounding treaties. Amongst these includes the 1763 *Royal Proclamation*, the 1868 *Rupert's Land Act*, the 1867 *British North America Act*, the 1870 *North West Territories Act*, the 1876 *Indian Act* (still enacted this day), the *Constitution Act* of 1982, and the 2007 United Nation's Declaration on the Rights of Indigenous People, to which Canada is a signatory as of 2010.<sup>66</sup> As well, this thesis will look at how the Specific and Comprehensive Claims Policies as well as the 1955 Inherent Right to Self-Government Policy hold up to the findings from both the

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<sup>64</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*.

<sup>65</sup> Alexander Morris, *The treaties of Canada with the Indians of Manitoba and the North-West Territories: Including the Negotiations on Which They Were Based, and Other Information Relating Thereto*, (Toronto: Willing and Williamson, 1880).

<sup>66</sup> United Nations, The General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2007.

1996 Royal Commission on Aboriginal Peoples and the 2015 Truth and Reconciliation Commission's 94 *Calls to Action* and the executive final report, *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*.

## **2.6 Conclusions**

My approach towards understanding and assessing this literature is deeply impacted by my identity and worldview as an Indigenous Black woman. This worldview became deeply entrenched within my methodology and guided how I assessed this research and how I present my arguments in this thesis. The next chapter provides further explanation of my methodology, including both Indigenous methods and political science approaches.

## Chapter Three

### 3 Integrating Indigenous and Western Research Methodology

#### 3.1 Intersectional, Feminist, and Anti-Oppressional Methodologies

In scholarship, self-location and positionality are important aspects of much qualitative work, including feminist and anti-oppressional approaches, for the purpose of sharing personal experience within research, as well as to establish reciprocity.<sup>1</sup> Feminism and feminist scholarship has been known to challenge the patriarchal nature of Western knowledge. Indigenous women, in particular, have played significant roles in exploring important intersections of gender, race, class, and difference, going against “the frame of colonization and oppression.”<sup>2</sup> Feminist and Indigenous perspectives share the similarities of challenging “the cultural outlook of mainstream society” by using relational theory to examine power relationships in Eurocentric fields.<sup>3</sup> Margaret Kovach argues that feminist inquiry as a methodological approach is “highly reflexive,” much in the same way that intersectional and Indigenous inquiry is.<sup>4</sup> Fionnuala Ní Aoláin argues that the role feminist inquiry plays in transitional justice literature is complex and multilayered, but offers a deeper level of reflexivity through engagement in the “other” that may often be overlooked, and can serve to bring discussion forward in theoretical and policy contexts.<sup>5</sup> As is often expressed

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<sup>1</sup> Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009), 110. Kovach states “Anti-oppressive inquiries integrate self-location to identity and then mitigate power differentials in research.”

<sup>2</sup> Linda Tuhiwai Smith, “On Tricky Ground: Researching the Native in the Age of Uncertainty,” in *The Sage Handbook of Qualitative Research*, edited by Norman K. Denzin and Yvonna S. Lincoln, 3rd ed., (Thousand Oaks: Sage Publications, 2005), 88.

<sup>3</sup> Shawn Wilson, *Research is Ceremony: Indigenous Research Methodologies* (Halifax: Fernwood Publishing, 2008), 16.

<sup>4</sup> Margaret Kovach, *Indigenous Methodologies*, 33.

<sup>5</sup> Eilish Rooney and Fionnuala Ní Aoláin, “Transitional Justice from the Margins: Intersections of Identities, Power and Human Rights,” *International Journal of Transitional Justice*, 12 (2018): 4; and Fionnuala Ní Aoláin, “Advancing Feminist Positioning in the Field of Transitional Justice,” *The International Journal of Transitional Justice* 6, no. 2 (2012): 205-206. Referring to classifications such as gender, class, socioeconomic status, race, disability, age, and

through positioning, identity is essential to how theory is framed in feminist methodology, and, although not always common, in transitional justice methodology.<sup>6</sup>

The concept of the “other” in relation to power and diversity also features heavily in anti-oppressional methodologies.<sup>7</sup> Anti-oppressional approaches seek “critical reflexivity” through self-reflection and the examination of location and privilege in political and decolonizing contexts, which is particularly true in Indigenous research.<sup>8</sup> Nisha Nath, Ethel Tungohan and Megan Gaucher describe anti-oppressional or “intersectional” work as, rather, “insurrectionary scholarship” that challenges domination, oppression, complicity and privilege.<sup>9</sup> Within Canada, this work rests at the intersections of settler-colonial contexts, considering systemic domination, heteropatriarchy, capitalism and racism.<sup>10</sup> Within Indigenous scholarship, anti-oppressional work encourages accountability, asking for reflection on the privileged focus of Western and Eurocentric perspectives to study contemporary Indigenous politics.<sup>11</sup> Anti-oppressional scholarship questions the position of the state, demanding recognition of power and the existence of non-state neutrality, particularly when it comes to culture and socio-politics.<sup>12</sup>

Intersectionality and reflexivity are essential to anti-oppressional methodology, particularly in transitional justice. I have lived my life at the intersections of race and privilege. I am a woman of mixed race who grew up in a predominantly white urban centre in southern Alberta.

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sexual orientation, as described in “Transitional Justice from the Margins: Intersections of Identities, Power and Human Rights.”

<sup>6</sup> Fionnuala Ní Aoláin, “Advancing Feminist Positioning in the Field of Transitional Justice,” 220.

<sup>7</sup> Nisha Nath, Ethel Tungohan and Megan Gaucher, “The Future of Canadian Political Science: Boundary Transgressions, Gender and Anti-Oppression Frameworks,” *Canadian Journal of Political Science*, 51, no. 3 (2018): 620. Nath, Tungohan, and Gaucher pay particular attention to stay away from language of ‘diversity’ which evades more direct language of white supremacy, racism and colonialism (p. 620-621).

<sup>8</sup> Margaret Kovach, *Indigenous Methodologies*, 33.

<sup>9</sup> Nisha Nath, Ethel Tungohan and Megan Gaucher, “The Future of Canadian Political Science,” 622 and 625.

<sup>10</sup> *Ibid.*, 624.

<sup>11</sup> *Ibid.*, 626.

<sup>12</sup> *Ibid.*, 627 and 633.

I have the lived experiences of what is to be a Canadian without privilege in many positions and settings as a woman of colour, as an Indigenous woman, and as Indigenous female scholar.<sup>13</sup> I have been fortunate enough to have had the privilege of achieving a higher education, first with a Bachelor of Arts degree, and now with a Master of Arts degree. These intersections of belonging have defined much of my life both inside and outside of academia. Within academia, it has often caused me to question: who am I and why do I have the right to say what I am saying? By grounding myself in my identity, I have been able to bring meaning to my work. For myself, my identity as an Indigenous woman has been grounded in a sense of connection with land and place. This comes from my experiences as a child growing up in southern Alberta, picking mint by the river, collecting Saskatoon berries off bushes, learning to offer tobacco to the grandmothers and grandfathers, smudging, attending ceremonies with my family, and recalling stories and teachings taught to me by my mother and grandmother. These became foundational as I began my research, and as an Indigenous scholar, a need to have my work connect back to the land also became foundational.

### **3.2 Indigenous Scholarship and Methodologies**

Self-location has become an essential aspect to the works of many Indigenous scholars and within many Indigenous methodologies. Linda Tuhiwai Smith says that declarations of Indigenous positioning are part of an Indigenous approach to research formed around principles “of resistance, political integrity, and privileging indigenous voices.”<sup>14</sup> Kovach speaks widely of the importance of self-location, stating that within Indigenous methodologies, it creates a wholistic and personal

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<sup>13</sup> I make note here that while I personally identify myself as an Indigenous Black Canadian, many Indigenous people themselves do not always identify, or struggle to identify, as Canadian, for personal and political reasons regarding relationships with the Canadian nation-state.

<sup>14</sup> Linda Tuhiwai Smith, “On Tricky Ground: Researching the Native in the Age of Uncertainty,” 89.



journey within research that brings intentionality to Indigenous works.<sup>15</sup> Within Indigenous research, self-location also provides “cultural identification,” which can be manifested as the intuitive “protocol of introductions” which “shows respect to the ancestors and allows community to locate us. Situating the self implies clarifying one’s perspective on the world.”<sup>16</sup> Critical and reflective self-location also provides Indigenous research with purpose, motive, mutuality, and creates accountability.<sup>17</sup> The personal and lived experience and cultural grounding shared through self-location and positionality creates, as Katherine Absolon says, “powerful instruments by which to measure the equality and social justice of society.”<sup>18</sup> Establishing voice and person within research, Absolon says, “makes my allegiances visible and myself accountable for my own writing.”<sup>19</sup>

Absolon refers to “conscious Indigenous scholars”: Indigenous researchers “who are aware of our cultural and colonial history and who are on a path of intentionally learning, recovering and reclaiming their Indigeneity.”<sup>20</sup> Understanding the colonial history surrounding Indigenous scholarship, self-assertion of Indigeneity is highly important in reclaiming both the self and Indigenous scholarship. My path as an Indigenous scholar has brought me back to my culture in different ways since leaving home. Betty Bastien refers to the Blackfoot word, *A’otsisstapikakyo’p*, which means “we (or you) understand,” and she uses it in a way to establish returning to the knowledge of *Siksikaitstapiipaitapiiyssin*, the Blackfoot way of life.<sup>21</sup> Knowledge

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<sup>15</sup> Margaret Kovach, *Indigenous Methodologies*, 15-16.

<sup>16</sup> *Ibid.*, 110.

<sup>17</sup> Margaret Kovach, *Indigenous Methodologies*, 112; and Kathy Absolon and Cam Willett, “Aboriginal Research: Berry Picking and Hunting in the 21<sup>st</sup> Century,” *First Peoples Child and Family Review* 1, no. 1 (2004): 5.

<sup>18</sup> Kathleen E. Absolon (Minogiizhigokwe), *Kaandossiwin: How We Come to Know* (Halifax: Fernwood Publishing, 2011), 18. Similarly shared by Margaret Kovach in the way lived experiences shape world view and vary by each person’s experience with culture in Margaret Kovach, *Indigenous Methodologies*, 112 and 115-116.

<sup>19</sup> Kathleen E. Absolon (Minogiizhigokwe), *Kaandossiwin*, 18 and 20-21.

<sup>20</sup> *Ibid.*, 22.

<sup>21</sup> Betty Bastien, *Blackfoot Ways of Knowing: The Worldview of the Siksikaitstapi* (Calgary: University of Calgary Press, 2004), 1 and 3.

for Indigenous people comes from within; it is “being, living, and doing.”<sup>22</sup> Bastien says that Indigenous knowledge is dynamic and transformative (unlike Eurocentric reason and rationality), and can be found in “ceremonial practices of tribal people,” as well as protocols, relationships, and connection to one’s self, the natural and spiritual worlds, or Creation.<sup>23</sup> Shawn Wilson shares a reflection on Peter Hanohano’s connection of Indigenous knowledge to community and land, saying that Indigenous knowledge is “held in the relationships and connections formed with the environment that surrounds us.”<sup>24</sup> Indigenous knowledge, or ways of knowing, are spiritual, relational, and connected to land and place.<sup>25</sup> It is from this connection to land and place, that I found a connection to my identity as an Indigenous woman. As I found my voice as an Indigenous woman, my research reflected these assertions, always focusing on aspects of the assertion of Indigenous rights to land and land reclamation.

My identity as an African Canadian woman and a woman of mixed race in Canada has also defined my research, particularly in the way of viewing relationship. The relationship of these two identities in myself has been a struggle at times, but there is harmony in the way they make me whole. These feelings were reflected in Absolon’s work, where she argues that Indigenous work, which often focuses on aspects of decolonization, is “full of contradictions”; it is Indigenous research that creates inclusiveness and wholism.<sup>26</sup> *Siksikaitsitapi* epistemology embodies kinship relationships.<sup>27</sup> My research looks at a desire to find harmony in relationships: between our nations and people, and with the land. My identity as a woman of mixed race has also taught me about

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<sup>22</sup> Kathy Absolon and Cam Willett, “Aboriginal Research,” 10.

<sup>23</sup> Betty Bastien, *Blackfoot Ways of Knowing*, 39 and 100.

<sup>24</sup> Shawn Wilson, *Research is Ceremony*, 87.

<sup>25</sup> Kathleen E. Absolon (Minogizhigokwe), *Kaandossiwin*, 12; Betty Bastien, *Blackfoot Ways of Knowing*, 102; and Shawn Wilson, *Research is Ceremony*, 86-87.

<sup>26</sup> Kathleen E. Absolon (Minogizhigokwe), *Kaandossiwin*, 19 and 22.

<sup>27</sup> Betty Bastien, *Blackfoot Ways of Knowing*, 102.

privilege and what it means to both possess and lack privilege at the same time. Together, these ideas of privilege, relationship and land become the cornerstones of this thesis.

Smith states that Indigenous women, sitting at the intersections of feminist and Indigenous epistemologies, have played “important roles in exploring the intersections of gender, race, class, and difference through the lens of native people and against the frame of colonization and oppression.”<sup>28</sup> Absolon and Cam Willett also state the importance that no work done by Indigenous researches can, or should attempt, to represent all Indigenous people, Indigenous research is reflective of perspective and orientations, and should be held accountable as such.<sup>29</sup> My work is no different; I cannot represent all Indigenous perspectives or attitudes in this thesis, for it is a reflection of my own knowledge as a *Niitsitapi* within my own experience. Kovach notes that Indigenous scholars often refer to their “tribal affiliation” since their choice of Indigenous epistemologies, as Indigenous knowledges “are bound to place.”<sup>30</sup> While I utilize a wide variety of perspectives by Indigenous scholars and Knowledge Keepers, my own perspective in this thesis is centered around my worldview as a *Niitsitapi*. As an Indigenous scholar, my purpose is to bring together these lived experiences of the knowledge I carry as an Indigenous woman, and as a woman of colour in Canada, to bring meaning not only to this work in academia, but for others who also find themselves at similar intersections.

Throughout this thesis I use the capitalized term “Indigenous” to describe “First Nations, Inuit, and Métis Peoples in Canada collectively, and also to refer to Indigenous Peoples worldwide collectively.”<sup>31</sup> While several different terminology have been used interchangeably to refer to

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<sup>28</sup> Linda Tuhiwai Smith, “On Tricky Ground: Researching the Native in the Age of Uncertainty,” 88.

<sup>29</sup> Kathy Absolon and Cam Willett, “Aboriginal Research,” 14.

<sup>30</sup> Margaret Kovach, *Indigenous Methodologies*, 37.

<sup>31</sup> Gregory Younging, *Elements of Indigenous Style: A Guide for Writing by and About Indigenous Peoples* (Brush Education Inc., 2018), 64. Younging states that “It is used in the UN Declaration on the Rights of Indigenous People, which has perhaps driven an increasing preference for Indigenous. The Canadian government and Department DIAND (Department of Indian and Northern Affairs) is currently Indigenous and Northern Affairs

Indigenous people, such as the word Aboriginal, which I use only when referring the *Canadian Constitution Act, 1982*, or First Peoples, I choose to use the collective and inclusive term “Indigenous” as part of the reclamation process understood with the political implications it carries.<sup>32</sup> Wilson says that Indigenous people are unique within our own cultures, “but common in our experiences of colonialism and our understanding of the world.”<sup>33</sup> He also refers to the meaning of the term “Indigenous” in Latin to refer to “born of the land,” or the environment, centering Indigenous people, including their traditions and customs, as “shaped by the environment, the land, their relationship; their spiritual, emotional and physical relationship to that land.”<sup>34</sup> Considering the focus of the relationship between land and people in this thesis, this terminology fits best within these contexts.

Kovach argues that the terminologies of Indigenous methodology and Indigenous theory themselves also warrant contention amongst Indigenous scholarship.<sup>35</sup> Absolon defines Indigenous methodologies as “methods, practices, and approaches that are guided by Indigenous worldviews, beliefs, values, principles, processes and contexts. Indigenous methodologies are wholistic, relational, interrelational and interdependent with Indigenous philosophies, beliefs and ways of life,” and she notes, importantly, that it is a wholistic process.<sup>36</sup> Qualitative research has historically had a long and unwanted history amongst Indigenous communities because of its

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Canada.” Also note that I use Indigenous capitalized, as Shawn Wilson notes that “Indigenous differs from ‘small I’ indigenous, which is sometimes used to indicate things that have developed ‘home grown’ in specific places... As Indigenous people become more active politically and in the field of academic, the term Indigenous, as an adjective, has come to mean, ‘relating to Indigenous people and peoples.’” See Shawn Wilson, *Research is Ceremony*, 15-16.

<sup>32</sup> Shawn Wilson, *Research is Ceremony*, 15-16. Aboriginal is the terminology used in the *Canadian Constitution Act* of 1982 and The Canadian Charter of Rights and Freedoms in Sections 35 and 25, respectively, as well as several court cases and legal documents, and the 1996 Royal Commission on Aboriginal Peoples, as stated in Gregory Younging, *Elements of Indigenous Style*, 62.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid, 88.

<sup>35</sup> Margaret Kovach, *Indigenous Methodologies*, 20.

<sup>36</sup> Kathleen E. Absolon (Minogizhigokwe), *Kaandossiwin*, 22.

traditional Western-style research processes. However, reflexivity and relational approaches within qualitative methods create what Kovach calls a “meaning-making process” and a new framework for representation within Indigenous work through the embracing of Indigenous methodologies alongside Western processes.<sup>37</sup>

### **3.3 Indigenous Methodologies and Historical Institutionalism**

From a Western academic approach, I combine Indigenous methodologies and the works of Indigenous scholars with historical institutionalism. Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate define historical institutionalism as “a research tradition that examines how temporal processes and events influence the origin and transformation of institutions that govern political and economic relations.”<sup>38</sup> Historical institutionalism has been used in political science research to enhance “political scientists’ understanding of the origins, evolution, and consequences of humanly created institutions across time and place.”<sup>39</sup> The institutions of Canada’s treaty process and policies involving Indigenous lands, rights and the land claims processes rightfully fall within the advantages of using this method of research.

This methodology involves building an understanding and use of the existing and historical relationships of Indigenous treaties and land claims and the Indigenous-Canadian relationship. It also involves my own inherent understandings of Indigenous knowledge as both *Niitsitapi* and an Indigenous woman scholar, which, in turn, inform my causal inferences in this research. This use of “prior knowledge,” defined by David Collier as “sets of interrelated concepts, often

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<sup>37</sup> Linda Tuhiwai Smith, “On Tricky Ground: Researching the Native in the Age of Uncertainty,” 103; and Margaret Kovach, *Indigenous Methodologies*, 24 and 32.

<sup>38</sup> Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate, “Historical Institutionalism in Political Science,” in *Oxford Handbook of Historical Institutionalism*, edited by Orfeo Fioretos, Tulia G. Falleti, and Adam Sheingate (New York: Oxford University Press, 2016), 1.

<sup>39</sup> *Ibid.*

accompanied by general ideas of how the concepts can be operationalized,” is utilized in this thesis through the information and insights collected from previous Indigenous scholars.<sup>40</sup> This includes knowledge of historic and modern treaties and treaty negotiations, as well as scholarly literature on reconciliation, truth commissions, and transitional justice. It also involves knowledge on Indigenous forms of traditional knowledge in relation to land and power as well as scholarly literature by both Indigenous and non-Indigenous scholars on self-determination and transitional justice as a means of reconciling Indigenous and Canadian states.

This thesis involves the heavy and primary use of qualitative data. Along with secondary scholarly literature, the data and knowledge base for this thesis relies on primary material, such as legal case studies, legislative statutes, and archival historical documents. The case study analysis employed in this thesis involves causal relationships from within-case analysis. I use a selection of examples that refer to both the contemporary and the historical record in order to properly assess the method of transformative reconciliation that this thesis discusses.

The land is what connects us all as Indigenous people and Canadians, both our relationships to the land and our place on it. Yet, what happens when these relationships with the land and with each other are violated? What happens when there is abuse? What happens when promises of stewardship are broken and how are they reconciled? How can an identity with land bring forth this reconciliation? Much the way I, as an Indigenous woman, an African American woman, a Canadian woman, and a scholar have had to grapple with my own identity and my relationship to land and place as a person, I have looked at finding harmony in the relationship between land, Indigenous people and Canada in my research. Indigenous research is premised on giving back to community.<sup>41</sup> The purpose of this research is not only to find the answers to these questions, but

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<sup>40</sup> David Collier, “Understanding Process Tracing,” *PS: Political Science and Politics* 44, no. 4 (2001): 824.

<sup>41</sup> Margaret Kovach, *Indigenous Methodologies*, 11.

to find meaning in these problems and proposed resolutions, for mending these relationships is necessary for Canada and Indigenous nations to move forward together.

## Chapter Four

### 4 The Importance of Land

The importance of land—politically, economically, spiritually and culturally—cannot be understated. This chapter examines the political, legal, and economic relationship Indigenous and Euro-Canadians share with land, as well the more spiritual and cultural importance of land and how that ties into Indigenous land claims. Understanding these relationships and how they become encompassed in settler colonialism both historically and contemporarily is essential to understanding not only the implications of land claim disputes and the settlement process, but also reconciling the Indigenous and Canadian relationship moving forward.

#### 4.1 Land and Spirit – Understanding Indigenous Knowledge

In 1996, the Supreme Court of Canada ruled in *R. v. Van der Peet* (1996) that in interpreting Aboriginal rights cases, section 35(1) of the *Constitution Act, 1982* “should be given a generous and liberal interpretation in favor of aboriginal peoples... This interpretive principle, articulated first in the context of treaty rights... arises from the nature of the relationship between the Crown and aboriginal peoples.”<sup>1</sup> This is due to the fiduciary duty that exists between Indigenous people and the Crown, which serves, within the constitutional provisions, to protect Indigenous interests. A fiduciary duty is defined within the Canadian legal system as,

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<sup>1</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues: Cases, Material and Commentary*, 5<sup>th</sup> edition (Toronto: LexisNexis Canada Publishing, 2018), 122, para. 24. Canada, Statutes of Canada, *Canadian Constitution Act, 1982*, 1982, c. 11, <https://laws-lois.justice.gc.ca/eng/const/page-16.html>. Section 35(1) of the *Canadian Constitution Act, 1982* states “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, “aboriginal peoples of Canada” includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) “treaty rights” includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.”



a multitude of special relationships in which one party is required to look after the best interests of the other in an exemplary manner. These relationships, which include solicitor/client, physician/patient, priest/parishioner, parent/child, partner/partner, director/corporation and principal/agent, are called fiduciary relationships. Fiduciary relationships entail trust and confidence and require that fiduciaries act honestly, in good faith, and strictly in the best interests of the beneficiaries of such relationships.<sup>2</sup>

This duty relates back to the provisions set in the *Royal Proclamation of 1763*.<sup>3</sup> The *Royal Proclamation*, “stands as one of the clearest and earliest expressions of what has been identified as a long-standing element of Canadian Aboriginal policy.”<sup>4</sup> According to John Borrows and Leonard Rotman, the *Royal Proclamation* “attempted to convince Indians that the British would respect existing political and territorial jurisdiction by incorporating Aboriginal understandings of this relationship in the document.”<sup>5</sup> The final report released by the Canadian Truth and Reconciliation Commission (TRC) stated that “As a fiduciary, the Crown, through the Government of Canada, has a legal obligation to act in the best interests of Aboriginal people to whom it owes a fiduciary obligation.”<sup>6</sup>

The Canadian courts have argued in several cases that Canada’s fiduciary duty, also known as the “honour of the Crown” must be upheld when dealing with Indigenous people, thus it is not

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<sup>2</sup> M.m. Litman, “Law of Fiduciary Obligation,” The Canadian Encyclopedia, February 7, 2006, modified December 16, 2013, <https://www.thecanadianencyclopedia.ca/en/article/law-of-fiduciary-obligation>.

