THE SCOPE OF THE POSSIBLE: CANADIAN COURTS, EMOTION AND THE ASSERTION OF CROWN SOVEREIGNTY

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Abstract

This thesis considers emotion and the role emotion plays in judicial reasoning in three Aboriginal title decisions. The aim of this analysis is to draw to the surface emotional undercurrents and commitments that, together with other currents, impact the direction of judicial reasoning in these cases.

Using methodologies and approaches from the area of law and emotion, this thesis employs close readings of the three Aboriginal title decisions to draw out lacunae in the Supreme Court of Canada's reasoning. These lacunae reflect fixed assumptions that the Court chooses not to interrogate, such as the Crown's acquisition of radical title to all land in Canada, and other postures and commitments that impact the Court's reasoning. The emotions analysis posits that these lacunae give us information about where resistance, aversion, fear, and other emotions arise to reinforce certain narratives and modes of thinking and to prevent engagement with challenging questions.

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Chapter 1 INTRODUCTION

aunt of the sovereignty of dust. aunt of that which cannot be negated entirely. she who is magic because she goes missing and comes back. she who walks upside down on the ceiling of the world and does not fall.

- ***Billy-Ray Belcourt***[1]

This thesis considers emotion and the role emotion plays in judicial reasoning. More specifically, this thesis looks at emotion in three Aboriginal title decisions from the Supreme Court of Canada, interrogating emotions embedded in the decisions' narratives and paradigms. The aim of this analysis is to draw to the surface emotional undercurrents and commitments that (combined with other currents) impact the direction of judicial reasoning in these cases.

This thesis relies on methodologies and approaches from the area of law and emotion to conduct this analysis. Law and emotion is a relatively new area of academic study[2] and remains somewhat outside the mainstream.[3] As a result, to the best of my knowledge, this is the first work looking at Canadian Aboriginal law primarily through a law and emotions lens. This is perhaps unsurprising, given the ongoing fiction in common law courts that emotions have no place in the courtroom and that judges are impartial, dispassionate adjudicators whose emotions do not inform their judgments.[4] Suggesting that emotions are as present in courtrooms and judges' chambers as

[1] Billy-Ray Belcourt, *This Wound Is a World*, First University of Minnesota Press (Minneapolis: University of Minnesota Press, 2019) at 9.
[2] See e.g. Susan Bandes, ed, "The Passions of Law" in *The Passions of Law* (New York University Press, 2000).
[3] Kathryn Abrams & Hila Keren, "Who's afraid of law and the emotions (2010)" in *Research Handbook on Law and Emotion* (Edward Elgar Publishing, 2021) 566 at 566.
[4] See e.g. *Ibid* at 568–569.

anywhere else – and that, more than this, emotion is an element of judgment itself[5] – is to challenge well-worn, comfortable presumptions. As a former practicing lawyer,[6] however, I have come to this area of research because I have seen emotion surfacing in the courtroom time and again, and have seen this emotion reflected in the court's decisions. While practicing in the area of Indigenous rights litigation, I encountered hostility, incredulity and dismissiveness from opposing counsel and the bench when advancing my clients' claims. Colleagues recounted similar experiences, with fear and anger inflecting their courtroom experiences. From this first-hand experience, I know that emotion shows up in the courtroom, impacting the direction of witness questioning, the outcome of objections, the result of motions, the opposing party's perception of how cooperative they are required to be, and the outcome of the case itself.

1.1 My Research Interest: How Did Crown Sovereignty Come About?

This experience with emotion was with me in 2020 when I first began to assist on the Wolastoqey Nation's Aboriginal title claim in New Brunswick. In this claim, the Wolastoqey Nation seeks, amongst other remedies, the return of land purportedly granted by the Crown to industrial players (Irving being the most high-profile defendant).[7] As I assisted with drafting the claim, I researched how an Aboriginal title declaration might impact third-party property interests (such as fee simple lands held by private parties). This research led me to the ostensible source of the Crown's authority to alienate land to third parties in the first place – its assertion of sovereignty and acquisition of radical title to all land in Canada. As I tried to make sense of how the Crown's

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[5] See e.g. Robert C Solomon, "Emotions as Evaluative Judgments" in *True to Our Feelings: What Our Emotions Are Really Telling Us* (Oxford University Press, 2008).

[6] I am a white settler who practiced Indigenous rights litigation for several years prior to beginning my graduate work. As noted in the Acknowledgments, I am greatly indebted to that work and my former colleagues and clients – they shaped my understanding of Aboriginal law and its limitations.

[7] See e.g. "Wolastoqey Title Claim", online: *OKT | Olthuis Kleer Townshend LLP* <https://www.oktlaw.com/services/cases/wolastoqey_title_claim/>.

assertion of sovereignty had resulted in the Crown, in fact, acquiring sovereignty and title, I slowly realized that the explanations available were either tautologies or relied on disavowed doctrines, such as the doctrine of *terra nullius*. I also realized that the Supreme Court of Canada (the "Court," "SCC," or "Supreme Court") had never explained how the Crown's acquisition of title and sovereignty had occurred. Instead, Crown sovereignty and radical title were taken as givens. This lacuna in reasoning has led John Borrows to describe the Crown's acquisition as alchemical, magical, and based on an incantation.[8] Douglas Sanderson has said it is the "mystery at the heart of Canadian law…"[9] This mystery does not lend itself to reasoned exposition.

As I wrestled with the Crown's assertion of sovereignty, it became clear that something other than legal reasoning was required to explain its operation. The doctrine's logic was obscure, and given my experiences with emotion in the courtroom, I wondered if a current of emotion might be operating alongside other currents to sweep the Court past the questions it ought to have been asking about the Crown's assertion of sovereignty. My desire to test that hypothesis led to this thesis.

1.2 Emotion and Aboriginal Title

Emotions have a great deal to tell us.[10] They can tell us what is important to us,[11] what we find challenging, and what we have difficulty engaging with.[12] They contain judgments about the

[8] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37:3 Osgoode Hall Law Journal 537–596.
[9] Douglas Sanderson, "The Residue of Imperium: Property and Sovereignty on Indigenous Lands" (2018) 68:3 U Toronto LJ 319–357 at 319.
[10] See e.g. Emily Kidd White, "Images of reach, range, and recognition: Thinking about emotions in the study of international law" in *Research Handbook on Law and Emotion*, 1st ed. ed (United Kingdom: Edward Elgar Publishing, 2021) at 506.
[11] See e.g. Martha C Nussbaum, *Hiding from humanity: disgust, shame, and the law* (Princeton, N.J: Princeton University Press, 2004) at 29.
[12] See e.g. Susan Bandes, "Fear and Degradation in Alabama: The Emotional Subtext of University of Alabama v. Garrett" (2002) 5:3 U Pa J Const L 520–536.

world around us.[13] In the context of legal decisions, as Susan Bandes has written, values expressed in the decisions are “both a product of and an expression of certain emotional assumptions and commitments.”[14] These emotional assumptions and commitments, however, “tend[] to remain unexpressed, and thus insulated from debate.”[15] Once surfaced, “[t]hese underlying emotional commitments have considerable explanatory power.”[16] Looking at emotion in judicial reasoning can contribute to understanding why the court has reasoned a certain way or reached an unexpected outcome.

As explored throughout this thesis, much of the legal reasoning and many of the outcomes reached in the Aboriginal title decisions invite investigation. These decisions call for emotions’ “considerable explanatory power.”[17]

Emotions in the context of Aboriginal title decisions can tell us where reasoning gets interrupted – where resistance, aversion, fear, and other emotions arise to reinforce certain narratives and modes of thinking. Emotion is not, of course, the singular explanation for the mysterious lacunae in Aboriginal title law – areas towards which the Court will not direct its attention and in which it will not question its assumptions. Emotion is, however, another lens through which to try to make sense of the title decisions. The inquiry undertaken in this thesis provides a pathway for considering the values and judgments we find if we look closely at these decisions. It is my hope for this work to complement the work others are doing to elucidate the mysterious aspects of Aboriginal law.[18]

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[13] See e.g. Solomon, *supra* note 5.
[14] Bandes, “Fear and Degradation in Alabama”, *supra* note 12 at 521.
[15] *Ibid* at 522 [citations omitted].
[16] *Ibid* at 522.
[17] *Ibid* at 522.
[18] See e.g. Sanderson, “The Residue of Imperium”, *supra* note 9; Borrows, “Sovereignty’s Alchemy”, *supra* note 8; John Borrows, “The Durability of Terra Nullius: Tsilhqot’in Nation v. British Columbia” (2015) 48:3 UBC L Rev 701–742; Joshua Nichols & Amy Swiffen, “Undoing the Colonial Double-Bind: Interpretation and Justification in Aboriginal Law” (2022) 27:2 Rev Const Stud 41–75.

My analysis focuses on three Aboriginal title decisions, *Calder et al. v Attorney-General of British Columbia*,[19] *Delgamuukw v. British Columbia*[20] and *Tsilhqot'in Nation v. British Columbia*.[21] These are the only three cases in Canadian jurisprudence in which Aboriginal title was the central claim at issue. Other cases have commented on Aboriginal title and impacted the Court's jurisprudence,[22] but it is these three that have directly shaped Aboriginal title law in this country.

1.3 METHODOLOGICAL APPROACH

I have conducted my analysis of the title cases relying on law and emotion's "legal-actor approach" methodology,[23] as well as the law and humanities approach of close textual reading.[24]

The legal-actor approach looks at how emotion "influences and informs, or should influence or inform, [those in the judicial system's] performance of [their] assigned legal function."[25] The legal actors at issue in this research are the judges of the Supreme Court of Canada. However, this thesis does not purport to uncover the emotions actually experienced by these judges. Rather, this thesis is focused on a close reading of the texts produced by the bench – the three title decisions – and on analysing the emotions disclosed in those texts. This textual analysis is conducted by undertaking a close reading of the cases and considering questions suggested by law and emotion

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[19] *Calder et al v Attorney-General of British Columbia*, [1973] SCR 313 [*Calder*].
[20] *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [*Delgamuukw (SCC)*].
[21] *Tsilhqot'in Nation v British Columbia*, [2014] 2 SCR 257 [*Tsilhqot'in Nation (SCR)*].
[22] See e.g. *St Catharines Milling and Lumber Co v R*, [1887] 13 SCR 577 [*St. Catherines Milling*]; *Guerin v The Queen*, [1984] 2 SCR 335 [*Guerin*].
[23] Terry A Maroney, "Law and emotion: A proposed taxonomy of an emerging field (2006)" in *Research Handbook on Law and Emotion* (Edward Elgar Publishing, 2021) 534.
[24] See e.g. Kathryn Temple, *Loving justice: legal emotions in William Blackstone's England* (New York: New York University Press, 2019).
[25] Maroney, *supra* note 23 at 551.

scholars, such as: how does the Court talk about the parties? Who is the centre of attention? What is included in the recitation of facts? What emotions are present or lacking?[26]

A more detailed account of the methodology and method followed can be found in Chapter 5.

1.4 SETTLER COLONIAL PROPERTY LOGICS

Situating the Aboriginal title decisions requires looking at Canadian property law, and its history, more generally.

Canadian property law is steeped in and reflective of settler colonial values and logics.[27]

Canadian property law derives from British common law principles, themselves originating from the period of William the Conqueror, from whose time forward all land was considered to be vested in the monarch, who ruled by divine right.[28] The monarch then granted limited interests in land to those whom he or she chose to favour,[29] but ultimate title rested with the monarch, regardless of any grants. Over time, this became the doctrine of Crown tenure, according to which estates in land could be held by owners, with the Crown retaining only limited rights, like that of escheat.[30]

How British law from the 11th century came to be applied centuries later on Turtle Island,[31] an ocean away from England and a land on which no English monarch set foot until well after the

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26 See e.g. Bandes, "Fear and Degradation in Alabama", *supra* note 12; White, *supra* note 10.
27 See e.g. Brenna Bhandar, *Colonial Lives of Property: Law, Land, and Racial Regimes of Ownership* (Durham, United States: Duke University Press, 2018); Aaron Mills, "Rooted Constitutionalism" in *Resurgence and Reconciliation : Indigenous-Settler Relations and Earth Teachings* (Toronto: University of Toronto Press, 2018); Liam Midzain-Gobin, "Comfort and insecurity in the reproduction of settler coloniality" (2021) 9:3 Critical Studies on Security 212–225; Sanderson, "The Residue of Imperium", *supra* note 9.
28 Sanderson, "The Residue of Imperium", *supra* note 9 at 325–327.
29 *Ibid*.
30 *Ibid*.
31 Turtle Island is the name many First Nations peoples use for North America. See e.g. *Looking Forward, Looking Back: Report of the Royal Commission on Aboriginal Peoples, Volume 1*, by RCAP Report Vol 1 (Ottawa: Royal

time of settlement, is the "mystery at the heart of Canadian law…"[32] Some of the answers to this mystery are found in settler colonial logics, including the doctrines of discovery and *terra nullius*.

The Doctrines of Dispossession:

In his article "The Residue of Imperium: Property and Sovereignty on Indigenous Lands," Douglas Sanderson explains that European international law long recognized four theories for acquiring sovereignty over a foreign land: discovery, conquest, cession (treaty) and prescription (the long-term occupation of land unopposed by its original inhabitants).[33] Sanderson considers each of these theories and demonstrates that the only theory that might apply in Canada to explain the Crown's purported acquisition of sovereignty and title is the doctrine of discovery.[34] According to this doctrine, "a European power is said to gain sovereignty and the property interest in territory that it discovers."[35] The *Final Report of the Truth and Reconciliation Commission of Canada* ("TRC Report") points out that "The Doctrine of Discovery cannot serve as the basis for a legitimate claim to the lands that were colonized, if for no other reason than that the so-called discovered lands were already well known to the Indigenous peoples who inhabited them for thousands of years."[36] Nevertheless, this doctrine was persuasive as between European powers at the time of colonization.[37]

Commission on Aboriginal Peoples, 1996) at 125. See also Edward Benton-Banai, *The Mishomis Book: The Voice of the Ojibway* (Minneapolis, Minnesota: University of Minnesota Press, 2010).

[32] Sanderson, "The Residue of Imperium", *supra* note 9 at 319.

[33] *Ibid* at 320.

[34] *Ibid* at 320–321.

[35] *Ibid* at 321.

[36] TRC Report, *Final Report of the Truth and Reconciliation Commission of Canada: Volume 1: Summary* (Toronto: James Lorimer & Company Ltd., 2015) at 49.

[37] Gerry Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement: An Unresolved Jurisprudence" (1993) 19:1 Melb U L Rev 195–210 at 391.

The doctrine of discovery is closely tied to the concept of *terra nullius*, or empty land.[38] *Terra nullius* posits that "no one owned the land prior to the European assertion of sovereignty."[39] This does not mean that the land in question was empty of inhabitants – only that European powers did not view the inhabitants' land use as "ownership," but rather as mere "occupation."[40] As the TRC Report tells us, "True ownership, [the Europeans] claimed, could come only with European-style agriculture."[41] Any lands not cultivated in ways familiar to European eyes were liable to be considered *terra nullius*.

Australia provides an example of the application of these doctrines. The doctrine of *terra nullius* was applied by courts in Australia for two centuries[42] to justify English settlement of Aboriginal lands. Until 1992, when the doctrine was ostensibly disavowed in the *Mabo* decision,[43] Australian courts contorted evidence about Aboriginals' societies in order to conclude that the doctrine of *terra nullius* applied in that country.[44] In order to cast the country as uninhabited at the time of settlement, the courts found, variously, that Australia had been unoccupied at the time of settlement, occupied by primitive groups, and occupied by groups that lacked social organization in a European style.[45]

Desmond Manderson explains the operation of *terra nullius* and its consequences in Australia in his article "Escaping Criticism":

> [*Terra nullius*] takes as given a set of eminently unproven facts – a land that is empty, if not of people, then of law, property and civilization – while maintaining the 'normative consequences' of those facts, viz. the legality of the British crown's claim to possession by right of settlement not conquest. Vast and enduring are the implications of that legal fiction, the founding myth of the entire history of settler

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[38] Sanderson, "The Residue of Imperium", *supra* note 9 at 321.
[39] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 69.
[40] TRC Report, *supra* note 36 at 46.
[41] *Ibid*.
[42] See e.g. Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement", *supra* note 37 at 196.
[43] *Mabo v Queensland (No 2)*, [1992] HCA 23 [*Mabo*].
[44] See e.g. Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement", *supra* note 37.
[45] *Ibid* at 202.

> Australia and the heart of centuries of injustice perpetrated against Indigenous Australians.[46]

While the Court in *Mabo* rejected the doctrine of *terra nullius*, holding that it was factually inapplicable,[47] Manderson tells us that “The express repudiation of the fiction in Mabo did not by any means signal the end of its legal or social impact, except in limited way [*sic*].”[48]

As will be explored in the next section, *terra nullius* has also been said not to apply in Canada,[49] but it is difficult to explain Crown sovereignty without reliance on the doctrine.

The application of *terra nullius* in Australia turned, in part, on the fact that Aboriginal people there did not engage in cultivation of land in ways familiar to Europeans.[50] This enabled the courts to portray Aboriginal people as primitive groups.[51] This understanding ties in with the stadial theory of civilizations,[52] whereby cultures were deemed more or less “civilized” based on their modes of food production and sustenance: “the theory was that society ‘naturally’ or ‘normally’ progressed over time through four more or less distinct and consecutive stages, each corresponding to a different mode of subsistence, these stages being defined as hunting, pasturage, agriculture, and commerce.”[53] The commercially-oriented Europeans who conceived of this theory placed themselves at the pinnacle of civilization.[54] Indigenous peoples, whom Europeans understood to be exclusively hunter-gatherers (with no cultivation practices),[55] were at the lowest rank of the

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[46] Desmond Manderson, “Escaping criticism?” (2022) 47:1 Journal of Legal Philosophy 102–114 at 113.
[47] Simpson, “Mabo, International Law, Terra Nullius and the Stories of Settlement”, *supra* note 37 at 206–207.
[48] Manderson, “Escaping Criticism”, *supra* note 46 at 113.
[49] *Tsilhqot’in Nation (SCR)*, *supra* note 21 at para 69.
[50] See e.g. Bhandar, *supra* note 27 at 77–113.
[51] *Ibid*.
[52] See e.g. Nichols & Swiffen, “Undoing the Colonial Double-Bind”, *supra* note 18 at 51.
[53] David B Schorr, “Savagery, Civilization, and Property: Theories of Societal Evolution and Commons Theory” (2018) 19:2 Theoretical Inquiries in Law 507–531 at 509 citing Ronald L. Meek, Social Science and the Ignoble Savage 5–98 (1976).
[54] See e.g. TRC Report, *supra* note 36 at 47.
[55] This was, of course, a profoundly mistaken understanding. See e.g. Robin Wall Kimmerer, *Braiding Sweetgrass : Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (Minneapolis, Minnesota: Milkweed Editions, 2013); Patrick Wolfe, “Settler colonialism and the elimination of the native” (2006) 8:4 Journal of Genocide Research

hierarchy.[56] This stadial theory posited that while Europeans had reached the pinnacle of civilization,

> the other peoples of the world had been held back by such factors as climate, geography, and migration. Through a civilizing process, Europeans could, however, raise the people of the world up to their level. This view was replaced in the nineteenth century by a racism that chose to cloak itself in the language of science, and held that the peoples of the world had differing abilities. Some argued that, for genetic reasons, there were limits on the ability of the less-developed peoples to improve. In some cases, it was thought, contact with superior races could lead to only one outcome: the extinction of the inferior peoples.[57]

These theories dovetail with the caveats of the doctrine of continuity, according to which the laws of original peoples in lands settled by the British were absorbed into the common law,[58] but only to the extent that the laws were cognizable to it.[59] This meant that in many settler colonial contexts, Indigenous rights were considered to be almost non-existent. As Lord Sumner explained in his now infamous decision in *Re Southern Rhodesia*,

> Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them.[60]

Together, the doctrines of discovery, *terra nullius*, and continuity, and the stadial theory, all supported arguments for the legitimacy of European settlement in foreign lands. Undergirding these are colonial logics that offered moral justifications for the doctrines' application.

387–409 at 395–396; Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement", *supra* note 37.

[56] TRC Report, *supra* note 36 at 47.

[57] *Ibid* at 47 (citations omitted); see also Ntina Tzouvala, ed, "The Standard of Civilisation in the Nineteenth Century: Between the 'Logic of Improvement' and the 'Logic of Biology'" in *Capitalism As Civilisation: A History of International Law* Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2020) 44.

[58] Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's Van Der Peet Trilogy: Naive Imperialism and Ropes of Sand Case and Comments" (1996) 42:4 McGill L J 993–1010 at 1007.

[59] See e.g. *Calder*, *supra* note 19 at 387.

[60] *Re Southern Rhodesia*, [1919] AC 211 at 233.

The Logics:

There are three settler colonial property logics undergirding the doctrines of dispossession to explore: improvement, civilization and racism.[61]

Brenna Bhandar explores each of these in her book *The Colonial Lives of Property: Law, Land and Racial Regimes of Ownership*. In this book, Bhandar explores how "possession of land was (and remains) the ultimate objective of colonial power…"[62] In his seminal article "Settler Colonialism and the Elimination of the Native," Patrick Wolfe states the same: "Territoriality is settler colonialism's specific, irreducible element."[63] This goal – the possession of another's land – means that settler colonialism is always inherently eliminatory, and often genocidal, because settlers seek to replace Indigenous peoples on their lands.[64] The three logics listed above were all used to justify the eliminatory violence inherent in taking possession of another's land.

Improvement:

The concept of improvement links land ownership with European-style of cultivation of land.[65] Bhandar writes that this concept "finds its clearest expression in the work of Locke."[66] Locke's influential theory of property ownership holds that "when man mixes his labor with the earth, this gives rise to a right in that land that he has improved."[67] For Locke, use and occupation of the land gives a man the god-given right to own the land.[68] This "use," however, must be of a certain type – it must be the cultivation of land for agricultural purposes.[69] Locke characterized

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[61] I am indebted to Professor Nedelsky's seminar course on Property for the opportunity to learn about these topics and many others. I explored aspects of these settler colonial property logics in my term paper for that course, and that thinking informs this section.
[62] Bhandar, *supra* note 27 at 3.
[63] Wolfe, *supra* note 55 at 388.
[64] *Ibid* at 387–388.
[65] Bhandar, *supra* note 27 at 39; TRC Report, *supra* note 36 at 46.
[66] Bhandar, *supra* note 27 at 39.
[67] *Ibid* at 48.
[68] *Ibid* at 49.
[69] *Ibid* at 48.

such cultivation as "improvement" of the land and reasoned that by mixing a man's labour with cultivation of the land he occupies, he gains the right to own the land.[70]

Improvement and ownership of land, in turn, act as catalysts for the "progression from a state of nature to a civilized state of being."[71] This progression is drawn out by William Blackstone in his *Commentaries on the Laws of England*. According to Blackstone, humanity without private property exists in a state of "primaeval simplicity."[72] In this state of simplicity, everyone enjoys the right of possession while using something but not the right to own the thing in substance.[73] As populations increase, the theory goes, permanent dominion is required to protect one's creations and improvements.[74] The need to protect property and the valuable products of that property is what results in European "civilization": "Necessity begat property; and, *in order to insure that property, recourse was had to civil society*, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties."[75] In this account, private property is the first step in the teleological progression towards civilization.[76]

Locke equated uncultivated or "unimproved" land with unowned wasteland.[77] Since the lands in North America (as in Australia) appeared uncultivated to European eyes,[78] the European view was, therefore, that Indigenous lands were wastelands and unowned,[79] peopled by

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[70] *Ibid* at 47–49.
[71] *Ibid* at 48.
[72] William Blackstone, *The Oxford edition of Blackstone: commentaries on the laws of England*, first edition. ed (Oxford United Kingdom ; Oxford University Press, 2016) at 2.
[73] *Ibid*.
[74] *Ibid* at 2-3.
[75] *Ibid* at 5 [emphasis added].
[76] Bhandar, *supra* note 27 at 4; Blackstone, *supra* note 72 at 5.
[77] Bhandar, *supra* note 27 at 48.
[78] Wolfe, *supra* note 55 at 395–396.
[79] Bhandar, *supra* note 27 at 47–49.

"uncivilized Indians."[80] The lands were, according to the logic of improvement, *terra nullius*, and taking possession of them for the purposes of cultivation was a good in itself.

Civilization:

Civilization was the end of the teleological progress begun by improvement of land. As outlined above, according to the stadial theory of civilization, cultures were deemed more or less "civilized" based on their modes of food production and sustenance, progressing from "hunting, pasturage, [and] agriculture, [to] commerce."[81] A land without agriculture was a land without civilization.

"Civilization" was deemed to be a good – something towards which all peoples should aspire,[82] and civilization was used as "a way of arguing about the distribution of rights and duties between different political communities."[83] The more civilized a people were, the more entitled to rights, and, conversely, the less civilized, the less entitled to rights.[84]

Apart from improvement of land, what were the markers of civilization? Tzouvala, relying on Bhandar, tells us that there was an "equation between civilisation, whiteness and productive economic activity, the taming of nature, and adventurous curiosity."[85] Together, these aspects of the "historically contingent form capitalist modernity had assumed in the West" were seen to be "the only morally acceptable state of being."[86]

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[80] *Ibid* at 49.
[81] Schorr, "Savagery, Civilization, and Property", *supra* note 44 at 509 citing Ronald L. Meek, *Social Science and the Ignoble Savage*, 5–98 (1976).
[82] See e.g. TRC Report, *supra* note 36 at 46–47.
[83] Tzouvala, *supra* note 57 at 44.
[84] *Ibid* at 51.
[85] *Ibid* at 69.
[86] *Ibid* at 55.

For peoples deemed "uncivilized," European powers considered it a moral obligation to try to "civilize" them (at least those who subscribed to the view that this was a viable aim[87]). As the TRC Report states, Europeans held the

> belief that the colonizers were bringing civilization to savage people who could never civilize themselves. The 'civilizing mission' rested on a belief of racial and cultural superiority. … In 1883, Lord Roseberry, a future British prime minister, told an Australian audience, 'It is on the British race … that rest the highest hopes of those who try to penetrate the dark future, or who seek to raise and better the patient masses of mankind.'[88]

In this vein, Tzouvala recounts that in the mid-19th century, the British considered themselves entitled to the gratitude of colonized peoples, since they saw themselves as assisting such peoples towards civilization.[89]

Based on the logic of civilization, settler colonialism was not only justifiable but was in fact a moral good, since non-Europeans needed the "assistance" of Europeans in order to become civilized. As the TRC Report states: "Taken as a whole, the colonial process relied for its justification on the sheer presumption of taking a specific set of European beliefs and values and proclaiming them to be universal values that could be imposed upon the peoples of the world."[90]

<u>Racism</u>

The last settler colonial logic to explore is that of race. Settler colonial property ownership in Canada was predicated on race (and gender) – only white men could hold property in the colonies in the early days, linking property and race directly.[91]

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[87] Tzouvala, *supra* note 57.
[88] TRC Report, *supra* note 36 at 46–47.
[89] Tzouvala, *supra* note 57 at 55.
[90] TRC Report, *supra* note 36 at 49.
[91] Bhandar, *supra* note 27 at 5.

This connection between race and land ownership (and therefore race and civilization) reflected the racism that developed in the 19th century, which held that "inferior" races would never be civilized and would therefore never be able to own property. The TRC Report states:

> European writers and politicians often arranged racial groups in a hierarchy, each with their own set of mental and physical capabilities. The 'special gifts' of the Europeans meant it was inevitable that they would conquer the lesser peoples. Beneath the Europeans, in descending order, were Asians, Africans, and the Indigenous peoples of the Americas and Australia.[92]

Race and the idea of racial hierarchy were logics used to justify land theft. Bhandar writes that some colonial administrators espoused "a view of First Nations as savages, who lacked … the capacities for [land] improvement, including the capacity for abstract thought."[93] This made Indigenous peoples unfit to own private property.[94]

Race was not only employed as a justification for land theft, however – it was also deployed as a logic that justified the elimination of Indigenous peoples. As excerpted from the TRC Report above, in the 19th century Europeans began to rely on:

> a racism that chose to cloak itself in the language of science, and held that the peoples of the world had differing abilities. Some argued that, for genetic reasons, there were limits on the ability of the less-developed peoples to improve. In some cases, it was thought, contact with superior races could lead to only one outcome: the extinction of the inferior peoples.[95]

Tzouvala tells us that some Europeans were explicit and unapologetic in their view that Indigenous peoples would be eliminated by their contact with the "superior" Europeans.[96] She cites Johann Bluntschli, who wrote in 1919 that "[t]he 'red race' can offer no opposition to the advance of the white civilisation, and are crushed and destroyed by it."[97] According to this logic,

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[92] TRC Report, *supra* note 36 at 46–47.
[93] Bhandar, *supra* note 27 at 53. This pertains to one administrator in particular, Joseph Trutch, whom Bhandar discusses at length.
[94] *Ibid*.
[95] TRC Report, *supra* note 36 at 47 [citations omitted]; see also Tzouvala, *supra* note 57.
[96] Tzouvala, *supra* note 57 at 69–70.
[97] *Ibid* at 70.