<sup>3</sup> King George III, *Royal Proclamation 1763* (London: Mark Baskett, Printer to the King’s most Excellent Majesty and by Assigns of Robert Baskett, 1763), in “250<sup>th</sup> Anniversary of the Royal Proclamation of 1763,” Indigenous and Northern Affairs Canada, modified March 8, 2016,

<https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a1>. “And whereas it is just and reasonable, and essential to Our Interest and the Security of Our Colonies, that the Several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.”

<sup>4</sup> 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* (Winnipeg: Library and Archives Canada Cataloguing in Publication, 2015), 51.

<sup>5</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 17; see King George III, *Royal Proclamation 1763* clause “And We do further do declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson’s Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rives which fall into the Sea from the West and North West as aforesaid.”

<sup>6</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 213.

“not merely an abstract principle, but one that must be applied with diligence.”<sup>7</sup> One of the most important cases was *R. v. Sparrow* (1990). In *Sparrow*, the Court ruled that “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples” due to the “trust-like” historical relationship that defines this duty between the Crown and Indigenous people.<sup>8</sup> Borrows and Rotman argue that the *Sparrow* decision was important in defining the Crown’s fiduciary obligations to Indigenous people because it showed that they extended “beyond the surrender of Aboriginal lands to Crown-Native relations more generally and that those obligations were constitutionally entrenched in section 35(1) of the *Constitution Act, 1982*.”<sup>9</sup> Other important cases, discussed below, include *Delgamuukw v. British Columbia* (1997) and *Haida Nation v. British Columbia (Minister of Forests)* (2004).

The Crown’s duty to consult with Indigenous people has become one of the most crucial and important developments regarding the Crown’s fiduciary duty in more recent years.<sup>10</sup> This has become particularly important in regards to Indigenous lands, particularly lands where Aboriginal title has not been extinguished, and to Indigenous treaties, including modern treaties, and treaty interpretation.<sup>11</sup> The duty to consult requires the Canadian governments to consults Indigenous nations on matters that affect Indigenous lands. When respected, this has implications in asserting Indigenous self-determination rights. The infringement test created in *Delgamuukw* to determine justifiable infringement on Aboriginal rights is “consistent with the Crown’s fiduciary duty towards Aboriginal peoples and upholds the honour of the Crown.”<sup>12</sup> In *Haida Nation* it was argued that “The government’s duty to consult with Aboriginal peoples and accommodate their

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<sup>7</sup> Ibid., 212-213.

<sup>8</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 109

<sup>9</sup> Ibid., 418-419.

<sup>10</sup> Ibid., 495.

<sup>11</sup> Ibid., 497, para. 19.

<sup>12</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 302.

interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples...”<sup>13</sup> In land claim cases, the “honour of the Crown” has been interpreted to mean that the British Crown, or Canadian government, is required to negotiate “to a just settlement” with Indigenous people.<sup>14</sup> The language of settlement is implied here in the context of treaties, thus it can be argued that the courts understand fiduciary duty in relation to comprehensive land claims to imply the use of the modern treaty process to extinguish Aboriginal title and “reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*.”<sup>15</sup> Here, the term reconcile is used not as a means of returning land or power to Indigenous people, but instead to assert the Crown’s sovereign power over Indigenous people. In this matter, the term “honour of the Crown” is used as the process of creating modern treaties and extinguishing Aboriginal title to Indigenous lands.

Furthermore, in the eyes of the courts, the Crown’s fiduciary duty has been interpreted to mean that where any doubt or ambiguity of evidence in Aboriginal rights claims exists, “such doubt or ambiguity must be resolved in favour of aboriginal peoples.”<sup>16</sup> *R. v. Van der Peet* (1996) builds on the precedents set in *R. v. Sparrow* (1990), which established the Sparrow Test for assessing Aboriginal rights claims. In that case, the Courts ruled that the courts may take Indigenous perspectives into account in their assessment.<sup>17</sup> *R. v. Van der Peet* (1996) is significant because it ruled the courts could not undervalue Indigenous traditional knowledge, such as oral history, as evidence in cases where “evidentiary difficulties in proving a right which originates in

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<sup>13</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 496, para. 16.

<sup>14</sup> *Ibid.*, 497, para. 20.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*, 122, para. 24.

<sup>17</sup> *Ibid.*, 125, para. 49. As part of the Sparrow Test “In assessing a claim for the existence of an aboriginal right, a court make take into account the perspective of the aboriginal people claiming the right.”

times where there were no written records of the practices, customs and traditions engaged in” existed.<sup>18</sup> This is significant because it allows for Indigenous forms of knowledge, such as oral histories, in which many Indigenous nations recorded treaty transactions with European nations, to stand as equal evidence to Western forms of knowledge in the eyes of the courts. Furthermore, this plays a crucial role in land claims cases where, especially where there are disputes in the written and oral records regarding land and treaties; in these cases, Indigenous knowledge has to be taken into account as evidence.

The assertion and protection of Indigenous knowledge in the courts is significant in two major ways. First, as stated, it helps affirm Indigenous voices in disputes over land and rights, which plays significance in land claim cases where disputes in language and treaty come into account. Second, it affirms a deeper understanding of Indigenous identity and Indigenous peoples’ cultural and political relationships to the land. Indigenous knowledge, as Leroy Little Bear describes it, is action oriented, meaning that there is always a connection between place and its purpose within that piece of knowledge.<sup>19</sup> In other words, “It is holistic and cyclical.”<sup>20</sup>

Indigenous knowledge has many forms and many carriers. Trickster stories, which provide cultural and moral lessons through humour or satire, often take the form of shape shifters in Indigenous storytelling.<sup>21</sup> The Blackfoot trickster, Napi, who takes the forms of, and can communicate with, animals, encompasses the importance of land and the relationship to land in Indigenous knowledge.<sup>22</sup> Amethyst First Rider describes a trickster as “a creator, and a teacher.

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<sup>18</sup> Ibid., 130, para. 68.

<sup>19</sup> Leroy Little Bear, “Traditional Knowledge and Humanities: A Perspective by a Blackfoot,” *Journal of Chinese Philosophy* 39, no. 4 (2012): 525.

<sup>20</sup> Ibid.

<sup>21</sup> Jo-ann (Q’um Q’um Xiem) Archibald, *Indigenous Storywork: Educating the Heart, Mind, Body, and Spirit* (Vancouver: UBC Press, 2008), 5.

<sup>22</sup> Amethyst First Rider, “Sweet Grass Visions: The Combination of Trickster and Theatre for the Transmission of Culture” (Master’s Thesis, The University of Calgary, 1994), 29-30; and Donald Duane Pepion, “Blackfoot Ceremony: A Qualitative Study of Learning” (PhD Dissertation, Montana State University-Bozeman, 1999), 15. From

He is constant flux,” a reflection of the chaos of the natural world.<sup>23</sup> Stories themselves also carry a connection to land as they “cannot be separated from geographical locations, from actual physical places within the land... And the stories are so much a part of these places that it is almost impossible for future generations to lose the stories because there are so many imposing geological elements...”<sup>24</sup> Creation stories share how Indigenous people came to be from the land and the Creator. In the Blackfoot creation story, Napi (also known in stories as “Old Man”) created people from natural clay.<sup>25</sup> Donald Pepion defines an Elder in Blackfoot culture and ceremony as “an older Blackfoot person who is generally recognized as possessing knowledge and wisdom relevant to the traditional ways of the people” or “usually someone who has had several [ceremonial bundle] transfers in their lifetime.”<sup>26</sup> Elders are knowledge carriers and “direct the learning process for those who ask, often doing so in a traditional way.”<sup>27</sup>

Land is essential to Indigenous knowledge. As shown through the previous examples of Indigenous stories and knowledge carriers, they cannot be separated from each other. Although all Indigenous nations have their own unique languages, creation stories, customs, and traditions, there are some shared commonalities. Land is one of them. According to John Borrows, “Indigenous languages, economies, and world views are rooted in their homelands.”<sup>28</sup> Place, in

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Pepion, ““Napi - A figure in Blackfoot genesis narratives who had divine qualities as well as human characteristics. He is portrayed in many of the childhood stories as a person that could converse and interact with the animals. Napi has mystical powers, yet he has fallible human characteristics that cause him to suffer consequences of action that is usually forewarned.

<sup>23</sup> Amethyst First Rider, “Sweet Grass Visions,” 30. Also see Peter Knudtson and David Suzuki, *Wisdom of the Elders: Native and Scientific Ways of Knowing about Nature* (Vancouver: Greystone Books, 1992), 19-30.

<sup>24</sup> Jo-ann (Q’um Q’um Xiiem) Archibald, *Indigenous Storywork*, 74. Spoken by Leslie Marmon Silko, quoted in Basso 1996, 64.

<sup>25</sup> Donald Duane Pepion, “Blackfoot Ceremony,” 22-23. Creation story told by Chewing Black Bones in 1935 to Ella E. Clark in her 1966 book entitled *Indian Legends from the Northern Rockies*.

<sup>26</sup> *Ibid.*, 13.

<sup>27</sup> Jo-ann (Q’um Q’um Xiiem) Archibald, *Indigenous Storywork*, 24.

<sup>28</sup> John Borrows, “Earth-Bound: Indigenous Resurgence and Environmental Reconciliation,” in *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings*, edited by Michael Asch, John Borrows and James Tully (Toronto: University of Toronto Press, 2018), 59.

particular, plays significant importance to various aspects of Indigenous identity and knowledge, whether that be through creation stories, or ceremony. Margaret Kovach says that Indigenous knowledges are “bound to place.”<sup>29</sup> The totem poles of the Gitksan people of Northern British Columbia, for example, encapsulate their spiritual connection to land and people.<sup>30</sup> In Blackfoot culture, “everything has a spirit.”<sup>31</sup> Dina Gilio-Whitaker argues that Indigenous people are distinguished by settler societies by “their unbroken connection to ancestral homelands. Their cultures and identities are linked to their original places in ways that define them; they are reflected in language, place names, and cosmology (origin stories). From an Indigenous worldview, there is no separation between people and land, between people and other life forms, or between people and their ancient ancestors whose bones are infused in the land they inhabit and whose spirits permeate place.”<sup>32</sup> While land is understood from a western socioeconomic and colonial standpoint as a form of ownership, Indigenous peoples’ relationship to land is understood in a much different manner. As discussed by a Hopi Elder in 1990,

Hopi Land is held in trust in a spiritual way for the Great Spirit, Massau’u... This land was granted to the Hopi by a power greater than man can explain. Title is invested in the whole make-up of Hopi life. Everything is dependent on it... The Hopi were given special guidance in caring for our sacred lands so as not to disrupt the fragile harmony that hold things together... To us, it is unthinkable to give up control over our sacred lands to non-Hopis. We have no way to express exchange of sacred lands for money. It is alien to our ways. The Hopis never gave authority to anyone to dispose of our lands and heritage and religion for any price. We received these lands from the Great Spirit and we must hold them for him, as a steward, a caretaker, until he returns.<sup>33</sup>

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<sup>29</sup> Margaret Kovach, *Indigenous Methodologies: Characteristics, Conversations, and Contexts* (Toronto: University of Toronto Press, 2009), 37.

<sup>30</sup> Peter Knudtson and David Suzuki, *Wisdom of the Elders*, 128. “In the memorable words of Delgam Uukw, a Gitksan and Gisday Wa, a hereditary Wetsúweten chief (spoken in 1987 in support of their ongoing land claim suit against Canadian governments)

<sup>31</sup> Donald Duane Pepion, “Blackfoot Ceremony,” 130.

<sup>32</sup> Dina Gilio-Whitaker, *As Long as the Grass Grows: The Indigenous Fight for Environmental Justice, from Colonization to Standing Rock* (Boston: Beacon Press, 2019), 27.

<sup>33</sup> Peter Knudtson and David Suzuki, *Wisdom of the Elders*, 136. Spoken by a Hopi Elder [American Southwest] at his home in Kykotsomovie, Arizona March 1990, statement originally publically issued by Lomayaktewa, Starlie, Mina Lansa, Ned Nayatewa, Claude Kewanyama, Jack Pongayesvia, Thomas Banyacya, Sr., David Monogyne, and Carlotta Shattuck, under the title ‘Statement of Hopi Religious Leaders.’

This perspective is not unique to the Hopi people but is central to most Indigenous worldviews. Taiaiake Alfred and Jeff Corntassel discuss a concept referred to as “Land is Life,” meaning that Indigenous people “must reconnect with the terrain and geography of their Indigenous heritage if they are to comprehend the teachings and values of the ancestors,” thus connecting Indigenous knowledge to the land itself.<sup>34</sup> Lewis Cardinal explains Indigenous knowledge by identifying it with the terminology of “indigenous,” which defined by its Latin meaning of “born of the land,” is that Indigenous people, traditions, and customs are “shaped by the environment, the land, their relationship; their spiritual, emotional and physical relationship to that land. It speaks to them; it gives them their responsibility for stewardship.”<sup>35</sup>

What is important to understand from these examples is that Aboriginal title and Indigenous claims to land differ distinctly from the western understanding of ownership. It can be argued that Indigenous worldviews do not see Indigenous people as the “owners” of the land but, rather, as stewards in a lifelong relationship to the land, and one that must be honoured. The language of “ownership” however, arises in Indigenous land and title cases due to the legal system in which Canada has entrenched Indigenous rights.<sup>36</sup> This difference is the source of a fundamental tension that is not easily resolved. In order for Indigenous people to fight for these traditional relationships and their homelands, they must use the language of the colonial system. Little Bear discusses a “different land ownership concept, namely a collective, undivided ownership coupled with a charge to take care of the land for future generations” that is continuously fought and denied in the courts, regardless of the understanding that Indigenous people were the first ‘owners’ of the

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<sup>34</sup> Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgence against Contemporary Colonialism,” *Government and Opposition* 40, no. 4 (2005): 613.

<sup>35</sup> Shawn Wilson, *Research is Ceremony: Indigenous Research Methodologies*, (Halifax: Fernwood Publishing, 2008), 88.

<sup>36</sup> Canada, Statutes of Canada, *Canadian Constitution Act, 1982*. Referring to the entrenchment of Aboriginal rights in section 35(1).

land.<sup>37</sup> The claims over land in the courts shifts the balance of the cultural and spiritual relationship Indigenous people have with the land to a political and legal battle for the right to maintain that stewardship of the land. These two understandings of land and ownership are incompatible, both culturally and legally. Yet, because the Canadian courts recognize only the western understanding of ownership in land claims and rights disputes, Indigenous people are locked into a legal battle that is inconsistent with their own cultural laws and values.

## **4.2 Aboriginal Rights, Aboriginal Title, and Self-Determination**

I refer to the terminology of “Indigenous” throughout this thesis to reflect the internationally recognized and preferred terminology by Indigenous people to refer to themselves since the 1980s.<sup>38</sup> However, the Canadian government legally and constitutionally uses the terminology “Aboriginal” to refer to Indigenous people and rights, as cited in the Canadian *Constitution Act, 1982*.<sup>39</sup> As a result, the terminology of “Indigenous” and “Aboriginal” are used interchangeably throughout the following sections, depending on the author and context the terminology is used in.

Indigenous land claims deal with three main components: Indigenous rights, Indigenous title (also known in Canada as Aboriginal rights and title), particularly in comprehensive land claim disputes, and the self-determination of Indigenous people to their land and nations. These three components together are sufficient to establish political and legal authority for Indigenous people over their lands and nations, including how they are governed, used, and cared for. The

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<sup>37</sup> Leroy Little Bear, “Introduction,” *Queen's Law Journal* 15, no. 2 (1990): 175.

<sup>38</sup> Gregory Younging, *Elements of Indigenous Style: A Guide for Writing by and About Indigenous Peoples* (Brush Education Inc., 2018), 64. Younging states that “It is used in the UN Declaration on the Rights of Indigenous People, which has perhaps driven an increasing preference for Indigenous. The Canadian government and Department DIAND (Department of Indian and Northern Affairs) is currently Indigenous and Northern Affairs Canada.”

<sup>39</sup> Canada, Statutes of Canada, *Canadian Constitution Act, 1982*. See Section 35.



assertion of an Aboriginal right, whether a cultural right or land right, encapsulates an Indigenous connection to the land through a political and legal assertion, and thus asserts the existence of Indigenous sovereignty.

An Indigenous right is most simply defined as “an inherent and original right possessed collectively by Indigenous Peoples, and, in some cases, by individual Indigenous people,” either legally or culturally.<sup>40</sup> The Sparrow Test, established in *R. v. Sparrow* (1990), has been used by the courts to test the continued existence of Aboriginal rights, protected by the *Constitution Act, 1982*.<sup>41</sup> Indigenous title “refers to the Indigenous Right to collective ownership and jurisdiction over land and resources,” and like Indigenous rights, carry a moral and ethical imperative.”<sup>42</sup> Aboriginal title in the eyes of the courts is considered a sub-category of Aboriginal rights. In other words, Aboriginal title is legally an Aboriginal right that “deals solely with claims of rights to lands.”<sup>43</sup> The decision of the Court in *R. v. Van der Peet* (1996) does signify that Aboriginal rights differ from Aboriginal title as “Aboriginal rights arise from the prior occupation of land, but they also arise from the prior social organization and distinctive cultures of aboriginal peoples on that land.”<sup>44</sup>

As argued by Kent McNeil, the *Royal Proclamation of 1763* did not create Aboriginal title, but rather, that Aboriginal title existed prior to European colonization of the Americas. This has been recognized by the Supreme Court of Canada.<sup>45</sup> As argued in *Calder v. British Columbia (Attorney General)* (1973), Aboriginal Title in British Columbia predated the *Royal Proclamation*

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<sup>40</sup> Gregory Younging, *Elements of Indigenous Style: A Guide for Writing by and About Indigenous Peoples*, (Brush Education Inc., 2018), 65.

<sup>41</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 110-111.

<sup>42</sup> Gregory Younging, *Elements of Indigenous Style*, 66.

<sup>43</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 132, para. 74.

<sup>44</sup> *Ibid.*

<sup>45</sup> Kent McNeil, “The Meaning of Aboriginal Title,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, edited by Michael Asch (Vancouver: UBC Press, 1997), 135-136.

due to the fact that “when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries.”<sup>46</sup> In other words, “Aboriginal peoples’ rights to their traditional lands are not derived from the legal systems which the Europeans imposed upon them.”<sup>47</sup> It is important to note that the courts have avoided specifying “the precise legal origins of Aboriginal title.”<sup>48</sup>

Referring back to the problem Little Bear describes, of the difficulty in relating Aboriginal title to private property law, Aboriginal interest in land differs from “a fee simple estate derived from Crown grant or even from adverse possession [as most property is dealt with in civil law]... unlike a fee simple estate, it cannot be alienated other than by surrender to the Crown. Neither of these unique features, however, has any relation to the nature of the interest which flows from Aboriginal title.”<sup>49</sup> McNeil also argues that Aboriginal title cannot limit title to Indigenous use of the land at the time of colonial acquisition of sovereignty, deeming it both inappropriate and discriminatory.<sup>50</sup> Aboriginal title also extends beyond a western understanding of fee simple ownership, as it also encompasses an Indigenous right to self-government and jurisdictional rights, “rendering it equivalent to the concept of underlying title in Canadian legal theory.”<sup>51</sup>

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<sup>46</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 216. This was confirmed in *Tsilhqot’in Nation v. British Columbia* [2014] see John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 278.

<sup>47</sup> Kent McNeil, “The Meaning of Aboriginal Title,” 135-136. According to McNeil, this means that the decision in *St. Catherine’s Milling and Lumber Co. v. The Queen* (1888) that stated that Aboriginal title cannot be alienated other than to the Crown, was based on an “interpretation of the *Royal Proclamation* which their Lordships regarded as the sole source of Aboriginal land rights” see page 142. Also see John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 241, para. 114: in *Delgamuukw v. British Columbia* (1996), ““It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*...However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada by aboriginal peoples.”

<sup>48</sup> Kent McNeil, “The Meaning of Aboriginal Title,” 136.

<sup>49</sup> *Ibid.*, 144; Leroy Little Bear, “Introduction,” 175.

<sup>50</sup> Kent McNeil, “The Meaning of Aboriginal Title,” 144.

<sup>51</sup> Michael Asch and Norman Zlotkin, “Affirming Aboriginal Title: A New Basis for Comprehensive Claims,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, edited by Michael Asch (Vancouver: UBC Press, 1997), 214.

Aboriginal title does not solely relate to unceded land, since Indian title in reserve lands, however limited, contains an “all-encompassing interest, subject only to a restriction on alienation other than surrender to the Crown in whom the legal title is vested.”<sup>52</sup> *Delgamuukw v. British Columbia* (1997) also clarified that by the “for the use and benefit” clause in section 18(1) of the *Indian Act*, reserve lands, based on *Guerin v. The Queen* (1984), can be held “pursuant to aboriginal title” and used for the same “broad variety of purposes” as unceded lands.<sup>53</sup>

Aboriginal title has been contested and defined in a variety of Supreme Court cases in Canada. The most notable is *Delgamuukw v. British Columbia* (1997). *Delgamuukw* was the decision that created the test that is used to determine what constitutes a justified infringement on Aboriginal rights and title.<sup>54</sup> One of the largest impacts of the justification of infringement test is that it places the onus of proving Aboriginal title exists on Indigenous nations by showing proof of occupation prior to sovereignty, and the “continuity of the relationship of an aboriginal community with its land.”<sup>55</sup> *Delgamuukw* provided a thorough definition of Aboriginal title to be used in infringement cases. This definition created a clearer understanding of how Aboriginal title is considered and assessed when it comes to land rights and land claims. The court defined three relevant aspects of Aboriginal title to be relevant to the *Delgamuukw* case: “First, aboriginal title encompasses the right to exclusive use and occupation of land; second, aboriginal title encompasses the right to choose to what uses land can be put, subject to the ultimate limit that those uses cannot destroy the ability of the land to sustain future generations of aboriginal peoples; and third, that lands held pursuant to aboriginal title have inescapable economic component.”<sup>56</sup>

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<sup>52</sup> Kent McNeil, “The Meaning of Aboriginal Title,” 148-149. “This is clear from federal legislation, enacted under the authority of section 91(24) of the *Constitution Act, 1867*, which gives Parliament exclusive legislative jurisdiction over ‘Indians, and Lands reserved for Indians.’”

<sup>53</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 243, para. 121.

<sup>54</sup> *Ibid.*, 142.

<sup>55</sup> *Ibid.*, 244-245, para. 127; 247, para. 143; 252.

<sup>56</sup> *Ibid.*, 142.

The significance of this is that it constrains how Indigenous people can live and use their land, not only in the present but in the future, as well defines those uses within a capitalist economy. *Delgamuukw* also differentiates Aboriginal title from aboriginal rights as not only an exclusive use to land, but the use of that land “for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to distinctive aboriginal cultures.” It further specifies that these uses cannot be “irreconcilable with the nature of the group’s attachment to that land...”<sup>57</sup>

The infringement test was further clarified in *Tsilhqot’in Nation v. British Columbia* (2014) to determine how the courts would determine Aboriginal title to land for semi-nomadic Indigenous groups by clarifying what is determined to be “sufficient” occupation of land.<sup>58</sup> To determine this, the courts are required to use “a culturally sensitive approach to occupation based on the dual perspectives of the Aboriginal group in question – its laws, practices, size, technological ability and the character of the land claimed – and the common law notion of possession as a basis for title.”<sup>59</sup> *Tsilhqot’in Nation* also stated that Aboriginal title is restricted by the collective use of its title for future generations, which means that “it cannot be alienated except to the Crown or encumbered in ways that would prevent future generations of the benefit of the land.”<sup>60</sup>

Self-determination is a term used in international law. It refers to “‘The Divine Right of People;’ which was born out of the American (1776) and French (1789-99) revolutions. The term denotes the right of peoples to choose freely how they would be governed.”<sup>61</sup> Self-determination

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<sup>57</sup> Ibid., 242, para. 117.

<sup>58</sup> Ibid., 266, para. 24; 267, para. 33 and 34.

<sup>59</sup> Ibid., 268, para. 41.

<sup>60</sup> Ibid., 272, para. 74.

<sup>61</sup> Gregory Younging, *Elements of Indigenous Style*, 68. Younging argues self-determination replaced self-government amongst Indigenous people in the 1980s.

for Indigenous people can be thought of in a larger context of international human rights law.<sup>62</sup> For members of traditional communities, human rights law allows for any individual to choose their way of life. Thus for members of a collective traditional community, “that choice of a way of life must be guaranteed.”<sup>63</sup> So long as individuals are able to “shape, maintain, and influence the evolution of community institutions,” self-determination of Indigenous nations falls directly in line with international human rights law.<sup>64</sup> Thus, the further entrenchment of self-determination and human rights in the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) falls directly in line with human rights law as well.<sup>65</sup>

### **4.3 Colonialism – Economic, Political and Legal Subordination**

From a western Euro-Canadian standpoint land has always taken on a different perspective than from an Indigenous standpoint. Land equals power: political, economic, and legal, as well as wealth and control. The acquisition of lands through war and colonialism is the foundation in which Canada was founded. In today’s modern era, this understanding of land as the securement of power, wealth and control is what dictates Canada’s relationship with Indigenous people, Indigenous lands and thus Indigenous land claims.

Canada was created, and is maintained, through a colonial system. Historically, this was

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<sup>62</sup> See Jennifer Balint, Julie Evans, and Nesam McMillan, “Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,” *International Journal of Transitional Justice* 8, no. 2 (2014): 194-216; Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd edition (Ithaca, NY: Cornell University Press, 2013) Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge: Cambridge University Press, 2017); Paul Nadasdy, *Sovereignty’s Entailments: First Nation State Formation in the Yukon* (Toronto: University of Toronto Press, 2017); and Rosemary Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission,” *The International Journal of Transitional Justice* 7, (2012): 52-73.

<sup>63</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice*, 153.

<sup>64</sup> *Ibid.*

<sup>65</sup> United Nations, The General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, 8. *Article 3*: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. *Article 4*: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

the result of external colonialism, which allowed for European settlement across North America. The Canadian Truth and Reconciliation Commission (TRC) argued that Canada's Indigenous policy for over a century was to "eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada."<sup>66</sup> This policy, which they describe as cultural genocide, was key to the seizure of Indigenous lands, rights, and people.<sup>67</sup>

The colonization of Indigenous lands was most successfully achieved through the signing of the historical treaties, which are discussed more in depth in the next chapter. Most notable here is that in the eyes of the Euro-Canadian powers, the treaties were understood as the transfer of Indigenous lands to Crown control. The mythology of treaties as "mechanisms through which Indigenous peoples surrendered not just land but also our associated powers of governance" argues Gina Starblanket, "promulgate misinformation, half-truths and uncertainty about Indigenous peoples' political status that cloud the contemporary legal and political implications of treaty relationships."<sup>68</sup> These mythologies, Starblanket claims, are the cause of the continued proliferation of Canadian legitimacies of title of Indigenous lands in Canada.<sup>69</sup>

Once Canada became its own nation, essentially independent from the British Crown, a

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<sup>66</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 1.

<sup>67</sup> Ibid. The TRC defines cultural genocide as the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next. In its dealing with Aboriginal people, Canada did all these things.

<sup>68</sup> Gina Starblanket, "The Numbered Treaties and the Politics of Incoherency," *Canadian Journal of Political Science* 52, (2019): 446.

<sup>69</sup> Ibid.

new form of colonialism supplanted Indigenous people.<sup>70</sup> It has become to be known as “settler-colonialism,” or “internal colonialism,” which Ward Churchill defines as

the result of an especially virulent and totalizing socioeconomic and political penetration whereby the colonizing power quite literally swallows up contiguous areas and peoples, incorporating them directly into itself. In a closely related variation known as ‘settler-state colonialism,’ the colonializing power exports a sufficient portion of its own population (‘settlers’), to supplant rather than simply subordinate the indigenous people(s) of the colony. Often, under such conditions, the settler population itself eventually revolts against the Mother Country and establishes itself as an independent or quasi-independent sovereignty. Indigenous peoples/nations are consequently encapsulated within the resulting ‘settler-state’s’ claimed territory rather than being subject to the more classic formula of domination from abroad.<sup>71</sup>

What is unique about this definition is that it describes colonialism not as a past action, but as a continuous action that defines the Canadian-Indigenous relationship in the modern era. Internal colonialism as the determinate of the current Canadian-Indigenous relationship is reflected through the arguments on colonialism presented by Alfred and Corntassel. According to Alfred and Corntassel, “Indigeness is an identity constructed, shaped and lived in the politicized context of contemporary colonialism... It is this oppositional, place-based existence, along with the consciousness of being in struggle against the dispossessing and demeaning fact of colonization by foreign peoples, that fundamentally distinguishes Indigenous peoples from other peoples of the world.”<sup>72</sup>

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<sup>70</sup> See Michael Asch, John Borrows and James Tully, *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018); Carole Blackburn, “The Treaty Relationship and Settler Colonialism in Canada,” in *Shifting Forms of Continental Colonialism: Unfinished Struggles and Tensions*, edited by Diitmar Schorkowitz, John R. Chávez, and Ingo W. Schröder (Singapore: Palgrave Macmillan, 2019), 415-435; Robyn Green, “The Economics of Reconciliation: Tracing Investments in Indigenous-Settler Relations,” *Journal of Genocide Research* 17, no. 4 (2015): 473-493; James [Sákéj] Youngblood Henderson, “Treaty Governance,” in *Aboriginal Self-Government in Canada: Current Trends and Issues*, edited by Yale D. Belanger (Saskatoon: Purich Publishing Ltd, 2008), 20-38; Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Winnipeg: Fernwood Publishing, 2016); Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties: Theorizing Post-Colonial States in Settler Colonies,” *Studies in Social Science* 12, no. 2 (2018):388-405; and Patrick Wolfe, “Settler Colonialism and the Elimination of the Native,” *Journal of Genocide Research* 8, no. 4 (2006): 387-409.

<sup>71</sup> Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide, and Colonization*, (Winnipeg: Arbeiter Ring Publishing, 1999), 25.

<sup>72</sup> Taiaiake Alfred and Jeff Corntassel, “Being Indigenous,” 597.

The conflict between the Euro-Canadian and Indigenous understanding of land rights is fundamental and is reflected in Canadian constitutional law. Federal Crown title to land is still viewed as superior to Aboriginal title.<sup>73</sup> Aboriginal title is constantly in contention with Canadian law as the Crown presumes that it holds underlying title to all lands in Canada, meaning it assumes “it has legitimate jurisdiction to govern and enforce its laws in all regions,” including land where Aboriginal title has not been extinguished.<sup>74</sup> Michael Asch and Norman Zlotkin argue that to the colonial legal system in which Aboriginal title cases are contested, the courts will favor Crown sovereignty due to an ethnocentric bias.<sup>75</sup> They argue that one of the clearest examples of this is the idea of the Doctrine of Discovery, which transferred underlying title to the land to European powers upon European “discovery,” meaning that Indigenous people simply became occupants of the land in the eyes of the Crown.<sup>76</sup> According to the TRC, the Doctrine of Discovery “was linked to [the] idea: the lands being claimed were *terra nullius*—no man’s land—and therefore open to claim... Under this doctrine, imperialists could argue that the presence of Indigenous people did not void a claim of *terra nullius*, since the Indigenous people simply occupied, rather than owned, the land.”<sup>77</sup> Today, land claims have replaced the language of cession and ownership, showing that Canada’s policies regarding Indigenous land have changed little since early colonial history.

The Canadian government assumes its underlying title is superior and is constantly working to find ways to claim Indigenous lands. The historical treaties have now given way to modern land claim agreements and parliamentary legislation such as the First Nations Property Ownership Act (FNPOA), which proposed the opening of Indigenous reserve lands to provincial

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<sup>73</sup> Michael Asch and Norman Zlotkin, “Affirming Aboriginal Title, 223.

<sup>74</sup> *Ibid.*, 222.

<sup>75</sup> *Ibid.*, 223.

<sup>76</sup> *Ibid.*, 223.

<sup>77</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 46.



law jurisdiction through the process of fee simple ownership privatization and the individualizing of Indigenous lands.<sup>78</sup> Pamela Palmater argues that legislation such as the FNPOA, which she has herself called the Flannagan National Petroleum Ownership Act, “will do more to open reserve lands to oil, gas, and mining companies than it will bring prosperity to First Nations.”<sup>79</sup> The processes for converting Indigenous lands into economic wells for the federal government is possible because of the discrepancies allowed through the legal definitions of Aboriginal title and Indigenous land rights that have been provided by the Canadian court systems, a colonial legal system.

Looking at how the courts understand Aboriginal title provides insight into how land is valued and characterize from a western Euro-Canadian understanding. In *Delgamukw v. British Columbia* (1997), the court differentiated Aboriginal title from an Aboriginal right to fish or hunt, due to Aboriginal title’s “inescapably economic aspect,” which in modern use requires compensation, or a payment, for use or infringement, discussed as settlement for the breach of fiduciary duty.<sup>80</sup> The understanding as Aboriginal title as an encompassing and economic claim was further accentuated in *Tsilhqot’in Nation v. British Columbia* (2014) where, the court ruled that “Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to pro-actively use and manage the land.”<sup>81</sup>

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<sup>78</sup> Pamela Palmater, *Indigenous Nationhood: Empowering Grassroots Citizens* (Halifax and Winnipeg: Fernwood Publishing, 2015), 193-194.

<sup>79</sup> Ibid. The name “Flannagan National Petroleum Ownership Act” Palmater references is from Tom Flannagan and his work *Beyond the Indian Act: Restoring Aboriginal Property Rights*.

<sup>80</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 143-144.

<sup>81</sup> Ibid., 272, para. 73.

The inescapable economic component of Aboriginal title can offer an answer as to why the Canadian government has made it so difficult to sign land claim agreements, which result in the full return of power and control of the lands over to Indigenous people. Canada desires to retain control over Indigenous lands, both unceded and reserve lands, because of the economic benefit they receive from the lands. Section 2(k) of the *Indian Act* states that underlying title of reserve lands remains with the Crown, of which, includes “all the trees, wood, timber, soil, stone, minerals, metals and other valuables thereon or therein.”<sup>82</sup> Churchill argues that in both Canada and the United States, the lands left to Indigenous people for reserves are some of the richest in natural minerals and resources, equal to roughly sixty percent of “all known U.S. ‘domestic’ uranium reserves and a quarter of its low-sulfur coal lie under Indian land. In addition, as much as a fifth of the oil and natural gas are in reservation areas,” with comparable figures in Canada.<sup>83</sup> From these figures, he argues that Indigenous people in North America should be “among the continent’s wealthiest residents,” yet he argues they “receive the lowest per capita income of any population group and evidence every standard indicator of dire poverty: the highest rates of malnutrition, plague disease, death by exposure, infant mortality, teen suicide, and so on.”<sup>84</sup> Like the land itself, the surrender of its resources was never consented by Indigenous peoples. In 1981, Wayne Christian, a delegate of the little known Constitutional Express to the United Nations, expressed to members of the UN that “I don’t think they ever gave much thought to how the wealth of Canada comes from the resources... and we never surrendered those resources.”<sup>85</sup>

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<sup>82</sup> Canada, Revised Statutes of Canada, *Indian Act*, 1985. c. I-6, s. 1, <https://laws-lois.justice.gc.ca/eng/acts/i-5/FullText.html>.

<sup>83</sup> Ward Churchill, *Struggle for the Land*, 239-240.

<sup>84</sup> *Ibid.*

<sup>85</sup> Joel Hebert, “‘Sacred Trust’: Rethinking Late British Decolonization in Indigenous Canada.” *Journal of British Studies* 58, (2019): 576.

#### 4.4 Conclusions

The economic importance of land shows that the conflict over Indigenous lands is not just a historical matter, but one of current political importance. The mere existence of land claims, Eva Mackey argues, shows that the colonial powers of Canada failed to remove Indigenous people permanently from this land. Land rights conflicts are “deeply embodied, grounded, and material disputes that are also about interpretations of history, justice, and identity because they raise the difficult question of who is entitled to ownership of the national homeland.”<sup>86</sup> According to Mackey, “Colonial and national struggles for possession of Indigenous land were, and continue to be, material conflicts that dispossess Indigenous peoples for the benefit of others in settler nation-states.”<sup>87</sup> In the next chapter, I look more closely at the colonial relationship of Indigenous nations and Canada and examine the importance of this relationships and its implications in modern treaties and modern land claim disputes.

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<sup>86</sup> Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Halifax and Winnipeg: Fernwood Publishing, 2016), 5.

<sup>87</sup> *Ibid.*, 4.

## Chapter Five

### 5 Modern Treaties and Land Claims

Land claim disputes—how they arise, how they are settled, and what it means for Indigenous nationhood—is the central idea of this thesis. However, in order to make sense of the argument, it is important to understand what a land claim is and what the process is for settling one. A land claim results where there is a dispute over Indigenous lands between Indigenous nations and the Crown. Most often, a land claim is the result of a dispute over unceded lands where historical treaties with the British Crown were never signed.<sup>1</sup> It can also be over lands signed under historical treaty that show inconsistencies or omissions in the official government treaty records or the *Indian Act*.<sup>2</sup> When a new agreement results from the settlement of a dispute over unceded land, the agreement is referred to as a modern treaty. Treaties are protected by Sections 25 and 35 of the *Constitution Act, 1982*. Section 35 states under subsection (3): “For greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.”<sup>3</sup> Thus, land claim agreements in Canadian law maintain the same constitutional protection as the historical treaties that preceded them.<sup>4</sup> This chapter will first look at the notions

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<sup>1</sup> Canada, “A History of Treaty Making in Canada,” Crown-Indigenous Relations and Northern Affairs Canada, modified September 2, 2011, <https://www.rcaanc-cirmac.gc.ca/eng/1314977704533/1544620451420>; Canada, “Treaties and Agreements,” Crown-Indigenous Relations and Northern Affairs Canada, modified September 11, 2018, <https://www.rcaanc-cirmac.gc.ca/eng/1100100028574/1529354437231>.

<sup>2</sup> *Ibid.*

<sup>3</sup> John Borrows, and Leonard Rotman, *Aboriginal Legal Issues: Cases, Material and Commentary*, 5<sup>th</sup> edition (Toronto: LexisNexis Canada Publishing, 2018), 380. See section 35(3) of *Constitution Act, 1982*. Canada, Statutes of Canada, *Canadian Constitution Act, 1982*, 1982, c. 11, <https://laws-lois.justice.gc.ca/eng/const/page-16.html>.

<sup>4</sup> John Borrows, and Leonard Rotman, *Aboriginal Legal Issues*, 380. Treaty rights are also protected under Section 25 of the Constitution Act, 1982 in *The Canadian Charter of Rights and Freedoms*: “The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763 (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

of Indigenous sovereignty and the original nation-to-nation treaties that were signed before looking at the shift to the modern treaty process.

## 5.1 Recognition of Indigenous Sovereignty

The notion of Indigenous sovereignty has historically been a contentious issue when it comes to the relationship between Indigenous nations and the Crown, particularly in regards to Indigenous lands and title.<sup>5</sup> Xavier Scott argues that the theory of sovereignty developed in early-modern Europe “to distinguish European, imperial violence from Indigenous violence, which takes place in the ‘state of nature,’ and thus promote European rule of law and encourage colonization and genocide in the ‘New World.’”<sup>6</sup> The idea of Indigenous sovereignty was established only to justify assimilation and conquest, thus it existed in European law as a “quasi-form of sovereignty” used to legitimize the conquest of lands and people.<sup>7</sup> Scott argues that through this concept, Indigenous nations had “just enough sovereignty to enter into treaties that legitimate the occupation of their land and establish the sovereign authority of the colonial powers, but not enough to meaningfully exercise their sovereign right to territorial control.”<sup>8</sup> This is important because it causes the assumption of the Crown’s underlying sovereignty to Indigenous lands to be considered as

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<sup>5</sup> Paul Nadsady, *Sovereignty’s Entailments: First Nation State Formation in the Yukon* (Toronto: University of Toronto Press, 2017), 57.

<sup>6</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties: Theorizing Post-Colonial States in Settler Colonies,” *Studies in Social Science* 12, no. 2 (2018): 391. This comes from Francisco de Vitoria’s creation of an international legal definition of Indigenous sovereignty that rationalized European property rights to Indigenous lands, and thus rationalized colonization, see page 392. Scott defines Sovereignty in international law as “the concept of a nation, whose people invest a supreme authority with a monopoly over the legitimate use of violence, which has absolute legal jurisdiction over a given territory, and is recognized by other sovereign states.”

<sup>7</sup> *Ibid.*, 393.

<sup>8</sup> *Ibid.* See Paul Nadsady, *Sovereignty’s Entailments*, 57. Nadsady argues that while the *Royal Proclamation* affirms Indigenous sovereignty, it also defined the process for extinguishing that sovereignty through the “sale” of Indigenous lands, leading to the creation of the historical treaty agreements.

justification for the historical and current exclusion of Indigenous sovereignty and assertions of self-determination in Canada. This is most clearly interpreted in the *Royal Proclamation of 1763*.<sup>9</sup>

The *Royal Proclamation* is argued to be the British Crown's affirmation of Indigenous sovereignty. This is further affirmed in the Canadian *Constitution Act, 1982*, through the protection of Aboriginal and Treaty Rights in Section 25 of *The Canadian Charter of Rights and Freedoms*.<sup>10</sup> However, the extinguishment of Aboriginal title through treaties designed in the *Royal Proclamation* is inherently inconsistent to the notion of Indigenous sovereignty, by favouring the idea of the Crown holding underlying title and control over Indigenous people and land.<sup>11</sup> Gina Starblanket argues that through colonization and dispossession, the Canadian treaty making process denies "Indigenous sovereignty and jurisdiction."<sup>12</sup> This is due to the clauses of "extinguishment" of Indigenous lands used in treaties, which make it difficult for Indigenous people to assert their sovereign rights to land in the Canadian legal system.

Indigenous definitions of sovereignty exist separate from those created by European colonial laws. According to Henderson, "Aboriginal sovereignty and governance exist because First Nations had their own confederated civilization with distinct governance, law, and economies

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<sup>9</sup> See King George III, *Royal Proclamation 1763* (London: Mark Baskett, Printer to the King's most Excellent Majesty and by Assigns of Robert Baskett, 1763), in "250<sup>th</sup> Anniversary of the Royal Proclamation of 1763," Indigenous and Northern Affairs Canada, modified March 8, 2016, <https://www.aadnc-aandc.gc.ca/eng/1370355181092/1370355203645#a1>. The *Royal Proclamation of 1763* states "...that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories..."

<sup>10</sup> Canada, Statutes of Canada, *Canadian Constitution Act*. See Section 25: The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763.

<sup>11</sup> See Michael Asch, and Norman Zlotkin, "Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, edited by Michael Asch (Vancouver: UBC Press, 1997), 222. Asch and Zlotkin state that "Currently, the Crown presumes that it holds underlying title to all of Canada and that Aboriginal title represents, at best, a mere encumbrance on that title. Because of its presumption of title, the Crown assumes that it has legitimate jurisdiction to govern and enforce its laws in all regions, including those regions in which Aboriginal title has not been extinguished."

<sup>12</sup> Gina Starblanket, "The Numbered Treaties and the Politics of Incoherency," *Canadian Journal of Political Science* 52, (2019): 443.

prior to the imperial treaties.”<sup>13</sup> Indigenous sovereignties exist within and apart from Canadian sovereignty. According to Simpson, “One does not entirely negate the other, but they necessarily stand in terrific tension and pose serious jurisdictional and normative challenges to each other... like Indigenous bodies, Indigenous sovereignties and Indigenous political orders prevail within and apart from settler governance.”<sup>14</sup> The tension created by these coexisting and conflicting bodies of sovereignty is what leads to land claim disputes when the assertion of sovereignty to land is challenged by Indigenous nations against the Canadian government.