Indigenous peoples were inferior, and their elimination was inevitable and therefore not something to lament. Such logic makes theft of Indigenous land part of the inevitable march of progress.

Patrick Wolfe outlines how race was employed in different ways to further Europeans' various exploitative aims.[98] Where expansion of an exploited population served the colonists' ends, race was expansive – for example, people with any Black ancestry were considered Black because the greater the number of people considered Black, the greater the number of people available for exploitation as enslaved people.[99] Where an exploited population stood in the way of colonists' ends, by contrast, race was restrictive – for example, marriage and blood quantum rules disentitling Indigenous peoples to "Indian" status.[100] But while race was differently constructed according to settlers' ends, all racialized peoples were seen to be lower in the hierarchy of races, which justified their exploitation and elimination.

1.5 SETTLER COLONIAL LOGICS AND ABORIGINAL LAW

As Sanderson writes, there is a "mystery at the heart of Canadian law…"[101] How did the Crown acquire radical title to and sovereignty over Indigenous lands? It is uncontroversial that Indigenous peoples in Canada were never conquered.[102] There are Treaties governing Indigenous-settler relations in much of the country, but these Treaties (a) do not cover the entirety of Canada,[103] and (b) many of the Indigenous nations that are signatories to the Treaties have always said that these are land and jurisdiction sharing – not cession – agreements.[104] As for gaining sovereignty

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[98] Wolfe, *supra* note 55 at 388.
[99] *Ibid* at 388–389.
[100] *Ibid*.
[101] Sanderson, "The Residue of Imperium", *supra* note 9 at 319.
[102] See e.g. *Haida Nation v British Columbia (Minister of Forests)*, [2004] 3 SCR 511 at para 25 [*Haida*].
[103] *Ibid*.
[104] See e.g. RCAP Report Vol. 1, *supra* note 31 at 626; John Long, *Treaty No. 9: Making the Agreement to Share the Land in Far Northern Ontario in 1905* (Montreal: McGill-Queen's University Press, 2010).

by prescription, the longstanding and ongoing Indigenous resistance against settler colonialism makes that doctrine inapplicable.[105] This leaves the doctrines of discovery and *terra nullius*, though these doctrines ought not to apply, given that, as the TRC Report states, Canada was already well-known to the Indigenous peoples here when the Europeans "discovered" it,[106] and that, as the Supreme Court acknowledged in *Calder*, far from being unoccupied, "when the settlers came, the Indians were [here], organized in societies and occupying the land as their forefathers had done for centuries."[107] Moreover, the Supreme Court in *Tsilhqot'in* explicitly states that "[t]he doctrine of *terra nullius* (that no one owned the land prior to European assertion of sovereignty) never applied in Canada…"[108]

The Supreme Court has explained the Crown's acquisition of radical title and sovereignty with statements such as: "At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province…"[109] and "Aboriginal title is a burden on the Crown's underlying title… the Crown did not gain this title until it asserted sovereignty over the land in question … [and] … aboriginal title crystallized at the time sovereignty was asserted."[110] These explanations do not offer much in the way of explanation – rather, they are statements that take the Crown's title and sovereignty as a given. In his article "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*," John Borrows characterizes these statements as "announcements" and "incantations" that act as alchemical magic, ostensibly displacing "previous Indigenous titles by making them subject to, and a burden on, another's higher legal claims."[111]

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[105] Sanderson, "The Residue of Imperium", *supra* note 9 at 320.
[106] TRC Report, *supra* note 36 at 49.
[107] *Calder*, *supra* note 19 at 329.
[108] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 69.
[109] *Ibid* at 69.
[110] *Delgamuukw (SCC)*, *supra* note 20 at para 145.
[111] Borrows, "Sovereignty's Alchemy", *supra* note 8 at 558, 562.

Borrows and other scholars have demonstrated that the Court's announcements regarding the Crown's acquisition of sovereignty do not bear scrutiny. There is simply no clear basis on which the Crown can have acquired radical title to Canada by asserting sovereignty.[112] To make sense of the Crown's purported acquisition of title, recourse must be made to *terra nullius* – it must be that the courts accept that Turtle Island was not owned by Indigenous peoples when the Europeans arrived. It must be that the courts take the position that Indigenous peoples merely occupied the land, without laws and social structures sufficiently cognizable to Europeans to rebut the applicability of *terra nullius*. This is, after all, what the courts in Australia explicitly held for two centuries, until *Mabo*.[113] Though the SCC has said that *terra nullius* never applied in Canada, here, as in Australia, "The express repudiation of the fiction […does…] not by any means signal the end of its legal or social impact, except in limited way [*sic*]."[114]

John Borrows draws this out in his article "The Durability of *Terra Nullius*: *Tsilhqot'in Nation v. British Columbia*," writing,

> The declaration that Crown sovereignty can displace Indigenous sovereignty through a bare assertion presumes that the land is empty of governance or that Indigenous governance powers are inferior. … It is a restatement of the doctrine of *terra nullius*, despite protestations to the contrary. The assertion of radical title retroactively affirms the Crown's appropriation of Indigenous legal interests without their knowledge or consent. In most other contexts, this would be called stealing.[115]

We are left in a situation where the Crown's acquisition of sovereignty cannot satisfactorily be explained without recourse to *terra nullius*, which the Supreme Court has said does not apply

[112] See e.g. Ryan Beaton, Robert Hamilton & Joshua Nichols, "Aboriginal Title, Self-Government, and Indigenous Jurisdiction in Canadian Law" (2022) 73 UNBLJ 93–132; Borrows, "Sovereignty's Alchemy", *supra* note 8; Nichols & Swiffen, "Undoing the Colonial Double-Bind", *supra* note 18; Sanderson, "The Residue of Imperium", *supra* note 9; Borrows, "The Durability of Terra Nullius", *supra* note 18.
[113] Simpson, "Mabo, International Law, Terra Nullius and the Stories of Settlement", *supra* note 37 at 196.
[114] Manderson, "Escaping Criticism", *supra* note 46 at 113.
[115] Borrows, "The Durability of Terra Nullius", *supra* note 18 at 724 (citations omitted).

in Canada. The Supreme Court has not attempted to provide an alternate explanation,[116] perhaps because articulating an explanation would require it to acknowledge that the doctrines and property logics outlined above have operated just under the surface in Canadian Aboriginal law all along.

1.6 Aboriginal Title Basics

Aboriginal title is, like all Aboriginal law concepts, largely a creature of Canadian, rather than Indigenous, law.[117]

The test for and content of Aboriginal title are relatively recent inventions of the Supreme Court of Canada.[118] Before the Supreme Court's 1973 decision in *Calder,* there was uncertainty that the Court would recognize the existence of Aboriginal title at all.[119] It took over twenty years after *Calder* for the Court to encounter another Aboriginal title case – *Delgamuukw* – which it decided in 1997.[120] In the interim period, the Federal Court had devised a test for title in the *Baker Lake* case,[121] based on the Supreme Court's decision in *Calder*,[122] but the majority in *Delgamuukw* chose to devise a new test in that case.[123]

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[116] See e.g. *Thomas and Saik'uz First Nation v Rio Tinto Alcan Inc*, 2022 BCSC 15 at para 197 [*Thomas and Saik'uz First Nation*].

[117] See e.g. John Borrows, "Aboriginal Title and Private Property" (2015) 71:1 The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, online: <https://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/5>; Sarah Morales, "'a 'lha'tham: The Re-Transformation of s. 35 through a Coast Salish Legal Methodology" (2017) 37:2 National Journal of Constitutional Law 145–176; Borrows, "Sovereignty's Alchemy", *supra* note 8; Sanderson, "The Residue of Imperium", *supra* note 9; Douglas Sanderson & Amitpal C Singh, "Why Is Aboriginal Title Property if It Looks Like Sovereignty?" (2021) 34:2 Canadian Journal of Law & Jurisprudence 417–460.

[118] See e.g. Borrows, "Sovereignty's Alchemy", *supra* note 8.

[119] See e.g. Christina Godlewska and Jeremy Webber, "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a" 1 at 3 in Hamar Foster, Jeremy H A Webber & Heather Raven, *Let right be done: Aboriginal title, the Calder case, and the future of Indigenous rights*, Law and society series (Vancouver: UBC Press, 2007).

[120] *Delgamuukw (SCC)*, *supra* note 20.

[121] *Hamlet of Baker Lake v Canada (Indian Affairs and Northern Development),* [1980] 1 FC 518 [*Baker Lake*].

[122] But see Michael Asch, "Calder and the Representation of Indigenous Society in Canadian Jurisprudence" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 337.

[123] This, of course, posed serious problems for the plaintiffs in *Delgamuukw,* who had argued their claim based on the *Baker Lake* test.

As a starting point, in *Delgamuukw*, Chief Justice Lamer, writing for the majority (the "Lamer majority"), takes it as a given that regardless of Aboriginal title, the Crown enjoys radical title to all lands in Canada, including Aboriginal title lands.[124] The Lamer majority does not explain this assumption, as will be interrogated throughout this thesis. Instead, Lamer CJ, for the majority, states that the Crown acquired sovereignty and title over Canada at the time of the Crown's assertion of sovereignty, at which time Aboriginal title crystallized and became a burden on the Crown's underlying title.[125]

The Lamer majority goes on to hold that to prove Aboriginal title:

> the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.[126]

If an Indigenous people meets those criteria, their Aboriginal title confers "the right to exclusive use and occupation of the land,"[127] but with significant caveats. The Lamer majority held that Aboriginal title is not a property interest like fee simple. Instead, the Lamer majority held that Aboriginal title is a *sui generis* right, since, the justices reasoned: its source predates Crown sovereignty; it is inalienable, except to the Crown; it is held communally; and Aboriginal title holders are limited in the uses they can make of their land.[128] In addition, Aboriginal title lands can be infringed upon by the Crown for a host of reasons.[129]

Certain aspects of Aboriginal title are highlighted throughout this thesis, including the Court's focus on historical evidence to prove occupation at the time of the Crown's assertion of

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[124] *Delgamuukw (SCC)*, *supra* note 20 at para 145. This assumption was consistent with previous Supreme Court decisions, including *Calder*, *supra* note 19; *Guerin*, *supra* note 22.
[125] *Delgamuukw (SCC)*, *supra* note 20 at para 145.
[126] *Ibid* at para 143.
[127] *Ibid* at para 117.
[128] *Ibid* at paras 112–115; 128.
[129] *Ibid* at paras 160–165.

sovereignty; the Court's decision to impose significant limitations on Aboriginal title rights; and the Court's assumption that the Crown acquired sovereignty and radical title when it asserted sovereignty.

1.7 ORGANIZATION

The next three chapters offer close readings of the three Aboriginal title cases in chronological order: *Calder*, *Delgamuukw* and, finally, *Tsilhqot'in*. Following the close readings, Chapters 5, 6, and 7 provide the emotions analysis of the cases, based on the themes discussed in the case law chapters. Finally, Chapter 8 concludes.

Chapter 2 *CALDER V. BRITISH COLUMBIA (ATTORNEY GENERAL)*

The SCC heard *Calder v. British Columbia (Attorney General)*[130] in 1973.[131] At that time, there was significant doubt that the Court would recognize the possibility that there was surviving Aboriginal title.[132] The Trudeau government's infamous White Paper had been published just a few years prior, in 1969, and had stated that Aboriginal rights were "so general and undefined that it is not realistic to think of them as specific claims capable of remedy."[133] That same year, Prime Minister Pierre Elliot Trudeau had demonstrated his skepticism about Aboriginal rights – Thomas Berger, the lawyer for the Nisga'a in their land claim, reports that on a visit to Vancouver in 1969, Trudeau stated, "[a]s far as we're concerned Aboriginal rights is an historical 'might have been.' We have to do justice in our time. This meant [*sic*] we cannot recognize Aboriginal rights. It's an anomaly."[134] So, when six of the seven judges of the SCC held that Aboriginal title remained a relevant legal concept in Canadian law, it marked a shift in the settler recognition of Indigenous rights.

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[130] *Calder*, *supra* note 19.

[131] I note that all three Aboriginal title cases considered in this thesis were brought by Indigenous nations located in what is now British Columbia. This can be attributed, in part, to the unique history of Indigenous-Crown relations in that province: very few treaties were negotiated between the Crown and Indigenous nations in British Columbia, making the issue of Aboriginal title somewhat more clear-cut there as compared with other jurisdictions. See e.g. Patricia Burke Wood & David A Rossiter, *Unstable Properties: Aboriginal Title and the Claim of British Columbia* (Vancouver: UBC Press, 2022) at 29–69. Of course, every Aboriginal title claim is unique and reflects the unique circumstances and histories of the nation(s) making the claim. The extent to which that specificity and uniqueness are reflected in the Supreme Court decisions discussed in this thesis is a question I invite the reader to consider.

[132] Christina Godlewska & Jeremy Webber, "The Calder Decision, Aboriginal Title, Treaties, and the Nisga'a" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 337 at 3.

[133] Canada, Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969) at 11, cited in Asch, *supra* note 122 at 101.

[134] Calder and Berger Conversation, "Frank Calder and Thomas Berger: A Conversation" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) at 46.

Though the SCC judges' finding on Aboriginal title is generally seen to have advanced Indigenous rights in Canada,[135] the decision itself reflects the preoccupations of the three judges who wrote reasons. The Court split three ways, with three judges finding that while the Nisga'a had had Aboriginal title, it had been extinguished by the actions of the colonial government.[136] Another three judges found that the Nisga'a's Aboriginal title had not been extinguished.[137] The seventh judge decided the case on a technicality, finding that the Nisga'a's claim could not be heard because no *fiat* had been obtained from the province, and sovereign immunity protected the province from the claim.[138] Because the three judges who had found that Nisga'a title had been extinguished expressed agreement with the seventh judge regarding the fiat, the appeal was dismissed on that procedural ground.

2.1 SOCIAL AND LEGAL ENVIRONMENT OF THE PERIOD

Settler British Columbia's attitude towards Aboriginal land claims in the 1960s has been described as "hostile."[139] This was perhaps unsurprising since, as the Royal Commission on Aboriginal Peoples reported, "[f]rom the early nineteenth century until about the end of the 1960s, displacement, the downgrading of the relationship, and an overall devaluing of the shared history of Aboriginal and non-Aboriginal peoples in the northern half of the North American continent was accepted in mainstream Canadian society."[140] Settler policies towards Indigenous peoples

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[135] See e.g. Asch, *supra* note 122 at 101. See also the comments of Frank Calder in Calder and Berger Conversation, *supra* note 134 at 45.
[136] *Calder*, *supra* note 19 at 314–346.
[137] *Ibid* at 346–423.
[138] *Ibid* at 426–427.
[139] Kent McNeil, "Judicial Approaches to Self-Government since Calder: Searching for Doctrinal Coherence" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 337 at 130.
[140] RCAP Report Vol. 1, *supra* note 31 at 133.

from the colonial period until the 1960s were explicitly aimed at assimilating Indigenous peoples and destroying their cultures.[141]

Despite this hostile environment, Indigenous peoples in British Columbia had never stopped asserting their Indigenous rights, including to their lands, but they had been severely and intentionally hampered in their advocacy work by the colonial and then provincial administrations. As Hamar Foster writes, by 1887, Aboriginal people had become a "politically and legally disadvantaged minority. They could not vote, stand for elected office, or pre-empt land as non-Aboriginal people could, and none of this would change until the mid-twentieth century."[142] From 1927 to 1951, First Nations were barred under s. 141 of the *Indian Act* from raising funds to make land claims,[143] which acted as a barrier to advancing Indigenous rights claims in the colonial courts.[144] From 1884 to 1951, the *Indian Act* barred First Nations from practicing certain ceremonies and aspects of their culture, including the potlatch ceremonies central to the Nisga'a's social fabric.[145] These prohibitions and the colonial government's residential school program were designed to force the Nisga'a and other First Nations to assimilate into colonial society.[146]

Nisga'a Resistance and Advocacy

Despite colonial measures intended to destroy First Nations' social, legal and political practices, First Nations, including the Nisga'a, resisted and advocated for their rights from the first threat of European settlement forward. In the Nisga'a's case, European settlement did not begin in

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[141] TRC Report, *supra* note 36 at 1–6.
[142] Hamar Foster, "We Are Not O'Meara's Children: Law, Lawyers, and the First Campaign for Aboriginal Title in British Columbia, 1908-28" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 337 at 63.
[143] Godlewska & Webber, *supra* note 132 at 1.
[144] See e.g. *Ibid*.
[145] See e.g. RCAP Report Vol. 1, *supra* note 31 at 73–76; Stephanie Hanna & Hamar Foster, "Appendix A: A Select Chronology" in *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007) 337 at 234, 236.
[146] See e.g. TRC Report, *supra* note 36 at 1–6.

their territory in the Nass Valley until the late 1800s.[147] Settlement meant that the colonial government needed land for settlers, and in the 1880s, the provincial government began trying to impose the reserve system on the Nisga'a in order to appropriate their land for settlement. The Nisga'a resisted from the start, sending a delegation to Victoria to protest the proposed imposition of the reserve system in 1881.[148] In 1886, the Nisga'a prevented surveyors sent by the B.C. government from completing the work necessary to created reserve boundaries.[149] From 1903 to 1908, the Nisga'a sent delegations advocating for their rights to the King in London, England and to the federal government in Ottawa.[150] This political advocacy came close to bearing fruit – in 1909, a lawyer retained by the dominion government produced a legal opinion that there was unextinguished Aboriginal title in B.C. Prime Minister Wilfred Laurier took this opinion seriously, and before his defeat in the next election, his government was considering avenues to force B.C. to recognize Aboriginal title.[151] Unfortunately, Laurier's defeat by Robert Borden cut short this moment of engagement by the federal government.[152]

When the Nisga'a's political advocacy failed to produce the desired outcome, they turned to the British legal system to assert their rights. In 1913, the Nisga'a made a Petition to the King of England, which they sought to have referred directly to the Judicial Committee of the Privy Council for determination. The Privy Council considered this request when the Petition was first made in 1913 and then again in 1918, but in the end declined to make the referral.[153]

[147] Hanna & Foster, *supra* note 145 at 232.
[148] *Ibid* at 233.
[149] *Ibid* at 234.
[150] *Ibid*.
[151] Foster, *supra* note 142 at 66–70.
[152] *Ibid*.
[153] *Ibid* at 75–84.

This left the Nisga'a with few options, and the 1927 *Indian Act* ban on fundraising impeded advocacy work until it was lifted in 1951.[154] Once the ban was lifted, the Nisga'a reestablished their Land Committee as the Nishga Tribal Council and hired a lawyer, Thomas Berger, to advance the nation's land claim in 1967.[155]

2.2 THE *CALDER* CASE

In 1968, the Nisga'a launched the first Aboriginal title claim in Canadian history, asserting the nation's right of occupation in their territory.[156]

Though there were several named plaintiffs acting as representatives for the Nisga'a First Nations, the case is known as the Calder case, named for the Nishga Tribal Council's President at the time, Frank Calder. Mr. Calder was already a well-known politician and leader when the case was launched in 1968. He had been elected to the Canadian Parliament in 1949 – the year First Nations people became eligible to vote in Canadian elections.[157] He was a Hereditary Chief[158] and a founding member of the Nishga Tribal Council.[159]

In 1968, the trial of the Nisga'a's claim for a declaration of Aboriginal title began. The Nisga'a were unsuccessful at trial and on appeal to the British Columbia Court of Appeal. When the case made its way to the SCC in 1971, it was that court's first consideration of Aboriginal title since its 1888 decision in *St. Catherine's Milling*,[160] and there was grave uncertainty around

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[154] Hanna & Foster, *supra* note 145 at 236.
[155] *Ibid*.
[156] *Ibid*.
[157] Calder and Berger Conversation, *supra* note 134 at 37.
[158] Katherine Palmer Gordon, "He Moved a Mountain: The Life of Frank Calder and the Nisga'a Land Claims Award" (2015) 188 BC Studies 121–121.
[159] Calder and Berger Conversation, *supra* note 134 at 37–38.
[160] *St. Catherines Milling*, *supra* note 22.

whether the Court would find that Aboriginal title continued to exist in Canada.[161] Perhaps for this reason, the claim was narrowly framed. The plaintiffs sought only a declaration that their Aboriginal title was unextinguished. They did not seek compensation or other remedies such as return of land. They did not challenge the views that radical title lay with the Crown and that Aboriginal title, if it existed, was a usufructuary type burden on underlying Crown title.[162] To a contemporary reader, the claim may seem unduly conservatively framed, such that the plaintiffs accepted certain legal principles that they need not to have conceded.[163] However, at the time the claim was made, it would have been radical and deeply concerning to settler Canada.[164]

<u>Summary of the Case</u>

The Nisga'a's claim was for a declaration that their Aboriginal title had never been extinguished.[165] The Statement of Claim also challenged the province's purported alienation of Nisga'a lands and the application of the *Land Act*, but the Nisga'a did not pursue these arguments at trial, instead focusing on their claim to unextinguished Aboriginal title.[166]

The province admitted that the Nisga'a

> …are descendants of the Indians who have inhabited since time immemorial the territory in question, where they have hunted, fished and roamed. It was agreed for purposes of this litigation that this territory consisted of 1,000 square miles in and around the Mass River Valley, Observatory Inlet, Portland Inlet and the Portland Canal, all located in northwestern British Columbia.[167]

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[161] See e.g. Christina Godlewska and Jeremy Webber, "The *Calder* Decision, Aboriginal Title, Treaties, and the Nisga'a" at p. 3 in Hamar Foster, Heather Raven & Jeremy Webber, *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (Vancouver: UBC Press, 2007).

[162] See e.g. Sanderson, "The Residue of Imperium", *supra* note 9 at 342–343; *Calder, supra* note 19 at 353; *Appellants' Factum in the Supreme Court of Canada, Calder v. British Columbia (Attorney General)*.

[163] See e.g. Sanderson, "The Residue of Imperium", *supra* note 9 at 342–343.

[164] See e.g. Mariana Valverde, "The Crown in a Multicultural Age: The Changing Epistemology of (Post)colonial Sovereignty" (2012) 21:1 Social & Legal Studies 3–21 at 5–6.

[165] *Calder*, *supra* note 19 at 317.

[166] *Ibid* at 352–354.

[167] *Ibid* at 317.

This meant that the Nisga'a did not need to present the exhaustive evidence on these questions typically presented in contemporary Aboriginal title litigation.[168]

At trial and at the Court of Appeal, the courts found that Nisga'a title had been extinguished, if they had ever had such title.

At the SCC, as noted above, the Court split three ways. What I refer to as the "majority" reasons were, in fact, the reasons of three judges delivered by Justice Judson. These judges ended up as a *de facto* majority not because Judson J's main arguments on the substance of the appeal were accepted by a majority of judges on the Court, but rather by virtue of Pigeon J's decision to determine the matter on a technicality and Judson J's *dicta*-like comment that while he did not need to decide the procedural issue, he agreed with Pigeon J's reasons.

The majority's central conclusion was that the Nisga'a had had Aboriginal title to their lands,[169] but that this title was extinguished by the colonial government prior to Confederation.[170]

The three dissenting judges, by contrast, held that the Nisga'a had Aboriginal title to their lands and this title had never been extinguished.[171]

Finally, Pigeon J, whose decision was determinative of the appeal, held that the Court lacked jurisdiction to hear the claim because the Nisga'a had not obtained a *fiat* from the province waiving Crown immunity.[172]

Despite the equivocal result, the outcome led Prime Minister Trudeau to concede that "perhaps you [the Nisga'a] had more legal rights than we thought you had when we did the White

[168] Calder and Berger Conversation, *supra* note 134.
[169] *Calder*, *supra* note 19 at 328–329.
[170] *Ibid* at 343–345.
[171] *Ibid* at 423.
[172] *Ibid* at 426–427.

Paper."[173] The federal government entered into treaty negotiations with the Nisga'a in 1976,[174] with a Final Agreement concluded in 1998.[175]

2.3 LACUNAE IN THE CALDER CASE

The SCC's decision reflects the claim's novelty to the Court. The cases relied on are primarily decisions from the U.K. and the U.S., with few Canadian cases cited, apart from *St. Catherine's Milling*.

While there are significant differences between the majority and dissent's reasons, they share the following striking lacunae in the Court's reasoning:

- There is limited effort to consider Nisga'a perspectives on the issues raised;
- Many fixed assumptions are not interrogated; and
- The court uses a condescending tone regarding the plaintiffs.

It will be argued that these lacunae indicate barriers to seriously grappling with the legal issues raised. These barriers are most evident in the majority's reasons, as we shall see in more detail below.

[173] Asch, *supra* note 122 at 101.
[174] Hanna & Foster, *supra* note 145 at 237.
[175] Government of Canada, Chronology of Events Leading to the Final Agreement with the Nisga'a Tribal Council, online, retrieved November 2, 2023: https://www.rcaanc-cirnac.gc.ca/eng/1100100031295/1543409973702. Note that the Framework Agreement signed in 1991 that led to the Final Agreement was signed by B.C. only one day before the release of the BCSC's decision in *Delgamuukw v British Columbia*, [1993] 104 DLR (4th) 470 [*Delgamuukw (BCCA)*]. Medig'm Gyamk attributes the province's willingness to sign that Framework Agreement to the province fearing the outcome of that case: Frank Cassidy & Delgam Uukw, *Aboriginal title in British Columbia : Delgamuukw v. the Queen : proceedings of a conference held September 10 & 11,1991* (Lantzville, B.C: Oolichan Books, 1992) at 306.

2.4 LIMITED EFFORT TO CONSIDER NISGA'A PERSPECTIVES

The majority's reasons were written by Justice Judson. From the decision's outset, there are signals that the majority is disinclined or unable seriously to engage with the Nisga'a's arguments. In 28 pages, the majority reasons refer to a Nisga'a perspective only twice. First, Judson J reproduces a paragraph from an 1888 Royal Commission in which David Mackay, a Nisga'a representative, is reported to have said:

> What we don't like about the Government is their saying this: "We will give you this much land." How can they give it when it is our own? We cannot understand it. They have never bought it from us or our forefathers. They have never fought and conquered our people and taken the land in that way, and yet they say now that they will give us so much land--our own land.[176]

Judson J does not engage with Mackay's questions or the assertion that the provincial government has no right to Nisga'a land, instead moving on immediately to a summary of the *St. Catherine's Milling* case.

Second, the majority makes a glancing mention to Frank Calder's testimony from trial. Judson J states that Mr. Calder had given evidence that the creation of Indian reserves in Nisga'a territory was done over Nisga'a objections. The majority does not question whether the creation of reserves was a valid Crown act in such circumstances, instead stating that the federal authority acted under its s. 91(24) *British North America Act* powers.[177]

By contrast, the majority outlines settler perspectives in great detail and at great length. Judson J reproduces several pieces of correspondence between the Colonial Office and the first colonial governor of Vancouver Island and British Columbia, James Douglas. He summarizes nine proclamations and four ordinances made by Douglas. Judson J also reproduces sections of

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[176] *Calder*, *supra* note 19 at 320.
[177] *Ibid* at 337.

the British Columbia Court of Appeal's reasons and other common law judgments he considers relevant to Aboriginal title principles.