## 5.2 Nation-to-Nation Agreements

The notion of Indigenous nationhood is inherent in the assertion of Indigenous sovereignty in the treaty making process.<sup>15</sup> While the *Royal Proclamation* may have dictated a European concept of treaty making that extinguished Indigenous rights, Indigenous nations have conversely held the *Royal Proclamation* to be an assertion of Indigenous nationhood and a confirmation of a “relationship of mutual support, respect, and assistance,” negotiated in good faith, and, in fact, ratified by over 2000 Indigenous leaders at the Treaty of Niagara in 1764.<sup>16</sup> According to Harold Cardinal, the *Royal Proclamation*, as a treaty between the British Crown and Indigenous nations, represented an “Indian Magna Carta,” and as argued by Joel Herbert, the “cornerstone of

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<sup>13</sup> James [Sákéj] Youngblood Henderson, “Treaty Governance,” in *Aboriginal Self-Government in Canada: Current Trends and Issues*, edited by Yale D. Belanger (Saskatoon: Purich Publishing Ltd, 2008), 20.

<sup>14</sup> Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014), 10-12.

<sup>15</sup> Gregory Younging defines “nation” in relationship to Indigenous people as the widely-accepted notion amongst Indigenous people to describe Indigenous groups as separate political entities. This serves as an assertion that Indigenous people “meet the four criteria of nationhood under customary international law (as first set out in the Montevideo Convention of 1933), which are a permanent population, a definite occupied territory, a government, and the ability to enter into relations with other nations.” See Gregory Younging, *Elements of Indigenous Style: A Guide for Writing by and About Indigenous Peoples* (Brush Education Inc., 2018), 68.

<sup>16</sup> 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* (Winnipeg: Library and Archives Canada Cataloguing in Publication, 2015), 184 and 197.

Indigenous peoples' trust relationship with the Crown," for over 250 years.<sup>17</sup> This matters because it clearly shows that Indigenous people held sovereignty in their own right before the arrival of Europeans and had the power to assert that sovereignty in the signing of the *Royal Proclamation* with the British Crown.

Herbert states that the *Royal Proclamation* established the initial nation-to-nation relationship between Indigenous nations, the British, and settler colonies that affirmed Indigenous sovereignty that existed previous to the arrival of Europeans.<sup>18</sup> Indigenous nations maintained active roles in treaty making with European nations, not only during and after the *Royal Proclamation*, but also before. When non-Indigenous settlers arrived on Indigenous lands, they were dealt with in the same manner as other Indigenous nations, following the same protocols, which included the signing of treaties.<sup>19</sup> The clearest and earliest notion of the "original intent" of a nation-to-nation agreement between Indigenous nations and European notions is *Guswenta*, also known as the Two Row Wampum treaty, between the Haudensaunee Nations and the Dutch.<sup>20</sup> This treaty dates back to 1613 and is known as a "living treaty."<sup>21</sup> Representatives of the Haudensaunee Confederacy describe *Guswenta* as a living treaty between two different peoples on two different paths of life living separately but in "peace, friendship, and respect."<sup>22</sup>

It is interesting to note that the Government of Canada and Canadian law do not recognize *Guswenta* as the first formal alliance between Indigenous and European nations in Canadian

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<sup>17</sup> Joel Herbert, "Sacred Trust": Rethinking Late British Decolonization in Indigenous Canada," *Journal of British Studies* 58 (2019): 569.

<sup>18</sup> *Ibid.*, 567.

<sup>19</sup> Sharon Venne, "Understanding Treaty 6: An indigenous Perspective," in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, edited by Michael Asch (Vancouver: UBC Press, 1997), 184.

<sup>20</sup> Oneida Nation, "Two Row Wampum – Guswenta," Oneida Nation, modified 2018, <https://www.onondaganation.org/culture/wampum/two-row-wampum-belt-guswenta/>.

<sup>21</sup> *Ibid.*

<sup>22</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back* (Ottawa: Canada Communications Group – Publishing, 1996), 97.



history, perhaps due to its nature with Dutch and not British powers. If the Canadian government did recognize its significance, then the treaty relationship that exists between Indigenous nations and the Canadian government would have to be honoured more as nation-to-nation sovereignties than the fiduciary system that is honoured now. The failure to recognize *Guswenta* as the first treaty agreement allows the Canadian government to ignore the nation-to-nation contexts of not only treaties, but true intent of Canada's relationships with Indigenous nations. Canadian legal tradition cites the Treaty of Albany in 1664 as the "first formal alliance between Aboriginal peoples in North America and the British Crown," in which the Haudenosaunee nations formalized their military ally-ship from previously only the Dutch to include the British.<sup>23</sup> However, unlike a military alliance, *Guswenta* more deeply describes a relationship of trust and coexistence between Indigenous and European nations. The War of 1812, Scott argues, shifted the nation-to-nation relationship to that of one that "deprived Indigenous communities of nationhood."<sup>24</sup>

While the Government of Canada continues to understand treaties as Indigenous nations' "cede, release, surrender, and yield" of Indigenous lands and Aboriginal title to those lands, Indigenous nations have continued to honour the original intent of treaties signed with early European nations.<sup>25</sup> Yet, it is the failure of the Canadian government to honour the original intent of these treaties that has caused a break in the relationship of trust between Indigenous people and Canadians.<sup>26</sup> Understanding this break in trust between Indigenous nations and the Government of Canada is crucial to understanding not only the barriers in resolving Indigenous land claim disputes, but also the source of conflict that is necessary to be resolved in order for meaningful reconciliation to occur in Canada.

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<sup>23</sup> John Borrows and Leonard Rotman, *Aboriginal Legal Issues*, 11-12.

<sup>24</sup> Xavier Scott, "Repairing Broken Relations by Repairing Broken Treaties," 394.

<sup>25</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 53.

<sup>26</sup> *Ibid.*, 184.

### 5.3 Colonialism and The Treaty Record

Recognition of Indigenous nations as having the same international status as nation-states is still a highly contentious concept. Sharon Venne argues that the exclusion of Indigenous nations from international law relates to the doctrine of discovery.<sup>27</sup> The doctrine of discovery and *terra nullius* are part of the international property law conceptual framework that was used by European powers as justifications for colonizing Indigenous lands.<sup>28</sup> The principle of *terra nullius* refers to the idea of “vacant land” in which lands then inhabited by Indigenous communities were declared to be “legally vacant,” or “land not possessed (in specific, culturally recognizable, ways) by either an individual or a sovereign power is open to claims of ownership.”<sup>29</sup> According to the Canadian Truth and Reconciliation Commission (TRC), under the doctrine of discovery, “imperialists could argue that the presence of Indigenous people did not void a claim of *terra nullius*, since the Indigenous people simply occupied, rather than owned, the land. True ownership, they claimed, could come only with European-style agriculture.”<sup>30</sup> This is important because it diminishes Indigenous rights and title to land, which in the modern context of land claims makes it more difficult for Indigenous nations to assert Indigenous sovereignty to land in the Canadian legal system.

*Terra nullius* became incorporated into the treaty process by allowing for the notion of the British Crown’s underlying title to land to cloud the treaty records. This created what Starblanket refers to as the “politics of incoherency,” which are part of a broader process of “colonial unknowing.”<sup>31</sup> Starblanket argues that this “functions to sustain settler claims to sovereignty by

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<sup>27</sup> Sharon Venne, “Understanding Treaty 6,” 185.

<sup>28</sup> Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Winnipeg: Fernwood Publishing, 2016), 47.

<sup>29</sup> Ibid.

<sup>30</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 46.

<sup>31</sup> Gina Starblanket, “The Numbered Treaties and the Politics of Incoherency,” 445.

disavowing the current and constitutive nature of colonialism.”<sup>32</sup> This is most easily found in the inconsistency between Indigenous oral histories of treaty records and the Crown’s written records of negotiations to the actual written text of the treaties themselves.<sup>33</sup> During the historical treaty making process, the Treaty commissioners “repeatedly assured the First Nations that the Crown had no intention of interfering with their worldview, their languages, their way of life, or their livelihood, in the treaties.”<sup>34</sup> In the record of the negotiations for the Numbered Treaties One through Seven that were written by Treaty Commissioner Alexander Morris, the stated purpose of the treaties was “securing the good will of the Indian tribes, and by the helpful hand of the Dominion, opening up to them, a future of promise, based upon the foundations of instruction and the many other advantages of civilized life,” while allowing for the white settlement of the fertile belt.<sup>35</sup>

In Treaty Seven, for example, Morris’s written record of the negotiations shows communication through translators to the Blackfoot chiefs of specific terms of the prepared Treaty, including the setting aside of reserve land for the exclusive use of the Blackfoot nations as well as for the ranching of cattle, annuity payments for each member, and the allowance of the British Queen’s “white children to come and live on your land and raise cattle...”<sup>36</sup> The oral history of the Treaty Seven negotiations follows in a manner similar to Morris’s account. George First Rider tells the story of “the Given to Us,” which was the account of Treaty Seven that his father attended.<sup>37</sup> In First Riders account,

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<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> James [Sákéj] Youngblood Henderson, “Treaty Governance,” 23.

<sup>35</sup> Alexander Morris, *The treaties of Canada with the Indians of Manitoba and the North-West Territories: Including the Negotiations on Which They Were Based, and Other Information Relating Thereto* (Toronto: Belfords, Clarke and Co. Publishers, 1880), Preface.

<sup>36</sup> Ibid., 250-269.

<sup>37</sup> Adolf Hungry Wolf, *The Blood People: A Division of the Blackfoot Confederacy, an Illustrated Interpretation of the Old Ways* (New York: Harper and Row, Publishers, 1977), 229-230.

That day, when they were given the promises, there was no one of us that was educated and spoke white-man talk. The interpreter was not a full Indian, and he left out a lot of words. There were a lot of words that he didn't translate... The Old People couldn't make the white people swear on the pipe because they didn't believe in it. So the Old People were shown to swear on the longest term of life. They were made to swear on the Holy Writings [the Bible]... But they swore in their own way: 'When the Sun ceases to shine, and the rivers have flown away dry, and the grass no longer grows, that will be the end of the Treaty – the education, rations, medical care – all these promises in our life.'<sup>38</sup>

Nothing in these records demonstrates that any land was ever ceded. In fact, it is stated in the treaty negotiation transcripts that “that nothing would be taken away from [the Blackfoot people] without their own consent.”<sup>39</sup> However, the written record of Treaty Seven states,

And whereas the said Commissioners have proceeded to negotiate a treaty with the said Indians; and the same has been finally agreed upon and concluded as follows, that is to say: the Blackfeet, Blood, Peigan, 'Sarcee,' Stony and other Indians inhabiting the district hereinafter more fully described and defined, do hereby *cede, release, surrender, and yield* up to the Government of Canada and Her Majesty the Queen and her successors forever, all their rights, titles and privileges whatsoever to the lands included within the following limits...<sup>40</sup>

These inconsistencies are not exclusive to Treaty Seven or the Numbered Treaties but are inherent in many of the historical treaty records. These are therefore the foundation of many land claim disputes, resulting in specific claims, in modern times.

#### **5.4 Land Claims Policy: 50 years of uncertainty**

The current land claims settlement process was created in 1973 as a result of a series of court decisions made including *Kanatewat et al. v. James Bay Development Corp. et al.* (1975) filed against the Superior Court of Quebec in 1972, *Calder v. British Columbia (Attorney General)* (1973), and *Paulette v. Registrar of Titles (No. 2)* (1973).<sup>41</sup> Prior to 1973, there was no clear

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<sup>38</sup> Ibid.

<sup>39</sup> Alexander Morris, *The treaties of Canada with the Indians of Manitoba and the North-West Territories*, 274-275.

<sup>40</sup> Ibid., 368-369. See “The Treaty with The Blackfeet, Number Seven.” Emphasis added in italics.

<sup>41</sup> Canada, “A History of Treaty Making in Canada.” *Kanatewat et al. v. James Bay Development Corp. et al.*, (1975) can also be found listed as *Chief Kanatewat et al. v. Quebec (Attorney General)* (1972).

mechanism for settling land claim disputes. With the conclusion of the Williams Treaties in 1923, the Government of Canada ceased its process of signing historical treaties, the original version of land agreements that were signed between the Crown and Indigenous peoples.<sup>42</sup> Any land claim disputes that came up between 1923 and 1973 were settled through the Canadian courts as civil law cases. By 1973, the courts were beginning to see clear evidence that Aboriginal title still existed unextinguished, meaning that there were Indigenous lands where no treaties were signed with the Crown and thus Aboriginal title remained with Indigenous people, in various areas of Canada and that Indigenous people were willing to fight for title. Notably, in *Calder*, the Court found that not only had the Nishga Indian Tribe's Aboriginal title never been extinguished since they had never been conquered and "nor did they at any time enter into a treaty or deed of surrender," the Court also determined that Aboriginal title itself existed *sui generis* from European power.<sup>43</sup> In other words, Aboriginal title existed before the *Royal Proclamation of 1763*. The Court stated: "the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries."<sup>44</sup> *Calder*, in fact, challenged the assessment and interpretation of historical documents and enactments in their current form, stressing that present-day research and knowledge must disregard "ancient concepts" and understandings of Indigenous people as "subhuman species."<sup>45</sup> *Calder*, with *Paulette* and *Kanatewat et al.* ushered in the need for a new process for settling outstanding land claims.

In 1973, the Government of Canada created two new policies for settling land claim disputes known as the Comprehensive and Specific Claims policies. According to the Government of

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<sup>42</sup> Canada, "Upper Canada Land Surrenders and the Williams Treaties (1764-1862/1923)," Crown-Indigenous Relations and Northern Affairs Canada, modified February 15, 2013, <https://www.rcaanc-cirnac.gc.ca/eng/1360941656761/1544619778887#uc>.

<sup>43</sup> John Borrows, and Leonard Rotman, *Aboriginal Legal Issues*, 214, 216, and 220.

<sup>44</sup> *Ibid.*, 216.

<sup>45</sup> *Ibid.*, 221.

Canada, these processes were created “to settle land claims through negotiation where Aboriginal rights and title would be transferred to the Crown through a settlement agreement which guaranteed defined rights and benefits for the signatories.”<sup>46</sup> This language signaled that from that time forward the government had decided that land claim settlements are an extension of the same policy used to settle historical treaties. In other words, the government viewed treaties as a colonial process of land surrender and the extinguishment of the rights of Indigenous people.

The juxtaposition of settling nation-to-nation agreements over land in the context of the domestic legal system of one nation cannot be understated here. Treaties in international law are settled as nation-to-nation agreements within international courts. Since Indigenous nations view treaties as nation-to-nation agreements, and the Government of Canada has affirmed this view in the spirit of reconciliation, there is an inherent problem in the fact that Indigenous claims are settled in Canadian courts.<sup>47</sup> From this perspective, these land claim policies are not set up for the assertion of Indigenous rights, they are set up in favour of the colonial powers who wish to extinguish them.

## 5.5 Specific Claims Policy

The Specific Claims Policy deals with “claims relating to the nonfulfilment of ‘lawful obligations’ flowing from the *Indian Act* or treaties.”<sup>48</sup> The policy underwent attempts at improvement in mid-1980s and early 1990s culminating in the creation of the Indian Specific Claims Commission to review decisions taken by the Ministry of Crown-Indigenous Relations (then Department of Indian

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<sup>46</sup> Canada, “A History of Treaty Making in Canada.”

<sup>47</sup> Carole Blackburn “The Treaty Relationship and Settler Colonialism in Canada,” in *Shifting Forms of Continental Colonialism: Unfinished Struggles and Tensions*, edited by Diitmar Schorkowitz, John R. Chávez, and Ingo W. Shröder (Singapore: Palgrave Macmillan, 2019), 430. Minister Carolyn Bennett stated that the dissolution of the Department of Indigenous Affairs in the Ministry of Crown-Indigenous relations was in the spirit of returning to the original nation-to-nation relationship between Canada and Indigenous people, in the spirit of reconciliation.

<sup>48</sup> Canada, “A History of Treaty Making in Canada.”

Affairs) regarding claims, as well as make recommendations.<sup>49</sup> A new independent body, known as the Specific Claims Tribunal, was created under the *Specific Claims Tribunal Act* by recommendation of the Senate’s Standing Committee on Aboriginal Peoples. The Specific Claims Tribunal has authority to make binding decisions “in respect to the validity of claims and compensation.”<sup>50</sup> The Tribunal came into effect on October 16<sup>th</sup> 2008.<sup>51</sup> According to Bradford Morse, “Specific claims relate to unfulfilled treaty promises, the maladministration of reserve lands or band trust funds and other assets. These type of land claims can also be negotiated or litigated... Specific claims are the avenues through which First Nations have challenged the mismanagement and fraud of their assets by the federal government, such as the illegal sale of their land.”<sup>52</sup>

There have been 1937 specific land claims filed against the Government of Canada since 1973.<sup>53</sup> As of 2019, 1003 claims had been concluded; 548 of these were settled through negotiations, 8 were awarded compensation by the Specific Claims Tribunal, 414 held “no lawful obligation found,” and 33 were “resolved through administrative remedy,” and an additional 316 had their file closed.<sup>54</sup> According to the “National Summary on Specific Claims,” 618 claims remained outstanding at the time of this writing.<sup>55</sup> It is estimated that seventy percent of First Nations in Canada have unsettled specific claims. These outstanding specific claims, argues Morse

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Bradford W. Morse, “Regaining Recognition of the Inherent Right of Aboriginal Governance,” in *Aboriginal Self-Government in Canada: Current Trends and Issues*, edited by Yale D. Belanger (Saskatoon: Purich Publishing Ltd., 2008), 58.

<sup>53</sup> Canada, “Specific Claims Branch: National Summary on Specific Claims,” Crown-Indigenous Relations and Northern Affairs Canada, modified September 21, 2020, [https://services.aadnc-aandc.gc.ca/SCBRI\\_E/Main/ReportingCentre/External/externalreporting.aspx](https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx).

<sup>54</sup> Ibid.

<sup>55</sup> Ibid.

are “one of the causes of the dire socioeconomic position of Aboriginal peoples in Canada.”<sup>56</sup> Morse argues that unresolved claims “create a potential multi-billion dollar liability for the Canadian government that must eventually be paid.”<sup>57</sup> Between 2019 and 2020, for example, the federal government is recorded to have paid out \$382,727,794 CAD in settlements in Ontario alone.<sup>58</sup> Between 2012 and 2013 the recorded share of the federal government was even higher at \$414,809,789 CAD paid in settlements in Ontario alone.<sup>59</sup> Through the Specific Claims Tribunal, the Canadian government has found a means to resolve its dilemma of paying out settlements by creating a resolution that “contains the potential of significantly augmenting the land base of First Nations as well as providing desperately necessary capital to spark the economic activity that is so indispensable to effective governance.”<sup>60</sup>

## 5.6 Comprehensive Claims Policy

The Comprehensive Claims Policy is known as the modern treaty process and deals with outstanding land claim disputes where no historical treaties were previously negotiated.<sup>61</sup> The first Comprehensive Land Claim Agreement, or the first modern treaty, to be negotiated was the James Bay and Northern Quebec Agreement in 1975, which came as a direct result of the previous court litigation surrounding Aboriginal title and land rights in 1972 and 1973.<sup>62</sup> Since 1975, there have been 26 modern treaties negotiated with 97 Indigenous nations, encompassing 87 000 Indigenous

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<sup>56</sup> Bradford W. Morse, “Regaining Recognition of the Inherent Right of Aboriginal Governance,” 59.

<sup>57</sup> *Ibid.*, 59-60.

<sup>58</sup> Canada, “Specific Claims Branch: Settlement Report on Specific Claims,” Crown-Indigenous Relations and Northern Affairs Canada, modified September 21, 2020, [https://services.aadnc-aandc.gc.ca/SCBRI\\_E/Main/ReportingCentre/External/externalreporting.aspx](https://services.aadnc-aandc.gc.ca/SCBRI_E/Main/ReportingCentre/External/externalreporting.aspx).

<sup>59</sup> *Ibid.*

<sup>60</sup> Bradford W. Morse, “Regaining Recognition of the Inherent Right of Aboriginal Governance,” 59-60.

<sup>61</sup> Canada, “Treaties and Agreements.”

<sup>62</sup> *Ibid.* The court cases mentioned include, the 1972 litigation presented by the Cree of Northern Quebec against the Superior Court of Quebec, *Calder v. British Columbia (Attorney General)* (1973), and *Paulette v. Registrar of Titles (No. 2)* (1973).



people.<sup>63</sup> These modern treaties effect “nearly half of Canada’s land, waters and resources,” including significantly parts of British Columbia, northern Quebec, the Northwest Territories, and Yukon.<sup>64</sup> The Comprehensive Claims Policy has been modified to address Indigenous concerns, notably in 1986 and 1991; in 1986 a new option for transferring rights and titles was added, “as well as a broader scope of rights and other issues,” and in 1991 the removal of the cap on the number of ongoing negotiations was completed.<sup>65</sup>

While modern treaty agreements maintain the same constitutional protection as historical treaties under the *Constitution Act, 1982* under Section 35, they are far more complex negotiations both in process and outcome.<sup>66</sup> According to John Borrows and Leonard Rotman, modern treaty agreements follow the same “canons of treaty interpretation” in the Canadian legal system as do historical treaties, yet the Canadian courts have yet to resolve how to apply those cannons to modern agreements where Indigenous nations are “far more familiar with the English language used in the treaties, as well as many of the concepts incorporated in those agreements.”<sup>67</sup> This has resulted in further government policies to allow for better negotiation tools and implementations for modern treaties. For example, in 1992 the British Columbia Treaty Commission was completed to deal specifically to the large unceded tracts of land in British Columbia. In 1995 they enacted the Inherent Right to Self-Government Policy, which was meant to negotiate “practical arrangements with First Nations to make a return to self-government a reality.”<sup>68</sup> Since 1995, there have been seventeen self-government agreements, most of which are part of larger Comprehensive

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<sup>63</sup> Ibid.

<sup>64</sup> John Borrows, and Leonard Rotman, *Aboriginal Legal Issues*, 380; Canada, “A History of Treaty Making in Canada.”

<sup>65</sup> Canada, “A History of Treaty Making in Canada.”

<sup>66</sup> John Borrows, and Leonard Rotman, *Aboriginal Legal Issues*, 380.

<sup>67</sup> Ibid., 380-381.

<sup>68</sup> Canada, “A History of Treaty Making in Canada.”

Land Claim Agreements.<sup>69</sup> Despite these new policies, modern treaties have fallen to the precedent of historical treaties in failing to fully implement agreements, resulting in further litigation such as the recent *Quebec (Attorney General) v. Moses* (2010), which dealt with the failure to implement the 1975 James Bay and Northern Quebec Agreement.<sup>70</sup>

According to a 2015 Government of Canada report on the comprehensive land claims process, comprehensive land claim agreements were described as having been “designed to provide certainty and predictability over land and resources.”<sup>71</sup> According to Mackey, this means promoting a stable environment for capitalist investment.<sup>72</sup> Michael Asch and Norman Zlotkin also argued that the Comprehensive Claims Policy aims to “replace uncertainty with certainty and resolve debates and legal ambiguities—the central one being the undefined nature of Aboriginal rights.”<sup>73</sup> The result of this attempt at certainty is that the Canadian federal government now requires Indigenous people to “relinquish undefined Aboriginal rights which they may have with respect to lands or resources, in favour of the rights and benefits which are written down in the settlement agreement.”<sup>74</sup> According to Asch and Zlotkin, the federal government describes this relinquishment clause as a means for Indigenous nations to “exchange undefined rights for rights that are defined and certain, with the stated aim of providing Aboriginal parties with benefits,” all while avoiding the language of “extinguishment,” which is what the relinquishment clause actually accomplishes.<sup>75</sup> What cannot be ignored is that although modern treaties are settled by means of

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<sup>69</sup> Ibid.

<sup>70</sup> John Borrows, and Leonard Rotman, *Aboriginal Legal Issues*, 381.

<sup>71</sup> Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Winnipeg: Fernwood Publishing, 2016), 60-61.

<sup>72</sup> Ibid.

<sup>73</sup> Michael Asch and Norman Zlotkin, “Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations,” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference*, edited by Michael Asch (Vancouver: UBC Press, 1997), 213.

<sup>74</sup> Ibid. Stated from the 1993 *Federal Policy for the Settlement of Native Claims*, Department of Indian Affairs and Northern Development.

<sup>75</sup> Ibid.

court litigation, the process is little unchanged by the historical treaties that preceded them. In order for Indigenous nations to proceed with negotiations to assert their Aboriginal title and rights to land, they must first relinquish that title and all existing rights to land to the federal government. The treaty rights that are protected under the Canadian *Constitution Act, 1982*, cannot be accessed by Indigenous people without first signing away Aboriginal title in modern treaties.<sup>76</sup>

The economic component of Indigenous land and Aboriginal title effectively makes the modern treaty process a new iteration of old settler colonial policies. Carole Blackburn argues that by “freeing up land and facilitating resource extraction, treaty making in these untreated areas of Canada is consistent with the imperatives of settler colonialism, which is always to bring land into the reach of either settlement or development.”<sup>77</sup> Since the *Royal Proclamation of 1763*, the British Crown, and now the Government of Canada, has been in a process of constantly amending its Indigenous policy to fit the political atmosphere, while refusing to sacrifice its own economic intentions. This is clear with the introduction of the Specific and Comprehensive Claims Policies in 1973, the Inherent Right to Self-Government Policy in 1995, and most recently the dissolution of the Department of Indigenous Affairs into the rebranded Ministry of Crown-Indigenous Relations and Ministry of Indigenous Services in 2017.<sup>78</sup> This rebranding of Indigenous Affairs simply creates the appearance of meaningful reconciliation for Indigenous nations, but in reality it is simply the reincarnation of the treaty policies that preceded it. The purpose of the Ministry of Crown-Indigenous Relations is to focus on the settling of land claims disputes, or “fulfilling the

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<sup>76</sup> See Canada, “Renewing the Comprehensive Land Claims Policy.” According to Government of Canada, not all modern treaties require full cession of Aboriginal Title in comprehensive claims negotiations, but rather the “legal reconciliation technique” seeks to establish a clear process that reconciles Aboriginal Title with the Canadian Government’s objectives for a treaty and which “cannot be used to undermine the agreement of the parties.”

<sup>77</sup> Carole Blackburn “The Treaty Relationship and Settler Colonialism in Canada,” in *Shifting Forms of Continental Colonialism: Unfinished Struggles and Tensions*, edited by Diitmar Schorkowitz, John R. Chávez, and Ingo W. Schröder (Singapore: Palgrave Macmillan, 2019), 430.

<sup>78</sup> *Ibid.*, 416.

federal government's treaty obligations.”<sup>79</sup> The Government of Canada's official statement was that the creation of the new Ministries, as stated by Minister Carolyn Bennett, was in the spirit of decolonization and reconciling the original nation-to-nation agreement.<sup>80</sup> However, Blackburn argues that “Current Canadian government rhetoric is replete with talk of reconciliation, a new relationship, and decolonization, but there is no actual political transition to accompany this rhetoric.”<sup>81</sup> What is clear is that regardless of the policy, the goal remains consolidating Indigenous lands into Crown possession as efficiently as possible. This is not the kind of reconciliation Indigenous people desire.

## **5.7 Inherent Right to Self-Government Policy**

The idea of extinguishment and diminishing of sovereignty carries through in the Inherent Right to Self-Government Policy, which states, “the inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states.’ ...and that ‘Aboriginal governments and institutions exercising the inherent right of self-government will operate within the framework of the Canadian constitution.”<sup>82</sup> Thus the policy retroactively works to diminish and exclude Indigenous sovereignty and the promotion of Indigenous nationhood within itself. Paul Nadsady argues that Canada introduced these clauses to calm ideas of secession, due to increased Indigenous activism in the 1990s<sup>83</sup>

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<sup>79</sup> Ibid.

<sup>80</sup> Ibid., 430.

<sup>81</sup> Ibid.

<sup>82</sup> Paul Nadsady, *Sovereignty's Entailments*, 60.

<sup>83</sup> Ibid. Referencing the 1990 Oka Crisis.

In some instances, Nadsady argues that the signing of self-government agreements through comprehensive land claims has replaced the *Indian Act* for modern treaties. Nadsady argues that new self-governing First Nations are merely an evolution of the *Indian Act* established band councils who preceded them, since they have inherited the responsibilities for the administration and delivery of programs and services, along with new programs and services, while still only receiving historical band funding levels.<sup>84</sup> Nadsady also argues that the creation of bands from Canadian colonial policies resulted in further differentiation and division amongst Indigenous nations, particularly in the Yukon, which became accentuated through land claims settlements and growing band membership.<sup>85</sup> As a result, it is plausible that land claims and self-government agreements will only result in the evolution of the previous colonial policies and administration within Indigenous nations that existed, due to historical treaties and the *Indian Act*, and not necessarily increased Indigenous sovereignty. Yet, what more can be expected out of a policy that extinguishes and diminishes Indigenous rights, keeping Indigenous people locked within the confines of a colonial system.

## **5.8 Conclusions**

It is clear that Canada's land claim policies are highly flawed and do not offer Indigenous people the chance for increased sovereignty or the promotion and protection of Indigenous rights, all are necessary components of meaningful reconciliation for Indigenous people. Yet land claim negotiations can fail. Disputes over land title are sometimes ignored, despite the existence of these policies. Canada has already seen instances of what happens when land rights come into conflict with Canadian colonial policies, sometimes to devastating ends with national impact.

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<sup>84</sup> Ibid., 105-106.

<sup>85</sup> Ibid., 206.

For example, in the summer of 1990, the Mohawks of Kanesatake came up against the Canadian military and the Quebec provincial police in a deadly confrontation in Oka, Quebec, in what came to be known as the Oka Crisis. The confrontation was a result of a barricade set up by the people of Kanesatake to protect sacred Mohawk burial grounds located within the forest that were located within the city's plans for the development of a golf course.<sup>86</sup> The barricade and resulting crisis was the accumulation of Kanesatake's more than 200-year old land claim and fight for recognition for their traditional lands, which stretched over 400 square kilometers.<sup>87</sup> This is what historian J. R. Miller refers to as "proof of Canada's failed Indian [land] claims policy."<sup>88</sup> The standoff lasted 78 days and involved armed military confrontation between the Mohawk warriors and the Canadian army.<sup>89</sup> The Oka Crisis sparked the need for the Royal Commission on Aboriginal Peoples (RCAP) in 1991, which looked at the condition of Indigenous people, showing a need for nationwide change and reconciliation in Canada.<sup>90</sup>

What reconciliation means and how did RCAP and other commissions, such as the 2015 Canadian Truth and Reconciliation Commission (TRC), impact land claims disputes and the settlement process in Canada is now the question that must be addressed in discussing the land claim question. Whether there been a change in how Canada deals with Indigenous land claims and will land claims really lead to reconciliation between Indigenous nations and Canada in the future will be discussed through the next few chapters.

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<sup>86</sup> 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* (Winnipeg: Library and Archives Canada Cataloguing in Publication, 2015), 185-186.

<sup>87</sup> Ibid.; Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples. Volume I: Looking Forward, Looking Back* (Ottawa: Canada Communications Group – Publishing, 1996), 196. The Kanesatake land claim dispute in question had existed since the 1700s

<sup>88</sup> Ibid.

<sup>89</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 185-186.

<sup>90</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, 199.

## Chapter Six

### 6 The Canadian Truth and Reconciliation Commission on the Land Claim Process

Transitional justice as a field of scholarship and practice generally considers societies with “histories of extreme, even genocidal, levels of violence.”<sup>1</sup> Traditionally, this was thought of only with post-conflict, undemocratic societies. But increasingly, there has been a sense that it can also be useful in the process of reconciling settler Canadians and Indigenous people.<sup>2</sup> An issue with traditional transitional justice studies, which Xavier Scott argues requires critical re-examination, is the assumption that “liberal-democratic regimes are the solution to, rather than the cause of, such abuses,” like those experienced by Indigenous people in settler-colonial societies.<sup>3</sup> This is because of the lack of “formal transition” from authoritarian regimes to democratic regimes, which causes “state-sanctioned approaches to reconciliation” to situate abuses of settler colonialism in the past, rather than the occurring present.<sup>4</sup> In a transitional society, or a settler-colonial society like Canada, transitional justice mechanisms establish key issues of past conflicts that require resolution. Yet, often times, these mechanisms do not address issues of economic development,

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<sup>1</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties: Theorizing Post-Colonial States in Settler Colonies,” *Studies in Social Science* 12, no. 2 (2018): 396.

<sup>2</sup> Ibid. See also Jennifer Balint, Julie Evans, and Nesam McMillan, “Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,” *International Journal of Transitional Justice* 8, no. 2 (2014): 194-216; Jeff Corntassel and Cindy Holder, “Who’s Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru,” *Human Rights Review*, no. 9 (2008): 465-489; Rosemary Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission,” *The International Journal of Transitional Justice* 7, (2012): 52-73; Ronald Niezen, *Truth and Indignation: Canada’s Truth and Reconciliation Commission on Indian Residential Schools* (Toronto: University of Toronto Press, 2013); and Brian Rice and Anna Snyder, “Reconciliation in the Context of a Settler Society: Healing the Legacy of Colonialism in Canada,” in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, edited by Marlene Brant-Castellano, Linda Archibald, and Mike DeGagné (Ottawa: Aboriginal Healing Foundation, 2008), 45-61.

<sup>3</sup> Ibid., 397.

<sup>4</sup> Ibid., 398. See Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 108.

resource distribution or wealth and power inequality.<sup>5</sup> The focus on individual accountability of civil and political rights by transitional justice mechanisms shows an institutional bias that ignores the impact social hierarchies in the socioeconomic contexts at hand.<sup>6</sup> Because of this, transitional justice mechanisms and institutions separate issues of development and economic inequality from conflict, which does not allow for them to be properly addressed, prosecuted or amnestied.<sup>7</sup>

In chapter four, I discussed the issues of economic disparity that arise from conflicting values in land and the impact of colonization. Chapter Five discussed the loss of trust that existed from broken treaty relationships between Indigenous nations and Canada. Roger Duthie argues that development and transitional justice are inherently linked and can promote civic trust, which can lead to increased social capital and thus overall societal development.<sup>8</sup> Violations of economic and social rights, which are key issues of development, can be directly addressed by transitional justice mechanisms when they address the “root causes of conflict and the structural and distributional inequalities that may have facilitated civil and political abuses, related to such issues as conflict resources, land, corruption, civil society, education and health.”<sup>9</sup> When it comes to resolving issues of inequality in land and development, trust is essential. The building and establishment of trust is also central to many common transitional justice mechanisms, such as truth commissions. This chapter will look at the use of truth commissions as a transitional justice mechanism in settler-colonial societies, in particular the 2015 Canadian Truth and Reconciliation Commission, and its impact on land claims and reconciliation in Canada.

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<sup>5</sup> Zinaida Miller, “Effects of Invisibility: In Search of the ‘Economic’ in Transitional Justice,” *International Journal of Transitional Justice* 2, no. 3 (2008): 268.

<sup>6</sup> *Ibid.*, 275 and 277.

<sup>7</sup> *Ibid.*, 268.

<sup>8</sup> Roger Duthie, “Toward a Development Sensitive Approach to TJ,” *International Journal of Transitional Justice* 2, no. 3 (2008): 298-299.

<sup>9</sup> *Ibid.*, 301.



## 6.1 What is a Truth Commission?

Truth commissions first developed when international law was seeking new means for holding criminal and human rights violators accountable, post-World War II era, in the 1970s.<sup>10</sup> The large-scale rise in human rights violations in emerging democracies, often referred to as transitional states, in the later twentieth century, also resulted in a rise in truth commissions to cope with the sheer context of state violations.<sup>11</sup> A truth commission can be defined as “an ad hoc, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.”<sup>12</sup> Truth commissions are often seen as more relevant mechanisms to promoting reconciliation because of their association with restorative justice and “the moral rehabilitation of society,” focussing on “transforming anger, resentment, and vengeance to community-building, particularly by emphasizing reconciliation.”<sup>13</sup> Truth commissions’ central focus on truth telling, establishing the truth of past harms, which as an objective of transitional justice itself, has contributed to its global widespread popularity.<sup>14</sup>

There are four main characteristics that distinguish truth commissions from other “investigative commissions,” as described by Eric Wiebelhaus-Brahm. Truth commissions 1) focus on past, often recent past, events 2) are an investigation of a pattern of abuses that span a

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<sup>10</sup> Kim Pamela Stanton, “Truth Commissions and Public Inquiries: Addressing Historical Injustices in Establishing Democracies,” (PhD Dissertation, The University of Toronto, 2010), 16.

<sup>11</sup> *Ibid.*, 19.

<sup>12</sup> Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy* (New York: Routledge, 2010), 3-4.

<sup>13</sup> *Ibid.*, 10; and Siri Gloppen, “Roads to Reconciliation: A Conceptual Framework,” in *Roads to Reconciliation*, edited by Elin Skaar, Siri Gloppen, and Astri Suhrke (Lanham, Maryland: Lexington Books, 2005), 37.

<sup>14</sup> Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 7 and 10; Siri Gloppen, “Roads to Reconciliation,” 37.

full political era (such as a period of civil conflict, a government administration tenure) 3) are temporary (typically lasting six months to two years) and 4) are an independent state sanctioned, authorized and empowered body.<sup>15</sup> State sanctioned authority is incredibly important to truth commissions as they often are seen to promote democracy by their identification and recommendation of “special legal and institutional reforms that will enable the country to achieve the long-term social, economic, and political objectives that are essential to ensuring a better future.”<sup>16</sup> However, while truth commissions operate outside of the judicial legal system, they do not have legal power to impose sanctions or possess the power to prosecute, and thus operate as only mechanisms of truth telling, often referred to as “soft” and ineffective forms of justice.<sup>17</sup> It can also be argued that truth commissions’ democratic favourability is a direct result of the liberal democratic states that facilitate their operations, and their weak implementation powers which can cause them to cave to domestic and international pressures.<sup>18</sup> A more realistic measure of the lasting impact of a truth commissions can be more appropriately be described as “whether developments with respect to democracy or human rights would have been possible without the truth commission.”<sup>19</sup>

The effectiveness of truth commissions in liberal settler colonial societies can be hindered due to the conflicting central ideas about reconciliation and democracy. Gutmann and Thompson argue that “reconciliation is an illiberal aim.”<sup>20</sup> Robert I. Rotberg argues that “disharmony is desirable and an attribute of a healthy democracy.”<sup>21</sup> Restorative justice focuses on the desire of

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<sup>15</sup> Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 4.

<sup>16</sup> *Ibid.*, 23.

<sup>17</sup> *Ibid.*, 15 and Siri Gloppen, “Roads to Reconciliation,” 27.

<sup>18</sup> Eric Wiebelhaus-Brahm, *Truth Commissions and Transitional Societies*, 26-27.

<sup>19</sup> *Ibid.*, 27.

<sup>20</sup> Robert I. Rotberg, “Truth Commissions and the Provision of Truth, Justice, and Reconciliation,” in *Truth v. Justice: The Morality of Truth Commissions*, edited by Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 9.

<sup>21</sup> *Ibid.*

creating a new nation by reconstructing society. Punishment and the prosecution of criminals “hinders the achievement of restorative justice,” with forgiveness and reconciliation through truth commissions being a better alternative path towards restorative justice.<sup>22</sup> Rotberg states that “Truth commissions are intended to be both preventative and restorative.”<sup>23</sup> Reparations are essential to the restorative aspect of the truth commission process, which is seen to be complete when victims obtain financial redress as well as knowledge (‘truth’), and a moral sense of completion.”<sup>24</sup> In regards to the preventative aspect, truth commissions empower public awareness and increase human comprehensibility in hopes to deter future human rights violations.<sup>25</sup> Truth commissions and criminal trials serve different purposes, and although they may overlap in the same subject matter, “neither can fill the role of the other.”<sup>26</sup> Truth commissions can contribute to a clearer and fuller understanding of the rule of law through truth telling on what caused the initial abuses, while fostering civic trust. Civic trust is essential within legal systems not only between citizens, but with institutions as well.<sup>27</sup>

Truth commissions can more broadly consider the social factors that contribute to inequality and address broader socioeconomic root causes of conflicts that are often treated as

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<sup>22</sup> Ibid., 10-11.

<sup>23</sup> Ibid., 3.

<sup>24</sup> Ibid., 10-11.

<sup>25</sup> Martha Minow, “The Hope for Healing: What can truth commissions do?” in *Truth v. Justice*, edited by Robert I. Rotberg and Dennis Thompson (Princeton: Princeton University Press, 2000), 235.

<sup>26</sup> Priscilla Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York: Routledge, 2002), 87-88.

<sup>27</sup> Pablo de Greiff, “Truth Telling and the Rule of Law,” in *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, edited by Tristan Anne Borer (Notre Dame, Indiana: University of Notre Dame Press, 2006) 185 and 188-189. de Greiff defines the rule of law from an article established by Harry Jones in 1950s, within the American context, as “a tradition of decision, a tradition embodying at least three indispensable elements: first, that every person whose interest will be affected by a judicial or administrative decision has the right to a meaningful ‘day in court’; second, the deciding officers shall be independent in the full sense, free from external direction by political or administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and third, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due accounts both of the demands of general principle and the demands of the particular situation.” See pages 190-191.

background information by other transitional justice mechanisms.<sup>28</sup> However, truth commissions often have limited mandates that focus on only civil and political human rights violations and fail to address socioeconomic violations.<sup>29</sup> Truth commissions can initiate long-term societal reforms, but to do so they must examine the larger socioeconomic conditions of conflict as “consequences of conscious policy decisions that fail to protect fundamental rights.”<sup>30</sup> They can also expose social contracts that have been broken, showing faults in civic trust, that can reveal how socioeconomic conditions violated human rights.<sup>31</sup> This is really important considering the large scope of Indigenous land rights and title disputes in Canada, and the socioeconomic factors that were revealed to be linked to these by the 2015 Canadian Truth and Reconciliation Commission. Exposing the socioeconomic roots of conflict expands “the notion of justice within the transitional justice paradigm,” or the cycle of violence, which prioritizes social justice in post-conflict recovery, placing the onus of addressing these socioeconomic factors on the state.<sup>32</sup> However, because transitional justice mechanisms are typically national in their scope and function, post conflict recovery often relies on the state itself to right its own wrongs, regardless of whether there is international pressure.<sup>33</sup> This means that outside international law, nations are not required to implement recommendations by transitional justice mechanisms that lack legal authority, such as truth commissions.

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<sup>28</sup> Zinaida Miller, “Effects of Invisibility,” 276; and Lisa J. Laplante, “Transitional Justice and Peace Building: Diagnosing and Addressing the Socioeconomic Roots of Violence through a Human Rights Framework,” *International Journal of Transitional Justice* 2, no. 3 (2008): 334-335.

<sup>29</sup> Lisa J. Laplante, “Transitional Justice and Peace Building,” 334-335.

<sup>30</sup> *Ibid.*, 342.

<sup>31</sup> *Ibid.*, 350.

<sup>32</sup> *Ibid.*, 351.

<sup>33</sup> *Ibid.*

## 6.2 The Canadian Truth and Reconciliation Commission: First of Its Kind?

The Canadian Truth and Reconciliation Commission (TRC) was formed as a result of a class action law settlement, more formally known as the Indian Residential Schools Settlement Agreement (IRSSA), of the former Indigenous students of 139 Indian Residential Schools against the Government of Canada, churches, and related organizations.<sup>34</sup> An estimated 18 000 lawsuits involved in the 2005 civil suit seeking compensation for abuse, treatment, and language and culture loss as a result of the Canadian Indian Residential School System (IRS) were settled in the form of the IRSSA in 2006 (and approved in 2007).<sup>35</sup> The settlement consisted of five main contingencies, including the funding for compensation in the form of a “Common Experience Payment” to each former student, and the formation of the TRC, by the Canadian federal government.<sup>36</sup> Parties of the Settlement Agreement appointed three commissioners in 2008: the Honourable Justice Harry Laforme as Chair, Jane Brewin-Morley and Claudette Dumont-Smith. However, all three shortly resigned and were replaced by the Honourable Justice Murray Sinclair as Chair, and Chief Wilton Littlechild and Dr. Marie Wilson in 2009.<sup>37</sup>

According to its mandate, the TRC was “to report on ‘the history, purpose, operation and supervision’ of Canada’s residential schools,” yet it also included a much broader look at Canada’s colonial practices and policies, including cultural assimilation, genocide, the exploitation and marginalization of Indigenous people and lands.<sup>38</sup> The TRC worked for six years during which the commissioners travelled across Canada conducting seven national events to educate the Canadian

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<sup>34</sup> 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* (Winnipeg: Library and Archives Canada Cataloguing in Publication, 2015), 130.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid., 23.

<sup>38</sup> Ibid., 43-44.

public on the history of the IRS and the experiences of its students. It also conducted community events centered on truth telling and giving communities, and all those affected by the IRS, including former students and their families, the opportunity to share and record their experiences to provide historical research and facilitate reconciliation.<sup>39</sup> Whether these community events were public or private was the choice of the communities themselves.<sup>40</sup>

The TRC's mandate explicitly stated that it was "not to act as a public inquiry or to conduct a formal legal process, it will, therefore, not duplicate in whole or in part the function of criminal investigations, the Independent Assessment Process, court actions, or make recommendations on matters already covered in the Agreement."<sup>41</sup> Thus, the mandate removed any ability for the TRC to have any legal power to enforce action or meaningful change as a result of truth-telling. Commissions are independent from the Canadian judiciaries and legislatures, which gives them the ability to more broadly investigate social causes and conditions. Therefore, they are more valuable in defining public policy and in promoting government accountability, which can help establish civic trust.<sup>42</sup> However, because they lack legal power to impose sanctions, they become reliant on political actors to enforce their recommendations.<sup>43</sup> Since not all political actors will be willing to enforce these recommendations on their own will, the lack of legal power by truth commissions has large implications in the actual re-establishment of civic trust, particularly in settler-colonial societies.