For the majority, the settler state is the centre of attention. Judson J does not spend time considering the plaintiffs' arguments, evidence and perspectives, even though these were convincing to three of his colleagues on the Court. The majority's one-sided focus is thrown into stark relief by the reasons of the dissenting judges, which were written by Justice Hall. Hall J reproduced large segments of the testimonies of Frank Calder and an expert witness called by the plaintiffs. This testimony explained Nisga'a land ownership and usage, as well the historical evidence of these. The dissenting judges considered the implications of the evidence tendered and concluded that "[w]hat emerges from the foregoing evidence is the following: the Nishgas in fact are and were from time immemorial a distinctive cultural entity with concepts of ownership indigenous to their culture and capable of articulation under the common law…"[178]

The dissenting judges also engage with the Nisga'a's arguments in a way that the majority does not. For example, the majority dismisses out of hand the Nisga'a's argument that treaties negotiated with other B.C. First Nations in 1899 "constituted a recognition of their rights by the Dominion."[179] Judson J repeats and accepts the province's argument "that original Indian title had been extinguished in the Colony of British Columbia prior to Confederation and that there were no Indian claims to transfer to the Dominion beyond those mentioned in Article 13 of the Terms of Union."[180] American case law suggesting the contrary is dismissed as irrelevant.[181] The dissent, by contrast, delves into this argument, reviewing the text of the 1899 Treaty as well as treaty case

[178] *Ibid* at 376.
[179] *Ibid* at 339.
[180] *Ibid* at 339–340.
[181] *Ibid* at 340–345.

law from America and other jurisdictions.[182] Hall J remarks that "[c]ertain statements in the [1899] treaty are entirely inconsistent with any argument or suggestion that such rights as the Indians may have had were extinguished prior to Confederation in 1871"[183] and he goes on to reproduce the language to which he is referring. Judson J's reasons make no reference to the 1899 Treaty text and he does not attempt to answer Hall J's apposite question: "[i]f there was no Indian title extant in British Columbia in 1899, why was the treaty negotiated and ratified?"[184]

The contrast between the majority and dissent's treatment of Nisga'a arguments and evidence draws attention to the majority's reliance on Crown evidence, to the near exclusion of the plaintiffs'. The dissent engages far more extensively with the Nisga'a's arguments and evidence than does the majority. As noted above, Hall J reproduces large portions of the trial transcripts. The Nisga'a evidence reproduced deals with the Nisga'a's relationship with land, territorial boundaries, identity,[185] and whether or not any treaty was ever entered into.[186] It is the evidence of the plaintiff's expert, Dr. Duff, however, that gets the most attention from the dissent – a full fifteen pages of the decision are transcript excerpts from Dr. Duff's testimony,[187] compared with four pages of transcript excerpts from Frank Calder and James Gosnell's, two of the Nisga'a witnesses, evidence.[188] Dr. Duff's testimony on Nisga'a land use,[189] the nature of Nisga'a property interests,[190] and on Nisga'a lifeways[191] are all reproduced at length. The dissent's reliance on Dr. Duff is noteworthy and invites interrogation. Why is the dissent inclined to rely so extensively on

[182] *Ibid* at 381–395.
[183] *Ibid* at 395.
[184] *Ibid*.
[185] *Ibid* at 356–357.
[186] *Ibid* at 357–360.
[187] *Ibid* at 361–376.
[188] *Ibid* at 350–351; 356–359.
[189] *Ibid* at 361–362.
[190] *Ibid* at 363–369.
[191] *Ibid* at 361–376.

Dr. Duff? Why is Dr. Duff's opinion, based largely on secondary sources, foregrounded instead of testimony from the Nisga'a witnesses?[192] Might it be that for the dissent, Dr. Duff's academic credentials lend him a veneer of authority that the Nisga'a's direct knowledge about their own culture lacks? Or perhaps the testimony of a white academic is more legible to the dissent than that of the Nisga'a witnesses?[193]

From both the minority and, to a much greater extent, the majority, we see a disinclination to engage with the Nisga'a's perspectives, and a reliance on and comfort with white settler sources.

2.5 FIXED ASSUMPTIONS

There are many questions not asked by both the majority and dissent, but this section focuses only on the most noteworthy instances of the Court accepting a proposition without investigation.

First and most centrally, none of the judges questions whether the Crown's assertion of sovereignty was a valid and effective way for the Crown to acquire radical title to Nisga'a land. As noted earlier, the plaintiffs did not challenge the Crown's claim to radical title, so it is perhaps unsurprising that the Court did not take it upon itself to interrogate the doctrine. That said, the sole account of a Nisga'a perspective reproduced by Judson J in his reasons (that of David Mackay) forcefully demands on what basis the Crown claims to have sovereignty over Nisga'a land. As the quote reproduced in the section above points out, the Crown had not bought the Nisga'a's land or conquered its inhabitants. The majority does not engage with the conundrum that this poses. Instead, the majority explicitly refuses to question what it appears to take for granted – that Crown

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[192] In addition to Mr. Calder and Mr. Gosnell, three other Chiefs from the Nass Valley testified. Calder and Berger Conversation, *supra* note 134 at 44.
[193] Please note that I have not been able to review the trial transcripts, which limits my ability to draw firm conclusions on these questions.

radical title came to underlie what he characterizes as an Indian right to occupancy. Judson J writes:

- "When the Colony of British Columbia was established in 1858, *there can be no doubt* that the Nishga territory became part of it;"[194]
- "What they are asserting in this action is that they had a right to continue to live on their lands as their forefathers had lived and that this right has never been lawfully extinguished. *There can be no question* that this right was 'dependent on the goodwill of the Sovereign.'"[195]

It is commonplace for students of law to be cautioned against using phrases like "there can be no question that," "it is obvious that," or "it is clear that" in court, since those phrases signal to the court that the proposition being made lacks support, such that the lawyer is resorting to assertion instead of argument.[196] Similarly, where a judge relies on such phrases, it signals that perhaps certain questions are being avoided. In the *Calder* decision, since there is "no question" for the majority around the Crown's radical title, it is excused from looking at a question the answers to which might be complex and unexpected.

Like the majority, the dissent does not engage with Mr. Mackay's questions. There is no question for that the dissent that, perhaps by discovery or declaration (Hall J does not specify), the Crown at some point acquired radical title to Nisga'a land.[197] Hall J states more than once that the

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[194] *Calder, supra* note 19 at 328 [emphasis added].
[195] *Ibid* at 329 [emphasis added].
[196] See e.g. Justice John I. Laskin, "Forget the Windup and Make the Pitch: Some Suggestions for Writing More Persuasive Factums" in David Stockwood & Spiro David, *Ethos, pathos, and logos: the best of the Advocates' Society journal 1982-2004* (Toronto: Irwin Law, 2005) at 219.
[197] *Calder*, *supra* note 19 at 390.

Nisga'a claim does not dispute the paramountcy of Crown title,[198] and in his reasons, neither does he.

Second, the majority does not question whether actions taken by colonial officials might have been invalid.[199] The majority takes as a given that the officials were acting within the scope of their powers and accepts the Crown's argument that Aboriginal title was extinguished by these colonial officials' actions.[200] Judson J does not engage with the plaintiffs' arguments regarding the proper scope and effect of these colonial actions and does not question whether the Crown's argument that these actions caused the extinguishment of Nisga'a title may be built on faulty foundations.

By contrast, in the dissenting reasons, Hall J notes that the colonial Governor's powers were limited to those set out in his Commission.[201] Hall J therefore reviews the Commission and finds that:

> … neither the Commission nor the Instructions contain any power or authorization to extinguish the Indian title, [and] it follows logically that if any attempt was made to extinguish the title it was beyond the power of the Governor or of the Council to do so and, therefore, *ultra vires*.[202]

Presumably, the majority had access both to the Governor's Commission and to Hall J's reasons before the Court's decision was published. Nevertheless, Judson J addresses neither. Instead, he cites and adopts the trial judge's reasoning that the colonial actions "reveal[ed] an intention to exercise… absolute sovereignty over the lands of British Columbia."[203] This intention is sufficient – the majority does not query whether there was actual authority underpinning it, despite the question being raised directly by the plaintiffs and dealt with by their colleagues in the dissent.

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[198] *Ibid* at 353–354; 411.
[199] See e.g. *Ibid* at 330–340.
[200] *Ibid* at 330–346.
[201] *Ibid* at 407–408.
[202] *Ibid* at 414.
[203] *Ibid* at 315.

Hall J, for his part, does not interrogate whether the doctrine of *terra nullius*, relied on in many of the decisions he considers, is a doctrine that has a place in Canadian jurisprudence.

As Michael Asch explains in his book chapter "*Calder* and the Representation of Indigenous Society in Canadian Jurisprudence," in general, Crown sovereignty can be established either by the settlement of unoccupied lands (*terra nullius*) or by cession or conquest of inhabited lands.[204] As discussed in Section 1.4, in some circumstances, however, British law treated lands as is they were unoccupied if "the indigenous peoples … were too primitive to have a form of political society requiring recognition by the settlers."[205] *Terra nullius* was applied in places like Australia, despite the fact that that continent was inhabited by Indigenous peoples when European settlers arrived.[206]

As discussed in the Introduction, the doctrine of *terra nullius* is grounded in ethnocentric preconceptions of what counts as "a civilized society."[207] However, in 1973, Hall J does not seem perturbed that the *terra nullius* cases he relies on make use of the same "ill-founded" assessment that he distances himself from in the dissent's opening paragraphs[208] – the assessment that Indigenous peoples were primitive and uncivilized and, it would seem, incapable of holding radical title. For example, Hall J reproduces a portion of *Re Southern Rhodesia*, in which Lord Sumner stated:

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[204] Asch, *supra* note 122. It should be noted that Asch's reading of *Calder* is quite different from mine. His analysis focuses on the Court's statements that Indigenous peoples were present in Canada living in organized societies at the time the settlers came and what he considers to be the logical implications of this finding. In his view, this statement is at odds with the application of the *terra nullius* doctrine, and courts after *Calder* failed to understand that *Calder* does not support the application of the doctrine of *terra nullius*. In my own view, *Baker Lake* and *Delgamuukw* can be seen as following *Calder*'s logic, if we take seriously the dissent's seeming comfort with the idea that British law recognized only the legal rights cognizable to the British. The discussion of *Re Southern Rhodesia* that follows takes up this argument.
[205] *Ibid* at 108.
[206] *Ibid*.
[207] *Ibid* at 105–106. Section 1.4 in the Introduction.
[208] *Calder*, *supra* note 19 at 346–348. This aspect of the dissent is discussed further in section 2.6 below.

> The estimation of the rights of aboriginal tribes is always inherently difficult. *Some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society. Such a gulf cannot be bridged. It would be idle to impute to such people some shadow of the rights known to our law and then to transmute it into the substance of transferable rights of property as we know them…* On the other hand, there are indigenous peoples whose legal conceptions, though differently developed, are hardly less precise than our own. When once they have been studied and understood they are no less enforceable than rights arising under English law.[209]

Michael Asch notes that this same passage is relied on in another early Aboriginal title decision, *Baker Lake*.[210] In that case, it was relied on for the proposition that the common law will recognize only the "incidents of […] enjoyment that were, themselves, given effect by the [Indigenous] regime that prevailed before [European assertion of sovereignty]."[211] This is problematic since "[i]t is transparent that the passage from *Southern Rhodesia* … is racist and ethnocentric… [and] it is fated to represent indigenous society… as being incommensurate with and, in fundamental ways, inferior to our own."[212]

But the dissent makes no comment on the presumption in *Southern Rhodesia* that some societies are so deficient in social organization as to be incapable of recognition to the common law. This matters because if *terra nullius* does not apply and British sovereignty was not obtained by cession or conquest of the Nisga'a, it becomes unclear by what means the British acquired radical title to Nisga'a lands. The dissent's fixed assumption that radical title lies with the Crown prevents it from interrogating *terra nullius* and its racist, ethnocentric underpinnings.

Hall J also reproduces a portion of *Re Worcester v. State of Georgia*, in which Chief Justice Marshall of the U.S. Supreme Court stated:

> After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world. *They found*

[209] *Re Southern Rhodesia*, *supra* note 51 at 233 [emphasis added], cited in *Calder*, *supra* note 19 at 388.
[210] *Baker Lake*, *supra* note 121.
[211] *Ibid* at 544, cited in Asch, *supra* note 122 at 106.
[212] Asch, *supra* note 122 at 106.

> *it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.*
>
> …
>
> The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. …To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was "that discovery gave title to the government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession."
>
> This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil and of making settlements upon it. [213]

The message here is that the Enlightened Europeans, with their science and enterprise, discovered a land whose occupants were not making meaningful use of it. Naturally and in the proper course of things, the Europeans acquired radical title to these lands, while the original inhabitants retained only a right of occupation.[214] As Hall J states:

> The dominant and recurring proposition stated by Chief Justice Marshall in *Johnson v. McIntosh* is that on discovery or on conquest the aborigines of newly-found lands were conceded to be the rightful occupants of the soil with a legal as well as a just claim to retain possession of it and to use it according to their own discretion, *but their rights to complete sovereignty as independent nations were necessarily diminished and their power to dispose of the soil on their own will to whomsoever they pleased was denied by the original fundamental principle that discovery or conquest gave exclusive title to those who made it.*[215]

Hall J's fixed assumption that the Crown holds radical title makes it impossible for him to maintain distance between the "unenlightened" aspects of Chief Justice Marshall's and other colonial courts' decisions, and his own account of title on Nisga'a land.

[213] *Worcester v State of Georgia*, [1832] 31 US 530, cited by Hall J in *Calder*, *supra* note 14 at 384–385 [emphasis added].
[214] This reflects the Property Logics discussed in the Introduction.
[215] *Calder*, *supra* note 19 at 384 [emphasis added].

The dissent likewise does not question a firmly held assumption that the texts of Canadian treaties accurately reflect the terms of the treaties negotiated with Indigenous peoples. Hall J states "[s]urely the Canadian treaties, made with much solemnity on behalf of the Crown, were intended to extinguish the Indian title. What other purpose did they serve?"[216] The dissent does not ask whether that presumed purpose – extinguishment of Indian title – was likely to have been the purpose of the Indigenous signatories. Hall J does not consider other possible purposes for the treaties, such as seeking to ensure peaceful co-existence between settlers and Indigenous peoples. The dissent also highlights the Crown's solemnity in signing the treaties without mentioning the equally solemn procedures and protocols and internal deliberations on the Indigenous signatories' parts.[217] The dissent's perspective on the treaties is firmly aligned with the Crown, and it strongly resists the possibility that the Crown might have misrepresented the terms of the treaties in the written text of the documents: "If they were not intended to extinguish the Indian right, they were a gross fraud and *that is not to be assumed*."[218]

Finally, the dissent characterizes the Royal Proclamation of 1763 as "remarkably enlightened."[219] Hall J states that "it can be said that when other exploring nations were showing a ruthless disregard of native rights England adopted a remarkably enlightened attitude towards the Indians of North America."[220] As with the treaties, the dissent does not consider whether the Proclamation might reflect Britain's understanding that the Indigenous peoples of Canada were a powerful force and that without negotiating peace with them, settlement of Canada would be

[216] *Ibid* at 395.
[217] See e.g. *Restoule v Canada (Attorney General)*, 2018 ONSC 7701.
[218] *Calder*, *supra* note 14 at 395 [emphasis added].
[219] *Ibid* at 396.
[220] *Ibid*.

fraught and perhaps impossible.[221] The dissent attributes the Proclamation to the British sovereign's benevolence, rather than to practical necessity.

Together, the Court's fixed assumptions direct and constrain the Court's reasoning and result in the tacit acceptance of doctrines based in "racist and ethnocentric"[222] understandings.

2.6 CONDESCENDING TONE

As noted above, the majority makes mention of Nisga'a perspectives only twice in its judgment, such that the most noteworthy thing about how the majority discusses the parties is the extent to which it avoids discussing the plaintiffs. Judson J's second mention of Nisga'a perspective is a brief mention of testimony by Frank Calder. Judson J describes Mr. Calder simply as "one of the appellants."[223] There is no mention of the political roles Mr. Calder plays or of Mr. Calder's hereditary title. This stands in contrast to the comparatively rich detail Judson J provides about Governor Douglas. Judson J explains that Douglas was first governor of Vancouver Island, and that he was then appointed governor of Colony of British Columbia, as well. We are given the dates during which Douglas held these offices, and Judson J reproduces Tysoe JA's approving description of Douglas:

> Prior to the establishment of the territories of Vancouver Island and the mainland of British Columbia as British colonies they had been governed by the Hudson's Bay Company, of which company James Douglas was for some time the chief factor. It had been his responsibility to see to the orderly settlement of the lands and to control the native Indians, some tribes of which were of a warlike and aggressive nature. Douglas had to keep law and order. The responsibility continued to rest upon his shoulders after the establishment of the colonies and until executive councils were appointed, as in due course they were.[224]

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[221] See e.g. Emerson W Baker & John G Reid, "Amerindian Power in the Early Modern Northeast: A Reappraisal" (2004) 61:1 The William and Mary Quarterly 77–106.
[222] Asch, *supra* note 122 at 106.
[223] *Calder*, *supra* note 19 at 337.
[224] *Calder v British Columbia (Attorney General)*, [1970] 13 DLR (3d) 64 at 80–81 [*Calder (BCCA)*], cited by Judson J in *Calder*, *supra* note 19 at 328.

This description informs us that Douglas had “responsibilities” (including controlling the “warlike” “Indians”) and that these responsibilities “continued to rest of his shoulders.” This language is approving – it gives us an image of a responsible, upright person. By contrast, no biographical information or approving characterizations are given about Mr. Calder or any other Nisga’a.

When the majority does discuss the Nisga’a, its tone is dismissive and condescending. In the judgment’s second paragraph, Judson J describes the Nisga’a’s way of life and land use by writing, “they have hunted, fished and roamed” over their territory from time immemorial.[225] They roamed – they did not travel. They hunted and fished – they did not inhabit complex relational webs of stewardship and obligation, reflecting their spiritual and legal commitments.[226]

The dissenting reasons in *Calder* offer a counterpoint to the majority. The dissenting reasons make clear that these judges wished to approach the Nisga’a’s claim with fair-mindedness – however, despite this, the judgment’s language is condescending. Justice Hall opens his reasons by situating his understanding in contrast to “ancient concepts” about the Indians that were formulated “when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.”[227] Hall J criticizes Chief Justice Davey of the Court of Appeal for describing the Indigenous peoples of mainland B.C. as “primitive” and with “few of the institutions of civilized society,” stating that Davey CJ made these statements despite having the benefit of “all the historical research and material available since 1823.”[228] Present-day

[225] *Calder*, *supra* note 19 at 318.
[226] See e.g. Mills, *supra* note 27.
[227] *Calder*, *supra* note 19 at 347.
[228] *Ibid* at 347–348.

research, writes Hall J, shows that such reductive assessments of Indigenous peoples are "ill-founded."[229]

Hall J's criticism of Davey CJ may be well-placed, but its context is interesting to consider. Hall J does not only chastise Davey CJ in this paragraph – he also contrasts him with Chief Justice Marshall, who, in 1823, rendered a decision describing Indigenous peoples as "fierce savages."[230] Hall J suggests that Marshall CJ can be excused for this language given the times in which he was writing and describes his decision as "otherwise enlightened."[231] We are given to understand that Davey CJ lacks such enlightenment.

"Enlightenment" in the dissent's usage is inextricably linked with ethnocentric thinking on what is civilized and what is not – a point driven home by Hall J's use of scare quotes later in the paragraph when mentioning the "religious and dynastic wars of 'civilized' Europe of the 16th and 17th centuries."[232] We have a notion from the dissent's opening paragraphs that its project may be to understand the Nisga'a as "civilized" according to an enlightened, ethnocentric understanding of what it is to be "civilized."

In using the term 'enlightened' positively to describe Marshall CJ's decision, the dissent signals not only attachment to the European tradition but also that its decision will be part of 'enlightened' jurisprudence. Unlike their colleagues, we can infer, the dissent will refrain from characterizing the plaintiffs as savages and will instead treat their legal issues as genuine questions to be considered. What ought to be a given – that the court will treat the issues brought before it with attention and seriousness – is positioned as something progressive and morally virtuous, and

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[229] *Ibid* at 347.
[230] *Ibid*.
[231] *Ibid*.
[232] *Ibid* at 348.

in line with the arc of ever-greater enlightenment in Western thought. Marshall CJ cannot have been expected to be enlightened in all aspects of his decision, but the dissenting judges will be.

This ethnocentric mode of thinking surfaces throughout the dissenting reasons and is most especially palpable in the patronizing tone the reasons take on at various points. The dissent highlights how cultured and sophisticated the Nisga'a are, as if this is something surprising and remarkable. For example, Hall J writes that the Nisga'a had a "well developed and sophisticated concept of property."[233] This begs the questions – sophisticated according to whom? Well-developed by whose metric? Why does the dissent feel that it is necessary to use these adjectives?

Similarly, the dissent notes Dr. Duff's opinion that the Nisga'a had "developed their cultures to higher peaks in many respects than in any other part of the continent north of Mexico."[234] Hall J continues:

> A remarkable confirmation of this statement comes from Captain Cook who, in 1778, at Cape Newenham claimed the land for Great Britain. He reported having gone ashore and entered one of the native houses which he said was 150 feet in length, 24 to 30 feet wide and 7 to 8 feet high and that "there were no native buildings to compare with these north of Mexico". The report continues that Cook's officers were full of admiration for the skill and patience required to erect these buildings which called for a considerable knowledge of engineering.[235]

What makes it noteworthy that the Nisga'a built structures that required skill and patience? Or that they had knowledge of engineering? Who is it who gets to judge how developed a culture is? And is it not likely that other cultures between Mexico and the Nass Valley were and remain complex, multi-faceted reflections of the complex, multi-faceted humans that make them up?

The dissent's focus on the Nisga'a's admirable skills and their sophisticated concept of property suggests that it finds these noteworthy – that they are, perhaps, outside the set of

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[233] *Ibid* at 370.
[234] *Ibid* at 362.
[235] *Ibid* at 376–377.

expectations the dissent had for an Indigenous people. It would be surprising for the dissent to use such language and examples if it were discussing a European people – the assumption would be that of course they had engineering knowledge and a concept of property. It would seem that for an Indigenous people, this is not an "of course" for the dissent.

The dissent's focus on the "sophisticated" aspects of Nisga'a culture does at least two things: first, it distances the dissent from the unenlightened perspectives of Davey CJ and his ilk – the dissent is able to perceive how un-primitive the Nisga'a are, unlike these peers. Second, and linked with the dissent's desire to be enlightened adjudicators, it obscures the underlying assumptions that are necessary to make the dissent's reasons coherent – namely, as outlined in the section above, that the Nisga'a's conceptions of property, sovereignty or jurisdiction are somehow deficient, such that radical title could not possibly lie with them.

Similar themes appear in the *Delgamuukw* and *Tsilhqot'in* decisions, as explored in the next two chapters.

Chapter 3 *Delgamuukw v. British Columbia*

By the time *Delgamuukw* was heard by the SCC in 1997, many things had changed. In 1981, the federal government released its first comprehensive land claims policy.[236] In 1982, *The Constitution Act, 1982* was patriated, including the hard-fought section 35, recognizing and affirming the rights of Indigenous peoples.[237] In 1996, the SCC released the *Van der Peet* trilogy, fleshing out its understanding of what was captured by s. 35.[238]

On the other hand, many things had not changed. Most First Nation communities still lived on reserve lands representing a fraction of their pre-colonization territory with sub-standard infrastructure, inadequate funding and damaging social programs.[239] Until the early 1990s, Indigenous children continued to be sent away to residential schools, where they experienced not only the trauma of being separated from their families, lifeways and languages, but the additional, horrific trauma of abuse.[240] And Indigenous nations continued to assert their nationhood and resist colonial efforts of assimilation.[241]

3.1 The *Delgamuukw* Case

Delgamuukw v. British Columbia was the first case asserting Aboriginal title heard by the SCC after *Calder*, and the first to be argued after the introduction of s. 35.[242] It was heard one year

[236] Hanna & Foster, *supra* note 145 at 237.
[237] *Ibid*.
[238] *Ibid* at 239.
[239] See e.g. TRC Report, *supra* note 36.
[240] *Ibid*.
[241] *Ibid*.
[242] Bhandar, *supra* note 27 at 64.

after the SCC released the *Van der Peet* trilogy, meaning that the parties did not marshal their evidence or tailor their arguments at trial, or on appeal to the BCCA, with the SCC's newly made s. 35 tests in mind.

<u>Case Summary</u>

In 1984, the Gitxsan and Wet'suwet'en filed claims, one each for most of the nation's hereditary Houses, for ownership and jurisdiction over their lands in the Babine, Skeena, Nass, Bulkley and parts of the Fraser-Nechako River watersheds.[243] After a trial lasting more than a year, during which the Houses presented extensive evidence, the British Columbia Supreme Court's Chief Justice, McEachern CJ, rejected the claim. McEachern CJ's findings were based, in part, on his refusal to give weight to oral histories presented by Gitxsan and Wet'suwet'en witnesses.[244]

On appeal, the Gitxsan and Wet'suwet'en reframed their claim as being for Aboriginal title and self-government, rather than ownership and jurisdiction, and also amalgamated the individual Gitxsan and Wet'suwet'en's Houses' claims into two claims – one for each nation. The nations were unsuccessful on appeal.[245]

On appeal to the SCC, a new trial was ordered, on the basis that the amalgamation of the claims had not been done by way of formal amendment.[246] Despite this decision, Chief Justice Lamer, writing for the majority, chose to elaborate on certain aspects of the claim and on Aboriginal title more generally.[247] The majority held that the trial judge had erred by refusing to

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[243] Hanna & Foster, *supra* note 145 at 238.
[244] Val Napoleon, "Delgamuukw: A Legal Straightjacket for Oral Histories Dossier: Aboriginal Rights Issues/Questions de Droits Autochtones" (2005) 20:2 Can JL & Soc 123–156 at 131.
[245] *Delgamuukw (BCCA)*, *supra* note 175.
[246] *Delgamuukw (SCC)*, *supra* note 20 at paras 76, 77, 184.
[247] I note that some First Nation communities saw the *Delgamuukw* decision as creating an opening for advocating for sovereignty and other rights. See e.g. Kim Goldberg, "Delgamuukw decision: a historic victory" *Canadian Dimension* (March 1998) 5. For example, the First Nations Summit of BC viewed the decision as confirming the ongoing

give weight to the oral histories presented by the Gitxsan and Wet'suwet'en, amongst other errors.[248] The majority also laid out the test and content of Aboriginal title and decided that provincial governments did not have the power to extinguish Aboriginal title from the period of Confederation to 1982 (though the federal government did).[249]

The concurring judges, La Forest and L'Heureux-Dube JJ, agreed with the majority that a new trial was necessary, but differed as to the reasons. The concurring judges were less concerned with the pleadings defect, which they characterized as a technicality, and more concerned with the evidence required to make a finding of Aboriginal title.[250] La Forest J's view was that by focusing their evidence on their control over their territory, the Gitxsan and Wet'suwet'en had failed to adduce sufficient evidence of simple occupation, which is what was required by the SCC's (new) test.

McLachlin J agreed with the reasons of both Lamer CJ and La Forest J.[251]

As with *Calder*, a close reading of the SCC's reasons in *Delgamuukw* uncovers themes worthy of investigation:

- A pervasive condescension and paternalism;
- An exasperation with the claims being made; and
- A fixity of assumptions limiting the Court's scope of inquiry.

existence of Aboriginal title across B.C.: Gurston Dacks, "British Columbia after the Delgamuukw Decision: Land Claims and Other Processes" (2002) 28:2 Canadian Public Policy / Analyse de Politiques 239–255 at 239.

[248] Napoleon, "Legal Straightjacket", *supra* note 244 at 132.

[249] SCC *Delgamuukw (SCC)*, *supra* note 20 at paras 143, 172–183.

[250] *Ibid* at para 188.

[251] *Ibid* at para 209.

3.2 PERVASIVE CONDESCENSION AND PATERNALISM

The majority's reasons contain many assumptions and attitudes that can be read as condescending and paternalistic. Some of these assumptions and attitudes have greater consequences for the legal outcome than others, but all are of a piece with a worldview in which Indigenous peoples are less civilized, less sophisticated and less fully human than Anglo-European settlers. The following expressions of paternalistic assumptions are explored below:

- The majority's reductive understanding of Gitxsan and Wet'suwet'en societies; and
- The majority's insertion of a limitation on possible uses of Aboriginal title lands.