What is unique about the Canadian TRC, from a global position, is that it was the first state-sponsored "truth commission" to be convoked in an established democracy.<sup>44</sup> Public

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<sup>39</sup> Ibid., v and 346-348.

<sup>40</sup> Ibid., 350.

<sup>41</sup> Ibid., 343.

<sup>42</sup> Kim Pamela Stanton, "Truth Commissions and Public Inquiries," 11.

<sup>43</sup> Ibid., 12-13.

<sup>44</sup> Ibid., 1.

inquiries are the more common legal mechanism that is used to address historical injustices in established democracies.<sup>45</sup> That the Canadian TRC referred to itself as a truth commission is notable since, as an established democracy with functioning civic and judicial processes, Canada has the privilege to design its own institutional mechanisms to address these type of injustices.<sup>46</sup> The credit is due almost entirely to the Residential School Survivors who negotiated the IRSSA, and who demanded the need for a truth commission *and* reconciliation specifically to address the need for truth and justice and not the Government of Canada itself. As Kim Stanton rightfully argues, none of them would not have chosen a truth commission as their first choice.<sup>47</sup> This arguably could be due to the Canadian government's lack of interest in being seen internationally as anything that does not fit its peacefully multicultural visage. A truth commission into the abuses of Indigenous people within Canada would rightfully dismantle that image.

According to Stanton, "A truth commission is a specialized form of public inquiry, distinguished by its symbolic acknowledgement of historical injustices and its explicit social function of public education about those injustices."<sup>48</sup> While a public inquiry and a truth commission both review a nation's recent past abuses in order to create an accurate public record, truth commissions typically address historical conditions that preceded whatever event is under investigation in order to "investigate practices that affected a minority group about which the wider population was unaware," and thus create a more powerful public impact.<sup>49</sup> According to Stanton, a truth commission is best understood as a specific kind of commission of inquiry to address human

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<sup>45</sup> Ibid.

<sup>46</sup> Ibid., 35-36.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid., 23-24. Stanton defines a public inquiry as any body that is formally mandated by a government, either on an *ad hoc* basis or with reference to a specific problem, to conduct a process of fact-finding and to arrive at a body of recommendations."

<sup>49</sup> Ibid., 24-26.

rights violations while focusing on achieving social goals.<sup>50</sup> In Canada both a “royal commission” and a “commission of inquiry” are identical as public inquiries with the same powers and privileges.<sup>51</sup> A royal commission differs from a commission of inquiry, which focuses on more discrete issues, whereas a royal commission is a mechanism for “tackling large and pressing concerns of institutional and policy reform.”<sup>52</sup> Stanton argues that the 1997 Royal Commission on Aboriginal Peoples (RCAP), a royal commission, should actually be defined as a truth commission.<sup>53</sup> The TRC was not officially a commission of inquiry appointed under the *Inquiries Act*. It was a product of the Indian Residential Schools Settlement Agreement. This is important to note because the TRC is not the first public inquiry to look into the treatment of Indigenous people in Canada. It is similar to earlier public inquiries, like RCAP, even if it was not appointed by, or legally empowered through, the regular process as set out in the *Inquiries Act*.

Before the Canadian TRC was launched, in June of 2007 National Chief Phil Fontaine denied that the TRC was modelled after the South African Truth and Reconciliation Commission that took place from 1995 to 2001.<sup>54</sup> However, it has since become widely accepted that the Canadian TRC, like many truth commissions around the world, was modeled after the earlier South African TRC. The South African TRC investigated the Apartheid period (1961-1994) and examined the “gross human rights abuses on all sides to the conflict.”<sup>55</sup> The South African TRC, which was established by the South African Parliament, was highly recognized for its transparency in educating the public on the official findings of the truth telling process through constant press,

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<sup>50</sup> Ibid., 15-16.

<sup>51</sup> Ibid., 9-10.

<sup>52</sup> Ibid., 11.

<sup>53</sup> Ibid., 26. The title “royal” has been reserved in Canadian practice for commissions related to policy, and since the Canadian TRC looks at the history of Canada’s “Indian Policy” it should be given the title of Royal as well. See pages 9-10.

<sup>54</sup> Ibid., 22.

<sup>55</sup> Siri Gloppen, “Roads to Reconciliation,” 28. See Table 2.3.



television and radio coverage.<sup>56</sup> Unlike the Canadian TRC, the South African TRC also had amnesty powers, granting amnesty to 7000 perpetrators, exempting them from criminal prosecutions, in exchange for evidence on their crimes against humanity, arguing that “truth for amnesty” would lead to a more “enriched form of justice” needed in the reconciliation process.<sup>57</sup> Those who were granted amnesty had to prove their crimes had been politically motivated, and in turn their criminal exemption also insured the state “from any liability that might flow from acts committed by those persons granted amnesty.”<sup>58</sup> Thus, although the South African TRC did have legal authority to seek justice, that power had to be compromised in favour of the state. Regardless, it appears that the positives of truth for amnesty in the South African TRC outweighed the negatives, leading to its widespread popularity as a model for truth commissions worldwide.<sup>59</sup>

The South African TRC dealt little with the broader implications of land and socioeconomic restitution, arguably because of the limitations of its enacting statute, which narrowed the scope of the inquiry “to one solely about gross human rights violations, which were defined as severe physical mistreatment.”<sup>60</sup> This is one way in which the Canadian TRC differed. The South African TRC commissioners felt they were constrained by “a number of legal provisions” in their mandate that focused on individual human rights abuses that were the result of political and legal policies, and by a responsibility to uncover the truth and ensure due process of law.<sup>61</sup> Thus, any larger socioeconomic factors addressed were included not as human rights violations on their own, but as the background to larger human rights violations that occurred

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<sup>56</sup> Robert I. Rotberg, “Truth Commissions and the Provision of Truth, Justice, and Reconciliation,” 5.

<sup>57</sup> *Ibid.*, 14-15.

<sup>58</sup> Priscilla Hayner, *Unspeakable Truths*, 98-99.

<sup>59</sup> Robert I. Rotberg, “Truth Commissions and the Provision of Truth, Justice, and Reconciliation,” 6.

<sup>60</sup> Zinaida Miller, “Effects of Invisibility,” 277.

<sup>61</sup> South Africa, *Truth and Reconciliation Commission of South Africa Report: Volume 1* (Cape Town: The Commission, 1999), 2 and 29.

during the Apartheid.<sup>62</sup> The South African TRC left one volume of its final report to findings from members of the business, religious, legal, health and media sectors of society during the Apartheid, but stated that they received only minimal responses.<sup>63</sup>

The Australian public inquiry, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families*, is the closest in mandated content for a truth commission in a settler-colonial society to the Canadian TRC, dealing with the “wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples.”<sup>64</sup> Established in 1995, the Australian Inquiry responded to “increasing concern among key Indigenous agencies and communities that the general public’s ignorance of the history of forcible removal [of Aboriginal children from their families] was hindering the recognition of the needs of its victims and their families and the provision of services.”<sup>65</sup> Despite similar mandates, the Australian inquiry did not as deeply consider the implications of colonialism and dispossession of land and people as the Canadian TRC. The Australian inquiry had far less time and resources, in comparison to the Canadian TRC, stating they had an inability “to take testimony from all who wished to provide it.”<sup>66</sup> In discussing the role of land and violations of “Native title rights,” the Australian inquiry considered these violations as collective or individual property rights, or the right to inhabit traditional lands, of original Aboriginal stewardship.<sup>67</sup> Reparations were highly used as the recommended mechanism to deal with either the loss of, or the forced removal of

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<sup>62</sup> Zinaida Miller, “Effects of Invisibility,” 277.

<sup>63</sup> Martha Minow, “The Hope for Healing,” 248-249.

<sup>64</sup> Human Rights and Equal Opportunities Commission, *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children and Their Families* (Sydney: Commonwealth of Australia, 1997), 4.

<sup>65</sup> *Ibid.*, 15.

<sup>66</sup> *Ibid.*, 17.

<sup>67</sup> *Ibid.*, 178. The term “Native” used here as was used in the Australian Inquiry. This section references the protection of Native title rights as “communal” and the need to show biological descent in order to be entitled to particular lands. Recommendation 41 is the only that discusses the Indigenous people of Australia as true land holders with full title rights, besides that, all other mentions of Indigenous land rights focus more in context of occupancy.

Native title rights; an inability to assert title in the present, or the return to traditional lands; and that “churches and other non-government agencies” operating on stolen land were to return the land to the Aboriginal people.<sup>68</sup> Like the Canadian TRC, the Australian commissioners also lacked legal authority to enforce their recommendations.

The Australian inquiry dealt with a much smaller scope of historical and modern Indigenous land rights and mechanisms for reconciliation. The Canadian TRC, however, paid far more attention to the broader socioeconomic and colonial factors, including land and identity, that have led to the present condition of Indigenous people in Canada. According to the TRC, Canada’s Indigenous policy for over a century was to “eliminate Aboriginal governments; ignore Aboriginal rights; terminate the Treaties; and, through a process of assimilation, cause Aboriginal peoples to cease to exist as distinct legal, social, cultural, religious, and racial entities in Canada,” or in other words, cultural genocide.<sup>69</sup> The IRS was central to Canada’s Indigenous policy.<sup>70</sup> The TRC opens its executive report with a description of Canada’s policy of cultural genocide that is linked to the theft and destruction of Indigenous lands, people and rights, showing that land and culture are inherently tied to reconciliation with Indigenous people.

### **6.3 The Findings: TRC’s Calls to Action**

In assessing the Government of Canada’s larger colonial policy on Indigenous lands and people, the Canadian TRC made several recommendations on how to address the legacies of these policies

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<sup>68</sup> Ibid., 246, 256 and 365.

<sup>69</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 1. The TRC defines cultural genocide as “the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group. Land is seized, and populations are forcibly transferred and their movement is restricted. Languages are banned. Spiritual leaders are persecuted, spiritual practices are forbidden, and objects of spiritual value are confiscated and destroyed. And, most significantly to the issue at hand, families are disrupted to prevent the transmission of cultural values and identity from one generation to the next. In its dealing with Aboriginal people, Canada did all these things.”

<sup>70</sup> Ibid.

in what it called its *Calls to Action*. Indigenous sovereignty, particularly in relation to Indigenous lands, title and treaty rights, was the topic of many of these *Calls to Action*. The full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) was of considerable importance. As stated in Calls #43 and #44:

#43: We call upon federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation.

#44: We call upon the Government of Canada to develop a national action plan, strategies, and other concrete measures to achieve the goals of the *United Nations Declaration on the Rights of Indigenous Peoples*.<sup>71</sup>

UNDRIP, which was adopted by the United Nations on September 13, 2007, established “minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world.”<sup>72</sup> At the time of writing, the Government of Canada has failed to fully adopt UNDRIP in its entirety. Yet, these Calls are of incredible importance to Indigenous land and treaty rights. In 2010, the Government of Canada endorsed UNDRIP in a non-legally binding manner. The *Calls to Action* demand the Canadian government formally recognize and affirm land, “honour and respect” treaty rights, and most importantly, they demand the need for the “Free, prior, and informed consent” of Indigenous nations in matters related to Indigenous lands and treaty rights.<sup>73</sup>

The duty to consult has larger implications for how Indigenous rights are defined. Currently the Indigenous rights affirmed in Section 35 of the *Constitution Act, 1982* have “largely failed to reconfigure its relations with First Nations and other Indigenous communities,” allowing for what

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<sup>71</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Library and Archives Canada Cataloguing Publication, 2015), 4.

<sup>72</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 187.

<sup>73</sup> *Ibid.*, 187-189. From the 2014 World Conference on Indigenous Peoples’ “Outcome Document” paragraphs 3 and 20, which would become part of important implementation of UNDRIP globally. See United Nations, The General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, 2 and 10.

constitutes a Section 35 Indigenous right to be defined by the Canadian courts.<sup>74</sup> Matthew Glass argues that, instead, proper fulfillment of the duty to consult by the Government of Canada would promote “conditions of mutual understanding and social solidarity,” thus increasing communication and better facilitate the goals for reconciliation in Canada.<sup>75</sup> The adoption of UNDRIP, as argued by the TRC, would be the first step towards reconciliation by showing the “development of new relationships based on recognition and respect for the inherent human rights of Indigenous peoples.”<sup>76</sup>

The TRC then called for all levels of the Canadian government to use UNDRIP to create a new Royal Proclamation of Reconciliation to “reaffirm the nation-to-nation relationship between Aboriginal peoples and the Crown,” in Calls #45 and #47.<sup>77</sup> Building off of the *Royal Proclamation of 1763* and the 1764 Treaty of Niagara, the new proclamation would “Repudiate concepts used to justify European sovereignty over Indigenous lands and peoples such as the *Doctrine of Discovery* and *terra nullius*.”<sup>78</sup> It would do this by using UNDRIP as a “framework for reconciliation” to establish new treaty relationships “based on principles of mutual recognition, mutual respect, and shared responsibility for maintaining those relationships into the future.”<sup>79</sup> This Call, in particular, looks at the need for new processes involving the “negotiation and

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<sup>74</sup> Matthew Glass, “Canada’s Duty to Consult: Communicative Equality and the Norms of Legal Discourse,” (Master’s thesis, The University of Western Ontario, 2015), 1.

<sup>75</sup> Ibid., 5.

<sup>76</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 189-190.

<sup>77</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 4-5.

<sup>78</sup> Ibid. The Royal Proclamation of 1763 has been used to determine the historical treaty process in Canada as well as the cession of Indigenous lands, stating the “several Nations or Tribes of Indians, with whom We are connected, and who live under Our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to, or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.” Canada’s policy regarding Indigenous lands and treaties has changed little since its earlier colonial history.

<sup>79</sup> Ibid.

implementation processes involving Treaties, land claims, and other constructive agreements” to reconcile the constitutional and legal orders of the Indigenous-Crown relationship.<sup>80</sup>

The *Royal Proclamation of 1763* is “one of the clearest and earliest expressions of what has been identified as a long-standing element of Canadian Aboriginal policy,” and it established Canada’s longstanding treaty processes.<sup>81</sup> While the process of “cede, release, surrender, and yield” was deemed as the surrender of Indigenous lands to the Crown in the eyes of the Canadian government, the TRC noted that “federal officials left the impression that the government intended the Treaties to establish a permanent relationship with First Nations.”<sup>82</sup> This caused the advancement of assimilationist Indian policies, including the *Indian Act, 1876*. The *Indian Act* allowed the Canadian government to have full control over Indigenous people, diminished Indigenous sovereignty through the implementation of band councils, and controlled every aspect of Indigenous livelihood.<sup>83</sup> The Government of Canada’s failure to honour the original intent of treaty relationships, as well as the “destructive impacts of residential schools, [and] the *Indian Act*,” have resulted in the broken trust amongst Indigenous people and Canadians.<sup>84</sup> The TRC saw this trust repaired through “a new vision for Canada; one that fully embraces Aboriginal peoples’ right to self-determination within, and in partnership with, a viable Canadian sovereignty,” as the essence of reconciliation.<sup>85</sup>

*Calls to Action #51* and *#52* directly address land claims in Canada, demanding that the Canadian government fulfill its fiduciary responsibility to Indigenous people through the creation of a new policy that “acts or intends to act, in regard to the scope and extent of Aboriginal and

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<sup>80</sup> Ibid.

<sup>81</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 51.

<sup>82</sup> Ibid., 53.

<sup>83</sup> Ibid., 55. It should be noted that the *Indian Act* is still active legislation in Canada as of this day.

<sup>84</sup> Ibid, 184.

<sup>85</sup> Ibid.

Treaty rights.”<sup>86</sup> The federal and provincial governments are asked to adopt legal principles in Call #52, stating these should include: “i. Aboriginal title claims are accepted once the Aboriginal claimant has established occupation over a particular territory at a particular point in time,” and “ii. Once Aboriginal title has been established, the burden of proving any limitation on any rights arising from the existence of that title shifts to the party asserting such a limitation.”<sup>87</sup> Commitment “to meaningful consultation, building respectful relationships, and obtaining the free, prior, and informed consent of Indigenous peoples before proceeding with economic development projects” is the essence of Call #92, which again asks for Canada, and this time its corporate sectors, to adopt UNDRIP as a “reconciliation framework.”<sup>88</sup> The proper adoption of “free, prior and informed consent,” would be a major stepping stone in the land claims process in favour of Indigenous people and lands, a highly controversial principle amongst Canada’s corporate, political, and economic sectors.

The Canadian TRC fundamentally went beyond the scope of the harms caused by IRS to look at how land and resource development have and continue to impact Indigenous people and their livelihoods in Canada. According to the TRC, “In the face of growing conflicts over lands, resources, and economic development, the scope of reconciliation must extend beyond residential schools to encompass all aspects of Aboriginal and non-Aboriginal relations and connections to the land.”<sup>89</sup> This is consistent with the “honour of the Crown,” (also discussed in Chapter Four), which has been upheld by the Supreme Court, showing a failure of Canada’s fiduciary duty to Indigenous people in cases such as *R. v. Sparrow* (1990) and *Haida Nation v. British Columbia*

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<sup>86</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 6. See definition of fiduciary duty in Chapter Four of this thesis.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*, 10.

<sup>89</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 190.

(*Minister of Forests*) (2004).<sup>90</sup> In comprehensive land claim disputes, the onus is on Indigenous people to “prove that they were in occupation of land since first contact and that the rights claimed over the territory continued from then to the present.”<sup>91</sup> According to the TRC, this allows for the modern assertion of the *Doctrine of Discovery* in the land claims process.<sup>92</sup> The TRC argued that proper repudiation of the *Doctrine of Discovery* is needed to ensure change and reconciliation.

#### 6.4 Does the TRC Signal Reconciliation?

The Canadian TRC’s understanding of a broken trust in the Indigenous-Canadian relationship was its key argument to understanding what is preventing reconciliation in Canada. Arguably, the building of trust through the establishment of truth is merely the central purpose of truth commissions, so this should not be seen as an overwhelming surprise. The key difference in Canada is that a truth commission was demanded by Indigenous people. The Canadian TRC, in this respect, was a step towards reconciliation because its origins begin from an Indigenous mandate.

The TRC placed a heavy emphasis on UNDRIP as a framework for reconciliation in Canada. The commissioners stated that they “remain[ed] convinced that the *United Nations Declaration* provides the necessary principles, norms, and standards for reconciliation to flourish

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<sup>90</sup> Ibid, 212-213. In *R. v. Sparrow* (1990) “the Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial ... the honour of the Crown is at stake in dealings with aboriginal peoples.” In *Haida Nation v. British Columbia (Minister of Forests)* (2004) the Court ruled that “in all its dealings with Aboriginal peoples, from the assertion of sovereignty to the resolution of claims and the implementation of treaties, the Crown must act honourably,” and that “the honour of the Crown ... is not a mere incantation, but rather a core precept that finds its application in concrete practices.” See *R. v. Sparrow* (1990) and *Haida Nation v. British Columbia (Minister of Forests)* (2004) in John J. Borrows, and Leonard I. Rotman. *Aboriginal Legal Issues: Cases, Materials, and Commentary*, 5<sup>th</sup> edition (Toronto: LexisNexis Canada Inc., 2018).

<sup>91</sup> Ibid., 214-215.

<sup>92</sup> Ibid. See *Deglamuukw v. British Columbia* (1997) in John J. Borrows, and Leonard I. Rotman. *Aboriginal Legal Issues*, 144.



in twenty-first-century Canada.”<sup>93</sup> Prior to the release of the TRC’s executive report, the Government of Canada under Prime Minister Stephen Harper adamantly rejected UNDRIP due to its clauses pertaining to free, prior and informed consent. The Government of Canada argued that the adoption of UNDRIP would give Indigenous people a “veto” power on land issues, which “cannot be reconciled with Canadian law,” due to its interference with resource and development plans to Indigenous peoples’ and lands’ expense.<sup>94</sup>

The lack of institutional power by the TRC to implement its *Calls to Action*, and the lack of urgency by the Canadian government and its democratic institutions, such as the Supreme Court, which can uphold the Crown’s right to “infringe” on Indigenous rights, reveals the lack of trust between Indigenous people and Canadians, and one that might not be able to be reconciled within the current system.<sup>95</sup> Some argue that this approach to reconciling the Canadian-Indigenous relationship has failed. According to Taiaiake Alfred, the failure to implement “massive restitution, including land, financial transfers, and other forms of assistance to compensate for past and continuing injustices against our peoples” is evidence of this failure.<sup>96</sup>

The establishment of a new trust, a new relationship, between Indigenous people and Canada will involve recognition of cultural and spiritual relationships. Mary Deleary, an Anishinaabe Elder, said “reconciliation must continue in ways that honour the ancestors, respect the land, and rebalance relationships... to reconcile with this land and everything that has happened, there is much work to be done... in order to create balance.”<sup>97</sup> Reconciliation has

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<sup>93</sup> Ibid., 21.

<sup>94</sup> Ibid., 189. This is from the formal statement made by Canada at the World Conference of Indigenous People in New York on September 22, 2014.

<sup>95</sup> Ibid. The Sparrow Test determines the Government of Canada’s right to infringe upon an Aboriginal right. See *R. v. Sparrow* (1990) in John J. Borrows, and Leonard I. Rotman, *Aboriginal Legal Issues*, 110-112.

<sup>96</sup> Glen Coulthard, *Red Skin, White Masks*, 122.

<sup>97</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 9. Spoken to the TRC commissioners at the Traditional Knowledge Keepers Forum.

different meanings to Indigenous people. There is no specific word for reconciliation existing amongst Indigenous languages, but rather, “there are many words, stories, and songs, as well as sacred objects such as wampum belts, peace pipes, eagle down, cedar boughs, drums, and regalia, that are used to establish relationships, repair conflicts, restore harmony, and make peace.”<sup>98</sup> How these new relationships will look, how Indigenous people see this relationship moving forward, and what is needed to reconcile the Indigenous-Canadian relationship with land will be discussed further in the next chapter.

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<sup>98</sup> Ibid., 17. Stated by the TRC commissioners by Elders and Indigenous Knowledge Keepers.