Flattening of Gitxsan and Wet'suwet'en Societies

To begin at the beginning of the majority's reasons – Lamer CJ's recital of facts includes a seven-paragraph summary of Gitxsan and Wet'suwet'en cultures, political structures, laws, history and spirituality.[252] In this glancing summary, the majority distills the Gitxsan and Wet'suwet'en nations' thousands of years of stewardship and relationship with the Skeena, Babine, and Bulkley River watersheds to the nations having a preference for these areas because of the easy obtainability of salmon.[253] Their relationship with the rest of their territory is explained by their need to hunt and gather.[254] According to the majority, hunting and gathering were the nations' main preoccupations: "there was no reason to travel far from the villages for anything other than subsistence requirements."[255] This statement is contradicted by extensive evidence of trade networks and webs of societal interconnection in pre-colonial North America,[256] but it is an

[252] *Ibid* at paras 8–14.
[253] *Ibid* at para 10.
[254] *Ibid*.
[255] *Ibid*.
[256] See e.g. Nancy J Turner & Dawn C Loewen, "The Original 'Free Trade': Exchange of Botanical Products and Associated Plant Knowledge in Northwestern North America" (1998) 40:1 Anthropologica 49–70 at 50–53. Note also that Chief Maxlaxlex (Johnny David) also testified regarding trade at the *Delgamuukw* trial: Antonia Curtze Mills,

unsurprising assumption to make if one understands a people to have been concerned (for millennia) with nothing but keeping themselves fed.

The majority's flattening of Gitxsan and Wet'suwet'en societies to what these societies did to feed themselves is consequential. It de-emphasizes the evidence presented by the Gitxsan and Wet'suwet'en about political, legal and spiritual practices and allows the majority to conceive of these nations not as civilizations or complex, sovereign nations, but instead as groups of individuals with certain 'practices, customs and traditions' whose main focus is making sure they have enough to eat the next day.

This flattening is of a piece with the trial judge's perspective on the Gitxsan and Wet'suwet'en, though less explicitly expressed. As Lamer CJ draws out in his summary of the trial decision, McEachern CJ's view was that the Gitxsan and Wet'suwet'en's use of resources was simply "commonsense subsistence practices."[257] He refused to accept that the Gitxsan and Wet'suwet'en's spiritual practices and political structures were hallmarks of cohesive, complex societies, instead finding that "they more likely acted as they did because of survival instincts."[258] It is worth noting that the majority offers no criticism of McEachern CJ's findings on these issues.[259]

The Gitxsan and Wet'suwet'en are not legible to the majority as humans and political actors with as much agency and sophistication as people of European descent. In her article, "Remorse and Judging," Susan Bandes comments on legibility in the context of criminal law sentencing.[260] Bandes explores how in that context, where expressions of remorse can have

'Hang on to these words' : Johnny David's Delgamuukw evidence (Toronto: University of Toronto Press, 2005) at 174–177; 219–226.

[257] *Delgamuukw (SCC)*, *supra* note 20 at para 18.

[258] *Ibid*.

[259] Cf the dissent in *Calder*, *supra* note 19.

[260] Susan A Bandes, "Remorse and judging" in *Remorse and Criminal Justice* (Routledge, 2021).

significant impacts on sentence, it becomes crucial to be able to express oneself in a way that is legible to the judge.[261] This puts a premium on cultural capital, and may penalize those who do not express themselves in ways that the judge (often white, often male) finds legible.[262] Race, ethnicity and culture all impact a judge's ability to "read" remorse expressed by those facing sentencing.[263] This is no doubt also true for the ability to "hear" certain evidence, like oral traditions, and understand its import.

The majority's gaze cannot (or will not) take in evidence of the Gitxsan and Wet'suwet'en nations' political, social, legal and spiritual structures.[264] Instead, it sees peoples whose lives can be reduced to their subsistence practices.

The majority's reductive understanding of Gitxsan and Wet'suwet'en cultures affects its perception of what type of society – and therefore what s. 35 rights – the Gitxsan and Wet'suwet'en had and have. Because the majority conceives of the plaintiff nations as societies preoccupied with survival, it fails to engage with the evidence adduced by the nations demonstrating that they are self-governing nations with complex cultures.[265] Throughout its reasons, the majority translates the concepts for which the nations adduced evidence to fit into its understanding of their societies as something less society-like than the Anglo-European, colonial one. The following two examples demonstrate this practice and its consequences at work.

From Land Tenure Law to Historic Occupation: As will be explored further in Section 3.3, the majority's reasons include a section dedicated to the admissibility of oral histories. Lamer CJ provides a brief summary of two forms of oral history, the adaawk and kungax, relying on the

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[261] *Ibid* at 27–29.
[262] *Ibid*.
[263] *Ibid* at 34–35.
[264] See e.g. *Delgamuukw v British Columbia*, [1991] 79 DLR (4th) 185 at 111–168 [*Delgamuukw (BCSC)*].
[265] *Ibid*.

trial judge's description of them as "sacred 'official' litany, or history, or recital of the most important laws, history, traditions and traditional territory of a House."[266] He then goes on to acknowledge that the adaawk and kungax "are of integral importance to the distinctive cultures of the appellant nations."[267] He states that the adaawk was introduced at trial "… as a component of and, therefore, as proof of the existence of a system of land tenure law…"[268] In the very next sentence, the majority flattens what the Gitxsan sought to prove from a "system of land tenure law" to "evidence of the Gitxsan's historical use and occupation."[269] This translation of evidence of property law to evidence of use and occupation strips away the adaawk's importance as a source of information on law.[270]

Val Napolean considers the lower court's similar flattening move in the context of the adwaak. She posits that it was hard for McEachern CJ to hear the adwaak because he "was not able to accept the symbolism of the adaawk within the Gitksan reality-where human and spirit worlds are interwoven, and all creation is spiritual."[271] Napolean cites the anthropologist Julie Cruikshank, who says that knowledges are culturally bounded and it devalues them to evaluate them in a different paradigm.[272] Rather than acknowledging the complex role and content of the adwaak, McEachern CJ, and later the Lamer majority, flatten it to something easier to understand.[273]

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[266] *Delgamuukw (SCC), supra* note 20 at para 93.
[267] *Ibid* at para 94.
[268] *Ibid*.
[269] *Ibid*.
[270] Lamer CJ's reduction here is foreshadowed at the outset of his reasons where, without explanation, he uses scare quotes when describing the Gitxsan and Wet'suwet'en claim: "Their claim was originally for 'ownership' of the territory and 'jurisdiction' over it." *Ibid* at para 7. I note that it is possible that Lamer CJ is using these quotation marks to denote that he is citing language from the lower court decisions, though the lack of attribution suggests otherwise.
[271] Napoleon, "Legal Straightjacket", *supra* note 244 at 151.
[272] *Ibid*.
[273] Napoleon, "Legal Straightjacket", *supra* note 244.

The majority's conception of the Gitxsan culture as one focused on subsistence erases the relevance of evidence concerning what would be called sovereignty and the exercise of jurisdiction in the Anglo-European tradition.[274] Bare use and occupation are all that is required to show that the Gitxsan and Wet'suwet'en hunted on their lands – evidence of sovereignty does not fit in. Considering the nations' exercise of laws and jurisdiction proves more than the majority is interested in turning its mind to.[275]

Reconciliation with Presence: Similarly, the majority's understanding of reconciliation reflects an impoverished understanding of the nations with which the Crown is meant to be reconciling. Lamer CJ focuses on Indigenous peoples' presence and bare existence, boiling down s. 35's purpose to reconciling the "*prior presence* of Aboriginal peoples in North American with the assertion of Crown sovereignty."[276] Lamer CJ also cites his reasons in *Van der Peet* to the effect that the "basic purpose of s. 35(1)" is to reconcile the "*pre-existence* of aboriginal societies with the sovereignty of the Crown."[277]

Indigenous peoples were not simply "present" when colonial powers asserted their control over North American lands – they were, then as now, powerful, complex societies with sovereignty over their lands. This was recognized at and after the assertion of sovereignty by the colonial powers who sought to treat with them on a nation-to-nation basis for over a century.[278]

Lamer CJ's formulation of "pre-existing" Aboriginal societies, who had a "prior presence" in North America reduces Indigenous nations from sovereign powers with all the complexity that

[274] But see e.g. Mills, *supra* note 26 on how Indigenous governance and political structures are not reduceable to Anglo-European concepts.
[275] See e.g. *Delgamuukw (SCC), supra* note 20 at paras 170–171. This is even more true for the concurring judges, who make clear that Aboriginal title does not amount to much more than usufruct and that the only evidence they would be interested in to establish title would be evidence of use and occupation (see e.g. *Ibid* at para 188.).
[276] *Delgamuukw (SCC)*, *supra* note 20 at para 141 [emphasis added].
[277] *Ibid* at para 186 [emphasis added].
[278] See e.g. *Calder, supra* note 19 at 394. See also Baker & Reid, "Amerindian Power in the Early Modern Northeast", *supra* note 221.

that entails to people who simply existed in North America before colonialism. The majority does not speak of needing to reconcile the sovereignty of Indigenous nations with the asserted sovereignty of the Crown – it speaks only of needing to take into account that Indigenous peoples happened to be in North America prior to colonization.[279]

Limitations on Use of Title Lands: the SCC Knows Best

In keeping with the majority's reductive understanding of Gitxsan and Wet'suwet'en societies, the majority defines Aboriginal title in a way that limits the uses to which Aboriginal title lands can be put.[280] Because the majority does not conceive of the Gitxsan and Wet'suwet'en as complex, sovereign societies but instead as groups primarily focused on subsistence, it does not conceive of them holding title and jurisdiction over their lands in a way commensurate with how an Anglo-European power might. This translates to the majority conceptualizing Indigenous nations' relationship with land as one of *use* rather than *jurisdiction*. That is to say, rather than seeing land use as an expression of a relationship that encompasses jurisdiction, the majority sees it as the central grounding for title. This narrow understanding gives the majority licence to make determinations about what use of Aboriginal title lands might be appropriate, which it does by looking back at what use Indigenous nations put their lands to prior to the assertion of sovereignty.[281]

The majority sees the Court as an appropriate arbiter of the acceptable uses of Aboriginal title lands and, by corollary, does not see Aboriginal title holders as the appropriate arbiters of their own uses of land. Lamer CJ's examples of limitations on use illustrate this:

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[279] Note that Lamer CJ does state, at para 141, that there are two aspects to prior presence – occupation of land and "prior social organization and distinctive cultures of aboriginal peoples on that land." However, this is not the focus of his discussions of reconciliation, and in any event substitutes "social organization" and "distinctive cultures" for sovereign nations.
[280] *Delgamuukw (SCC)*, *supra* note 20 at paras 125–132.
[281] *Ibid* at para 128.

> …if occupation is established with reference to the use of the land as a hunting ground, then the group that successfully claims aboriginal title to that land may not use it in such a fashion as to destroy its value for such a use (e.g., by strip mining it). Similarly, if a group claims a special bond with the land because of its ceremonial or cultural significance, it may not use the land in such a way as to destroy that relationship (e.g., by developing it in such a way that the bond is destroyed, perhaps by turning it into a parking lot).[282]

Let us pause here and consider what that would look like for another society. What if, for example, a Norman judiciary had ruled that the Angles and Saxons of England had Aboriginal title to their lands, with the condition that they could not put their land to uses that would threaten the uses made at the time of the Norman conquest in 1066 – there would be swathes of England restricted to smallhold farming, with no option to, say, expand existing urban centres (London, for example) since this would interfere with the 1066 land use. Such constraints would be considered a limitation on “progress” and “land improvement” for non-Indigenous title-holders,[283] and it is worth asking why it is that the majority does not see its land use limitation on Aboriginal title lands in that light.

The majority’s approach freezes Aboriginal title lands in time. If an Indigenous nation harvested on lands in 1824 (or whenever the Crown claims to have asserted sovereignty), the land cannot be altered to preclude that same use in 2024, no matter how the nation’s relationship with its land may have changed in the intervening two centuries. By including this limitation on use in Aboriginal title, the majority takes for granted that the SCC knows better than Aboriginal title holders how Indigenous peoples may best maintain their relationship with their title lands.[284] The majority also inserts the SCC not only as the limiter of uses of Aboriginal title lands, but also as the entity that will surveil and enforce the limitation on use. This creates an “SCC knows best”

[282] *Ibid*.
[283] See Sections 1.4 and 1.5.
[284] *Delgamuukw (SCC)*, *supra* note 20 at para 126.

approach that betrays the Court's conviction that Indigenous nations cannot be trusted to maintain their relationships to their own lands without the Court requiring it of them.

As Russel Barsh and James Youngblood Henderson write in their article "The SCC's *Van der Peet* Trilogy: Naïve Imperialism and Ropes of Sand," the approach to Aboriginal rights developed by the Lamer Court is one that entrenches European paternalism.[285] Henderson and Barsh write that by assuming the authority to define Indigenous cultures, Lamer CJ is acting with "naïve imperialism."[286] By freezing Aboriginal rights in time, Lamer CJ presumes that "…Aboriginal societies are less dynamic or creative than other cultures, or that they must remain stuck in time in order to remain authentic and deserve to retain their rights…"[287] This, the authors write, "is sociological nonsense recalling the discredited social-Darwinist conception of 'primitivity'."[288]

3.3 EXASPERATION

The next theme to consider from the majority's reasons is the judges' apparent exasperation with having to adjudicate the Gitxsan and Wet'suwet'en's appeal. This theme is expressed in three ways:

- The majority's discussion of the pleadings issues;
- Its discussion of the admissibility of Indigenous evidence; and
- Its remarkable closing sentence.

Each of these will be explored below.

<u>Pleadings Issue</u>

[285] Barsh & Henderson, "The Supreme Court's Van Der Peet Trilogy", *supra* note 58 at 1002.
[286] *Ibid*.
[287] *Ibid* at 1001.
[288] *Ibid* at 1002.

The majority famously declined to decide the merits of the Gitxsan and Wet'suwet'en's appeal on the basis that a defect in their pleadings precluded the Court from doing so. Lamer CJ held that because the appellants had amalgamated the fifty-one separate claims of the Gitxsan and Wet'suwet'en Houses into two collective claims on appeal, the Crown "suffered some prejudice."[289] This was despite the actual content of the claims remaining the same,[290] and stands in contrast to the concurring judges' characterization of the issue as a defect "technically speaking."[291]

The majority's refusal to consider the merits of the appeal is suggestive of the Court throwing up its hands. The majority appears put out by the complexity of the matter and the volume of evidence adduced at trial, commenting more than once on the length of the trial,[292] the "enormous" volume of evidence[293] and the length of McEachern CJ's judgment.[294] In Lamer CJ's consideration of the oral histories evidence, though he rules that McEachern CJ's factual findings cannot stand, he declines to engage with the evidence and make new findings based on the evidence from trial. He states, "given the *enormous complexity* of the factual issues at hand, it would be *impossible* for the Court to do justice to the parties by *sifting through* the record itself and making new factual findings. A new trial is warranted…"[295] Would such a task be impossible? Or is it a task the Court should expect to be required to undertake, in light of the masses of evidence required to meet the tests the Court has set for "proving" Aboriginal rights and title?

The majority's comments on the volume of evidence adduced by the Gitxsan and Wet'suwet'en and its retreat from adjudicating the claim on its merits are especially noteworthy

289 *Delgamuukw (SCC), supra* note 20 at para 76.
290 *Ibid*.
291 *Ibid* at para 188.
292 See e.g. *Ibid* at paras 5, 89, 108.
293 See e.g. *Ibid* at paras 89, 108.
294 See e.g. *Ibid* at paras 6, 89.
295 *Ibid* at para 108 [emphasis added].

when considered in conjunction with the majority's refusal to adjudicate the Gitxsan and Wet'suwet'en's claim to self-government. Despite the significant evidence put forward by the Gitxsan and Wet'suwet'en at trial,[296] Lamer CJ states that their claims for self-government were too broadly put, such that the parties failed "to address many of the difficult conceptual issues which surround the recognition of aboriginal self-government."[297]

The Gitxsan and Wet'suwet'en are left in an impossible situation. The evidence they have adduced is simultaneously too much and not enough, depending on which justifies the Court not issuing a ruling on the merits of their claims.

Indigenous Evidence

To continue on the subject of evidence, the majority also appears exasperated about the type of evidence available to meet the tests set by the SCC. In his section on the general principles of evidence, Lamer CJ characterizes the "flexibility" in evidentiary rules he mandated in *Van der Peet* as an "accommodation" that must not "strain 'the Canadian legal and constitutional structure.'"[298] The Indigenous nations' lack of written records is seen to be a challenge that the SCC is required to fix by permitting the admission on non-written records.[299]

What the majority does not seem to consider is that almost all historical evidence is hearsay evidence and presumptively inadmissible, whether it is written or not.[300] It is the SCC's insistence on detailed historical evidence to support Aboriginal title claims that necessitates the introduction of hearsay evidence. Common law courts have a strong preference for direct evidence[301] and an

[296] See e.g. *Ibid* at para 188; *Delgamuukw (BCSC), supra* note 264.
[297] *Delgamuukw (SCC), supra* note 20 at para 171. It should be noted that *R v Pamajewon*, [1996] 2 SCR 821 had not been released when the Gitxsan and Wet'suwet'en argued their claims at trial.
[298] *Delgamuukw (SCC), supra* note 19 at para 82 [citations omitted].
[299] *Ibid* at paras 80, 83.
[300] See e.g. Sidney N Lederman, Michelle K Fuerst & Hamish C Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis, 2022) at para 18.09.
[301] See e.g. *Ibid* at para 6.9-6.16.

aversion to anything else, but direct evidence to support historical claims is hard to come by. The most common practice for adducing evidence of historic events at trial is to have an expert qualified who is permitted to speak to hearsay (written records or otherwise) as part of the basis for their opinion.[302]

Creating an exception to the hearsay rule in order to permit the introduction of oral histories is therefore simply in keeping with what is required in historic claims generally. In light of this, it is strange for the majority to characterize oral histories as something requiring unusual accommodation. Lamer CJ states several times that oral histories pose "challenges" and "difficult[ies]"[303] but casts the Court as encouraging "accommodat[ions]" for them so that they can have an "equal footing with the types of historical evidence that courts are familiar with, which largely consists of historical documents."[304] The real issue for common law rules of evidence, though, is that direct evidence of historic events is something of an impossibility. It is not really that oral histories pose greater evidentiary challenges than other forms of historical evidence, but rather that by creating tests that focus on the time of contact and the assertion of sovereignty, the SCC is inviting evidence of historic events – and, it would seem, regretting it.

The fact that the majority uses the language of "challenges" and "accommodation" to describe the court's admission of these records speaks to a general irritation with the friction between the tests the SCC has set and the historic evidence the parties must adduce to try to meet those tests.

<u>Let's Face It</u>

[302] See e.g. *Ibid* at para 12.39-12.45. This has been the approach taken in every trial dealing with historic evidence in which I have participated. Note that there is a limited exception to the rule against hearsay for "ancient documents", but this exception is quite limited and pertains to items like deeds. *Ibid* at 6.324-6.330. There are also other exceptions to the rule against hearsay, such as the public records exception, that might apply when dealing with certain historic evidence.

[303] *Delgamuukw (SCC), supra* note 20 at paras 86–87.

[304] *Ibid* at para 87.

Finally, the majority communicates exasperation in its final sentence. Having commented on the length and expense of the litigation,[305] Lamer CJ encourages the parties towards negotiation to avoid the further expense and time of the new trial the majority has ordered,[306] and, presumably, any need for the Court to re-hear the complicated claim. The majority closes with resigned weariness: "Let us face it, we are all here to stay."[307]

3.4 Fixed Assumptions

The final theme to be explored in the majority's decision is the presence of fixed assumptions that limit its ability (or perhaps willingness) to fully apprehend the Gitxsan and Wet'suwet'en's evidence and claims. These fixed assumptions are many, and Section 3.2 on condescension and paternalism focuses on one such assumption – that Indigenous nations were and are somehow less nation-like than non-Indigenous nations, such that their claims for ownership and jurisdiction attract scare quotes.[308] Another overarching fixed assumption is that the Crown's assertion of sovereignty resulted in the Crown gaining jurisdiction over Canadian lands. This assumption is, of course, a continuation of the SCC's assumption of the same in *Calder*. It is not something that either court pauses to question.

Borrows draws out how illogical these assumptions around Crown sovereignty are in his article "Sovereignty's Alchemy: An Analysis of *Delgamuukw v. British Columbia*." Borrows points out that in 1871, a quarter of a century *after* the Court's date for the assertion of sovereignty in British Columbia,[309] Indigenous peoples were a substantial majority of the population in the

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305 *Ibid* at para 186.
306 *Ibid*.
307 *Ibid*.
308 *Ibid* at para 7. See footnote 270.
309 *Ibid* at para 145.

province.[310] But this fact does not appear in Lamer CJ's (or later McLachlin CJ's) reasons, and nor does the obvious associated question of how it is that in 1846 the imperial Crown acquired sovereignty over this majority's lands. Instead, the Court incants that "Aboriginal title is a burden on the Crown's underlying title."[311] As Borrows writes, "This mere assertion is said to displace previous Indigenous titles by making them subject to, and a burden on, another's higher legal claims."[312] This cannot be explained except by magic and alchemy.[313]

Common Law Governs

The assumption that the Crown's assertion of sovereignty resulted in the Crown gaining jurisdiction over Canadian lands leads the Court to assume that the common law applies across Canada, including to Indigenous claims. The majority does make some effort to account for Indigenous law and perspective and suggests that its approach has created a *sui generis* way of approaching Indigenous rights claims that takes into account both common law and Indigenous law. But upon scrutiny, there is no question that the majority sees the common law as the governing law for Aboriginal title claims and common law procedures as the default procedures that ought, preferably, to be followed.

In terms of common law procedures, the majority never questions that standard common law rules ought to govern the Gitxsan and Wet'suwet'en's claims to the greatest extent possible. We see this most strongly in its finding that the pleadings are deficient and the court cannot decide the appeal.[314] As Borrows notes, "… the forms of action the Gitksan and Wet'suwet'en pleaded had to be exact, even though the Court itself found there to be considerable legal uncertainty."[315]

[310] Borrows, "Sovereignty's Alchemy", *supra* note 8 at 545.
[311] *Delgamuukw (SCC)*, *supra* note 20 at para 145; *Tsilhqot'in Nation (SCR)*, *supra* note 21 at paras 12, 69, 75.
[312] Borrows, "Sovereignty's Alchemy", *supra* note 8 at 562.
[313] Borrows, "Sovereignty's Alchemy", *supra* note 8.
[314] See e.g. *Ibid*.
[315] *Ibid* at 553.

Borrows sees the Court's requirement that the pleadings conform with common law requirements to be an extension of Canada's sovereignty "through centralizing control of access to justice."[316] The result of this extension of Canada's sovereignty is that:

> …in this historic case, which considers the wholesale territorial dispossession of two entire Aboriginal peoples, the ratio decidendi turns on the Court's finding that the province suffered prejudice in considering this issue. There is something deeply troubling about having to recognize Crown assertions of sovereignty in framing a case to dispute the effect of these assertions. Given the imbalance in the parties' financial and political resources, and the century-long denial of Aboriginal land and political rights in British Columbia, this sleight of hand is remarkable.[317]

This assumption is also present in the majority's discussion of Indigenous evidence. Common law principles are clearly the default for the majority:

> … although the doctrine of aboriginal rights is a common law doctrine, aboriginal rights are truly sui generis, and demand a unique approach to the treatment of evidence which accords due weight to the perspective of aboriginal peoples. However, that accommodation must be done in a manner which does not strain "the Canadian legal and constitutional structure".[318]

Throughout its discussion of evidentiary principles, the majority makes clear that it sees the types of evidence presented by the Gitxsan and Wet'suwet'en as less than ideal. Lamer CJ suggests several times that written records of historical information would be preferable to oral histories.[319] As discussed in the Exasperation section, the majority also characterizes oral histories as posing "challenges" and "difficult[ies]"[320] which require accommodation by the courts.

As Val Napolean discusses in her article, "Delgamuukw: A Legal Straightjacket for Oral Histories," despite the majority's stated commitment to considering the perspectives of Indigenous peoples in Aboriginal law cases, "the courts' treatment of aboriginal oral histories as cultural

[316] *Ibid* at 551.
[317] *Ibid* at 553.
[318] *Delgamuukw (SCC), supra* note 15 at para 82 [citation omitted].
[319] See e.g. *Ibid* at paras 80, 83, 87.
[320] *Ibid* at 86–87.

artefacts continues to be appallingly ethnocentric."[321] Napolean explains that the Court's approach to the adwaak altered them by refusing to understand adwaak as living documents, and instead requiring them to be fixed, "dead memorials."[322] The Court's unstrained "accommodations" are insufficient to treat oral histories appropriately.

In terms of the fixed assumption that common law governs Aboriginal title claims, we see this in, for example, the majority's importation of the common law requirement of exclusivity into Aboriginal title. Lamer CJ writes that "at sovereignty, occupation must have been exclusive. The requirement for exclusivity flows from the definition of aboriginal title itself, *because I have defined aboriginal title in terms of the right to exclusive use and occupation of land*."[323] This tautology emphasizes the importance the majority places on exclusivity, which Lamer CJ acknowledges is "a common law principle derived from the notion of fee simple ownership."[324] The majority considers it to be absurd to think that multiple Indigenous nations might have shared stewardship over the same piece of land, because that would not accord with his definition of Aboriginal title as denoting exclusive use and occupation:

> Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.[325]

Though the Gitxsan and Wet'suwet'en pushed against the notion that exclusivity is required to establish title and gave the example of shared control of land, the majority was set in its assumption that exclusivity must be an aspect of Aboriginal title.[326]

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[321] Napoleon, "Legal Straightjacket", *supra* note 244 at 123–124.
[322] *Ibid* at 125, 151. Napolean borrows the phrase "dead memorials" from Gavin Smith.
[323] *Delgamuukw (SCC)*, *supra* note 20 at para 155 [emphasis added].
[324] *Ibid* at para 156.
[325] *Ibid* at para 155.
[326] His suggestion that Aboriginal title might be jointly shared where nations had "shared exclusive possession" is his answer to the Gitxsan and Wet'suwet'en's arguments. *Ibid* at para 158.

Non-Indigenous Interests Prevail Over Indigenous Interests

Finally, the majority operates from the fixed assumption that the interests of non-Indigenous Canadians must be more important than those of Indigenous peoples. This is communicated most notably in the majority's discussion of infringement of Aboriginal title. In this section, the majority drains Aboriginal title of much of its content. Lamer CJ writes that Aboriginal title is "not absolute" and may be infringed by both the federal and provincial governments.[327] All that is required is that infringements be justified – which the Crown may do, according to the majority, in any number of ways that prioritize the interests of non-Indigenous Canadians over Indigenous Aboriginal title holders. Lamer CJ's list of examples of potential justifications for infringement of title is long and broad:

- "the development of agriculture, forestry, mining, and hydroelectric power;"
- "the general economic development of the interior of British Columbia;"
- "protection of the environment or endangered species;"
- "the building of infrastructure;" and
- "the settlement of foreign populations to support those aims."[328]

John Borrows has described Lamer CJ's list of justified infringements as colonization renamed as an "infringement," and has noted that "[c]alling colonization 'infringement' is an understatement of immense proportions."[329]

The majority seems to assume that a declaration of Aboriginal title will not meaningfully alter who is the decision-maker about lands subject to an Aboriginal title declaration. Aboriginal title holders, in the majority's conception, will be entitled to consultation, but the Crown will

[327] *Ibid* at para 160.
[328] *Ibid* at para 165.
[329] Borrows, "Sovereignty's Alchemy", *supra* note 8 at 568.

continue to make decisions about resource extraction and land use. All that is required is that the Crown,

> … accommodate the participation of aboriginal peoples in the development of the resources of British Columbia, that the conferral of fee simples for agriculture, and of leases and licences for forestry and mining reflect the prior occupation of aboriginal title lands, [and] that economic barriers to aboriginal uses of their lands (e.g., licensing fees) be somewhat reduced.[330]

Lamer CJ's long list of justifications for infringement reflects a prioritization of the non-Indigenous public's interests over those of Aboriginal title holders. This prioritization appears to be a given to the majority – its reasons do not suggest any concern that such a wide list of justifications might make a declaration of Aboriginal title nearly meaningless. Rather, the reasons suggest that the majority assumes that where settler colonial development goals conflict with Aboriginal title holders' goals for their lands, the development goals ought to prevail.

These same fixed assumptions are seen in the *Tsilhqot'in* decision, discussed in the next chapter.

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[330] *Delgamuukw (SCC)*, *supra* note 20 at para 167.

Chapter 4 *TSILHQOT'IN NATION V. BRITISH COLUMBIA*

The SCC's 2014 decision in *Tsilhqot'in Nation v. British Columbia*[331] is, in one crucial way, a significant change in the SCC's Aboriginal law jurisprudence. For the first time, the SCC did not decline on procedural grounds to adjudicate an Aboriginal title claim on its merits. Instead, the Court, with Chief Justice McLachlin writing for a unanimous bench, found that the Tsilhqot'in Nation had Aboriginal title to a 1,900 square kilometers area in the interior of B.C.[332] With this case, common law Aboriginal title in Canadian law went from a theoretical possibility to an existing right over a specific area of land.

4.1 THE *TSILHQOT'IN NATION* CASE

The Tsilhqot'in Nation's title claim began its life as two separate actions, filed in 1990 and 1998, both aimed at preventing clear-cutting on Tsilhqot'in lands.[333] The actions were consolidated in 2002 and proceeded as a claim not only for control over forestry on Tsilhqot'in lands, but also for a declaration of Aboriginal rights and title.[334] The action was brought by Chief Roger William in his representative capacity as the Chief of the Xeni Gwet'in, one of the communities making up the Tsilhqot'in Nation, on behalf of the Xeni Gwet'in and all Tsilhqot'in people.[335]

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331 *Tsilhqot'in Nation (SCR)*, *supra* note 21. [*Tsilhqot'in*].
332 "Declared Title Area", online: *Tŝilhqot'in National Government* <https://tsilhqotin.ca/governance/declared-title-area/>.
333 *Tsilhqot'in Nation v British Columbia* (2007), [2008] 1 CNLR 112 at paras 22–27; 39; 60–100 [*Tsilhqot'in Nation (BCSC)*]. [*Tsilhqot'in* trial decision].
334 *Ibid* at paras 60–100.
335 *Ibid* at Executive Summary.

The Tsilhqot'in have a long history of resistance to colonization and of defending their lands from colonial resource extraction projects.[336] In the 1860s, in response to settler incursions, resource extraction and an attempt to construct a road through Tsilhqot'in territory without the nation's consent, the Tsilhqot'in began a war against settlers in their territory. All non-Indigenous people were expelled from Tsilhqot'in lands, and 19 settlers were killed. The colonial government did not understand these acts as acts of war committed by one nation against an invading force and subjected four Tsilhqot'in Chiefs to a criminal trial and hanging for the killings.[337]

Following the Tsilhqot'in War,[338] colonial incursions into Tsilhqot'in territory were less focused on settlement and resource extraction,[339] but the nation experienced other consequences of colonialism, including European diseases and the harms of the residential schools.[340] In 1983, however, resource extraction came to the fore again: a forestry licence was granted to Carrier Lumber Ltd, sparking first resistance through blockades and negotiations, followed by the legal actions that became the Tsilhqot'in title claim.[341]

The trial was heard between 2002 and 2007.[342] Though the trial judge found that the Tsilhqot'in were entitled to a declaration of Aboriginal title to some of the claim area, he found that he was prevented from issuing such a declaration because the plaintiffs had framed the claim as "all or nothing" – if the claim for the full area was not made out, as he found it was not, he felt unable to issue a declaration for a smaller portion thereof.[343]

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[336] See e.g. Lorraine Weir, "'Oral Tradition' as Legal Fiction: The Challenge of Dechen Ts'edilhtan in Tsilhqot'in Nation v. British Columbia Special Issues: (Re)Imagining Law: Marginalised Bodies/Indigenous Spaces" (2016) 29:1 Int'l J Semiotics L 159–190 at 173–175.

[337] Borrows, "The Durability of Terra Nullius", *supra* note 18 at 708; Note that Lorraine Weir writes that five Tsilhqot'in were hanged: Weir, "'Oral Tradition' as Legal Fiction", *supra* note 336 at 173.

[338] Also referred to as the Chilcotin War in some sources.

[339] Borrows, "The Durability of Terra Nullius", *supra* note 18 at 708.

[340] Weir, "'Oral Tradition' as Legal Fiction", *supra* note 336 at 173–174.

[341] *Ibid* at 174; Borrows, "The Durability of Terra Nullius", *supra* note 18 at 709.

[342] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 7.

[343] *Tsilhqot'in Nation (BCSC)*, *supra* note 333 at para 129 [citations omitted].

On appeal, the BCCA found that while the trial judge had been mistaken in finding that he was unable to issue a declaration for a smaller portion of the claim area than had been prayed for in the pleadings, Aboriginal title had not been made out.[344] The BCCA found instead that the Tsilhqot'in had proven Aboriginal rights in the claim area.[345]

On appeal to the SCC, the Court agreed with the BCCA that the trial judge was not precluded from making a declaration of title for a portion of the claim area and found that Aboriginal title to such an area had been made out.[346]

The Supreme Court's Reasons in* Tsilhqot'in*: Delgamuukw's Flaws Persist

Apart from the crucial difference that in *Tsilhqot'in*, the SCC issued an Aboriginal title declaration, *Tsilhqot'in* does not depart meaningfully from earlier Aboriginal title decisions. The Court does not alter the majority's key findings from *Delgamuukw* (explored in the previous section), including:

- that radical title lies with the Crown;[347]
- the appropriate test for Aboriginal title;[348]
- that the Crown has the right to infringe on Aboriginal title;[349]
- that the SCC is best placed to determine how Indigenous peoples should use their title lands;[350] and
- that common law and common law procedures govern Aboriginal title claims.[351]

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[344] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 8.
[345] *Ibid*.
[346] *Ibid* at para 2.
[347] See e.g. *Ibid* at paras 18, 69.
[348] *Ibid* at paras 25–26.
[349] See e.g. *Ibid* at paras 2, 18, 77, 83, 87.
[350] See e.g. *Ibid* at paras 67, 74.
[351] See e.g. *Ibid* at paras 19–23. See Valverde, "The Crown in a Multicultural Age", *supra* note 164 at 14.

These common findings mean that despite the profoundly different outcome in the *Tsilhqot'in* case as compared with *Calder* and *Delgamuukw*, the underlying reasoning from the Court did not change and the shortcomings of the earlier decisions detailed in Chapters 2 and 3 were not addressed. In *Tsilhqot'in*, the McLachlin Court follows the Lamer majority in viewing Aboriginal rights, and, as a corollary, Indigenous rights claimants, as frozen in time and place.

In his article "The Durability of *Terra Nullius*," John Borrows explores how the McLachlin Court's failure to interrogate the assertion of Crown sovereignty impacts the contents of Aboriginal title.[352] Borrows considers the Court's statement that: "At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province."[353] Borrows points out that this statement "presumes that the land is empty of governance or that Indigenous governance powers are inferior."[354] This presumption "requires a discriminatory denigration of Indigenous peoples' laws and ways of life,"[355] and is in deed, if not in word, a continuation of the doctrine of *terra nullius*.

The Lamer majority made this same presumption regarding *terra nullius*, as explored in the previous chapter, and two of the presumption's consequences that Borrows explores in "The Durability of *Terra Nullius*" are consequences we have considered in the *Delgamuukw* chapter: "a) the Crown is empowered to justifiably infringe Aboriginal title, b) the Crown can shift the burden for proving Aboriginal title to Indigenous peoples."[356] Those consequences persist in the *Tsilhqot'in* decision, as Borrows draws out, and two further consequences arise in the *Tsilhqot'in* case that were absent from the *Delgamuukw* case: "c) the Crown can subject Indigenous peoples

[352] Borrows, "The Durability of Terra Nullius", *supra* note 18.
[353] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 69 citing Guerin v The Queen, (1984) 2 SCR 335.
[354] Borrows, "The Durability of Terra Nullius", *supra* note 18 at 724.
[355] *Ibid* at 725.
[356] *Ibid* at 727.

to provincial jurisdiction, and d) the Courts can characterize Aboriginal title as existing within a legal vacuum when provincial legislation is not present."[357] These two new consequences, which arise based on the particular facts of the *Tsilhqot'in* case, are considered as aspects of historicization in Section 4.4 below, titled "Gazing Backwards."

The *Tsilhqot'in* decision differs slightly from the *Delgamuukw* decision in two subtle ways. The McLachlin Court adds two glosses to previous statements of law from *Delgamuukw*: it urges a less formalistic, "functional" approach to pleadings in Aboriginal title cases in recognition of the uncertainties inherent in framing these cases;[358] and it slightly recasts the limits on uses of title lands, translating Lamer CJ's statement that the "protected uses must not be irreconcilable with the nature of the group's attachment to that land"[359] to: "that is, it is group title and cannot be alienated in a way that deprives future generations of the control and benefit of the land."[360]

These glosses aside, the Court's commitments, assumptions and attitudes in *Tsilhqot'in* do not differ significantly from those of the Lamer majority in *Delgamuukw*. The Tsilhqot'in Nation, as with the Gitxsan, the Wet'suwet'en and the Nisga'a nations before it, is not understood as a fully realized political actor whose people have a complex, multi-faceted culture. Instead, the Tsilhqot'in are characterized in relation to their ancestors' subsistence activities. Despite the trial judge's description of the Tsilhqot'in's laws, spirituality, teachings, social structures,[361] the McLachlin Court flattens their relationship to the land similarly to the manner in which the Lamer majority did with the Gitxsan and Wet'suwet'en: McLachlin CJ writes that the Tsilhqot'in managed their lands "for the foraging of roots and herbs" and for hunting and trapping.[362] This

[357] *Ibid*.
[358] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at paras 20–21.
[359] *Ibid* at para 15 citing *Delgamuukw* at para 117.
[360] *Ibid*.
[361] *Tsilhqot'in Nation (BCSC)*, *supra* note 333 at paras 340–436.
[362] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 3.

flattening reflects Borrows' observation that the Court's decision shows "a denigration of Indigenous peoples' laws and ways of life."[363] The Court is able to see the Tsilhqot'in's subsistence practices, but not their governance powers. The consequences of this type of flattening are the same as those explored in the *Delgamuukw* chapter: by focusing its attention on how the plaintiffs historically fed themselves, the Court does not focus on the Tsilhqot'in's evidence about their political, legal and spiritual practices – evidence of their nation's nation-ness.[364] This makes it possible for the Court to maintain an impoverished idea of what type of society – and therefore what s. 35 rights – the Tsilhqot'in have. This is explored further in section 4.4 "Gazing Backwards" below.

In addition, the McLachlin Court appears somewhat weary with the claim before it: McLachlin CJ repeats Lamer CJ's remarkable closing comment from *Delgamuukw*, while adding her own resigned view: "Aboriginals and non-Aboriginals are 'all here to stay' and must *of necessity* move forward in a process of reconciliation."[365] As with the Lamer majority's language before her, McLachlin CJ's language here reflects unenthusiastic resignation.

While the McLachlin Court's assumptions, attitudes and commitments are the same as the Lamer Court's, they do find some different modes of expression in the *Tsilhqot'in* case, most notably:

- Condescension and paternalism: the McLachlin Court enlarges and further entrenches the Court's role as the arbiter of Indigenous rights; and
- Condescension and paternalism: the McLachlin Court's focus is squarely on historic rights of an historic Indigenous people, rather than on the rights-claimants before it in this case.

[363] Borrows, "The Durability of Terra Nullius", *supra* note 18 at 725.
[364] See Chapter 3, Section 3.2.
[365] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 82 citing Delgamuukw at para 186 [emphasis added].

4.2 CONDESCENSION: THE SCC (STILL) KNOWS BEST

A Beneficent, Liberal Court

Adopting the Lamer majority's approach to introducing the Indigenous plaintiffs in *Delgamuukw*, the McLachlin Court devotes only seven paragraphs to summarizing Tsilhqot'in history, the history of their lands and the history of the trial.[366] Following this glancing summary, McLachlin CJ provides a nine paragraph summary of the SCC's Aboriginal law jurisprudence.[367] McLachlin CJ opens this summary with the statement that "[i]n 1973, the Supreme Court of Canada ushered in the modern era of Aboriginal land law by ruling that Aboriginal land rights survived European settlement and remain valid to the present unless extinguished by treaty or otherwise…"[368]

The Court, in this description, is cast as an ameliorative body – it has "ushered in" a new era – one in which Aboriginal title exists. It is not that in 1973, the SCC was forced to consider Aboriginal title because of the persistent advocacy of the Nisga'a, nor that the SCC found, based on arguments raised by the Nisga'a regarding the principles of common law Aboriginal title, that such title could exist in Canada. Instead, it is the Court that has opened the door to the "modern era of Aboriginal land law."[369] There is no acknowledgment of Indigenous peoples' consistent assertion of their ongoing rights and jurisdiction – rather, there is a transformation from no rights to rights, which comes thanks to the SCC's decisions. The SCC is the body that created and holds the alchemical formula, to continue with Borrows' apt metaphor.[370]

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[366] *Ibid* at paras 3–9.
[367] *Ibid* at paras 10–18.
[368] *Ibid* at para 10.
[369] *Ibid*.
[370] John Borrows, "Sovereignty's Alchemy: An Analysis of Delgamuukw v. British Columbia" (1999) 37:3 Osgoode Hall Law Journal 537–596.

The SCC's self-perception as a beneficent body is also apparent in its discussion of how Indigenous groups must prove sufficiency of occupation for the Aboriginal title test. The Court urges what it calls a "culturally sensitive approach" that is "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."[371]

Framing the requirement to take the Indigenous rights claimants' perspective into account as "culturally sensitive" places the SCC in the role of tolerant, liberal arbiter. As will be expanded upon below, this obscures the Court's ongoing commitment to ethnocentric colonial perspectives.

Similarly, with respect to pleadings, the Court urges a "functional approach" in which "minor defects should be overlooked, in the absence of clear prejudice."[372] This echoes Lamer CJ's exhortation that the courts should be "accommodating" to Indigenous claimants. The suggestion is that the SCC is generously offering leniency to Indigenous claimants, whereas in fact Indigenous claimants face the next to impossible task of framing their claims in a way that will accord with the SCC's changing Aboriginal title jurisprudence in twenty years' time, when they might finally be determined.

These statements obscure the actual conservative content of the Court's decision and act as window dressing portraying a progressive Court.

<u>Conservative Underpinnings – Ongoing Colonial Perspectives</u>

The SCC's move in *Tsilhqot'in* of casting itself as a liberal, tolerant body while reinforcing colonial commitments (for example, the doctrine of *terra nullius*) is a settler move of a piece with those explored by Liam Midzain-Gobin in his article "Comfort and Insecurity in the reproduction of settler coloniality." In this article, Midzain-Gobin explores the "settler insecurity" associated

[371] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 41.
[372] *Ibid* at para 20.

with colonialism and ongoing Indigenous resistance, along with the ways that settlers seek to avoid this insecurity.[373] Midzain-Gobin writes that multiculturalism has been deployed as one way for settlers to reassure ourselves that our society is "tolerant" and "honourable," and therefore not engaged in ongoing efforts at Indigenous erasure.[374] As Midzain-Gobin writes, "We envision a uniquely inclusive Canadian tolerance, one that is practically embodied in the rhetoric of reconciliation and multiculturalism. … This 'tolerant' and 'honourable' vision of ourselves is not unique across liberal democratic settler states, rather such narratives remain foundational to settler mythologies."[375]

The McLachlin Court's language of "cultural sensitivity" and its implication that it is offering leniency towards Indigenous claimants by "accommodating" their evidence work to cast the Court in a favourable light.[376] As Midzain-Gobin explains, through this type of move "…we develop an affective comfort in understanding ourselves as a generous nation that seeks to correct any historical wrongs suffered by Indigenous peoples by empowering them through settler systems."[377] This affective comfort will be explored further in Chapter 7.

4.3 Condescension: A Rights-Conferring Court

In a noteworthy shift from *Calder* and *Delgamuukw*, the Court in *Tsilhqot'in* casts itself in the role of conferring, rather than confirming, Aboriginal rights. In *Calder* and *Delgamuukw*, the SCC reasoned that Aboriginal title exists because of the pre-existence of Aboriginal societies in

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[373] Midzain-Gobin, *supra* note 27.
[374] *Ibid* at 217–218.
[375] *Ibid* at 217 [citations omitted].
[376] This language also recalls Hall J's position of the dissent in *Calder* as enlightened: Chapter 2, Section 2.6.
[377] Midzain-Gobin, *supra* note 27 at 218.

Canada.[378] The claimants in those cases sought declarations confirming their existing title rights, and the SCC took no issue with that framing of the claims. In *Tsilhqot'in*, while the claimants similarly sought "the long overdue *recognition* of [their] Aboriginal title…,"[379] the Court altered what a declaration of Aboriginal title does. Rather than recognizing existing title, following *Tsilhqot'in*, the decision's language suggests that a declaration of Aboriginal title instead establishes Aboriginal title and confers the rights that accompany it.[380]

With the *Tsilhqot'in* version of Aboriginal title, although title "flows from the fact of Aboriginal occupancy at the time of European sovereignty," before a declaration is issued, Indigenous claimants have no legal rights or interests with respect to their lands beyond the thin right to be consulted and accommodated.[381] Aboriginal title can only be "established" by a court declaration or by agreement with the Crown.[382] As Borrows writes in "The Durability of *Terra Nullius*," "…it seems as if Aboriginal title will never be an enforceable interest within Canadian law without some kind of accreditation by a colonial emanation."[383]

After *Tsilhqot'in*, Aboriginal title is not legally recognized without a declaration from the SCC.[384] It is only upon a declaration of Aboriginal title, according to the McLachlin Court, that title lands vest in possession *and interest* to the Indigenous claimants.[385] Only once this has

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[378] See e.g. Hall J's statement in *Calder*: "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. This is what Indian title means…" *Calder*, *supra* note 19 at 328.
[379] *Appellants' Factum in the Supreme Court of Canada, Tsilhqot'in Nation v. British Columbia* at para 1 [emphasis added].
[380] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at paras 2, 73-76. But see paras 69, 75. But see Borrows, "The Durability of Terra Nullius", *supra* note 18 at 720.
[381] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at para 89.
[382] *Ibid*.
[383] Borrows, "The Durability of Terra Nullius", *supra* note 13 at 729 [citations omitted]. I note that while Borrows draws out the SCC's "accreditation" requirement, he also sees the decision as recognizing how pre-existing legal systems in Canada translate to present day rights through the doctrine of continuity (see pp. 703-704). But see: Barsh & Henderson, "The Supreme Court's Van Der Peet Trilogy", *supra* note 49; Morales, "'a 'lha'tham", *supra* note 106.
[384] But see: Borrows, "The Durability of Terra Nullius", *supra* note 18; Val Napoleon, "Tsilhqot'in Law of Consent" (2015) 48:3 UBC L Rev 873–902.
[385] *Tsilhqot'in Nation (SCR)*, *supra* note 21 at paras 112, 115.

happened do rights, such as the legal right to manage resources on title lands,[386] arise. As McLachlin CJ writes, prior to the SCC's declaration of Aboriginal title, "the Tsilhqot'in held an interest in the land that was not yet legally recognized."[387]

This means that after the *Tsilhqot'in* decision, the SCC controls access to Aboriginal title even more firmly than it previously did. Its role is no longer to look at the evidence and assess whether Aboriginal title claimants have existing title, but instead to "establish" title and in doing so to confer rights. This control speaks to the Court's conviction that it is the appropriate arbiter of Indigenous rights.

The SCC's self-conception as a beneficent body that has ushered in an era of new rights for Indigenous peoples, coupled with taking for itself the role of conferring, rather than confirming, rights, work to cast the Court in the role of a benefactor – a benefactor that uniquely possesses the alchemical formula to create Aboriginal title rights.

This view is markedly one-sided. The SCC's account of Aboriginal rights and title has no space for the Indigenous plaintiffs whose advocacy has forced the Court to consider these rights. There is no acknowledgement that Aboriginal title claims are simply the most recent form of advocacy employed by Indigenous peoples in the ongoing assertion of their rights and title.[388] Instead, for the SCC in *Tsilhqot'in*, Aboriginal title is established thanks to an enlightened Court.

In her article "a 'lha'tham: The Re-transformation of s. 35 through a Coast Salish Legal Methodology," Sarah Morales offers an alternate understanding of the courts' role in recognizing Aboriginal rights. Morales focuses this alternate view on s. 35 and the need for Indigenous law to be central to s. 35's interpretation. Morales uses Coast Salish law, in the form of a transformation

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[386] *Ibid* at para 113.
[387] *Ibid* at para 95.Para. 95.
[388] See e.g. *Tsilhqot'in Nation (BCSC)*, *supra* note 333 at paras 237–331; Foster, *supra* note 142.

story, to do this.[389] Morales recounts how in the story "The Sockeye that Became a Rainbow," *Xeel's*, "a figure considered to be an agent of the sun" or the sun,[390] transforms a sockeye into a rainbow. *Xeel's* does this because a sockeye boy has fallen in love with a cod girl, and they cannot be together unless the sockeye boy becomes a rainbow and the cod girl chooses to join him in the sky.[391] As part of this transformation, *Xeel's* tells the sockeye boy, he will be able to help his family on their journey upriver every year, by bringing rain.[392]

Morales explains that s. 35 is also a transformer: it transformed Indigenous rights, which exist on their own terms and in accordance with Indigenous laws, into "Aboriginal rights" that can override federal regulations.[393] Morales writes that in this understanding of s. 35, "there is no need to define the right according to s. 35, because s. 35 is not the source of the right. The source of the right stems from the practices and tradition of the Indigenous peoples themselves."[394] Instead of being the source of the right, s. 35 can act as a "bridge between the Indigenous legal traditions of Canada and the common law and civil law traditions."[395] In this way, s. 35, as a bridge, can play the role of the rainbow in the "The Sockeye that Became a Rainbow."[396] Morales shows how this interpretation of s. 35 was relied on by the SCC until after its decision in *R v. Sparrow*.

However, under the Lamer Court, the SCC moved from interpreting s. 35 as a bridge to a conception in which Aboriginal rights are "non-living, impermeable, hard objects."[397] In this

[389] Morales, "'a 'lha'tham", *supra* note 117.
[390] *Ibid* at 152.
[391] *Ibid* at 153–158.
[392] *Ibid*.
[393] *Ibid* at 163–164.
[394] *Ibid* at 164.
[395] *Ibid* at 165.
[396] *Ibid*.
[397] *Ibid* at 168.

interpretation, the court plays a role in defining Aboriginal rights under s. 35, instead of deferring to the Indigenous rights claimants' definition of the right under their law.[398]

Morales explains that this interpretation of s. 35 must be revised, because it fails to "take into account the legal traditions of the Indigenous peoples themselves in defining, interpreting and implementing these rights."[399] Morales writes that s. 35 "was never meant to transform the entire sockeye family or freeze them in time and place. It was meant to provide an avenue for those family members to continue on their journey up the river, because it was acknowledged that their journey was essential to the continuation of their future generations."[400]

The McLachlin Court, however, does not see its declaration of Aboriginal title as a bridge to transform existing Indigenous title rights to Aboriginal title recognized by the common law. Instead, it uses its alchemy to create a new Aboriginal title right whose content and composition it gets to define, because the SCC (still) knows best.

4.4 LIMITED EFFORT TO CONSIDER THE TSILHQOT'IN: GAZING BACKWARDS

Another dimension of the Court's condescending posture is that the Court directs its focus squarely to historical evidence. While historical evidence is, of course, central to the test for Aboriginal title set by the Court, the Tsilhqot'in presented extensive evidence of continuity of occupation as part of their claim. This evidence explained: Tsilhqot'in place names; oral traditions

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[398] *Ibid* at 169.
[399] *Ibid* at 176. Joshua Nichols and Amy Swiffen propose a similar "adaptive" approach to the interpretation of Aboriginal rights in their article "Undoing the Colonial Double-Bind." In this approach, the court would "…place equal weight on the perspective of both parties [Indigenous claimant and Crown]." Nichols & Swiffen, "Undoing the Colonial Double-Bind", *supra* note 18 at 52. Nichols and Swiffen note that in her dissent in *R. v. Van der Peet*, L'Heureux-Dube J urged an approach largely aligned with an adaptive approach, and that if her reasoning is followed, "… the emphasis on "Aboriginal" to define section 35 rights is not doomed to a narrow reading. Instead, it could be a way of maintaining the perspectival character of those rights. In other words, the turn to particularity could capture the fact that the Indigenous perspective is part of what defines those rights." *Ibid* at 62.
[400] Morales, "'a 'lha'tham", *supra* note 117 at 176.

guiding relationships to land and other relations; spiritual beliefs guiding all aspects of Tsilhqot'in life, including land use; and Tsilhqot'in laws, including land use laws.[401] The trial judge, Justice Vickers, made clear that while much of this evidence reflected long-standing lifeways, it also spoke to the Tsilhqot'in's ongoing, present-day lifeways.[402] But in her reasons, McLachlin CJ turns her gaze away from this evidence and towards the distant past.[403] Though the Tsilhqot'in Nation demonstrated that its people continue to use the claimed lands in the present period, the McLachlin Court characterizes the lands claimed as "ancestral lands"[404] and focuses on how it is that the Tsilhqot'in's ancestors used these lands.[405]

A consequence of this historicization of the Tsilhqot'in is seen in the section of the decision that considers whether the province's *Forest Act* applies to the lands claimed.[406] The Tsilhqot'in people started the litigation that evolved into their title claim in order to halt commercial logging on their lands authorized by the province under the *Forest Act*.[407] Preventing the exploitation of their forests was the catalyst for the Tsilhqot'in people enduring twenty years of litigation in the Canadian legal system.

This act of stewardship is invisible to the McLachlin Court. The Court reasons that the *Forest Act* must have applied prior to the declaration of Aboriginal title, because "To proceed otherwise would have left *no one* in charge of the forests that cover hundreds of thousands of hectares…"[408] and because "To hold otherwise would be to accept that the legislature intended the

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[401] *Tsilhqot'in Nation (BCSC), supra* note 333 at paras 340–436.
[402] See e.g. *Ibid* at paras 436; 949–962.
[403] But see *Tsilhqot'in Nation (SCR), supra* note 18 at 57 in which McLachlin CJ briefly summarizes the trial judge's evidentiary findings regarding continuity of occupation.
[404] *Ibid* at paras 12, 18.
[405] See e.g. *Ibid* at 27–30.
[406] On the applicability of provincial laws as a consequence of *terra nullius,* see Borrows, "The Durability of Terra Nullius", *supra* note 18 at 734–740.
[407] *Tsilhqot'in Nation (BCSC), supra* note 333 at paras 60–100.
[408] *Tsilhqot'in Nation (SCR), supra* note 21 at para 114 [emphasis added].

forests on such lands to be *wholly unregulated*…"[409] For the McLachlin Court, the Tsilhqot'in's decision to spend twenty-four years trying to convince the colonial legal system of their right to manage their own land so that they could, amongst other objectives, stop commercial logging does not register as a committed act of stewardship. Nor does the evidence that the Tsilhqot'in Nation presented at trial outlining their hundreds of years of stewardship over and protection of their lands.[410] Instead, in the absence of the province regulating forestry pre-declaration, the Court sees literally "no one" being in charge of the forests. The Court is able to see the Tsilhqot'in people's ancestors fishing, but not the contemporary Tsilhqot'in peoples' slog through the colonial courts to protect their lands and jurisdiction. As John Borrows has put it, for the Court, the Tsilhqot'in appear to be "past-tense peoples."[411]

This gazing backward once again limits the rights of the present-day plaintiffs.

The emotional component of the Court's postures and fixed assumptions is explored in the following three chapters.

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[409] *Ibid* at para 115 [emphasis added].
[410] See e.g. *Tsilhqot'in Nation (BCSC)*, *supra* note 333 at paras 71, 232–331, 419–420, 468.
[411] John Borrows, "Challenging Historical Frameworks: Aboriginal Rights, The Trickster, and Originalism" (2017) 98:1 Canadian Historical Review 114–135 at 120.

Chapter 5 EMOTIONS FRAMEWORK

My project in this thesis is to consider whether there is a layer of emotion in the decisions analysed in the previous three chapters. Those chapters have outlined themes of avoidance, condescension and superiority. This chapter investigates the emotional dimension of these themes.