## Chapter Seven

### 7 Renewing Nation-to-Nation Agreements: Reconciliation as a Process for Meaningful Change

There is an “urgent need for Reconciliation” in Canada that goes beyond redressing the harms caused by the Indian Residential Schools System (IRS), requiring an expansion of the public dialogue and action.<sup>1</sup> The Canadian Truth and Reconciliation Commission (TRC) revealed the broader fault lines in the Indigenous-Canadian relationship and the colonial factors that have led to the broken trust in that relationship. It also provided recommendations, both from an institutional standpoint and from the realm of Indigenous knowledge, on how to heal that relationship. The essence of all these recommendations lies in the central concepts surrounding trust between Indigenous peoples and the Government of Canada. As a truth commission, the TRC is embodied with the foundations of transitional justice, for which it serves as a mechanism.

Yet, the TRC was also unique in the way it framed reconciliation within Canada by revealing the conflicts that exist between Canadians and Indigenous people, which makes reconciliation difficult, and provided light to Indigenous understandings of reconciliation. The central idea of reconciliation in the Canadian TRC is visible in the use of the word “reconciliation” in the commission’s title, showing what the Residential School Survivors of the Indian Residential School Settlement Agreement (IRSSA) wanted the truth commission to achieve.<sup>2</sup> This is important as not all truth commissions are truth *and* reconciliation commissions.<sup>3</sup> The importance of

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<sup>1</sup> 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* (Winnipeg: Library and Archives Canada Cataloguing in Publication, 2015), 8.

<sup>2</sup> *Ibid.*, 3 and 130.

<sup>3</sup> This is another sign that the Canadian TRC was indeed modeled after the South African truth commission, another truth *and* reconciliation commission.

reconciliation in the Canadian TRC, as well its focus on colonialism and its impact on Indigenous lands, requires us to ask what true reconciliation means in regards to land and land claims. The TRC offered insights into a process for meaningful reconciliation within Canada that looks at both institutional changes and aspects of Indigenous traditional knowledge. The cornerstone of this thesis lies in these two key concepts: first, the relationship to land through Indigenous knowledge, and second, honouring the original intent of the Indigenous-Canadian treaty relationships as internationally recognized nation-to-nation agreements.

## **7.1 Transitional Justice and Reconciliation**

Reconciliation can be defined in many ways in many different contexts. Within the traditional scope of transitional justice, reconciliation is defined within the contexts of nations' political and legal systems. According to Paige Arthur, reconciliation is only defined within the framework of post-conflict states moving from authoritarian rule to democracy, using transitional justice mechanisms to reform state institutions.<sup>4</sup> Siri Gloppen established a definition of reconciliation that involves five strategies to “come to grips with the challenges posed by the shadow of past injustices.”<sup>5</sup> The second of Gloppen's strategies centers on truth and “is based on the assumption that knowledge about what happened and who were responsible for planning and executing these deeds can be a road to reconciliation,” utilizing truth commissions as mechanisms for reconciliation.<sup>6</sup> Most importantly, Gloppen refers to reconciliation as a process “of different kinds and at various levels,” including individual, interpersonal, and collective.<sup>7</sup> A society that has been

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<sup>4</sup> Paige Arthur, “How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice,” *Human Rights Quarterly* 31, no. 2 (2009): 324.

<sup>5</sup> Siri Gloppen, “Roads to Reconciliation: A Conceptual Framework,” in *Roads to Reconciliation*, edited by Elin Skaar, Siri Gloppen, and Astri Suhrke (Lanham, Maryland: Lexington Books, 2005), 17.

<sup>6</sup> *Ibid.*, 18.

<sup>7</sup> *Ibid.*, 20.

“torn apart by internal conflict can mend its social fabric,” and “reweave thread by thread the fabric of that society and reconstitute... the desire to live together.”<sup>8</sup> Transitional justice often distinguishes reconciliation in the collective at a national level, interrelating it with the institutions of democracy to promote social stability and establish peace.<sup>9</sup> Truth commissions, as mechanisms of transitional justice, operate as a function of liberal democracy with those particular values of reconciliation.

The idea of reconciliation as a process is important as, often times, particularly after the release of the Canadian TRC with its ninety-four *Calls to Action*, reconciliation is what is understood as a kind of checklist, a means to end Canada’s longstanding “Indian problem.” The 1997 Royal Commission on Aboriginal Peoples (RCAP) argued that reconciling the Indigenous-Canadian relationship has been viewed as means of resolving this “Aboriginal problem.”<sup>10</sup> Since 1997, this sentiment has changed little, even after the work of the Canadian TRC in 2015. RCAP argued that the idea of an “Indian” or “Aboriginal Problem,”

inevitably places the onus on Aboriginal people to desist from ‘troublesome behaviour.’ It is an assimilationist approach, the kind that has been attempted repeatedly in the past, seeking to eradicate Aboriginal language, culture and political institutions from the face of Canada and to absorb Aboriginal people into the body politic — so that there are no discernible Aboriginal people and thus, no Aboriginal problem. Our report proposes instead that the relationship between Aboriginal and non-Aboriginal people in Canada be restructured fundamentally and grounded in ethical principles to which all participants subscribe freely.<sup>11</sup>

Reconciliation as a process, a path towards restoring the original intent of the Indigenous-Canadian relationship, and must work actively to undo assimilationist worldviews in Canada and offer new ways towards promoting Indigenous rights in Canada. RCAP did not offer solutions to

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<sup>8</sup> Ibid.

<sup>9</sup> Ibid., 21.

<sup>10</sup> Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples. Volume 1: Looking Forward, Looking Back* (Ottawa: Canada Communications Group – Publishing, 1996), 12.

<sup>11</sup> Ibid.

the “Aboriginal problem.” Instead, it asked Canadians to “consider anew the character of the Aboriginal nations that have inhabited these lands from time immemorial” and to restore and honour the “co-operative relationships that generally characterized the first contact between Aboriginal and non-Aboriginal people... understanding just how, when and why things started to go wrong” to help achieve the goal of reconciliation.<sup>12</sup> This view of reconciliation put forward by RCAP was built upon by the Canadian TRC, which argued that “Reconciliation is not an Aboriginal problem; it is a Canadian one.”<sup>13</sup>

## **7.2 Reconciliation and the Re-establishment of Trust**

Reconciliation is often referred to as “the re-establishment of a conciliatory state.”<sup>14</sup> However, this definition is problematic in settler-colonial states, like Canada, where such a conciliatory state may never have truly existed.<sup>15</sup> What the TRC recommended instead is the need to overcome conflict and establish “a respectful and healthy relationship among people, going forward.”<sup>16</sup> According to the TRC, reconciliation can be defined as “establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. In order for that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour.”<sup>17</sup> According to the TRC, the largest barrier in the way of reconciliation in Canada is the deterioration of the Indigenous-Canadian relationship.<sup>18</sup> The lack of trust that exists between these entities prevents meaningful action from

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<sup>12</sup> Ibid.

<sup>13</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, vi.

<sup>14</sup> Ibid., 6.

<sup>15</sup> Ibid.

<sup>16</sup> Ibid., 6-7.

<sup>17</sup> Ibid., 6-7.

<sup>18</sup> Ibid., 8.

occurring on critical Indigenous issues in Canada. This is important because without trust, finding solutions that allow the assertion of Indigenous sovereignty and nationhood and the process of a meaningful reconciliation between Indigenous people and Canadians will be almost impossible.

Reconciling this trust and this relationship must go deeper than just the political and legal contexts that transitional justice focuses on. It also implies looking at what creates those relationships, such as the roots that interlace these beings together and create a relationship that is strong and long-lasting.<sup>19</sup> When it comes to the deteriorating relationships between Indigenous nations and Canada that are exposed in land claim disputes, it is essential to look at the relationships each nation has with the land, as discussed in Chapter Four. As long as these relationships conflict with each other, there cannot be reconciliation. Thus, an understanding of Indigenous knowledge and its connection to the land is essential to reconciling the Indigenous-Canadian relationship. According to the TRC, “Land, language, culture, and identity are inseparable from spirituality; all are necessary elements of a whole way of being, of living on the land as Indigenous peoples.”<sup>20</sup> John Borrows, too, argues that “Indigenous languages, economies, and world views are rooted in their homelands.”<sup>21</sup> At their very core, this means they “reject the

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<sup>19</sup> See Jennifer Balint, Julie Evans, and Nesam McMillan. “Rethinking Transitional Justice, Redressing Indigenous Harm: A New Conceptual Approach,” *International Journal of Transitional Justice* 8, no. 2 (2014): 194-216; Carole Blackburn, “The Treaty Relationship and Settler Colonialism in Canada,” in *Shifting Forms of Continental Colonialism: Unfinished Struggles and Tensions*, edited by Diitmar Schorkowitz, John R. Chávez, and Ingo W. Schröder (Singapore: Palgrave Macmillan, 2019), 415-435; John Borrows, “Earth-Bound: Indigenous Resurgence and Environmental Reconciliation,” in *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings*, edited by Michael Asch, John Borrows and James Tully (Toronto: University of Toronto Press, 2018), 49-81; Jeff Corntassel and Cindy Holder, “Who’s Sorry Now? Government Apologies, Truth Commissions, and Indigenous Self-Determination in Australia, Canada, Guatemala, and Peru,” *Human Rights Review*, no. 9 (2008): 465-489; Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Winnipeg: Fernwood Publishing, 2016); Rosemary Nagy, “The Scope and Bounds of Transitional Justice and the Canadian Truth and Reconciliation Commission,” *The International Journal of Transitional Justice* 7, (2012): 52-73; Ronald Niezen, *Truth and Indignation: Canada’s Truth and Reconciliation Commission on Indian Residential Schools* (Toronto: University of Toronto Press, 2013); and Brian Rice and Anna Snyder, “Reconciliation in the Context of a Settler Society: Healing the Legacy of Colonialism in Canada,” in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, edited by Marlene Brant-Castellano, Linda Archibald, and Mike DeGagné (Ottawa: Aboriginal Healing Foundation, 2008), 45-61.

<sup>20</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 225.

<sup>21</sup> John Borrows, “Earth-Bound,” 59.

very idea of surrender,” which conflicts with not only the Indigenous treaty records, which define treaties as the “cede, surrender, and release,” of lands that was ostensibly consented to by Indigenous nations a hundred years ago, but also Indigenous peoples’ very connection to the land.<sup>22</sup> As Borrows argues, this “does not extinguish the idea that we will always draw our life from the sun, waters, and plants that shine, flow, and grow on our traditional territories.”<sup>23</sup> Indigenous knowledges and the land are inseparable. Indigenous land stewardship is an everlasting relationship, and will always be at conflict with Euro-Canadian understandings of land unless Indigenous worldviews become wholly and institutionally recognized.

Trust is central to Indigenous land rights and land claims. The TRC discussed reconciliation of land claims as a form of socioeconomic reconciliation, stating that “Economic reconciliation will require finding common ground that balances the respective rights, legal interests, and needs of Aboriginal peoples, governments, and industry in the face of climate change and competitive global markets.”<sup>24</sup> The establishment of trust, community engagement, conflict resolution, and “building mutually beneficial partnerships—to advance reconciliation” are all a part of this common ground.<sup>25</sup> Most importantly, economic reconciliation involves working in partnership with Indigenous people to ensure that lands and resources within their traditional territories are developed in “culturally respectful ways that fully recognize Treaty and Aboriginal rights and title.”<sup>26</sup> The establishment of trust can be seen as the re-establishment of the original intent of treaty agreements. According to Eva Mackey, the rebuilding of these relationships can take several different forms, but the rebuilding of these connections by respecting the boundaries

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<sup>22</sup> Ibid.

<sup>23</sup> Ibid.

<sup>24</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 303.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid., 305.



of each nation, like the rows and spaces of *Guswenta*, “is essential to the decolonization of settler-Indigenous alliances.”<sup>27</sup> Recognition of treaty relationships is a starting point for the re-establishment of trust. James Sákéj Youngblood Henderson argues that Indigenous sovereignty and the “written treaties with the Crown create consensual reconciliations, delegations, obligations, and rights for the treaty parties.”<sup>28</sup>

Here might be where the Canadian TRC reached its limits. While the TRC argued that the reestablishment of trust was necessary for reconciliation between Indigenous people and Canadians, it failed to offer actionable methods or a process for that reestablishment. The necessary trust needed to build the process of reconciliation has been shown not to be improving, but is in fact decreasing, particularly around issues of Indigenous lands and Aboriginal title rights. This has been seen in the increased levels of activism in the 2010s over corporate industrial resource development on Indigenous lands and the disrespect of Indigenous rights, from the “Idle No More” protests in 2012 to the large widespread solidarity protests in 2020 in support of the Wet’suwet’en barricade against oil pipeline development on Indigenous lands. Two years before the release of the findings of the TRC, in 2013, the future federal Minister of Justice, Jody Wilson-Raybould, made a public statement that “There is a growing lack of trust amongst our peoples with other governments, particularly in light of proposed resource development.”<sup>29</sup> Whether or not the TRC created movement towards reconciliation has yet to be seen. So far, it appears that the TRC revealed more barriers that need to be overcome than solutions.

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<sup>27</sup> Eva Mackey, *Unsettled Expectations: Uncertainty, Land and Settler Decolonization* (Winnipeg: Fernwood Publishing, 2016), 169.

<sup>28</sup> James [Sákéj] Youngblood Henderson, “Treaty Governance,” in *Aboriginal Self-Government in Canada: Current Trends and Issues*, edited by Yale D. Belanger (Saskatoon: Purich Publishing Ltd, 2008), 22.

<sup>29</sup> Jody Wilson-Raybould, *From Where I Stand: Rebuilding Indigenous Nations for a Stronger Canada* (Vancouver: Purich Books UBC Press, 2019), 40-41.

### 7.3 The Reconciliation Process Moving Forward

The commissioners of the Canadian TRC recognized that “reconciliation could not be achieved during the TRC’s lifetime,” and that it would take “ongoing positive and concrete steps forward.”<sup>30</sup> Yet, despite the TRC’s ninety-four *Calls to Action*, Canada seems to be in need of clarity over what those steps are. The TRC’s recommendation to return to the original intent of nation-to-nation agreements may be the clearest path forward when it comes to reconciling the Indigenous-Canadian treaty relationship. This would pave a path toward reconciling the land claims process. The renewal of the original intent of the nation-to-nation agreements involves the active assertion of Indigenous sovereignty and recognition of Indigenous nations as sovereign nations with self-determination rights. This is essential.

Canadian Prime Minister Justin Trudeau made a call for the renewal of the nation-to-nation agreements with Indigenous people central in his 2015 campaign and throughout his first term; this was a relationship he said should be “guided by the spirit and intent of the original treaty relationship.”<sup>31</sup> Yet, despite the international praise Trudeau received for these public assertions, he has been highly criticized for his prioritization of the Indigenous-Canadian relationship as a symbolic gesture, rather than one which has shown actionable change.<sup>32</sup> An example of this, as argued by Gina Starblanket, is the “Overview of a Recognition and Implementation of Indigenous Rights Framework,” which frames Indigenous self-government as a delineation “flowing from federal recognition.”<sup>33</sup> In other words, this self-government framework defined Indigenous self-

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<sup>30</sup> Truth and Reconciliation Commission of Canada, *Honouring the Truth, Reconciling for the Future*, 8.

<sup>31</sup> Gina Starblanket, “The Numbered Treaties and the Politics of Incoherency,” *Canadian Journal of Political Science* 52, (2019): 450.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, 451.

government as a right given by the federal government, and not as an inherent Indigenous right flowing from Indigenous sovereignty and nationhood.

Glen Coulthard argues that there are three “distinct yet interrelated ways” that reconciliation is invoked in Canada in regards to Indigenous self-determination.<sup>34</sup> The first of these notions looks at reconciliation as recognition, usually by another, particularly examining the establishment of “relation-to-self” where Indigenous individual or culturally practices have been “damaged or distorted by some form of symbolic or structural violence.”<sup>35</sup> The second of these notions involves restoring “estranged or damaged social and political relationships,” or political reconciliation, of the kind that is often reestablished in settler-colonial states through “truth and reconciliation” commissions alongside state assertions that “claim to recognize and accommodate Indigenous identity-related differences, are viewed as important institutional means to facilitate reconciliation in these first two senses.”<sup>36</sup> The third notion looks at “the action of rendering things consistent,” or in other words, looks at the core of Canadian legal and political understandings of Indigenous nationhood and sovereignty and attempts to make it consistent with “the state’s unilateral assertion of sovereignty over Native peoples’ land and populations.”<sup>37</sup> In this form, the institutional assertion of reconciliation “effectively undermin[es] the realization of the previous two forms of reconciliation.”<sup>38</sup> The need to institutionally recognize Indigenous self-determination and sovereignty, as shown by Coulthard and Trudeau’s administrative attempts, is the right way forward in recognizing Indigenous rights in a way that makes actionable and meaningful change. Yet, what is missing in these methods is the proper recognition of Indigenous nations as sovereign

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<sup>34</sup> Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014), 106.

<sup>35</sup> *Ibid.*, 106.

<sup>36</sup> *Ibid.*, 107.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.*

nations that have their own power outside of the Canadian federal framework. In order for this to be properly reconciled, Indigenous rights need to be understood and dealt with as matters of international, and not solely domestic, affairs.

Audra Simpson argues that “sovereignty may exist within sovereignty. One does not entirely negate the other, but they necessarily stand in terrific tension and pose serious jurisdictional and normative challenges to each other... like Indigenous bodies, Indigenous sovereignties and Indigenous political orders prevail within and apart from settler governance.”<sup>39</sup> Simpson argues for what she calls refusal, which “comes with the requirement of having one’s political sovereignty acknowledged and upheld, and raises the question of legitimacy for those who are usually in the position of recognizing,” as a political alternative to recognition multicultural politics.<sup>40</sup> Simpson also argues for the importance of questioning the term “settled” in regards to colonial politics, which she states demonstrates “a blindness to the structure of settler-colonial nation-statehood—of its labour, its pain, and its agonies” in the field of western political science.<sup>41</sup> These key understandings of sovereignty and their assertion within settler-colonial states is essential to understanding the assertion of Indigenous nationhood, moving forward. Xavier Scott argues that Indigenous sovereignty requires the full recognition of sovereign rights extending over “the entire territory that is currently occupied by Settler-colonial states.”<sup>42</sup> These rights were not extinguished with historical treaty-making and therefore remain active in the modern day. Carole Blackburn argues that modern treaty-making in Canada acts to minimize this threat “that Aboriginal rights and title pose to capital,” which she argues is an “insufficient nation-to-nation

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<sup>39</sup> Audra Simpson, *Mohawk Interruptus: Political Life Across the Borders of Settler States* (Durham: Duke University Press, 2014), 10-11.

<sup>40</sup> *Ibid.*, 11.

<sup>41</sup> *Ibid.*, 11-12.

<sup>42</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties: Theorizing Post-Colonial States in Settler Colonies,” *Studies in Social Science* 12, no. 2 (2018): 389.

approach.”<sup>43</sup> Instead, a return to treaty making, for what it was originally intended, as “a time-honored Indigenous mechanism for creating relationships,” is required.<sup>44</sup> Honouring this mechanism is a way of reconciling the Indigenous-Canadian relationships, showing that treaties can be used to empower Indigenous nations and Indigenous rights by enabling “Indigenous legal orders and governments to co-exist with non-Indigenous law and governments in Canada,” which “is in keeping with the original spirit and intent of treaty making.”<sup>45</sup>

#### **7.4 International Recognition of Nation-to-Nation Agreements**

Broken treaty agreements should be seen as a violation of Indigenous sovereignty by colonial powers, which require legal consequences and restoration according to international law.<sup>46</sup> Scott argues that “Only by respecting the traditional rights of Indigenous peoples – including rights to their territories – can colonial states repair the sovereign wrong done in the abrogation of their duty to stand by their treaties.”<sup>47</sup> George Williams argues that simply listening to Indigenous people “is by itself insufficient to bring about real change. Change must be built on the genuine partnership between Indigenous peoples and governments that can arise through the making of a treaty.”<sup>48</sup> In other words, action is necessary to create meaningful reconciliation with Indigenous people, and part of that action involves recognizing the international sovereignty of Indigenous nations.

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<sup>43</sup> Carole Blackburn, “The Treaty Relationship and Settler Colonialism in Canada,” in *Shifting Forms of Continental Colonialism: Unfinished Struggles and Tensions*, edited by Diitmar Schorkowitz, John R. Chávez, and Ingo W. Schröder (Singapore: Palgrave Macmillan, 2019), 432.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*

<sup>46</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties,” 396.

<sup>47</sup> *Ibid.*

<sup>48</sup> George Williams, “Does Reconciliation Require a Treaty?” *Indigenous Law Bulletin* 8, no. 10 (2014): 4.

The Nisga'a nation and the Land Claims Agreement Coalition have previously argued internationally to the United Nations Human Rights Council in 2007, and to the Universal Periodic Review of Canada in 2012 for a better implementation process, or "Land Claims Agreement Implementation Commission," that would operate "outside of the current federal organization of Departments, to coordinate and oversee implementation of treaties."<sup>49</sup> Such an external commission, they argued would report directly to the Canadian Parliament and have "the prominence to prioritize the relationship between Indigenous peoples and the Crown."<sup>50</sup> However, this solution would still involve Indigenous land claim settlements being dealt with within Canada as domestic affairs rather than as disputes between equal nations. What is needed is for Indigenous land claim disputes to be recognized as international matters to be decided between sovereign nations. This argument is not new. In fact, in 1923, leaders from Six Nations travelled to the League of Nations (now the United Nations) in Geneva to petition for the ratification of "treaty violations and erosions of Indigenous sovereignty by the government of Canada, wrongs which constituted, to the Six Nations, 'an act of war' and 'a menace to international peace.'"<sup>51</sup> Catherine Lu argues that this acknowledges that the "contemporary conflicts between Indigenous peoples and settler colonial states constitute a category of cases that belong in an examination of justice and reconciliation international and transnational relations."<sup>52</sup>

Indigenous nations have been alienated from contemporary international politics, and the acknowledgement of this reveals one barrier to reconciliation, while acknowledging the "living legacies" of colonialism in the contemporary era.<sup>53</sup> Scott argues that international law and

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<sup>49</sup> Carole Blackburn, "The Treaty Relationship and Settler Colonialism in Canada," 426 and 431.

<sup>50</sup> *Ibid.*, 431.

<sup>51</sup> Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge: Cambridge University Press, 2017), 199.

<sup>52</sup> *Ibid.*, 199-200.