As will become clear in the analysis below, it is not my contention that emotion is the singular, or even substantial, explanation for how these three cases were decided. Rather, my aim is to bring attention to emotion as a seldom-discussed component of decision-making – to snap into focus, to the best of my abilities, emotions embedded in the decisions. These emotions, I argue, may act as "further bulwarks"[412] against engagement with the legal issues raised in the cases, but I do not suggest that settler colonial commitments are a purely emotional affair.

This chapter will, first, outline the methodology employed in my analysis. Second, I will outline my understanding of emotion and its relationship with judgment, based on sources from the fields of law and emotion and philosophy of emotion. In the following two chapters, I will bring us back to the central themes identified in the cases reviewed and will propose an emotions analysis of these themes.

5.1 METHODOLOGY

As prefaced in the introduction, this thesis focuses on the writing of specific legal actors – judges of the Supreme Court of Canada. Using the taxonomy developed by Terry Maroney in her

[412] Emily Kidd White, personal communication, July 19, 2024. I am greatly indebted to Professor Kidd White for capturing with such precision what was, for me, a hard-to-articulate aim.

influential article “Law and emotion: A proposed taxonomy of an emerging field,” this analysis falls into the “legal-actor approach” methodology of law and emotions scholarship.[413] The method used to conduct this analysis is close textual reading, a law and humanities approach.[414]

“Legal-actor approach” scholarship looks at “the humans that populate legal systems and explores how emotion influences and informs, or should influence or inform, those persons’ performance of the assigned legal function.”[415] Scholarship investigating the role of emotion in judging often looks “to judicial determinations—particularly verbal cues embedded in written opinions—for clues as to judges’ feelings about parties and issues…”[416] This is the project undertaken in this thesis – to review judicial determinations closely in order to ascertain what emotions might be embedded within them. However, this project is a *textual* analysis – my project is to draw out the emotions communicated by the texts of the judgments reviewed, not to deliver an opinion on what emotions the judges drafting the decisions actually experienced as they drafted their reasons.

There are several examples of legal-actor approach scholarship in which judicial emotions are analysed. Bandes, a leading scholar in the law and emotions field, demonstrates one approach to this type of analysis in her article “Fear and Degradation in Alabama.”[417] Bandes uses a close reading approach in her analysis of emotions in that article, as I have done in this thesis. Bandes’ close reading approach is explored below. Francesca Laguardia offers another way of approaching emotion in judicial reasons in her article “Pain that only she must bear.”[418] In this article, Laguardia

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[413] Maroney, *supra* note 23 at 551–554.
[414] See e.g. Temple, *supra* note 24.
[415] Maroney, *supra* note 23 at 551.
[416] *Ibid* at 552–553.
[417] Bandes, “Fear and Degradation in Alabama”, *supra* note 12.
[418] Francesca Laguardia, “Pain that only she must bear: on the invisibility of women in judicial abortion rhetoric” (2022) 9:1 Journal of Law and the Biosciences.

reviews 223 judicial decisions dealing with abortion.[419] Laguardia's analysis is quantitative – looking at how many times certain types of pain are mentioned in each case – and qualitative – looking at how this pain is discussed (or not) by the court.[420] Sharyn Anleu, Jennifer Elek and Kathy Mack offer a third approach in their book chapter "Researching judicial emotion and emotion management," in which they outline their findings from conducting interviews with judges about how these legal actors approach emotions in their work.[421]

I have preferred the textual reading method for my analysis, since: there are not many Canadian Aboriginal title decisions to review, meaning an empirical approach would suffer from the small sample size; expanding the cases reviewed beyond the three dealt with would have posed challenges in terms of scope for a Master's thesis; and, it was neither practical nor in line with my research goals to attempt to interview the judges (several of whom are deceased) who drafted the decisions analysed.

With respect to the close textual reading method followed for conducting this analysis, Susan Bandes' scholarship provides helpful guidance on how the texts of judicial determinations can be analysed for emotional content, and her work informs the approach taken in my own analysis of the three cases considered in this thesis. In her article "Fear and Degradation in Alabama," Bandes analyses the U.S. Supreme Court's "emotional commitments and blind spots"[422] in the case *University of Alabama v Garrett* by looking closely at the decision's text. Bandes does this by considering:

[419] *Ibid* at 19.
[420] Laguardia, "Pain that only she must bear", *supra* note 418.
[421] Sharyn Roach Anleu, Jennifer K Elek & Kathy Mack, "Researching judicial emotion and emotion management" in *Research Handbook on Law and Emotion* (2021).
[422] Bandes, "Fear and Degradation in Alabama", *supra* note 12 at 520.

- How the court portrays the parties. For example, who is considered as an active agent, and who is described as a passive agent?[423]
- Who the centre of attention is for the court. For instance, who gets the court's focus and about whom do the judges write most in their decisions?[424]
- What emotions are evident and what emotions are lacking? In *University of Alabama v. Garrett*, for example, Bandes writes that there is a "lack of concern toward the privations of individual plaintiffs or entire classes of plaintiffs."[425]

Other scholars working in the field of law and emotion have also suggested considering:

- What metaphors the court uses;[426] and
- What role irony or sarcasm play in the decision.[427]

In her article "Images of Reach, Range and Recognition," Emily Kidd White suggests that we might be interested in emotions "…embedded within or invoked via [materials in] the text of the judgment,"[428] such as:

- "the recitation of the facts,"[429]
- "the woven-in metaphors,"[430]
- "the use of past cases as analogies,"[431]
- "the use of hypotheticals and exemplars, and"[432]

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[423] *Ibid* at 525–526.
[424] *Ibid* at 525.
[425] *Ibid* at 521.
[426] Åsa Wettergren & Stina Bergman Blix, "Comparing culturally embedded frames of judicial dispassion" in *Research Handbook on Law and Emotion* (Edward Elgar Publishing, 2021) 147 at 147.
[427] *Ibid*.
[428] White, *supra* note 10 at 426.
[429] *Ibid* at 496.
[430] *Ibid* at 496 [citation omitted].
[431] *Ibid* at 496.
[432] *Ibid* at 496 [citations omitted].

- "the judgment's overall style (or lack thereof) or prose."[433]

While Kidd White's article pertains to international law, her invitation to consider these aspects of text is no less pertinent to the text of Aboriginal law judgments.

In my review of the cases analysed, I kept all the questions posed above in my mind. I endeavoured to be attentive to what the judgments state explicitly, what they fail to state and how they go about expressing these statements.

In addition, I have drawn from scholarship in other areas of law and humanities scholarship to broaden and deepen my analysis of emotion, including: critical legal scholarship;[434] history of emotion;[435] and Indigenous legal scholarship.[436]

5.2 Emotions and Evaluative Judgments/Beliefs

There are rich discussions in the law and emotion and philosophy of emotion fields exploring different conceptions of what emotions are.[437] For the purposes of this thesis, I adopt the view that emotions are "engagements with the world"[438] that contain "evaluative judgments."[439] Our emotions are *about* something – they have objects – and reflect *judgments*

[433] *Ibid*.
[434] For example, Robert Knox, "Haiti at the League of Nations: Racialisation, Accumulation and Representation Special Feature: The League of Nations Decentred" (2020) 21:2 Melb J Int'l L 245–274.
[435] For example, Temple, *supra* note 24.
[436] For example, Morales, "'a 'lha'tham", *supra* note 117. I note that another rich vein of scholarship to have drawn from would be law and psychoanalysis, such as Veracini Lorenzo, "Settler Collective, Founding Violence and Disavowal: The Settler Colonial Situation" (2008) 29:4 Journal of Intercultural Studies 363–379; Maria Aristodemou, "A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours" (2014) 25:1 European Journal of International Law 35–58. However, due to my lack of familiarity with the theory of psychoanalysis and the limited time for undertaking my research, I have left this vein of inquiry for a future project.
[437] See e.g. Andrea Scarantino & Ronald de Sousa, "Emotion" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy*, summer 2021 ed (Metaphysics Research Lab, Stanford University, 2021). See also Maroney, *supra* note 23.
[438] Solomon, *supra* note 5 at 204; White, *supra* note 10 at 492.
[439] Solomon, *supra* note 5 at 204–206; White, *supra* note 10 at 492–493. Martha Nussbaum words this slightly differently, but in a similar manner: "emotion involve a focus on an intentional object and evaluative beliefs about that object." Nussbaum, *supra* note 11 at 31.

about these objects. For example, we fear something because we believe that something to be dangerous or harmful or painful, or associated with something that is dangerous or painful.[440] The feeling of fear does not arise unless there is an object that we judge may be harmful for us.

In his book *True to Our Feelings*, Robert C. Solomon explains that in this understanding of emotions, emotions do not necessarily involve deliberative judgment – that is to say, emotions do not necessarily involve judgments based on careful thought.[441] Instead, some emotions can be compared to the types of unreflective kinesthetic judgments we make as we navigate down a flight of stairs.[442] More often than not, we are not conscious of the evaluative judgments contained in our emotions, just as we are generally not conscious of the calculations we undertake to navigate stairs.[443]

As Solomon writes, emotions can be processes, such as loving a person over a long period of time.[444] Importantly, we are not always conscious of our emotions (let alone the evaluative judgments contained within them).[445] Our emotions may sit below the surface, coming into our awareness only when a precipitating event pushes them out of the sub- or unconscious. For example, as Nussbaum writes, we may not reflect on or be conscious of our emotions associated with a person until something happens that threatens to remove that person from our lives.[446]

As Emily Kidd White explains in her article *Images of Reach, Range and Recognition*, the judgments embedded in our emotions are shaped by our environments. Kidd White writes,

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[440] In her article on Buddhist understandings of fear, Bronwyn Finnigan gives the example of feeling fear at the sound of a twig breaking in the dark. We do not fear the twig or its destruction – we fear that it signals the approach of a dangerous creature. Bronwyn Finnigan, "Fear is Anticipatory: A Buddhist Analysis" (2023) 30:7–8 Journal of Consciousness Studies 112–138 at 124.
[441] Solomon, *supra* note 5 at 205–206.
[442] *Ibid* at 206.
[443] *Ibid*.
[444] Robert C Solomon, "Introduction" in *True to Our Feelings: What Our Emotions Are Really Telling Us* (Oxford University Press, 2008) at 6.
[445] *Ibid*.
[446] Nussbaum, *supra* note 11 at 29.

> Where evaluative judgments are embedded within the structure of an emotion, we can expect it to be scripted, at least to an extent, by time and place (shaped by political and material realities, and prone to drawing on idiom, norms, caches of images, binaries, myths, etc.—and with all of this extending even to one's experience and description of the physiological aspects of emotions).[447]

The emotions we feel are shaped by the beliefs we hold,[448] which are, in turn, shaped by the worlds we inhabit.[449] The emotions evoked by the same object may be significantly different for different people and in different time periods. Contemporary visitors to a square where people convicted of crimes used to be hanged, for example, are likely to have different emotions from one another, depending on whether or not they are in favour of capital punishment, and also from those members of the public who chose or were reluctantly persuaded to attend a hanging when that practice was still employed.[450]

Martha Nussbaum captures the centrality of beliefs, and evaluative beliefs specifically, [451] to our emotions in her book *Hiding from Humanity*.[452] Like Solomon, Nussbaum believes that emotions "involve appraisals or evaluations of the object,"[453] giving the example that "[w]e do not grieve the loss of something that seems to us utterly unimportant."[454] For Nussbaum, the evaluative beliefs that underpin our emotions "are essential bases for emotion,"[455] and "appear to be part of what the emotion itself is."[456] These evaluative beliefs are value-laden, reflecting a person's

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[447] White, *supra* note 10 at 500 (citations omitted). Similarly, in her article exploring Buddhist conceptions of fear, Bronwyn Finnigan writes that "Individual and social learning, as well as environmental and cultural influences, are also relevant to fear." Finnigan, "Fear is Anticipatory", *supra* note 440 at 130.
[448] See e.g. Emily Kidd White, "Emotions and Precedent" in *Philosophical Foundations of Precedent* (Oxford: Oxford University Press, 2023) at 8.
[449] I use worlds (plural) to signify the many, overlapping spaces that shape us, such as our cultural milieu, our political system, our family world, our socio-economic status, our race, our gender identity, our work environments, and on and on.
[450] For a profound reflection on emotion and environment, see WG Sebald, *Austerlitz* (Toronto: Random House of Canada Limited, 2001) Translated by Anthea Bell.
[451] Nussbaum, *supra* note 11 at 24–30.
[452] Nussbaum, *supra* note 11.
[453] *Ibid* at 29.
[454] *Ibid*.
[455] *Ibid* at 26.
[456] *Ibid* at 27.

convictions: we are likely to have strong emotions about objects (i.e. people, political ideals, material objects, etc.) we value, and not, as Nussbaum points out, objects that are "utterly unimportant"[457] to us. As Kidd White tells us, "Emotions are […] comprised of cognitive judgments reflecting in some sense what the person experiencing the emotion considers important, which opens them up to probing questions about the status of the values underlying those emotional concerns."[458] When we consider emotions, then, we must also consider the values, or evaluative judgments and beliefs, embedded within them.

As explained in the methodology section above, this thesis aims to analyse emotions found in the texts of the three cases reviewed in Chapters 2 to 4 using the tools of textual analysis. This aim is not without its obvious challenges – as Kidd White writes,

> …we might ask whether we can study the emotions of legal actors by reference to legal documents, evidentiary records, legislative speeches, judgments? If so, are we studying the emotions of these legal actors, or the expression (even performance) of their emotions, the quality of their speech, writing, prose, or something else? What of documents written in concert?[459]

To these questions, I offer that: I cannot and do not claim to be excavating the emotions actually felt by the judges of the Court who penned the reasons analysed. Rather, my analysis looks at the texts they wrote and asks whether the texts themselves are suggestive of emotions. In Kidd White's framing, this could be characterized as studying the emotions expressed in the judges' texts.

It is reasonable to ask, "to what end?" What is the value in providing an analysis of what I take to be the emotions found in the texts of these judgments? The answers are: First, I see value simply in the attempt to contribute to the discussion of emotion in judicial reasoning in Canada, since this topic remains off-limits in the profession. Second, considering emotion as an aspect of

[457] *Ibid* at 29.
[458] White, *supra* note 10 at 506.
[459] *Ibid* at 501–502 [citations omitted].

settler colonial narratives can add another layer to our understanding of how settler colonial narratives and structures perpetuate and protect themselves – of the makeup of the bulwarks against seeing clearly entrenched systemic racism.[460] Third, because emotions are value-laden and involve judgments, attempting to snap into focus the emotions in these texts can give us a helpful pathway with which to consider the values and judgments we find if we look closely at these decisions. As Susan Bandes writes in her article "Fear and Degradation in Alabama," the "underlying emotional commitments [in judgments] have considerable explanatory power."[461]

So let us embark on the analysis of what emotions we find in these cases, and of the beliefs or judgments tied to those emotions.

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[460] My thanks again to Professor Kidd White for her apt and evocative description of emotions acting as "bulwarks."
[461] Bandes, "Fear and Degradation in Alabama", *supra* note 12 at 522.

Chapter 6 FIXITY AND FEELINGS

6.1 EMOTIONS IN THE CASES

By way of recapitulation, the themes that have been drawn out from our three cases are:

- Fixed assumptions not questioned, including:
  - The Crown's acquisition of radical title and sovereignty over Indigenous lands by way of the assertion of sovereignty;[462]
  - The applicability and preferability of the common law and common law procedures to Aboriginal title cases;[463] and
  - The prioritization of non-Indigenous interests over Indigenous interests.[464]
- Prevalent condescension resulting in:
  - Flattening of Indigenous cultures[465] and historicization of the Indigenous claimants,[466] and
  - The Court casting itself as a benevolent body accommodating Indigenous plaintiffs[467] and protecting Aboriginal title lands from Aboriginal title holders through the Supreme Court of Canada's.[468]

[462]See Sections 2.5; 3.4; and 4.1.
[463] *Ibid*.
[464] See Section 3.4
[465] See Sections 2.4; 3.2; and 4.1.
[466] See Section 4.4.
[467] See Sections 2.6; 3.2; and 4.3.
[468] See Sections 3.2 and 4.2.

My analysis below is offered in the spirit of possibility, and with the acknowledgement that there are no doubt emotions that others might notice in their close readings of these cases that I have missed in my own.

The emotions and beliefs I see at play in the themes identified are:

- Fixed assumptions not questioned:
    - Aversion based in fear to questioning the settler colonial status quo;
- Prevalent condescension:
    - Contempt tied to a belief that the Court is a civilized, enlightened body adjudicating claims made by peoples neither as civilized nor as sophisticated as the Court; and
    - Aversion based in disgust to adequately considering the plaintiffs' claims and engaging with their arguments.

These emotions will be explored below.

6.2 "There Can Be No Doubt": Fixed Assumptions and Aversion

As the preceding chapters have illustrated, the SCC takes as a given a number of fixed assumptions in these three cases, since for the court "there can be no doubt"[469] about them. The Court entertains no doubts about:

- the Crown's sovereignty;[470]
- the applicability and preferability of the common law and its procedures;[471] or
- that settler interests prevail over Indigenous interests[472]

[469] *Calder*, *supra* note 19 at 327.
[470] See Sections 2.5; 3.4; and 4.1.
[471] *Ibid*.
[472] See Section 3.4.

(together, the "fixed assumptions").

The SCC's fixed assumptions around Crown sovereignty and the applicability of the common law are not surprising if one considers what the Court is avoiding by relying without question on the fixed assumptions. The Court avoids entertaining the possibility that the Crown never did acquire *de jure* sovereignty.[473] It also avoids considering the possibility that the Nisga'a or the Gitxsan or the Wet'suwet'en or the Tsilhqot'in have not just title, but unextinguished jurisdiction – perhaps best characterized as sovereignty[474] – over their lands.

If the Court were to engage with these issues, it would risk destabilizing the Court's own authority, and more than that, it would risk calling into question the legitimacy of the existing settler colonial order. As Michael Asch states in his book chapter "*Calder* and the Representation of Indigenous Society in Canadian Jurisprudence," questioning these assumptions would "open up a challenge to the political tenets that explain the legitimacy of the Canadian state…"[475]

To dig deeper into what would be at stake if the Court were to question the assumptions that it accepts as givens, let us look at three different registers in which the status quo would be imperilled: societal (as a challenge to settler colonialism); personal (as a challenge to personal identity and power); and personal for settlers more broadly (as a challenge to personal property).

6.3 CHALLENGE TO SETTLER COLONIAL "CIVILIZATION"

As outlined in Section 1.4, settler colonialism has employed a logic of "civilization" to justify itself[476] and its theft of land.[477] Settler colonial discourse relied on a theory of civilization

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473 On de jure and de facto sovereignty, see e.g. Sanderson, "The Residue of Imperium", *supra* note 9.
474 Sanderson & Singh, *supra* note 117. But see Mills, *supra* note 27 at 160. Mills writes that sovereignty is not a concept reflective of Anishinaabe world views.
475 Foster, Webber & Raven, *supra* note 119 at 109.
476 Tzouvala, *supra* note 57 at 45.
477 See e.g. *Ibid* at 70; Wolfe, *supra* note 55 at 387–388.

to justify its displacement and elimination of Indigenous peoples. Indigenous peoples were characterized as "premodern,"[478] as falling outside "a developmental, teleological vision of modernization that has set the standard for what can be considered civilized."[479] To be civilized, one needed to own land as private property (which meant one needed to be white) and to "improve" it by cultivating it in specific ways visible to the settler eye.[480] Civilization meant embodying "a particular cultural and economic ideal of how to live as a rational, productive economic actor."[481] It meant participating in political, legal and institutional systems designed to create secure environments.[482] As Ntina Tzouvala has written, the concept of civilization was of an "openly hierarchical and racist character, and … embodie[d] a very specific version of bourgeois liberalism."[483] As Liam Midzain-Gobin has written, "Indigenous lifeways were deliberately excluded from this standard of civilisation…."[484]

Despite this iniquitous history, the concepts of "civilization" and "being civilized" run through the SCC's decisions. Hall J invokes these concepts in his dissent in *Calder*, seeking to show that the Nisga'a are "civilized," with the implication that this makes them worthy of holding the rights they seek.[485] In the more recent *Delgamuukw* and *Tsilhqot'in* cases, the language of "civilization" is replaced by the language of liberalism, but the concepts' commitments are the same. In her article "The Standard of Civilization in the 19th Century," Tzouvala draws out how the language of liberalism came to replace the now out of favour language of civilization without

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[478] Bhandar, *supra* note 27 at 4.
[479] *Ibid*.
[480] *Ibid* at 36.
[481] *Ibid* at 54.
[482] Ntina Tzouvala, "Civilization" in *Concepts for International Law* (Edward Elgar Publishing, 2019) 83 at 88–89. Note that Tzouvala is concerned with capitalism, and she frames these secure environments as being secure for commercial transactions.
[483] *Ibid* at 93.
[484] Midzain-Gobin, *supra* note 27 at 214.
[485] See Section 2.6.

displacing the substance of the concept of civilization.[486] So, while the Courts in *Delgamuukw* and *Tsilhqot'in* do not use the language of civilization in the same way that Hall J did in the 1970s, the substance of that concept is still relied upon. The Lamer majority and McLachlin Court both espouse principles of liberalism, framing their treatment of the plaintiffs' evidence as "accommodations," language intended to demonstrate the Court's tolerance, as required by liberal ideals.[487]

Moreover, the SCC is one of the "civilized" systems necessary to the creation of a secure environment.[488] Its existence signals a "civilized" state where the rule of law prevails,[489] and its decisions maintain that secure environment.

By their very nature, the three cases analysed in Chapters 2 to 4 threaten civilization's narratives. The plaintiffs in these cases are asking that the Court recognize their title to land that the Crown had purported to acquire using the logic of civilization.[490] The plaintiffs are challenging the validity and effectiveness of the Crown's actions – a challenge with implications extending beyond the borders of the title areas claimed. Though the plaintiffs did not choose explicitly to challenge the Crown's acquisition of sovereignty in their claims, challenging the logic of civilization implicates the Crown's sovereignty. As explored throughout this thesis, the question of whether the Crown's assertion of sovereignty resulted in the Crown's acquisition of sovereignty over Indigenous lands ought to be unavoidable once questions of Aboriginal title are raised. And yet the Court and the litigants before it do avoid this question.

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[486] Tzouvala, *supra* note 57.
[487] This will be explored further in Section 7.3.
[488] Tzouvala, *supra* note 482.
[489] *Ibid* at 94–95.
[490] See Sections 1.4 and 1.5.

In his book *Artefacts of Legal Inquiry*, Maksymilian Del Mar writes of the common law system as one in which open inquiry and imagination are key components.[491] Del Mar offers a view of the common law as flexible and dynamic,[492] and of its courts as spaces designed for interaction and collective inquiry.[493] For Del Mar, "artefacts" (his word for spaces of intentional imagination, like hypotheticals, legal fictions and metaphors) are one way in which imagination is used in common law,[494] enabling participants in the courts, including judges, to move outside their "regular epistemic framework."[495]

Leaving aside the question of to what extent it is possible to move outside our regular epistemic frameworks, what we see in the title cases does not reflect Del Mar's account. Instead of open inquiry generated by imaginative practices, we see a resolute avoidance of difficult questions, including the question of Crown sovereignty. In these cases, we see that the scope of inquiry in our common law courts is constrained – interestingly, including by one of the artefacts (a legal fiction) that Del Mar considers as generative of imagination: the legal fiction that the assertion of Crown sovereignty resulted in the Crown acquiring radical title.

Both Kidd White and Desmond Manderson offer strong critiques of Del Mar's account of imagination in the common law, pointing out that his account is "ahistorical and acontextual"[496] (Kidd White) and "strips the political meaning out of the ways in which legal reasoning actually uses fictions, metaphors, figures and scenarios…" (Manderson).[497] Looking at legal fictions specifically, Manderson draws out how these artefacts act as "trompe l'oeil" – by using

[491] Maksymilian Del Mar, *Artefacts of Legal Inquiry : The Value of Imagination in Adjudication* (Oxford: Hart, 2020).
[492] *Ibid* at 18.
[493] *Ibid* at 223.
[494] *Ibid* at 78.
[495] See e.g. *Ibid* at 125.
[496] Emily Kidd White, *Notes toward a supreme (legal) fiction* (Rochester, NY, 2022) at 6.
[497] Manderson, "Escaping Criticism", *supra* note 46 at 106.

conventional language, courts can create a realistic illusion that something unproven is fact.[498] Aptly for our analysis, Manderson looks at the legal fiction of *terra nullius*, upon which, as I have argued, the Court's acceptance of Crown sovereignty rests. Manderson writes that *terra nullius*

> is a textbook example of a legal fiction: it takes as given a set of eminently unproven facts – a land that is empty, if not of people, then of law, property and civilization – while maintaining the 'normative consequences' of those facts, viz. the legality of the British crown's claim to possession by right of settlement not conquest.[499]

Rather than enabling imaginative inquiry, *terra nullius* operates to shut down questions around sovereignty and settler colonialism. This legal fiction forecloses inquiry, contrary to Del Mar's optimistic account.

Let us return to the issues that the Court avoids by accepting the fixed assumptions. Questioning the Crown's acquisition of sovereignty gets at the root of the settler colonial state's validity, authority and purported supremacy over Indigenous nations. If the Crown did not acquire sovereignty over Indigenous lands, on what basis are settlers making decisions about these lands and the lives of the people stewarding them? On what basis is the Court enacting its own authority to uphold the interests of the settler state?[500]

Or, from a slightly different angle and using Tzouvala's equation of civilization with stable environments: if the Crown's assertion of sovereignty was no more than an assertion that did not result in *de jure* sovereignty, the settler state has failed to create the secure environment that civilization requires – it has failed to create a stable, "civilized" state.[501] If Indigenous peoples

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[498] *Ibid* at 111.
[499] *Ibid* at 116. I note that Del Mar anticipates this criticism, stating: "Where a fiction becomes automatic, ie no longer signalling its artifice, and no longer involving exercises of imagination, then it arguably no longer serves to communicate the need for a change in the law, and thus does not any longer contribute to inquiry." However, Del Mar's caveat is a brief one in his largely positive account of legal fictions. Del Mar, *supra* note 491 at 237.
[500] See Sections 3.2 and 4.2.
[501] I note that the ongoing resistance of Indigenous peoples to colonial projects such as resource extraction projects might be seen as evidence that a secure environment for transactions (Tzouvala's focus: Tzouvala, *supra* note 56) has never been assured in Canada.

retain radical title and jurisdiction (or sovereignty) over their lands, Canada might become a patchwork of jurisdictions, some of which might choose to operate outside the Western framework of "civilization" and in opposition to settler colonial goals.

To seriously consider these questions is to seriously consider that the settler state may be, to some extent (possibly a great extent), invalid. These questions are destabilizing and they endanger the status quo, with its concepts of civilization and the primacy of the settler state. For anyone invested in these concepts, these questions are dangerous.

Beliefs: Why It's Better Not to Ask (about the fixed assumptions)

The decisions suggest a comfort with and adoption of prevalent Western notions of civilizations. To borrow Midzain-Gobin's apt phrase, there is a (seemingly) placid "settler comfort"[502] at work in these decisions, thanks to which the current "affective and material"[503] benefits enjoyed by settlers need not be disrupted.

It is reasonable to think that the Court would be invested in the idea of "civilization" (or, in the contemporary language, a "specific version of bourgeois liberalism"[504]) and believe in its worth. The decisions analysed are written by individuals who have chosen careers as arbiters and enforcers of the rule of law. As Tzouvala's work tells us, the rule of law is a shorthand for a certain set of political, legal and institutional arrangements meant to ensure a secure environment.[505] To accomplish this, the rule of law must maintain stability and must not challenge the status quo in ways that might lead to instability or unrest. Judges are required by this system to be conservative. They are required to "develop the law incrementally,"[506] as what will maintain stability shifts, but

[502] Midzain-Gobin, *supra* note 27 at 215.
[503] *Ibid*.
[504] Tzouvala, *supra* note 482 at 93.
[505] *Ibid* at 88–89, 94–95. I note again that Tzouvala, writing with a focus on capitalism, believes that the goal is to create a secure commercial environment.
[506] See e.g. *Nevsun Resources Ltd v Araya*, [2020] 1 SCR 166 at para 225.

not to go further than such incremental change. As Kidd White has written, there is an "inherent conservatism that exists within the past-looking, common-law practices of judicial reasoning."[507]

Given the conservative task required of judges, we can expect that those who choose to become judges are likely to believe in the rule of law and in the importance of maintaining the status quo. By extension, we can infer that they believe in the value of the status quo that they are tasked with maintaining – in the value of the political and social systems they inhabit and protect. There is likely to be aversion to posing questions which might disrupt the status quo and the comfort enjoyed by settlers within it. This aversion is explored further in Section 6.7 titled "Aversion, Fear and Anxiety" below.