<sup>53</sup> *Ibid.*, 200.

transitional justice try to accomplish justice for Indigenous people “within the confines of the colonial state.”<sup>54</sup> He recommends instead that a shift is required so that reconciliation *with* Indigenous people is the focus of transitional justice in settler-colonial states.<sup>55</sup> This again involves reconciling issues of Indigenous nationhood and sovereignty within international law, which “provides tools to recognize the illegal nature of the original ‘theft of sovereignty.’”<sup>56</sup>

One way of incorporating international law into the reconciliation process was already suggested in the Canadian TRC’s *Calls to Action*, which recommended the full adoption and incorporation of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) into the Canadian legal system.<sup>57</sup> This is discussed further in Chapter Six. What is important in this context is the following: Jack Donnelly argues that Indigenous self-determination needs to be seen within “the broader social context of internationally recognized individual human rights,” which guarantee individuals to choose their way of life.<sup>58</sup> Thus, members of traditional communities must have “the opportunities to shape, maintain, and influence the evolution of community institutions.”<sup>59</sup> Adopting UNDRIP in its entirety in Canada would add to the protection of Indigenous cultural rights as human rights, but Indigenous land and title rights as well. UNDRIP offers a step towards decolonization in Canada, which is essential to meaningful reconciliation. According to Taiaiake Alfred and Jeff Corntassel, “Colonialism corrupted the relationship between original peoples and the Settlers, and it eventually led to the corruption of Indigenous cultures and

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<sup>54</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties,” 390.

<sup>55</sup> *Ibid.* Emphasis added in italics.

<sup>56</sup> *Ibid.*

<sup>57</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Library and Archives Canada Cataloguing Publication, 2015), 4-5 and 10. See *Calls to Action* #43, #44, #45, and #92.

<sup>58</sup> Jack Donnelly, *Universal Human Rights in Theory and Practice*, 3rd edition (Ithaca, NY: Cornell University Press, 2013), 153.

<sup>59</sup> *Ibid.*

communities too.”<sup>60</sup> UNDRIP, according to the Canadian TRC’s recommendations, offers a means of repairing Indigenous communities by promoting cultural rights.

The adoption of international practices in the land claims process is necessary because it goes beyond the simple actions of reparations or apologies, which Scott argues “are not suited to addressing the theft of sovereignty from Indigenous peoples.”<sup>61</sup> Reparations do not recognize Indigenous nations’ sovereign powers, but rather continue to imbed them in the colonial system, dependent on the federal government. Reparations and monetary settlements from modern treaty agreements are no more than modern interpretations of the clauses for proper compensation outlined in the *Indian Act*.<sup>62</sup> Canada needs new policy tools to “restore right relations with Indigenous peoples.”<sup>63</sup> Institutional changes have not yet, as Alfred and Corntassel have argued, “led to what we understand as decolonization and regeneration; rather they have further embedded Indigenous people in the colonial institutions they set out to challenge.”<sup>64</sup> The essence of this problem is due to the “logical inconsistencies at the core of the institutional approaches.”<sup>65</sup> Institutional change involves going deeper, challenging settler assumptions about not only reconciliation, but about sovereignty itself.<sup>66</sup> Scott argues that returning Indigenous lands and sovereignty will involve major institutional changes from tax law to private property law. This does not, as he described, involve “forcing the settlers to leave and claiming their property for Indigenous people,” but rather preparing settlers “for a major restructuring of their previous rights

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<sup>60</sup> Taiaiake Alfred and Jeff Corntassel, “Being Indigenous: Resurgence against Contemporary Colonialism,” *Government and Opposition* 40, no. 4 (2005): 611-612.

<sup>61</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties,” 398-399.

<sup>62</sup> Canada, Revised Statutes of Canada, *Indian Act*, 1985, c. I-6, s. 1, <https://laws-lois.justice.gc.ca/eng/acts/i-5/FullText.html>. This is based on the agreement of compensation for government use of reserve lands for “the benefit of the band,” in Section 18.

<sup>63</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties,” 399.

<sup>64</sup> Taiaiake Alfred and Jeff Corntassel, “Being Indigenous,” 611-612.

<sup>65</sup> *Ibid.*, 611-612.

<sup>66</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties,” 399.



over the land.”<sup>67</sup> Returning Indigenous lands and the restoration of Indigenous sovereignty means the renewal and respect of Indigenous legal traditions.<sup>68</sup> It involves generating a renewal in Indigenous economies by “closing the skills and education gap between First Nations and the rest of the population,” which could generate not only \$400 billion for Indigenous nations within a generation but “save Canada \$150 billion in social costs,” showing that reconciliation from a socioeconomic standpoint is pragmatic as well as moral.<sup>69</sup>

## 7.5 Conclusions

Reconciliation in Canada and the reconciliation and decolonization of Indigenous lands has yet to find a consensus between Indigenous nations and Canadians. The broken trust existing between Indigenous nations and Canadians has yet to be repaired. Treaty agreements have yet to be honoured for their original intent, and Indigenous nations have yet to be recognized as the sovereign nations they are at the international level. This does not mean that there is no way forward; in fact, the work of the Canadian TRC and subsequent research shows that a solution is becoming ever clearer. Meaningful reconciliation involves inclusive communication that engages Indigenous nations and Canadian representatives in dialogues that create “social and constitutional reforms, within Canada and within international order.”<sup>70</sup> Alfred and Corntassel argue that “Land Is Life – our people must reconnect with the terrain and geography of their Indigenous heritage if they are to comprehend the teachings and values of the ancestors, and if they are to draw strength and sustenance that is independent of colonial power, and which is regenerative of an authentic,

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<sup>67</sup> Ibid., 401.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid., 402.

<sup>70</sup> Catherine Lu, *Justice and Reconciliation in World Politics*, 214-215.

autonomous, Indigenous existence.”<sup>71</sup> The path to reconciliation lies in a reconnection to Indigenous traditional knowledge, a connection to the land and the decolonization of political and legal institutions that allow for the recognition of Indigenous nations as sovereign nations in their own right to be renewed.

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<sup>71</sup> Taiaiake Alfred and Jeff Corntassel, “Being Indigenous,” 613.

## **Chapter Eight**

### **8 Conclusions**

This thesis has examined the question of whether land claim settlements between Indigenous nations and the Government of Canada signal meaningful reconciliation of the Indigenous-Canadian relationship. Yet, the current process for settling land claim disputes in Canada does not in fact signal true and meaningful reconciliation between Indigenous Nations and the Government of Canada. This is due to the fact that the land claims settlement process, including the modern treaty process, is simply a reiteration of the colonial policies that preceded it. As a result, the land claims process diminishes Indigenous sovereignty and Aboriginal title by settling Indigenous claims to land within a Canadian domestic courts system, which favours the Crown's underlying title to land and Crown sovereignty. Meaningful reconciliation, as the 2015 Canadian Truth and Reconciliation Commission (TRC) recommended, needs to be seen as a renewed process that asserts' Indigenous sovereignty and respects the original intent of the Indigenous-Canadian relationship as one that is nation-to-nation. This would involve settling land claim disputes in the same nation-to-nation intent, which could involve the incorporation of international law frameworks that settle land matters as existing agreements between separate sovereign nations.

#### **8.1 Analysis: Chapters in Review**

Various aspects involved in the question regarding Indigenous land claims and reconciliation are examined throughout each of the chapters of this thesis. This was necessary in order to form the conclusion that reconciliation of Indigenous lands and land claims requires the proper assertion of Indigenous sovereignty in a nation-to-nation relationship.

Chapter One introduced the research question, and the components involved in that question, in this thesis as well as established myself as an Indigenous researcher within the context of this writing. Chapter Two examined the existing literature on the Indigenous-Canadian relationship to understand the frameworks in which land claims exist within Canada. This included looking at Indigenous knowledge and understandings of land. This chapter looked at the historical and modern treaty processes in Canada from the seventeenth century to the modern era. This also involved looking at the history of Euro-Canadian colonialism and the existing settler-colonial state. It also discussed the existing literature on reconciliation from traditional transitional justice frameworks, to new transitional justice frameworks which consider settler-colonial states, as well as Indigenous scholarship and pedagogy on reconciliation.

Chapter Three discussed the methodology used throughout this thesis. In this chapter, I established my identity as an Indigenous woman and an African Canadian woman and the impact that had on how I approached this thesis as a researcher. My methodology incorporated Indigenous methodologies that involve the reclamation of Indigeneity or Indigenous ways of knowing into academic research and scholarship. This research also involved the use of feminist, intersectional, and anti-oppressional lenses in scholarship that also address both the issues of ‘othering’ in research as well as the impacts of colonialism in research. Lastly, I discussed the use of combining Indigenous methodologies and the works of Indigenous scholars with historical institutionalism as a method throughout this thesis as a tool for analysis.

Chapter Four discussed the importance of land. It examines land first from an Indigenous spiritual and cultural understanding, which included a look at Indigenous knowledge and Indigenous oral history and story-telling. It then examined the Indigenous political and legal understanding of land. This involved a discussion on the fiduciary duty, or “honour of the Crown,”

as well a discussion on Aboriginal Rights, Title, and Self-determination. It also examined land from a Euro-Canadian perspective and the political and socioeconomic values land possesses, particularly within the context of a settler-colonial state like Canada. This chapter set up the context for why land is an important discussion within the broader land claims question.

Chapter Five then assessed land claim disputes and the modern treaty process. This chapter established the current land claims processes in order to understand why they require change. This chapter began with a discussion on the implications of Indigenous sovereignty and the original intent of nation-to-nation agreements in Canada. It then looked at the impact of colonialism in the treaty making process, which shifted the original intent of Indigenous-European treaties to those that read as the “cede, surrender, and release” of Indigenous lands. It then examined the creation of the Specific and Comprehensive Land Claims Commissions, known more commonly as the modern treaty process, and the Self-Determination Policy in Canada.

Chapter Six looked at truth commissions as a mechanism of transitional justice, and their use in promoting reconciliation. It examined the implication of truth commissions in settler-colonial states, which differs from their original use and establishment in the traditional transitional justice framework. It then looked particularly at the 2015 Canadian TRC to determine whether it had a major impact on land claim settlements and the recommendations it made for reconciling the Indigenous-Canadian relationship in relation to land, treaties, and land claims through the re-establishment of trust. It also examined the South African TRC post-Apartheid and the Australian Inquiry into missing children to determine their effectiveness at addressing land, development, and socioeconomic issues in comparison to the Canadian TRC.

Finally, Chapter Seven discussed the path towards meaningful change and reconciliation post-TRC. This chapter discussed the various definitions of reconciliation within transitional

justice and within Indigenous ways of knowing. It looked deeper into the Canadian TRC's assessment on the broken trust of the Indigenous-Canadian relationship and how to repair that trust. It discussed the limitations of the TRC in creating a path towards reconciliation in regards to land and the land claims process. Lastly, this chapter looked at the incorporation of international law as a means of reconciling the Indigenous land claim process. This involves recognizing Indigenous nations as sovereign nations of their own right and the return of a true nation-to-nation relationship with the Canadian government on an international level.

## **8.2 Reconciliation as Land and Relationship**

Reconciliation between Indigenous nations and the Government of Canada is a current and ever-pressing issue in Canada. This issue has been discussed in the contexts of the Royal Commission on Aboriginal Peoples (RCAP) in 1997, following the Oka Crisis in 1990, and more recently in the 2015 Canadian TRC as a result of the Indian Residential Schools Settlement Agreement (IRSSA).<sup>1</sup> However, meaningful reconciliation in Canada has still yet to be seen. These commissions dove deeply into the colonial conditions that affect Indigenous peoples' lands and lives and discussed the need for the return of Indigenous lands and the proper recognition of Indigenous sovereignty. This thesis discussed the importance of these findings and their implications in the context of land claim settlements and reconciliation in Canada.

Land is not just an Indigenous issue. Land is also not just a means for government or corporate exploitation. Increasingly levels of climate change in the last few decades have shown that the issue of land is one that concerns everyone. Rising activism in response to climate change

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<sup>1</sup> 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* (Winnipeg: Library and Archives Canada Cataloguing in Publication, 2015), 130.

is a reflection of what Indigenous knowledge has always said: land matters. In order for true reconciliation to occur in Canada, reconciliation needs to be seen beyond the scope of Residential Schools, or the colonial harms of the past. Reconciliation needs to be seen as a broken relationship between Indigenous people and Canada that requires reparation. The reconciliation of this relationship requires, as John Borrows argued, “our collective reconciliation with the earth,” or reconciling how our relationships with the land connect us with one another.<sup>2</sup> The land claims process holds the key to the reparation of trust and restoration of our relationships with the land.

The key to reconciliation lies in the reconciliation of the land claims process. If Canada wants to refer to the comprehensive land claims process as a modern treaty process, then it needs to return to and honour the original intent of the treaty relationship. This involves the recognition of Indigenous sovereignty and nationhood. This also involves the incorporation of international frameworks, such as the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), and international human rights law. This requires using the Canadian TRC’s *Calls to Action*, not as a checklist of items in the form of Indigenous accommodation into the existing institutions, which can be hidden or ignored, but recognition of the *Calls to Action* as demands for institutional change. The institution of treaty making in Canada, as one of the longest standing institutions representative of the relationship between Indigenous nations and the Government of Canada, requires drastic change. If the land claims process can be reconciled by recognizing Indigenous sovereignty, then it is possible that the other aspects of the Indigenous-Canadian relationship in Canada will also follow in the path to reconciliation as well.

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<sup>2</sup> John Borrows, “Earth-Bound: Indigenous Resurgence and Environmental Reconciliation,” in *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings*, edited by Michael Asch, John Borrows and James Tully (Toronto: University of Toronto Press, 2018), 49.

### **8.3 Contributions to Academia**

There is a need for more Indigenous voices in Western academia. In this thesis, I have demonstrated a use of Indigenous methodologies combined with the works of Indigenous scholars and historical institutionalism. I have demonstrated an ability to use my prior knowledge and lived experience as an Indigenous woman and scholar with the works of other Indigenous scholars and primary and historical records to show how treaties, land, and reconciliation are inherently linked, as well as the necessary discussion they pose to the Indigenous-Canadian relationship. What makes this thesis a particularly unique contribution to the works of both political science and transitional justice is my voice as an Indigenous Black scholar in this field and the perspective I brought to my analysis of the land claims dispute issue and reconciliation in Canada.

Indigenous scholars are reclaiming our methodologies in our works within the fields of academia. The work in this thesis strives to operate both within the fields of Western scholarship, and outside the confines of academic research in a hope to promote an understanding of Indigenous knowledge, relationships, and legal traditions in Indigenous policy and political institutions. Indigenous issues are complex and cannot be painted with a single brush. They extend beyond history books and scholarly papers having real and lasting impacts amongst Indigenous people and settler Canadians alike. My work encourages the reader to think beyond these constraints to understand and approach reconciliation with land and people outside of academia.

While my methodology as an Indigenous scholar might not be solely unique within itself in the field of Indigenous scholarship, my perspective as an Indigenous Black Canadian within this field of scholarship provides a lens of analysis that is unique. It offers a new understanding for scholars to approach anti-oppressional and intersectional works of this kind in the future. The



hopes of normalizing these perspectives in the fields of academia that have historically discouraged these insights is what I hope my thesis contributes towards.

#### **8.4 Further Questions to Consider**

In discussing the question of land claims and reconciliation, there are a number of other questions that arise, and all of which warrant further study. Many of these questions look deeper at the land claims process itself and the future of the nation-to-nation relationship. As mentioned in Chapter Seven, increased levels of Indigenous activism against the Canadian government and resource development have been arising in the 2010s. Recently, in 2020, protests by Indigenous people and non-Indigenous allies arose across the country to stand in solidarity with the Wet'suwet'en people who were fighting to protect 22 000 square kilometres of unceded traditional lands from the construction of the Coastal GasLink Pipeline.<sup>3</sup>

The height of the Wet'suwet'en protests in late 2019 and early 2020 revealed the issue of colonial band government interests conflicting with those of the traditional Indigenous hereditary governments, which conflicted over the issue of land and development in the Wet'suwet'en case. With the signing of historical treaties, the *Indian Act, 1876* implemented band councils with elected chiefs and councils to act as the pseudo governments for Indigenous nations, replacing Indigenous hereditary forms of traditional governments.<sup>4</sup> It is these colonially created band councils that are often the representatives of Indigenous nations and who are placed in position to

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<sup>3</sup> Rafferty Baker, "A Who's Who in the Wet'suwet'en Pipeline Conflict," *CBC News*, February 25, 2020, modified March 2, 2020, <https://www.cbc.ca/news/canada/british-columbia/wetsuweten-whos-who-guide-1.5471898>.

<sup>4</sup> Canada, Revised Statutes of Canada, *Indian Act*, 1985, c. I-6, s. 1, <https://laws-lois.justice.gc.ca/eng/acts/i-5/FullText.html>. See Section 74, "Elected councils (1) Whenever he deems it advisable for the good government of a band, the Minister may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act. Composition of council (2) Unless otherwise ordered by the Minister, the council of a band in respect of which an order has been made under subsection (1) shall consist of one chief, and one councillor for every one hundred members of the band, but the number of councillors shall not be less than two nor more than twelve and no band shall have more than one chief."

settle land claim disputes with the Canadian government while having to balance the interests of their nations within the limited resources the government provides them. Resource development can provide Indigenous communities with many economic benefits and these may need to be taken into account by band councils despite the impacts resource development has on traditional lands. This often, as was the main issue in Wet'suwet'en, conflicts with the wishes of hereditary land protectors.<sup>5</sup> Yet, it should also be noted that not all Indigenous communities suffer degrees of poverty, nor the same degrees of poverty, and thus the benefits of signing land claim agreements may vary to different extents regarding individual nations needs or desires. Examining the impacts of colonial band councils in the land claims settlement process and the inclusion of not only hereditary governments but also Indigenous communities and grass roots involvement in the land claims process is a further question that needs to be examined.

Another question that needs to be addressed is the issue regarding the formation of an international tribunal that would settle Indigenous land disputes with the Canadian government within the framework of international law. Chapter Seven introduced this idea of an international tribunal or framework that would settle land claims in the true spirit of nation-to-nation agreements that respects Indigenous sovereignty. Xavier Scott discussed the value of using international law as a framework to properly address the “theft of sovereignty” resulting from historical treaties and colonialism that led to the loss of Indigenous lands to the British Crown.<sup>6</sup> Other scholars discussed the need for a new process of settling land claim disputes that involves the need for international

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<sup>5</sup> Rafferty Baker, “A Who’s Who in the Wet’suwet’en Pipeline Conflict.”

<sup>6</sup> Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties: Theorizing Post-Colonial States in Settler Colonies,” *Studies in Social Science* 12, no. 2 (2018): 390.

law and frameworks.<sup>7</sup> This would go beyond the idea of a “Royal Proclamation of Reconciliation” recommended by the Canadian TRC, as discussed in Chapter Six.<sup>8</sup>

Borrows and James Tully discuss reconciliation as a resurgence, which includes the need for Indigenous legal frameworks to be incorporated into the Canadian legal system.<sup>9</sup> Borrows argues that the reconciliation of land in Canada requires the resurgence of Indigenous legal systems, which he argues apply to the honour of the Crown, and thus could be used as a means for not only land dispute resolution, but other Indigenous legal issues in Canada.<sup>10</sup> Yet, Borrows’ argument remains within the framework of domestic legal systems in Canada and does not appear to consider Indigenous legal systems within international law. A further question that could be discussed is how the incorporation of Indigenous law into an international legal framework would look, and how that could achieve a better process for settling Indigenous land claim disputes, not only in Canada, but in other settler-colonial nations. This thesis stayed within the limited scope of examining Indigenous issues within Canada. However, other settler-colonial nations across the globe suffer from similar issues involving Indigenous land rights conflicting with settler-colonial governments. Discussing the incorporation of Indigenous law into international legal frameworks may prove to be a resolution for Indigenous land claim disputes globally, and is a question worth looking into in the future.

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<sup>7</sup> See Carole Blackburn, “The Treaty Relationship and Settler Colonialism in Canada,” in *Shifting Forms of Continental Colonialism: Unfinished Struggles and Tensions*, edited by Diitmar Schorkowitz, John R. Chávez, and Ingo W. Schröder (Singapore: Palgrave Macmillan, 2019), 415-435; Catherine Lu, *Justice and Reconciliation in World Politics* (Cambridge: Cambridge University Press, 2017); and Xavier Scott, “Repairing Broken Relations by Repairing Broken Treaties.

<sup>8</sup> Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg: Library and Archives Canada Cataloguing Publication, 2015), 4-5. See *Calls to Action* #45 and #47.

<sup>9</sup> John Borrows and James Tully, “Introduction,” in *Resurgence and Reconciliation: Indigenous Settler Relations and Earth Teachings*, edited by Michael Asch, John Borrows and James Tully (Toronto: University of Toronto Press, 2018), 4.

<sup>10</sup> John Borrows, “Earth-Bound,” 50.

## 8.5 Final Thoughts

The Government of Canada has argued that its relationship with Indigenous people is its most important relationship.<sup>11</sup> Yet, Indigenous research along with the rise in Indigenous activism, like the Wet'suwet'en protests, has shown that the Indigenous-Canadian relationship has indeed been broken, and reconciliation appears to be no more than a symbolic gesture by the Canadian government to implore an image of peace on the international stage. The call for the reparation of this broken trust between these sovereign entities has been made. A path forward may still be unclear, but has been set forth. What awaits now is for Indigenous nations to be recognized for what they have always been: sovereignties, protectors, and partners of, and with, this land.

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<sup>11</sup> Gina Starblanket, "The Numbered Treaties and the Politics of Incoherency," *Canadian Journal of Political Science* 52, (2019): 450. Speaking of statements made by Prime Minister Trudeau and his Liberal government.

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Younging, Gregory. *Elements of Indigenous Style: A Guide for Writing by and About Indigenous Peoples*. Brush Education Inc., 2018.

## Curriculum Vitae

**Name:** Joy S. Spear Chief-Morris

**Post-Secondary Education**

Bachelor of Arts  
The University of Western Ontario  
London, Ontario, Canada  
2014-2017

Bachelor of Arts (partial completion)  
The University of British Columbia  
Vancouver, British Columbia, Canada  
2012-2014

**Honours and Awards:**

Western Graduate Student Summer Term Bursary  
2020

Western Graduate Student Scholarship  
2019-2020

The Honourable G. Howard Ferguson Award  
2016-2017

Western University Dean's List Honour  
2014-2015, 2015-2016, 2016-2017

Academic All-Canadian Achievement  
2012-2013, 2013-2014, 2014-2015, 2015-2016, 2016-2017

Dorothy Walsh Female Student-Athlete Scholarship  
2016

Twenty-8 Award for Academic Achievement  
2013

ACTO Pipelines Aboriginal Education Awards Scholarship  
2012

**Related Work Experience:**

Student Opportunities Coordinator  
Indigenous Student Centre  
The University of Western Ontario  
2020

Graduate Teaching Assistant  
The University of Western Ontario

2019-2020

Program Coordinator Assistant  
Indigenous Student Centre  
The University of Western Ontario  
2018-2020

Research Assistant  
The University of Western Ontario  
2015-2018