6.4 THREAT TO PERSONAL IDENTITY

The questions that are raised if one does not accept the fixed assumptions are also dangerous on the personal level, posing a threat to the judges' personal identities.

As noted at the beginning of this chapter, it is not my intention in this thesis to purport to uncover what the emotions of the judges writing our three decisions were. Without venturing into that type of exercise, however, we can look at what is generally at stake for judges confronting issues that call into question the settler colonial social order.

Judges in Canadian society have high social status and a great deal of power. In her book *Epistemic Injustice*, Miranda Fricker considers the dynamics that lead to individuals enjoying an excess, or suffering a deficit, of credibility, amongst other issues.[508] Fricker traces how social power and identity power play into these credibility dynamics. Fricker explains that social power

[507] White, *supra* note 496 at 11.
[508] Miranda Fricker, *Epistemic Injustice* (Oxford University Press, 2007) DOI: 10.1093/acprof:oso/9780198237907.001.0001.

is a person's ability to influence how things go in the world,[509] whereas identity power is "dependent upon agents having shared conceptions of social identity."[510]

Judges enjoy both social and identity power. They hold highly respected positions in Canadian society and are seen as successful, respectable people. In this way, they hold identity power. They also, of course, hold social power because they directly "influence how things go in the world."[511]

Judges' social power and identity power are tied to their role as arbiters and enforcers of the rule of law, which, as discussed above, concerns itself with maintaining stability. A judge who disturbs stability imperils their own source of power.

Moreover, as explored in the section above, it is not unreasonable to think that judges likely believe in the value of the status quo and are comfortable therein. These are individuals who have worked hard to distinguish themselves within the dominant culture and who have been rewarded by being elevated to the role of judge. Questioning the validity of the Crown's sovereignty means questioning the legitimacy of aspects of the Canadian state, and therefore the foundations of their own professional success.[512] Threats to one's professional and social identities, which, for judges, come with power and influence, are frightening. They are destabilizing on the personal level. A judge questioning Crown sovereignty would destabilize their world on both the personal and societal scales. In so doing, such a judge would be imperilling their position and belonging in the dominant group, risking social and professional criticism and isolation. For someone who has been

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[509] *Ibid* at 9.
[510] *Ibid* at 14.
[511] *Ibid* at 9.
[512] It is interesting, with this in mind, to consider McLachlin CJ's comment that: "A person's employment, and the conditions of their workplace, inform one's identity, emotional health, and sense of self-worth…" *RWDSU*, [2002] 1 SCR 156 at para 33.

sufficiently committed to the status quo society to have succeeded in becoming a judge, such consequences would presumably be profoundly painful and frightening.

Beliefs: Why It's Better Not to Ask (about the fixed assumptions)

As explored in the section on Aversion, Fear and Anxiety below, fear is a narrowing emotion – it shuts down our capacity for calm inquiry. In the title decisions reviewed, the judges could not, or perhaps would not, genuinely hear and consider arguments and questions running against the Court's fixed assumptions.[513] Judson J states this quite explicitly in *Calder*, using the language of "there can be no doubt" about assumptions he makes, and he communicates this by omission by not engaging with the Nisga'a's arguments.[514] The Lamer majority similarly avoids engaging with certain questions, for example by failing to engage with the Gitxsan and Wet'suwet'en's arguments for self-government.[515] The McLachlin Court, for its part, demonstrates a striking inability to see the active stewardship of present-day Tsilhqot'in, reasoning that prior to a declaration of Aboriginal title, the province must have had jurisdiction over forestry on Tsilhqot'in lands, because otherwise "no one [would have been] in charge of the forests."[516]

Recalling Del Mar, we see another challenge to his account of courtrooms as spaces of collective inquiry.[517] Del Mar would have us accept that judges facing difficult questions "create time and space for inquiry,"[518] and in this time and space that they "invite others to inquire with

[513] Patrick Wolfe writes of a different iteration of this type of "not hearing", in which "settler-colonial discourse is *resolutely impervious* to glaring inconsistencies" with its narrative that Indigenous peoples are "unsettled, nomadic, rootless, etc." Wolfe, *supra* note 54 at 396 [emphasis added].
[514] See Section 2.5.
[515] See Section 3.2. Sanderson has an insightful critique of the Court's lack of engagement with these arguments: Sanderson, "The Residue of Imperium", *supra* note 9 at 343–347.
[516] See Section 4.4.
[517] Del Mar, *supra* note 491 at 223.
[518] *Ibid* at 204.

[them] about a common issue."[519] Del Mar goes on to argue that "artefacts and related processes of imagination help the individual judges … with these tasks… they help an individual judge to create space and time for inquiry."[520]

There is a pronounced lack of this type of inquiry in the title cases. Instead, we see a resolute aversion to engaging with difficult questions, imaginatively or otherwise. Kidd White anticipates this in her critique of Del Mar's book, writing:

> …I think I part ways with Del Mar when he says that 'because of the difficulties of judging, judges often employ a more experimental attitude and more experimental epistemic practices, eg being less assertive, and embracing uncertainty rather than pretending it is not here'. We are trading intuitions here but it seems we more regularly see the opposite, that is, shows of assurance and conviction, and full-throated reasons detailing the necessity, or rightness even, of a ruling.[521]

Certainly, in the decisions reviewed, we do not see the Court acknowledging, let alone exploring, uncertainties around its fixed assumptions. Rather, we see Kidd White's "assurance and conviction" on the "rightness… of [the] ruling[s]."[522]

As I will explore in the section on Aversion, Fear and Anxiety below, in my view, it is illuminating to consider whether some part of this resistance to hearing and considering certain arguments in the title decisions might be linked to fear of the threats the arguments pose to the judges' personal identities.

6.5 Threat to Private Property

Another threat posed by questioning the fixed assumptions is that settler private property could be put in issue.

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[519] *Ibid*.
[520] *Ibid*.
[521] White, *supra* note 473 at 13 [citations omitted].
[522] *Ibid* at 13.

Private property, and most especially primary residences, play an outsized role in our society.[523] We rely on our homes as spaces of freedom, where we can discard our public personas and exist as vulnerable humans. Homes are spaces of security and of freedom from our neighbours' and the state's gazes.[524] In her influential article "Property and Personhood," Margaret Radin explains why homes are considered sacred, protected spaces:

> There is more to the rationale based on sanctity of the home; it contains a strand of property for personhood. It is not just that liberty needs some sanctuary and the home is a logical one to choose because of social consensus. There is also the feeling that it would be an insult for the state to invade one's home because it is the scene of one's history and future, one's life and growth. In other words, one embodies or constitutes oneself there. *The home is affirmatively part of oneself*-property for personhood-and not just the agreed-on locale for protection from outside interference.[525]

Jeremy Blumenthal, considering property from the psycho-legal perspective, notes in his article "To Be Human: A Psychological Perspective on Property Law" that in some studies, respondents linked home and self-identity in terms of their self-perception and how they wanted others to see them.[526] Blumenthal also cites the philosopher William James to illustrate how closely tied property and identity are in Anglo-American culture: "between what a man calls me and what he simply calls mine the line is difficult to draw."[527] These authors tell us that, whether it is desirable or not, homes are intimately tied to a person's sense of self.

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[523] I am greatly indebted to Professor Nedelsky for her thought-provoking, challenging seminar course on Property, in which I was able to explore the relationship between private property, values and settler colonialism. This section draws on research conducted for my term paper in that course.
[524] See e.g. Sarah Ferencz et al, "Are Tents a 'Home'? Extending Section 8 Privacy Rights for the Precariously Housed" (2021) 67:4 McGill L J 369–406 at 380–382.
[525] Margaret Jane Radin, "Property and Personhood" (1982) 34:5 Stanford Law Review 957–1015 at 992 [emphasis added].
[526] Jeremy A Blumenthal, "To Be Human: A Psychological Perspective on Property Law Symposium: A Psychological Perspective on Property Law" (2008) 83:3 Tul L Rev 609–644 at 618.
[527] *Ibid* at 610–611 [citations omitted].

Home ownership is the most assured way to access the space privacy, security and freedom that we crave.[528] Threats to private property are therefore threats to important values.[529] If you take away my home, I am left exposed and unprotected, both physically and in terms of having access to a space of privacy, security and freedom.[530]

The importance of private property, and the strength of the fear of losing it, are reflected in the castle doctrine. This doctrine, first articulated by Lord Coke in *Semayne's Case*, provides that if one's private property is threatened, one is permitted to defend it, rather than retreat.[531] Put differently, the doctrine (codified in section 35 of the *Criminal Code*[532]) permits the use of violence to protect property.[533] This rare exception to the state's monopoly on violence signals how much importance our society places on home and its protection.

As explored in Section 1.4, Aboriginal title cases come uncomfortably close to challenging private property held in title areas, even leaving aside the question of Crown sovereignty. To date, no court has determined whether private property is affected by a declaration of Aboriginal title. However, as John Borrows points out in his article "Aboriginal Title and Private Property," "[t]he Crown cannot give to others what it does not itself possess."[534] If lands purportedly granted by the Crown to third parties were never the Crown's to grant, there is a strong case to be made that such grants may be invalid.[535] This is true for lands subject to the common law's version of Aboriginal

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528 Ferencz et al, "Are Tents a 'Home'?", *supra* note 524 at 389.
529 On how this dynamic might be shifted such that these values do not rely so heavily on private property, see e.g. Jennifer Nedelsky, "Law, Boundaries, and the Bounded Self" in Jennifer Nedelsky, ed, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).
530 See e.g. Ferencz et al, "Are Tents a 'Home'?", *supra* note 524.
531 *Semayne's Case*, [1604] 77 ER 194.
532 Noah Weisbord, "Who's Afraid of the Lucky Moose? Canada's Dangerous Self-Defence Innovation" (2018) 64:2 McGill Law Journal 349.
533 Alexandra Flynn & Estair Van Wagner, "A Colonial Castle: Defence of Property in R v Stanley" (2020) 98:2 Can B Rev 358–387 at 364–365.
534 Borrows, *supra* note 117 at 111–112.
535 Borrows, *supra* note 117.

title, and would more certainly be the case if it were accepted that the Crown never acquired radical title to Indigenous lands, since it would then have a far weaker claim to any jurisdiction to alienate property interests.

It is fair to say that most in settler society believe that private property and the values of privacy, security and freedom associated with it are crucially important. The possibility of losing one's home is certain to evoke significant fear (so much so that the common law condones the use of violence in its face).

It is worth noting that in Haida Gwaii, the Haida have recently negotiated a settlement of their land claim that recognizes their Aboriginal title over the entirety of Haida Gwaii, including over private property.[536] However, the settlement makes clear that the province retains jurisdiction over the private property lands for the foreseeable future and that fee simple ownership is not impacted by the agreement. The central change for private property lands will not affect living owners or any one who does not die intestate: with the agreement, land will not escheat to the Crown, but rather to the Haida.[537]

Though the agreement was carefully drafted to ensure that settlers' fee simple interests were not affected, the outcry about the agreement has been substantial,[538] with the Leader of the

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[536] Ministry of Indigenous Relations and Reconciliation, "Agreement on Haida Aboriginal Title - Province of British Columbia", online: <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/first-nations-a-z-listing/haida-nation-council-of/haida-title-agreement> Last Modified: 2024-06-28.

[537] Victoria Wicks & Graeme Cook, "Historic Agreement Recognizes Haida Title to Haida Gwaii", (19 April 2024), online: *OKT | Olthuis Kleer Townshend LLP* <https://www.oktlaw.com/historic-agreement-recognizes-haida-title-to-haida-gwaii/>.

[538] See.e.g. Caroline Elliott, "Caroline Elliott: Public interest comes second with B.C.'s Haida agreement", online: <https://thehub.ca/2024/05/06/caroline-elliott-b-c-s-haida-agreement/>; FNLC, "FNLC Calls Out Opposition Parties' Baseless and Harmful Critiques of Bill Recognizing Haida Aboriginal Title", online: *UBCIC* <https://www.ubcic.bc.ca/fnlc_calls_out_opposition_parties_harmful_critiques_of_bill_recognizing_haida_aboriginal_title>; An Pham, "More Than Meets the Eye: The Legal Implications of British Columbia's Agreement to Recognize Aboriginal Title Over Haida Gwaii", (23 April 2024), online: *McMillan LLP*

Opposition reportedly stating, "landowners on Haida Gwaii are at the mercy of future Haida Indigenous law."[539] Caroline Elliott, a candidate for B.C. United and a PhD candidate, wrote in an opinion piece that the agreement is anti-democratic and raises concerns and private property and "… about the constraints [the agreement] places on future governments' ability to act in the public interest."[540] These reactions give a sense of what concerns might be at play in Aboriginal title cases more broadly, with settler anxieties coming to the fore.

Beliefs: Why It's Better Not to Ask (about the fixed assumptions)

The SCC has demonstrated in the past that it is alive and responsive to settler fears sparked by its decisions on Aboriginal rights. In 1999, following settler outcry and violence over the Court's finding that the Mi'kmaq had a limited Treaty right to fish commercially,[541] the Court made the very unusual choice to issue extensive reasons in *Marshall II*[542] for its dismissal of a motion to rehear the decision, *Marshall I*,[543] that had sparked the outcry. As Bruce Wildsmith, Mr. Marshall's counsel, has written, in its reasons "refusing to conduct a re-hearing on the questions posed by the West Nova Fishermen's Coalition, [the Court] … not only answered them but … elaborated on its original decision."[544] This is a highly unusual step for the Court to take.[545]

The *Marshall I* decision, which recognized a Mi'kmaq Treaty right to commercial fishing, affected only a small segment of the settler population – commercial fishers in Nova Scotia – but

<https://mcmillan.ca/insights/publications/more-than-meets-the-eye-the-legal-implications-of-british-columbias-agreement-to-recognize-aboriginal-title-over-haida-gwaii/>.

539 FNLC, *supra* note 538.

540 Elliott, *supra* note 538. (Ms. Elliott makes no comment on the lack of a democratic process or consultation with Indigenous peoples in the Crown's purported acquisition of sovereignty over the lands.)

541 *R v Marshall*, [1999] 3 SCR 533 [*Marshall II*]; Beaton, Hamilton & Nichols, "Aboriginal Title, Self-Government, and Indigenous Jurisdiction in Canadian Law Part II", *supra* note 112 at 105.

542 *Marshall II*, *supra* note 541.

543 *R v Marshall*, [1999] 3 SCR 456 [*Marshall I*].

544 Bruce H Wildsmith, "Vindicating Mi'kmaq Rights: The Struggle before, during and after Marshall" (2001) 19 Windsor YB Access Just 203–242 at 228.

545 See e.g. Wildsmith, "Vindicating Mi'Kmaq Rights", *supra* note 544.

sparked enough outrage that the Court not only released further reasons explicating its decision in *Marshall I*, but in fact modified the majority's findings from *Marshall I*.[546] Wildsmith writes that in his view, " …the Court bowed to the intense controversy that resulted from its decision, to the confrontations between natives and non-natives, and to the public criticism that was directed to the Court."[547] Wildsmith further writes that he feels, "the Court went beyond its appropriate role in *Marshall (No. 2)* by yielding to political considerations and commenting on issues that came to the Court through the media and not through the parties."[548]

The Court's decision to take steps to assuage settler fears by issuing *Marshall II* shows us that it is aware of and concerned about the emotions of the settler community. With Aboriginal title cases, as with an Aboriginal rights case like *Marshall*, the Court is deciding issues with the potential negatively to impact "settler comfort."[549] But an impact to private property would affect not only a subset of the settler population – it could potentially impact private property holders on all Aboriginal title land. The potential scope of backlash and outrage by the settler community is therefore significantly larger than with the *Marshall* decisions.

Avoiding questions of radical title by avoiding questions about the Crown's assertion of sovereignty, however, excuses the Court from having to tread into waters that would cause turbulence in the settler community.

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[546] *Ibid*. Wildsmith notes that the two judges who wrote *Marshall II* were the dissenting judges from *Marshall I*. *Ibid* at 228.
[547] Wildsmith, "Vindicating Mi'Kmaq Rights", *supra* note 544 at 235.
[548] *Ibid*.
[549] Midzain-Gobin, *supra* note 27.

6.6 FIXED ASSUMPTIONS AND EMOTIONS

We have seen that there are at least three registers in which the status quo could be imperilled by questioning the fixed assumptions: societal (as a challenge to settler colonialism); personal (as a challenge to personal identity and power); and personal for settlers more broadly (as a challenge to personal property). Common between these three registers is that questioning the fixed assumptions poses a threat to the current state of things. We have seen in the case analyses that the Court does not question the fixed assumptions, and so avoids the threats that such inquiry would pose.

What might be the emotional component of the Court's determined acceptance of the fixed assumptions? We can certainly see aversion in the Court's decisions and the moves it takes to avoid questions it does not wish to engage with. We can also, I think, see underneath that aversion wellsprings of unconscious fear and settler anxiety.

6.7 AVERSION, FEAR AND ANXIETY

Aversion is an emotion that might be linked with more than one family of emotions, including fear and disgust. I will consider aversion and disgust in the next chapter. Here, I consider aversion as a member of the fear family of emotions.

Robert Solomon uses the concept of families of emotions in his book *True to Our Feelings* to capture the relationship between an emotion like fear and the various shades of fear that can be experienced.[550] For example, Solomon considers panic, terror and horror to be part of the fear family, though they are different from each other in important ways.[551] Solomon does not provide

[550] Robert C Solomon, "Varieties of Fear and Anger: Emotions and Moods" in *True to Our Feelings: What Our Emotions Are Really Telling Us* (Oxford University Press, 2008) at 44–49.
[551] *Ibid* at 49.

guidance on what constitutes a family of emotions, but there is an intuitive logic to classifying certain emotions together, under the broad umbrellas of the "basic" emotions like anger, hate, fear and love.[552]

Aversion can be grouped into the fear family of emotions, since it is one common component of fear. In her article "Fear is Anticipatory," Bronwyn Finnigan considers Buddhist conceptions of fear and links aversion and aversive behaviour to the experience of fear. Finnigan writes that fear is anticipatory – it arises when we are faced with an object that causes us to anticipate danger or harm.[553] This fear may or may not be conscious,[554] but either way, the "phenomenal quality of fear 'feels bad' or unpleasant; individuals are averse to bad or unpleasant feelings, and so are motivated to do things to block or prevent them."[555]

Aversion will look different depending on the object of a person's fear. Aversive behaviour caused by fearing a bee sting, for example, will be different from aversive behaviour caused by fearing state surveillance. But the root of aversion and aversive behaviour in the case of fear is consistent – the wish to avoid the danger or harm causing the fear.

There are many varieties of fear that could give rise to aversion and aversive behaviour. As Solomon writes, "The range of fear reactions […] is breathtaking. There is fear of snakes, fear of heights, fear of authority, fear of success, hypochondria, fear of public speaking, fear of being alone, fear of crowds, fear of being embarrassed or humiliated, [etc.]."[556] As noted above, some fears may be conscious, while others may simmer below the surface of our conscious minds,[557]

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[552] See e.g. Robert C Solomon, "Why It Is Good to Be Afraid" in *True to Our Feelings: What Our Emotions Are Really Telling Us* (Oxford University Press, 2008) at 29.
[553] Finnigan, "Fear is Anticipatory", *supra* note 440 at 119–126.
[554] *Ibid* at 126; Robert C Solomon, "Emotions, Self, and Consciousness" in *True to Our Feelings: What Our Emotions Are Really Telling Us* (Oxford University Press, 2008) at 225.
[555] Finnigan, "Fear is Anticipatory", *supra* note 440 at 128.
[556] Solomon, *supra* note 550 at 39.
[557] See e.g. Finnigan, "Fear is Anticipatory", *supra* note 440 at 126; Solomon, *supra* note 444 at 6.

sparking aversive behaviours that we may find hard to explain. Fear can be a brief emotion caused by a particular situation, like the classic example of a bear in the woods, or it can be a long-standing emotion that stays with us throughout our lives.

Martha Nussbaum writes of fear as a narrowing emotion.[558] Fear concentrates us on a danger and on management of that danger. As Nussbaum writes, "[b]ecause of tendencies to intense self-focusing that derive from its biological origins, fear often hijacks thought powerfully, making it difficult to think about anything else but oneself and one's immediate circle, so long as intense anxiety lasts."[559] When we are experiencing fear, we are cut off from expansive thinking and calm curiosity. This may be experienced more acutely in instances of sharp, focused fear, as with the bear in the woods, or less noticeably in instances of long-standing fear.

One example of a long-standing fear that many women are likely familiar with is the fear of sexual harassment and assault. This type of fear may be with us from the moment we first notice the male gaze, with its "undertone of violence,"[560] until the end of our lives. We may be conscious of it at some points, and not at all conscious of it at others. It may guide our behaviours in ways that are obvious or under-the-radar for us, causing us to laugh uncomfortably at an inappropriate joke when we might wish instead to speak a biting retort, to restrict our movements to areas we feel are less likely to be unsafe, or to leave a job where a boss' comments or conduct have escalated past the point of endurance.[561]

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[558] Martha C Nussbaum, *Political Emotions: Why Love Matters for Justice* (Cambridge, United States: Harvard University Press, 2013) at 321–322.
[559] *Ibid* at 322.
[560] *Barbie* (Warner Bros. Pictures, 2023).
[561] For a devastating account of how sexual violence and fear of sexual violence shape the lives of women, see Jennifer Nedelsky, "Violence against Women: Challenges to the Liberal State and Relational Feminism" in Jennifer Nedelsky, ed, *Law's Relations: A Relational Theory of Self, Autonomy, and Law* (Oxford University Press, 2012).

Solomon writes that these types of long-standing fears "… are ongoing structures of a person's experience and personality …"[562] Settler insecurity is another example of this type of structural, long-standing, often unconscious emotion. Midzain-Gobin explains that settler insecurity is inescapable for settlers living on Indigenous lands. He writes,

> [Indigenous peoples' ongoing] existence, paired with increasingly wide-spread, visible and insistent refusal, produces an anxiety in settlers who have developed a comfort in the benefits of Canadian citizenship and sought to resign colonialism to the past. Instead of succeeding, settlers are confronted with the tenuous nature of their claim to sovereignty and must face the ongoing nature of their colonial endeavours. […] this produces a form of ontological insecurity that can be described as 'settler insecurity'.[563]

While Midzain-Gobin focuses on insecurity and anxiety, I would suggest that fear is a cousin emotion that may arise when settler anxieties are linked with more specific dangers.

Aboriginal title cases force the judiciary into contact with such specific dangers: the danger that settler colonial society might be built on a foundation of incantations; the danger that Indigenous peoples might retain sovereignty and might choose to exercise that sovereignty in ways anathema to settler colonial goals; the danger that the rule of law that the Court is charged with enforcing is, to some extent and for some legal issues, illegitimate; the danger that settlers' lives and homes are built on stolen land whose Indigenous owners may retain jurisdiction and radical title.

As we have seen, fear is linked with danger – the danger of suffering or harm.[564] Fear is also linked with aversive behaviour, to try to avoid that suffering and harm.[565] Fear need not be

[562] Solomon, *supra* note 552 at 37.
[563] Midzain-Gobin, *supra* note 27 at 213.
[564] Finnigan, "Fear is Anticipatory", *supra* note 440 at 119–126.
[565] *Ibid* at 128.

conscious to direct aversive behaviour.[566] Fear can be long-standing and a part of someone's structure of self.[567]

To offer my argument as plainly as possible: In the decisions analysed, we see the Court committed to certain assumptions that are not, in fact, givens. I believe that this commitment reflects an aversion to approaching the dangers that arise if the assumptions are questioned. That aversion stems from the fear of unsettling the settler colonial status quo, with the different registers of ramifications (societal and personal) associated with such an unsettling. This fear is likely unconscious and long-standing – an aspect of being a settler in a settler colonial society where Indigenous peoples continue to resist their dispossession and attempted erasure.

The consequence of the Court's fear and aversion is that questions fundamental to the title cases are not asked or even acknowledged to be questions. The consequence is that the title cases unquestioningly perpetuate settler colonial narratives, such that, as Kidd White has said, "justice will always be deferred."[568]

[566] *Ibid* at 126.
[567] Solomon, *supra* note 552 at 37.
[568] Emily Kidd White, personal communication, July 19, 2024.

Chapter 7 FLATTENING AND FEELINGS

We turn now to the second overarching theme drawn from the cases: prevalent condescension. We see this theme (1) in the Court's flattening of the plaintiffs, and (2) in its self-conception as a superior, benevolent body. This condescension can be traced to contempt, shame, disgust and aversion.

7.1 HUNTERS AND GATHERERS: FLATTENING THE PLAINTIFFS

In all three cases analysed, we have seen that the SCC has failed to conceive of the plaintiff Indigenous nations as sophisticated political actors whose members are as fully and complexly human as non-Indigenous rights claimants. Instead, in *Calder*, the plaintiffs were almost absent from the majority's decision.[569] In *Delgamuukw*, the Lamer majority flattened the plaintiffs' evidence of law, politics and other social structures such that the plaintiffs ended up defined and understood by their ancestors' subsistence practices.[570] Similarly, in *Tsilhqot'in*, the Court conceived of the plaintiffs as an historical people and failed to see the present-day nation's members as active stewards of their lands.[571] In *Calder*, the majority's flattening of the plaintiffs is evident by their omission. In *Delgamuukw* and *Tsilhqot'in*, the flattening is more explicit, enacted by Courts that continue to see the plaintiffs through the lens of the colonial period.

These flattening moves serve to contain the plaintiffs and their claims. As discussed in the chapter on *Delgamuukw*, if the plaintiffs are understood as peoples primarily concerned with

[569] See Section 2.4.
[570] See Section 3.2.
[571] See Section 4.4.

survival, they need not be understood as complex, self-governing nations composed of complex, self-governing people, and their claims for jurisdiction and self-governance need not be seriously entertained.[572] Flattening the plaintiffs to two-dimensional hunter-gatherers narrows the scope of rights they might hold. It is an expression of the logic from *Re Southern Rhodesia* discussed in the chapter on *Calder* – the plaintiffs are only entitled to rights commensurate with their perceived "sophistication" and level of "civilization."[573] If they are two-dimensional hunter-gatherers, they only have use for rights relating to hunting and gathering.

This flattening is a useful settler colonial move. Many brilliant thinkers have explored how settler colonial countries demean and diminish "Others," including Indigenous peoples, in order to justify these Others' exploitation or elimination. In his article "Haiti at the League of Nations," for example, Robert Knox explores how the U.S. cast Haiti as "backwards" and in need of U.S. assistance to justify its occupation and economic control of that country.[574] By casting Haiti as "backwards" and its citizens as low-ranking in a racial hierarchy,[575] the U.S. could undermine Haiti's right to self-government – "baby murderers and creatures of the forest"[576] are surely not fit to run a country. Knox also draws on Franz Fanon's work to explain this justificatory strategy:

> …any country that 'draws its substance from the exploitation of other people, makes those peoples inferior'. For Fanon, as the nature and character of this exploitation changed, so too did the forms in which racism was articulated. In particular, Fanon

[572] See Section 3.2.
[573] See Section 2.6. This may explain Hall J's peculiar emphasis on the evidence that the Nisga'a had engineering knowledge at the time of contact – Hall J was working to treat the Nisga'a's claim seriously, but according to the logic of *Re Southern Rhodesia*, he had to demonstrate that the Nisga'a were sufficiently "sophisticated" to hold the rights claimed, and engineering knowledge might be considered proof of this, in that case's logic.
[574] Knox, "Haiti at the League of Nations", *supra* note 434 at 247–248.
[575] The Truth and Reconciliation Commission writes in its Final Report that: "European writers and politicians often arranged racial groups in a hierarchy, each with their own set of mental and physical capabilities. The 'special gifts' of the Europeans meant it was inevitable that they would conquer the lesser peoples. Beneath the Europeans, in descending order, were Asians, Africans, and the Indigenous peoples of the Americas and Australia." TRC Report, *supra* note 36 at 46–47.
[576] Knox, "Haiti at the League of Nations", *supra* note 434 at 261.

> argued that as capitalism became more sophisticated, '[v]ulgar racism' gave way to 'more subtle forms' of racism.[577]

Since Canada's land base was acquired largely through unilateral settlement and the breach of Treaties,[578] it is fair to say that this country "draws its substance from the exploitation of other people."[579] In order to justify this exploitation, settlers have long cast Indigenous peoples as inferior,[580] relying on stereotyped, two-dimensional conceptions of Indigenous peoples.

As Wayne Warry outlines in *Ending Denial*, stereotypes about Indigenous peoples have shifted throughout Canada's history, in accordance with what exploitative conduct settlers have needed to justify.[581] Warry writes that during the contact period, when Europeans needed Indigenous peoples' assistance, Indigenous peoples were portrayed sympathetically as "noble savages."[582] Later, when Indigenous communities posed an obstacle to settler expansion, Indigenous peoples were portrayed as violent enemies.[583] Later on still, Indigenous peoples were portrayed as child-like peoples in need of protection.[584]

The Royal Commission on Aboriginal Peoples summarized certain stereotypes of Indigenous peoples in the first volume of its Report ("RCAP Report"), from the long period of colonization focused on "displacement and assimilation" of Indigenous peoples.[585] While these stereotypes took root in an earlier period, the Commissioners write that they continue to impact Indigenous peoples in the present.[586] Two of the stereotypes observed by the Commissioners are:

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[577] *Ibid* at 263.
[578] See e.g. TRC Report, *supra* note 36 at 43–50.
[579] Knox, "Haiti at the League of Nations", *supra* note 434 at 263.
[580] See e.g. TRC Report, *supra* note 36 at 46–47.
[581] Wayne Warry, *Ending Denial* (Peterborough, Canada: Broadview Press, 2007) at 100.
[582] *Ibid*.
[583] *Ibid*.
[584] *Ibid*.
[585] RCAP Report Vol. 1, *supra* note 31 at 228–234.
[586] *Ibid*.

- that Indigenous peoples are "inherently inferior and incapable of governing themselves;"[587] and
- that "wardship was appropriate" for Indigenous peoples.[588]

In terms of stereotypical representations in cultural institutions, the RCAP Report found that there were "stereotyped exhibitions that depict First Peoples as dying, primitive and inferior cultures, or as cultures isolated from Canada's history, in 'pre-history' galleries."[589]

In Volume 3 of the RCAP Report, common settler stereotypes of Indigenous peoples are recorded:

> Aboriginal people are portrayed in a historical past reconstructed in present stereotypes: the noble Red Man roaming free in the forest; the bloodthirsty savage attacking the colony or the wagon train; the drunken Indian; the Aboriginal environmentalist; and, most recently, the warrior in para-military dress, wielding a gun.[590]

We see from these examples that settlers have found various ways to flatten Indigenous peoples and portray them in two-dimensional, reductive ways over the course of Canada's history. Far from disappearing with the time periods in which they have originated, these stereotypes have accumulated over the centuries, so that there are now stereotypes suited to every occasion where justification of exploitation is required.[591]

The SCC, for its part, uses the strategy of stereotyping the plaintiff Indigenous nations as two-dimensional hunter-gatherers, making them inferior by reducing them to subsistence

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[587] *Ibid* at 229.
[588] *Ibid*.
[589] *Gathering Strength: Report of the Royal Commission on Aboriginal Peoples, Volume 3* (Royal Commission on Aboriginal Peoples, 1996) at 611.
[590] *Ibid* at 581.
[591] See e.g. *Ibid* at 581.

practices.[592] In so doing, the Court limits the scope of Aboriginal title, all the while couching this move in the language of tolerance and accommodation.[593] This is Fanon's "subtle form" of racism. The SCC does not employ plainly racist language, but its reasoning reflects a commitment to what Fricker terms a "social stereotype" – this one, a social stereotype of Indigenous peoples as primitive hunter-gatherers preoccupied with subsistence who exist outside the scope of "civilization." This social stereotype is explored further in the following section.

Whether conscious or not, the Court's moves do violence to the plaintiffs. Rather than engaging with the plaintiffs as peoples with cultures, politics and laws commensurate to settler cultures, politics and laws (though reflective of profoundly different worldviews),[594] the SCC reduces them so that they can be folded into the setter state.[595] It fits them into what Sanderson has called the "fish and moose paradigm."[596] In her influential essay "Can the Subaltern Speak?," Gayatri Spivak discusses the violence of this type of "ventriloquism."[597] By flattening the plaintiff nations, the SCC makes them small enough and their rights minimal enough that they can fit comfortably into the common law without straining it.[598] This is the "itinerary of recognition through assimilation"[599] that Spivak draws out. As discussed in the section on Superiority and Contempt below, flattening the plaintiff nations' claims and rights so that they can be subsumed into the common law speaks to the Court's conviction that its superior position and understanding give it licence to take these steps.

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[592] See Sections 3.2; 4.1; and 4.4.
[593] The SCC's language of tolerance and accommodation is explored in the following section.
[594] See e.g. Morales, "'a 'lha'tham", *supra* note 117; Napoleon, *supra* note 384.
[595] See Section 3.2. Barsh & Henderson, "The Supreme Court's Van Der Peet Trilogy", *supra* note 58.
[596] Sanderson, "The Residue of Imperium", *supra* note 9 at 355.
[597] Gayatri Spivak, *Can the Subaltern Speak?: Reflections on the History of an Idea* (New York: Columbia University Press, 2010) at 27–35.
[598] See *Delgamuukw (SCC), supra* note 20 at para 82.
[599] Spivak, *supra* note 597 at 46.

7.2 Shame, Disgust and Aversion

Like Knox, Nussbaum has explored the violence done to exploited Others, though without using the lens of settler colonial discourse. Nussbaum writes in *Political Emotions* that every society has its "list of stigmatized groups" who are shamed for "who and what they are."[600] This shaming can be defensive – a way to "displace personal shame."[601] By displacing shame onto the shamed group, the dominant group frees itself (or tries to) of its collective and individual inadequacies.[602] In so doing, importantly, the dominant group infects its own judgment, impeding its ability to see wrongs done to the shamed group. Nussbaum writes that shame

> …can even infect the judgments of seriousness and nonfault: when something bad happens to the shamed group, it seems less bad to the dominant group if they already see these people as base, quasi- animals, and they are more likely to believe that this bad fate is exactly what those low people deserve. Thus many horrible and grotesque exclusions and crimes against minorities are not even recognized as crimes (lynching, marital rape, the exclusion of people with disabilities from schooling), because it is believed that the treatment is just right for the base nature of that group, or even that they "asked for it" by being who they are.[603]

Given that in the very recent past, Indigenous children were forced to attend residential schools specifically designed to shame them out of their Indigenous cultures,[604] it is not a stretch to think that the SCC might on a certain (likely unconscious) level participate in the collective settler shaming of Indigenous peoples that has been prevalent throughout the imperial and settler colonial periods. Moreover, many would say that settler colonial culture, and the capitalist agenda it promotes,[605] have a good deal of collective inadequacies they might seek to displace onto another group.

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[600] Nussbaum, *supra* note 558 at 360.
[601] *Ibid* at 362.
[602] *Ibid* at 360–363.
[603] *Ibid* at 364.
[604] See e.g. TRC Report, *supra* note 36 at 80–84.
[605] See e.g. Tzouvala, *supra* note 57.

Nussbaum has also written about disgust and how it has been employed to diminish the humanity, and therefore the rights, of certain groups throughout history.[606] Nussbaum writes that linking groups with animality is a way to make them disgusting and beyond the pale of human sympathy.[607] Nussbaum illustrates this point with the language used in Nazi propaganda portraying Jews as animals.[608] Knox has also provided us with the example of the U.S.'s depiction of Haitians as "creatures of the forest."[609] And in Canada, we have McEachern CJ reproducing the reports of a colonial official who described Indigenous peoples in British Columbia as burdensome, barbaric babies, and who counselled that, "[t]o treat Indians as paupers is to perpetuate their baby-hood and burdensomeness. To treat them as savages whom we fear and who must be tamed and kept in good temper by presents, will perpetuate their barbarism and increase their insolence."[610]

Nussbaum's reflections tell us that stereotyping Indigenous peoples as two-dimensional hunter-gathers and treating them as objects of disgust and displaced shame means that harms against them do not need to be addressed in the same way that harms against the dominant settler group would be addressed, since shamed groups are seen as deserving their "bad fate."[611] Moreover, if Indigenous peoples are understood as primitive and inferior, they have less capacity to hold and exercise rights than the "civilized" dominant settler group and the harms against them may not even register as harms. A version of title that is a cousin to usufructuary rights is sufficient to meet their hunter-gatherer needs.

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[606] Martha C Nussbaum, "Chapter One. 'Secret Sewers of Vice': Disgust, Bodies, and the Law" in *The Passions of Law* (New York University Press, 2000) 19 at 29–35.
[607] *Ibid* at 25–39.
[608] *Ibid* at 29.
[609] Knox, "Haiti at the League of Nations", *supra* note 434 at 261.
[610] McEachern CJ in *Delgamuukw (BCSC), supra* note 264.
[611] Nussbaum, *supra* note 558 at 364.

Whether the SCC had any conscious aim of protecting the settler colonial agenda by flattening the plaintiffs is uncertain and perhaps unlikely. However, the stereotype of Indigenous people (treated as a monolith with a singular, pan-Indigenous culture) as primitive hunter-gatherer societies is a strong one with a long history in Western thought.[612] As Fricker explores in *Epistemic Injustice*, such stereotypes live in the social imagination and can act upon us unawares, and perhaps even against our conscious beliefs.[613] Fricker writes that social stereotypes – that is to say stereotypes about groups of people – have a visceral impact on our judgment and can "linger in our psychology in residual form, lagging behind the progress of belief, so that they retain an influence upon our social perception."[614] So, when the SCC tries to conceive of the plaintiff Indigenous nations, it may be that unconscious stereotypes, perhaps most especially that Indigenous peoples are "inherently inferior and incapable of governing themselves,"[615] contribute to the Court's inability to understand the plaintiffs as complex nations that have governed themselves and their lands for millennia.

The stereotype of the primitive hunter-gatherer may give rise to unconscious (or conscious but quickly repressed) disgust, contempt and displaced shame in white settlers because it was crafted by Western thinkers as a strawman meant to represent the undesirable opposite of the ideal civilized European.[616] Post-Enlightenment Western thinking values specific versions of scientific thinking and reason. The stereotyped hunter-gatherer, conveniently for the imperial and colonial agendas, is not understood to exhibit these modes of thinking.[617] We see this stereotype stated

[612] See e.g. Blackstone, *supra* note 72 at 4.
[613] Fricker, *supra* note 508 at 36–37.
[614] *Ibid* at 37.
[615] RCAP Report Vol. 1, *supra* note 31 at 229.
[616] See e.g. Pat Moloney, "Hobbes, Savagery, and International Anarchy" (2011) 105:1 American Political Science Review 189–204.
[617] Bhandar, *supra* note 27 at 56.

explicitly in McEachern CJ's trial level decision in *Delgamuukw* when he writes that that the Gitxsan and Wet'suwet'en "likely acted as they did because of survival instincts."[618]

This strawman stereotype is one onto which the white gaze has projected a proximity to the natural world that is anathema to the ideals of Western civilization. As Nussbaum writes in "Secret Sewers of Vice': Disgust, Bodies, and the Law," there is a strong cultural aversion to those parts of the self that are seen as more "animal" than human (much is said even by this invented division between human and animal).[619] Living in relationship with, rather than dominance over, the natural world, as the stereotyped hunter-gatherer is meant to do, crosses this boundary.[620] This, according to Nussbaum's analysis, is likely to elicit disgust on the part of Westerners.

It is here that we can return to our consideration of aversion – this time, aversion linked with disgust. As discussed in the previous chapter, aversion is an emotion that might be linked with more than one family of emotions, including fear, as discussed in the previous chapter, and disgust. Here, I consider aversion as a member of the disgust family of emotions.

Disgust has a strong visceral component[621] and is likely to spark aversion and a desire to avoid the sources of the disgust. As Nussbaum writes, disgust causes us to wish to avoid contact with the source of disgust.[622] When the source of disgust is rotten food, this aversion may look like physical avoidance.[623] When the source of disgust is proximity to our own displaced shame, or proximity to a stereotyped way of being in the world that is considered inherently inferior to

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[618] Cited in *Delgamuukw (SCC)*, *supra* note 20 at para 18.
[619] Nussbaum, *supra* note 606 at 26.
[620] Of course, many Indigenous peoples *do* have worldviews in which relationship and interconnection are core concepts. See e.g. Mills, *supra* note 27. But the stereotyped version of this is seen from the settler's gaze, and is not intended to engage with Indigenous peoples' actual lifeways and worldviews.
[621] Nussbaum, *supra* note 606 at 22.
[622] *Ibid* at 22–35.
[623] *Ibid* at 22–25.

one's own, aversion might look different. In a situation that demands some level of engagement with the source of disgust, aversion in these situations might look like an averted gaze, a refusal to engage, or a determined failure to hear.

This, I suggest, is what we see in the Court's decisions. We can see the aversion – the failure to engage with some of the plaintiffs' central arguments. And we can see the move that permits this aversion – the reduction of the plaintiffs to two-dimensional hunter-gatherers whose claims become easier to contain thanks to this tactic. And, as I offer in my analysis above, we can see certain emotions that might act as wellsprings for this aversion: contempt, disgust and displaced shame.

7.3 "Justified Infringement": the SCC Knows Best

The final theme to explore is the SCC's understanding of itself as a superior, benevolent body. In *Calder*, we see this in the dissent's laboured attempt to portray the Nisga'a as "civilized" – trying to fit that nation into a category legible to the Court, so that they might measure up to settler colonial standards required by colonial thinking to hold the rights sought by the plaintiffs.[624] In *Delgamuukw*, we see this in the Lamer majority's imposition of a "justified infringement" test over Aboriginal title lands, and in the role the majority gives the court in ensuring that the uses of Aboriginal title lands accord with the title holders' ancestors' uses.[625] In *Tsilhqot'in*, we see this in the Court's framing of itself as conferring rights on Aboriginal title claimants and its ongoing commitment to the Lamer majority's Aboriginal title principles.[626]

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[624] See Section 2.6.
[625] See Section 3.2.
[626] See Sections 4.1 and 4.3.

As discussed in the section on Fixed Assumptions, in her article "The Standard of Civilisation in the Nineteenth Century," Ntina Tzouvala explores how the concept of "civilization" was used to justify colonialism and exploitation.[627] Civilization was closely tied to race. Tzouvala writes that there was an "equation between civilisation, whiteness and productive economic activity, the taming of nature, and adventurous curiosity" with these used as "juridical justifications of settler colonialism."[628] In order to be considered "civilized," a group needed to espouse and embody these values and to adopt the logic of improvement.[629] But the group needed also, ideally, to be white. For racialized groups unable to fulfil that criterion, Tzouvala writes that "constant scrutiny" was employed to ensure they were meeting the other markers of civilization.[630]

In *Delgamuukw* and *Tsilhqot'in*, we see a variation on this scrutiny. The SCC's version of Aboriginal title is one that is not really intended to recognize the title holders as "civilized" autonomous rights-holders. Instead, it is a limited property interest with only thin decision-making dimensions. Since the SCC in these cases does not see the plaintiffs as "civilized" and crafts Aboriginal title accordingly, the scrutiny that it decides it will subject Aboriginal title land uses to is geared towards ensuring that uses will not encroach on decision-making that ought to be made by "civilized" decision-makers. Thus, Aboriginal title holders are limited to using their lands in ways compatible with their ancestors' land uses, and the SCC takes on the role of policing this.[631] The Crown, however, may make such uses of Aboriginal title lands, so long as it can meet the permissive justified infringement test. The result is that Aboriginal title holders may not choose

[627] Tzouvala, *supra* note 57.
[628] *Ibid* at 70. Note that McEachern CJ employes this logic in explaining the Crown's acquisition of sovereignty: "They became a conquered people, not by force of arms, for that was not necessary, but by an invading culture and a relentless energy with which they would not, or could not compete." *Delgamuukw (BCSC), supra* note 264.
[629] Tzouvala, *supra* note 57 at 45.
[630] *Ibid* at 69.
[631] See Section 3.2.

to mine on their lands, for example, but the Crown may, and may do so over the title holders' objections.[632] There is a hierarchy here, with the SCC entrenching "European paternalism"[633] and displaying what Youngblood Henderson and Barsh named "naïve imperialism."[634]

In creating limitations on uses of Aboriginal title lands and taking on the role of surveilling compliance with these limitations, the SCC is communicating that it knows better than Aboriginal title holders how their lands should be used. The SCC is also communicating that Aboriginal title holders need to be protected from themselves so that they do not make poor decisions about the uses of their lands, and that they require the SCC's help and guidance to avoid doing so.[635] The SCC, here, is understanding itself as superior to the Aboriginal title holders – superior and therefore better situated to make decisions than the plaintiff Indigenous nations.

As discussed in the chapter on *Tsilhqot'in*, this sense of superiority is also expressed in that case by the Court casting itself in the role of benevolent rights-granter (rather than rights-affirmer), conferring rights associated with Aboriginal title rather than confirming them. The Court in *Tsilhqot'in* sees itself as a beneficent body, and one that is "culturally sensitive" and which "accommodates" Indigenous parties.[636] This language is separative, underscoring that the Indigenous parties are outside the dominant group, since something is not considered an accommodation unless it differs from the dominant group's norms. In adopting the character of benevolent, accommodating rights-granter, the SCC paints itself as virtuous body – in spite of its power and the common law's proclivity for disavowing the rights of colonized peoples, it has

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[632] See e.g. Borrows, "The Durability of Terra Nullius", *supra* note 18 at 728.
[633] Barsh & Henderson, "The Supreme Court's Van Der Peet Trilogy", *supra* note 58 at 1002.
[634] *Ibid*.
[635] This recalls Knox's account of the U.S.'s justification for its occupation of Haiti – acting as a benevolent big brother with Haiti's best interests at heart. Knox, "Haiti at the League of Nations", *supra* note 434.
[636] See Section 4.3.

granted Aboriginal title. If one does not scrutinize what that title encompasses, and the tests that must be met to prove title, it is a compelling depiction of a progressive, liberal court – one that would have thought of itself using the language "enlightened" and "civilized" in an earlier era.[637]

The SCC's move here reflects a broader settler commitment, as Midzain-Gobin writes in his article "Comfort and insecurity in the reproduction of settler coloniality." Midzain-Gobin writes that both "comfort and insecurity are fundamentally co-constitutive, foundational elements of settler sovereignty,"[638] and that these emotional states result in certain moves required to perpetuate settler colonialism.[639] One of these moves, necessary to settler comfort, is that settlers "envision a uniquely inclusive Canadian tolerance, one that is practically embodied in the rhetoric of reconciliation and multiculturalism."[640] The SCC participates in this rhetoric, with its "cultural sensitivity" and "accommodations." This permits settlers broadly to "develop an affective comfort in understanding ourselves as a generous nation that seeks to correct any historical wrongs suffered by Indigenous peoples by empowering them through settler systems."[641]

Superiority surfaces somewhat differently in *Delgamuukw*, where the Lamer majority betrays the sense of superiority motivating its judgment in the flashes of exasperation with the claim before it.[642] As outlined in the chapter on *Delgamuukw*, the Lamer majority throws up its hands at various points as if put out by the complexity of the case before it, ignoring that that complexity is attributable to the SCC's own convoluted test for Aboriginal rights.[643] The sense

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[637] *Ibid*.
[638] Midzain-Gobin, *supra* note 27 at 222.
[639] *Ibid* at 217–222.
[640] *Ibid* at 217.
[641] *Ibid* at 218.
[642] See Section 3.3.
[643] And also the test for Aboriginal title from *Baker Lake*, *supra* note 110, which was the test for which the plaintiffs adduced evidence.

communicated is that the SCC is doing the plaintiffs a favour in adjudicating their overly complex claim (even though of course the Lamer majority refused to adjudicate the claim on the merits) – it is condescending to “sift[] through”[644] the case, up to a point, but it is not going to “strain”[645] itself for these plaintiffs.

7.4 SUPERIORITY AND CONTEMPT

Robert Solomon writes that contempt and a sense of superiority are linked, since contempt reflects an emotional judgment relating to status.[646] When we hold someone in contempt, we are “looking down” on them (signifying that we understand ourselves to be their superior).[647] As Solomon writes, “[c]ontempt involves an essential judgment of marked superiority.”[648] It also involves feelings of hostility or harshness about the object of our contempt.[649]

When the SCC understands itself to be superior to the plaintiff nations before it, and best placed to make decisions about Aboriginal title lands, it displays contempt for the plaintiff nations. Contempt and a sense of superiority are inherently comparative and hierarchical – if we feel superior, it is superior *to* something or someone. Given this, it is not an emotion likely to open a person to profound listening and perspectives other than their own – why should I listen closely to someone I already know to be less intelligent and insightful and educated than me? To someone inferior?

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644 *Delgamuukw (SCC)*, *supra* note 20 at para 108.
645 *Ibid* at para 82.
646 Solomon, *supra* note 5 at 211.
647 *Ibid*.
648 *Ibid*.
649 *Ibid*.

What does it mean for the SCC to see itself as superior to the plaintiff Indigenous nations in these cases? It means that the Court can feel justified in limiting the scope of the rights "granted," because it knows best. What does it mean for the Court to see itself as a benevolent, rights-conferring body? It means that the Court can control what rights the common law will recognize for the Indigenous claimants, and that it is right for the Court to do so.

Nussbaum has told us, with respect to the emotion of shame, that "when something bad happens to the shamed group, it seems less bad to the dominant group"[650] than if the same thing were to happen to someone in the dominant group. Contempt and the sense of superiority have a similar impact on our sympathies since they are separative and hierarchical. If something bad happens to someone whom I consider to be my inferior, my empathy is not called upon in the same way that it would be if that same bad thing happened to someone whom I see as the same as myself.

We see a startling example of this type of not-seeing and not-feeling in Francesca Laguardia's article "Pain That Only She Must Bear."[651] In this article, Laguardia surveys U.S. cases dealing with abortion. Laguardia outlines how in the cases surveyed, "one would think childbirth was painless."[652] Though the U.S. courts do no, in general, shy away from the "graphic and bodily facts"[653] of other types of cases, describing torture and violence in detail, with pregnancy and childbirth, the courts' language is "blunted, the details hidden…"[654]

Women, of course, can count ourselves amongst the bodies seen as inferior.[655] Our pain does not register as being as bad as pain suffered by a male (especially a white male). Fricker's

[650] Nussbaum, *supra* note 558 at 364.
[651] Laguardia, "Pain that only she must bear", *supra* note 418.
[652] *Ibid* at 2.
[653] *Ibid*.
[654] *Ibid*.
[655] See e.g. Tzouvala, *supra* note 57 at 71.

work helps to explain how and why this is. She writes that shared imaginative conceptions of social identity impact power operations.[656] Women, in the social imagination, do not wield power in the same way as men. They can be silenced and sidelined because of their identity's (lack) of power.[657] We can infer that women's inferior identity power also makes their gendered pain less affecting and visible to (often male) jurists. And we can similarly infer, in line with Nussbaum's thinking, that wrongs suffered by others whose social identities are also seen as inferior to our own do not get seen and understood as wrongs in the same way as they might for a dominant group.

Superiority means not seeing harms that we may prefer not to see. It insulates the self from having to grapple with questions posed and issues raised by people and groups deemed "inferior." It justifies turning away and makes instances of not turning away appear noteworthy and virtuous.

That is what we see in these three SCC decisions. The Court sees itself as superior. The majority in *Calder* does not even attempt to engage with Nisga'a evidence and arguments – it does not see fit to condescend to direct its attention in this way. The majority in *Delgamuukw* and the Court in *Tsilhqot'in* do turn their attention, such as it is, to the plaintiffs' cases and congratulate themselves for being so accommodating. But their attention is limited and takes in only what does not strain their understanding. Their sense of benevolent superiority insulates them from having to pose the questions that are frightening to pose.

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[656] Fricker, *supra* note 508 at 14–15.
[657] *Ibid*.

Chapter 8 CONCLUSION

The close readings of the three Aboriginal title cases outlined in Chapters 2 to 4 uncovered incoherencies in the Court's reasoning – notable lacunae where exposition and engagement should have been. These gaps in reasoning are obfuscated in the texts by bluster, reliance on "announcements,"[658] and the refusal to question assumptions about which there "can be no question."[659] Once observed, these lacunae are hard to ignore or overlook. They become a part of the troubling "emptiness at the heart of the Court's"[660] decisions uncovered by Borrows. They invite interrogation. Why aren't the fixed assumptions questioned? Why doesn't the Court see that its uninterrogated acceptance of the Crown's sovereignty cannot be explained except by the application of *terra nullius*? Why does the Court characterize the plaintiffs as two-dimensional hunter-gatherers, despite the evidence presented about their cultures, governance and laws? How can it be that beneficial interest in Aboriginal title lands lies with the Crown before a declaration of Aboriginal title? Why does the Court see itself as the appropriate decision-maker about the uses to which Aboriginal title lands can be put?

The cases themselves make no effort to answer these questions. This thesis has argued that one answer can be found in the Court's emotional commitments, and the values these reveal. As discussed in the preceding two chapters, we can begin to make some sense of these decisions if we consider what emotions might prevent turning towards challenging questions or ingrained, stereotyped preconceptions. My analysis has suggested that the emotions bound up in the Court's

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[658] Borrows, "Sovereignty's Alchemy", *supra* note 8 at 562.
[659] *Calder, supra* note 19 at 327.
[660] Borrows, "The Durability of Terra Nullius", *supra* note 18 at 703.

decisions include aversion, fear and contempt, most prominently. Disgust, shame and condescension also contribute to the troubling emptiness.

I have argued that these emotions are not the sole or primary causes of the lacunae found in the decisions. The fixed assumptions, for instance, are not made only because of fear or aversion – they reflect settler colonial narratives and modes of thought, and arise to resist the challenge the Aboriginal title claims pose to these narratives and modes of thinking. But the emotional commitments bound up in these postures – the emotional component of valuing the status quo, for instance – do have "explanatory power."[661] They tell us something about the makeup of the bulwarks that act as obstacles to and insulation from engagement with the fundamental questions raised by the claims. They also tell us something about what the Court values and wishes to protect.[662]

As argued in Chapters 6 and 7, there are stereotypes, racist logics like the logic of civilization and unwarranted contempt linked with the emotions uncovered. These values and commitments deserve to be questioned and challenged, if we do not think them appropriate components of judicial reasoning.

It is my hope that the attempt made in this thesis to surface the emotional undercurrents in the Aboriginal title decisions raises questions about Aboriginal title law. One court, at least, has questioned the Crown's assertion of sovereignty, but felt constrained by precedent from departing from this doctrine.[663] But in their article "Undoing the Colonial Double-Bind," Joshua Nichols and Amy Swiffen remind us that it is inexcusable to rely on what they describe as "flawed" precedents: "In [settler colonial] jurisdictions, judges need to remember that respecting the legal authority of

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[661] Bandes, "Fear and Degradation in Alabama", *supra* note 12 at 522.
[662] See e.g. White, *supra* note 10 at 506.
[663] *Thomas and Saik'uz First Nation*, *supra* note 116 at paras 201–204.

precedent requires them to not only acknowledge legal frailties but to also remedy them by rejecting flawed precedents."[664] If it is accepted that the current Aboriginal title precedents are shaped by racist doctrines and by reasoning affected by aversion, fear and contempt, then perhaps these precedents can be treated with renewed scrutiny.

The undercurrents in these decisions show us the settler colonial logics and associated emotional commitments impacting how Indigenous plaintiff nations' claims were and continue to be dealt with.

By drawing these undercurrents to the surface, I hope I have made felt a flow (one amongst many others) that has guided the Court's judgment. If these emotional currents reflect values that we do not wish to have a place in our courts, we can remind ourselves that interrogating our values can reshape our emotional commitments.[665] As Solomon tells us, "we are not merely passive victims of our emotions but quite active in cultivating and constituting them."[666] We can choose to make our way to fresh waters.

[664] Nichols & Swiffen, "Undoing the Colonial Double-Bind", *supra* note 18 at 49.
[665] Solomon, *supra* note 444 at 3.
[666] *Ibid*.

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